Centre for Aerospace & Defence Laws (CADL)
Directorate of Distance Education
NALSAR University of Law, Hyderabad

Course Material

M.A. (AVIATION LAW AND AIR TRANSPORT MANAGEMENT)

Academic Year: 2018-2019; Batch 2018-20
I Year–I Semester

1.1.1. General Principles of Law

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INTRODUCTION TO THE COURSE

Why aviation law and air transport management course?

The Indian Aviation Industry has shown tremendous growth potential in the past decade both in terms of volume as well as in quality of services rendered. With privatization of Indian Aviation Industry and introduction of government schemes like UDAN (Ude Desh ka Aam Nagrik) and NABH Nirman, the airlines have drastically expanded its domestic market and now India is seen a major player in the Aviation market. Its rapid growth within India recently and across the globe coupled with usage of the best and the most innovative technologies and increasing contribution to the economic and infrastructural development of a country makes the international civil aviation sector particularly important from both legal as well as management perspective.

The scientific and technological developments in the field are so rapid that they have posed challenges to the legal fraternity. At present, the significance of Air Law and aerospace management needs no explanation due to indispensible uses of airspace for the purposes ranging from commercial to military. The increasing volume of disputes in the field of aviation has also resulted in the manifold increase in the legal practitioners working in the field of aviation at both developed and developing countries including India. India being a significant player in the field of aviation sector lacks professionalism in various manners because of the improper knowledge of the legal and managerial aspects of aviation when compared to other developed countries.

Keeping this in mind, the two years course on M.A. (Aviation Law & Air Transport Management) is a unique initiative undertaken by Centre for Aerospace and Defense Laws (from now onwards CADL) at NALSAR, Hyderabad. The course is designed to provide an in-depth understanding of Air Law and aerospace management along with some fundamental principles of public international law related to aviation. The course would be highly useful to the candidates having wide-ranging background from legal to scientific.

Through this course CADL at NALSAR aims to create an industry of aviation lawyers catering and specializing in both legal and management aspects of international aviation law. The course participants would not only have a sound and strong foundation on legal and management

patterns of international civil aviation sector but also will be well-equipped to handle practical and contemporary aspects and challenges faced in the daily governance of the aviation industry.

Why this course at NALSAR?

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

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

The innovative law course has been introduced keeping in mind the need of the hour. The study of this course will cater the need of **Aerospace Lawyers** which will meet the demand of trained and certified professional lawyers in ever growing aviation sector. Growth and commercialization of aviation business has created the demand for legal professionals to handle the legal complications in the industry. It enables students to obtain an understanding of the application of legal principles to aviation. It further provides an overview of the role of law in the management of aviation and explains legal concepts and principles as they apply to aviation and the conduct of pilots and operators. It examines international regulatory body conventions, regulations and audit processes.

Legal and Management aspects of International Civil Aviation are so well interconnected that the study of one aspect is incomplete without the study of the other. The unique advantage of the course is the comprehensive understanding of the aviation industry which would include its operational aspects, legal management and technical knowledge with a special focus on catering to the contemporary requirements of the growing aerospace industry.

The curriculum of the course is a tailor-made to meet the professional needs of the aviation industry which includes airport, airline, aerospace and related sectors so that the trained professionals are in a position to directly take on the core legal-cum-managerial positions in any of these sectors. A lawyer who has been endowed with rational mind can perform the multiple roles in the form of an aviation lawyer, manager and technical support. Similarly, a manager who is endowed with analytical ability is now in a position to function at a higher level with a greater competence by acquiring the specific knowledge of the rules of the game – Aviation Law.

Nature of perspective target group learners

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

How Course is conducted?

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

Face to Face contact sessions will be conducted for seven days in a semester at Hyderabad by the subject experts. Suggested reference guidance would be provided at the contact sessions. Each subject shall consist of 15 teaching hours which will come to 60 teaching hours per semester for

three semesters. Case study analysis will be part of the concerned subjects and will be discussed in onsite sessions. Attendance at the onsite session is not compulsory.

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

Course Structure

SEMESTER – I			
Subject Code	**Subject**	**Marks**	**Credits**
1.1.1	General Principles of Law	100	5
1.1.2	International Air Law	100	5
1.1.3	Principles of Management	100	5
1.1.4	Airport Management	100	5
SEMESTER – II			
1.2.5	Domestic Air Laws in India	100	5
1.2.6	Aviation Safety, Security and Liability Laws	100	5
1.2.7	Airline Management	100	5
1.2.8	Air Space & Air Traffic Management	100	5
SEMESTER – III			
2.3.9	Aviation Contracts & Tenders	100	5
2.3.10	Aviation Corporate Laws	100	5
2.3.11	Air Transport Economics and Statistics	100	5
2.3.12	**Aviation Marketing**	100	5
SEMESTER – IV			
2.4.13	Dissertation (written: 150 marks + viva: 50 marks)	200	6

1. **General Principles of Law**

   It is a well-known legal maxim '*ignorantia juris neminem excusat*' which means that 'ignorance of law is no excuse'. This is one of the most fundamental principles of law followed since time immemorial. With the growing complexities in the nature of a society, legal awareness is of utmost importance as helps a student of one's rights and obligations as a responsible citizen of a country and a member of the global community. The paper is designed with the intention of providing the course participants with an overall understanding of the fundamental concepts and principles of law and also develops an in-depth base on the functioning of law in government, society and our lives. Therefore knowledge about the practical aspects of law is as important as knowledge about theory and principles of law.

2. **International Air Law**

   With the taking-off of the first manned flight way back in 1903, the advent of international aviation began setting the stage for a number of additional conferences aimed at regulating international air transport and consequently leading to the Chicago regime. The technological, infrastructural, institutional, economic and human challenges have prompted those in charge of airlines and aviation-related agencies to affect a shift in their policies and approaches pursued for years. In fact, civil aviation in the new millennium would be one of the biggest growth sectors. With these emerging issues it was of paramount importance to design a paper on the International Air Law. Through this paper aim is to give an overview of the basic laws and principles covered under the ambit of modern international law as well as its impact on the domestic sphere within India. Transport (particularly air transport) being an integral part of the international law plays an important role in the field of aviation and hence, the laws and principles of international law act as an umbrella law for regulating the law of Aviation and aerospace management.

3. **Principles of Management**

   A basic knowledge of management principles is very crucial as subsequent management courses rest on an understanding of the core concepts. Students of management,

therefore, need to learn the basic concepts of management for developing application-based knowledge of the subject. Modem organizations apply management practices to achieve their goals and objectives. The complexity of businesses has further made it imperative to apply management practices, without which organizations cannot survive their competition. Application of management theories and concepts is now required in every activity of an organization. Air transport management being an integral part of the course aims to provide a comprehensive understanding of several aspects of the aviation industry including its operational aspects, legal management, technical knowledge, etc. The paper plays an integral part in making the participants aware of the basic principles and theories involved in management which will further help them attain a better understanding of the different management aspects involved in aviation and airline management.

4. Airport Management

Airport has been traditionally viewed as a strategic entity of a nation and therefore they have been traditionally operated to meet the just needs from that perspective. The concept of 'airport management' as a discipline is a new adoption borne out of the progressive traffic growth, both of passengers and cargo during the past few years. Airport leaders have now realized that complexities of airport operations can no more be handled by a mere traditional 'organisation' structure and have visualized that the airport management is too demanding, and started looking at it as a 'Business'. Aviation Management being an integral part of aviation sector involves a variety of activities including planning, designing, operating, and maintaining aircrafts, airport etc. When it comes to aviation, there is a broad range of responsibilities within. The paper aims to make the participants understand the basics of Airport Management thereby providing an overview of how the airports and airlines are managed worldwide.

5. Domestic Air Laws in India

The tremendous growth in the civil aviation industry in India is a product of such need to save time and energy and has become a very convenient mode of travel. Aviation is one of the few areas which developed very early prior to the independence. India is perhaps

one of the most progressive countries as far as the development in the civil and general aviation is concerned. The legal regulatory regime governing the civil aviation sector in India developed way back in 1934 with the advent of the Aircraft Act of 1934 and subsequently the Aircraft Rules of 1937. However the safety, security and liability regime have developed in the past few decades and with the emerging trends there is a need to revise the entire regime. The government of India has been vigorously involved in pursuing policies of liberalization thereby bringing greater integration in the world. This calls for greater intervention of international law in the domestic front. It is therefore, imperative for us to understand the subject and be aware of the interface between international law and municipal law with respect to aviation industry. The paper therefore aims to familiarize the participants with the laws regulating aviation sector in India thereby giving detailed analysis of the existing laws, regulations and policies.

6. Aviation Safety, Security and Liability Laws

Airport transport industry plays a major role in world economic activity. One of the key elements to maintain the vitality of civil aviation is to ensure safe, secure, efficient and environmentally sustainable operations at the global, regional and national levels. The objective of the paper is to highlight the various difficulties in regulating air safety and security and the measures taken by international organisations, particularly the ICAO, in this direction. The paper will study the causes

of aircraft accidents, their investigations, liability issues involving air disasters and evolution of security law through various international conventions.

7. Airline Management

Air transportation is one of the most important services to offer both significant social and economic benefits. By serving tourism and trade, it contributes to economic growth. The use of commercial aviation has grown significantly over the last few decades, estimated to be more than seventy-fold since the first jet airliner flew in 1949. Current records indicate that there are more than 900 commercial airlines around the world, with a total fleet of nearly 22,000. Commercial airlines serve nearly 1,670 airports through a route network of several million kilometers. The increasing number of commercial airline companies has put more pressure on their management to continually seek profits, reduce

cost, and increase revenues. Increasing demand for air transportation service has compelled airline management to take advantage of opportunities in different markets. At the same time, increasing competition among airlines necessitates that airline management seek efficiency in all their decisions to promote their profit. It is no surprise that many airlines throughout aviation history have been unable to remain in business, and in most cases, it is agreed that the demise of these airlines has been attributable to deficient management. Airline is a major player in air transportation industry. The paper helps in getting a broad overview of the airline industry and creates awareness of the underlying marketing, financial, operational, and other factors influencing airline management. It provides information on global implications of the airline industry and its impact in India.

8. Air Space & Air Traffic Management

Since the aviation industry first started needing controllers to track aircraft movements in the early 1930s, the introduction of any new technology or operational procedure has been undertaken in a very systematic way and often quite slowly. Every day, over 100,000 flights take off at airports across the world. Some are short hops to nearby destinations; some flights cross the oceans, but all have to fly in the same sky. It is estimated that up to 8% of all aviation fuel is wasted as a result of inefficient routes that aircraft have to fly. But there is an evolution in the global air navigation industry which is already having a profound impact on the way aircraft are handled in increasing numbers, more safely, efficiently and in more environmentally-responsible ways than in the past. The industry can only take this challenge so far – governments will need to look at the very institutional arrangements of their air navigation providers to bring about full efficiencies. Keeping in mind the crucial role of the subject has to play in the management of aviation industry, a paper on Air Space and Air Traffic Management has been designed. In order to ensure that the limited available airspace is efficiently and effectively utilized by civil aircraft for their safe, orderly and economic operations, it is essential that an efficient airspace management is available on a global as well as regional and national basis. The paper aims to highlight the conceptual and legal framework (both

national and international) air space and air traffic management thereby giving detailed analysis of the issues involved.

9. Aviation Contracts & Tenders

Law of contracts constitutes the most important branch of mercantile law. It is the backbone of trade and commerce. Contract law lies at the heart of our system of laws and serves as the foundation of our entire society. This is not an exaggeration. It is a simple observation – one that too often goes unobserved. Our society depends upon free exchange in the marketplace at every level. The business environment is full of agreements between businesses and individuals and the business of aviation is no exception to this legal framework. While oral agreements can be used, most businesses use formal written contracts when engaging in operations. Written contracts provide individuals and businesses with a legal document stating the expectations of both parties and how negative situations will be resolved. The objective of the paper is to gain good understanding of typical airline contracts and their effects on airline operations. The Paper also go on highlighting the contractual issues relating airports, MROs and other stakeholders who are part of the aviation business.

10. Aviation Corporate Laws

Aviation sector in India has been transformed from an over regulated and under managed sector to a more open, liberal and investment friendly sector since 2004. Aviation business is governed by a varied range of corporate laws. Aviation Corporate Law deals with the formation and operations of corporations and is related to commercial and contract law. A corporation is a legal entity created under the laws of the state it's incorporated within. State laws, which vary from state to state, regulate the creation, organization and dissolution of their corporations. A corporation creates a legal or "artificial person" or entity that has standing to sue and be sued, enter into contracts, and perform other duties necessary to maintain a business, separate from its stockholders. In order to regulate the business of aviation in India, there is a wide ambit of corporate laws applicable to regular business enterprises with a legal form. The paper aims to familiarize

the participants with fundamental law of business and have an interdisciplinary analysis of the legal issues confronting airlines and aviation corporate laws.

11. Air Transport Economics and Statistics

Being the fastest means of connecting people and businesses, air transport is an important tool that enhances economic development. The benefits from air transport can only be felt if there is sufficient investment in infrastructure capacity (Airports, roads) which will enable the airline industry to provide the necessary connections to internal and worldwide markets that businesses need and prosper from. Aviation provides the only rapid worldwide transportation network, which makes it essential for global business and tourism. It plays a vital role in facilitating economic growth, particularly in developing countries. Air Transport Economics is a core area in the aviation business. Aviation statistics are widely used throughout the industry, ranging from monitoring global industry performance, to detailed network planning and competitor benchmarking. The paper gives a broad understanding of the economic aspects of aviation industry. It also gives a broad understanding of the statistics which are part of the aviation sector.

12. Aviation Marketing

An airline which is to apply the principles of marketing successfully needs a thorough knowledge of current and potential markets for its services. This knowledge should encompass an understanding of the businesses in which they participate, and of the market research techniques they must apply in order to gain the knowledge they need about the marketplace. They must be able to identify “Customers” and distinguish them from “Consumers”. They must segment their markets and identify the requirements of Customers in each of the segments. Finally, and most importantly, they must examine their markets in a dynamic rather than a static sense and anticipate future changes in customer needs. Marketing is a core business component in the aviation industry, where the environment is highly competitive and margins often low. Having regards to the significance of the subject a paper on aviation marketing has been designed. The paper aims to provide an in depth aviation business knowledge in the areas of marketing

channels thereby highlighting the core concepts of marketing and its uses in airport and airline marketing.

13. Dissertation

The spectacular fast developments in aircraft technology in the beginning of the 20th century, made law-making necessary in this new field of transportation, in peace and in war. The course extensively tries to encompass numerous aspects of Aviation Law and Management. Given the nature of the course, there are numerous contemporary aspects of the aviation law and management that cannot be discussed in detail. Hence the component of Dissertation has been introduced which allows the student concerned to pursue mandatory research in a topic in the field of aviation of his or her own interest and to draw a critical legal analysis of the policies and the regulatory framework and examine the impact of its concern on field. This component also allows us the assist the students in developing their research and writing skills, assess them on this count and to provide a platform for creative legal scholarship and can be refined and submitted for publication in scholarly journals or even serve as the basis for full length dissertations in doctoral programmes.

General Principles of Law

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

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

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

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

<u>Module I - Introduction to Law</u>

Having regard to the importance of the fundamental understanding of law, the first module of this paper focuses basic concepts of law. It gives a brief background to the meaning of law and its varied forms. The module will also look into the law reforms and the transition of law as per the changing needs of a growing society. Without public enforcement agencies the concept of

law will just remain an abstract notion. The module further go on describing the classification of global legal systems, Legal System amongst International Institutions and countries inter se and the impact of globlisation on legal systems.

Module II - Constitutional Law and Administrative Law

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

Module III - Indian Judicial and Legal System

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

Module IV - Fundamental Aspects of Law and its Relevance to Air Law

Having understood the practical operation of law and the law enforcement agencies in India, it is now crucial for the course participants to have a brief insight of few of the most fundamental areas which are subjected to legal regulation. Legal subjects like the law of torts, consumer laws, criminal laws, intellectual property laws, cyber laws are very commonly used in the aviation sector. Hence the this module has been designed in a manner that it entails a discussion on these

key aspects which have been chosen from the vast array of subjects of law primarily because of the relationship they share with International and Domestic Air and Space Law.

Module V - Fundamental Aspects of Corporate Laws and its Relevance to Air Laws

Globlisation, libralisation and privatization have significant impact on the aviation industry at both domestic and international front leading to the emergence of several new issues and challenges including mergers, acquisitions, amalgamations, joint ventures, etc. These changes are having significant impact on the different areas of corporate law and governance. Taking this into consideration the module thereby taking an interdisciplinary approach is designed to address the relevant areas of corporate laws including contract law, company law, competition law, insurance law, taxation law and their relationship with aviation sector in India.

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MODULE-I

Introduction to Law

DEFINITION, NATURE, SOURCES AND SIGNIFICANCE OF LAW

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

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

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

The meaning of law has been defined by various jurists. However, there is no unanimity of opinion regarding the true definition of law. The reason for lack of unanimity on the subject is that the subject has been viewed and dealt with by different jurists so as to formulate a general theory of legal order at different times and from different points of view, that is to say, from the point of view of nature, source, function and purpose of law, to meet the needs of some given period of legal development. Therefore, it is not practicable to give a precise and definite meaning to law which may hold good for all times to come. However, it is desirable to refer to some of the definitions given by different jurists so as to clarify and amplify the term "law". The

various definitions of law propounded by legal theorists serve to emphasise the different facets of law and build up a complete and rounded picture of the concept of law.

Hereinafter we shall refer to some representative definitions and discuss them. For the purpose of clarity and better understanding of the nature and meaning of law, we may classify the various definitions into five broad classes:

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

(a) *Idealistic Definition of law:* Under this class fall most of the ancient definitions given by Roman and other ancient Jurists. **Ulpine** defined Law as "the art or science of what is equitable and good." Cicero said that Law is "the highest reason implanted in nature." Justinian's Digest defines Law as "the standard of what is just and unjust." In all these definitions, propounded by **Romans**, "justice" is the main and guiding element of law. **Ancient Hindu** view was that 'law' is the command of God and not of any political sovereign. Everybody including the ruler, is bound to obey it. Thus, 'law' is a part of "Dharma". The idea of "justice" is always present in Hindu concept of law.

Salmond, the prominent modern idealistic thinker, defines law as "the body of principles recognised and applied by the State in the administration of justice." In other words, the law consists of rules recognised and acted on by the courts of Justice. It may be noted that there are two main factors of the definition. First, that to understand law, one should know its purpose: Second, in order to ascertain the true nature of law, one should go to the courts and not to the legislature. **Vinogradoff** described Law as "a set of rules imposed and enforced by societywith regard to the attribution and exercise of power over persons and things."

(b) *Positivistic Definition of Law:* According to Austin, "Law is the aggregate of rules set by man as politically superior, or sovereign, to men as political subject." In other words, law is the "command of the sovereign". It obliges a certain course of conduct or imposes a duty and is backed by a sanction. Thus, the command, duty and sanction are the three elements of law. **Kelsen** gave a 'pure theory of law'. According to him, law is a 'normative science'. The legal norms are 'Ought' norms as distinct from 'Is' norms of physical and natural sciences. Law does not attempt to describe what actually occurs but only prescribes certain rules. The science of law to Kelson is the knowledge of hierarchy of normative relations. All norms derive their power from the ultimate norm called Grund norm.

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

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

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

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

(e) *Realist Definition of Law:* Realists define law in terms of judicial process. According to **Holmes**, "Law is a statement of the circumstances in which public force will be brought to bear upon through courts." According to Cardozo, "A principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged, is a principle or rule of law." From the above definitions, it follows that law is nothing but a mechanism of regulating the human conduct in society so that the harmonious co-operation of its members increases and thereby avoid the ruin by co-ordinating the divergent conflicting interests of individuals and of society which would, in its turn, enhance the potentialities and viability of the society as a whole.

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

(a) Law pre-supposes a State.
(b) The State makes or authorizes to make, or recognises or sanctions rules which are called law.
(c) For the rules to be effective, there are sanctions behind them.
(d) These rules (called laws) are made to serve some purpose. The purpose may be a social purpose, or it may be simply to serve some personal ends of a despot.

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

Laws are made effective:

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

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

SOURCES OF INDIAN LAW

The expression "sources of law" has been used to convey different meanings. There are as many interpretations of the expression "sources of law" as there are schools and theories about the concept of law. The general meaning of the word "source" is origin. There is a difference of opinion among the jurists about the origin of law. Austin contends that law originates from the sovereign. Savigny traces the origin in Volkgeist (general consciousness of the people). The sociologists find law in numerous heterogeneous factors. For theologians, law originates from God. Vedas and the Quran which are the primary sources of Hindu and Mohammedan Law respectively, are considered to have been revealed by God. Precisely, whatever source of origin may be attributed to law, it has emanated from almost similar sources in most of the societies.

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

(A) Principal sources of Indian Law.
(B) Secondary sources of Indian Law.

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

(i) Customs or Customary Law.
(ii) Judicial Decisions or Precedents.
(iii) Statutes or Legislation.

(iv) Personal Law e.g., Hindu and Mohammedan Law, *etc.*

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

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

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

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

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

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

Legal Customs: These customs operate as a binding rule of law. They have been recognised and enforced by the courts and therefore, they have become a part of the law of land. Legal customs are again of two kinds: (a) Local Customs (b) General Customs. Local Customs: Local custom is the custom which prevails in some definite locality and constitutes a source of law for that place only. But there are certain sects or communities which take their customs with them wherever they go. They are also local customs. Thus, local customs may be divided into two classes: Geographical Local Customs, and Personal Local Customs. These customs are law only for a particular locality, sect or community. General Customs: A general custom is that which prevails throughout the country and constitutes one of the sources of law of the land. The Common Law in England is equated with the general customs of the realm.

Conventional Customs: These are also known as "usages". These customs are binding due to an agreement between the parties, and not due to any legal authority independently possessed by

them. Before a Court treats the conventional custom as incorporated in a contract, following conditions must be satisfied:

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

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

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

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

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

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

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

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

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

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

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

Judicial Precedents: In general use, the term "precedent" means some set pattern guiding the future conduct. In the judicial field, it means the guidance or authority of past decisions of the courts for future cases. Only such decisions which lay down some new rule or principle are called judicial precedents. Judicial precedents are an important source of law. They have enjoyed high authority at all times and in all countries. This is particularly so in the case of England and other countries which have been influenced by English jurisprudence. The principles of law expressed for the first time in court decisions become precedents to be followed as law in deciding problems and cases identical with them in future. The rule that a court decision becomes a precedent to be followed in similar cases is known as doctrine of stare decisis.

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

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

High Courts

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

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

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

(4) The Supreme Court is the highest Court and its decisions are binding on all courts and other judicial tribunals of the country. Article 141 of the Constitution makes it clear that the law declared by the Supreme Court shall be binding on all courts within the territory of India. The words "law declared" includes an obiter dictum provided it is upon a point raised and argued (Bimladevi v. Chaturvedi, AIR 1953 All. 613). However, it does not mean that every statement in a judgement of the Supreme Court has the binding effect. Only the statement of ratio of the judgement is having the binding force.

Supreme Court

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

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

(a) Declaratory and original precedents: According to Salmond, a declaratory precedent is one which is merely the application of an already existing rule of law. An original precedent is one which creates and applies a new rule of law. In the case of a declaratory precedent, the rule is applied because it is already a law. In the case of an original precedent, it is law for the future because it is now applied. In the case of advanced countries, declaratory precedents are more numerous. The number of original precedents is small but their importance is very great. They alone develop the law of the country. They serve as good evidence of law for the future. A declaratory precedent is as good a source of law as an original precedent. The legal authority of both is exactly the same.

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

(c) Absolutely authoritative precedents: An authoritative precedent is one which judges must follow whether they approve of it or not. Its binding force is absolute and the judge's discretion is altogether excluded as he must follow it. Such a decision has a legal claim to implicit obedience, even if the judge considers it wrong. Unlike a persuasive precedent which is merely historical, an authoritative precedent is a legal source of law. Absolutely authoritative precedents in India: Every court in India is absolutely bound by the decisions of courts superior to itself. The subordinate courts are bound to follow the decisions of the High Court to which they are subordinate. A single judge of a High Court is bound by the decision of a bench of two or more judges. All courts are absolutely bound by decisions of the Supreme Court. In England decisions of the House of Lords are absolutely binding not only upon all inferior courts but even upon itself. Likewise, the decisions of the Court of Appeal are absolutely binding upon itself.

(d) Conditionally authoritative precedents: A conditionally authoritative precedent is one which, though ordinarily binding on the court before which it is cited, is liable to be disregarded in certain circumstances. The court is entitled to disregard a decision if it is a wrong one, i.e., contrary to law and reason. In India, for instance, the decision of a single Judge of the High Court is absolutely authoritative so far as subordinate judiciary is concerned, but it is only conditionally authoritative when cited before a Division Bench of the same High Court.

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

Ratio Decidendi: The underlying principle of a judicial decision, which is only authoritative, is termed as ratio decidendi. The proposition of law which is necessary for the decision or could be extracted from the decision constitutes the ratio. The concrete decision is binding between the parties to it. The abstract ratio decidendi alone has the force of law as regards the world at large. In other words, the authority of a decision as a precedent lies in its ratio decidendi. Prof. Goodhart says that ratio decidendi is nothing more than the decision based on the material facts of the case. Where an issue requires to be answered on principles, the principles which are deduced by way of abstraction of the material facts of the case eliminating the immaterial elements is known as ratio decidendi and such principle is not only applicable to that case but to other cases also which are of similar nature.

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

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

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

Statutes or Legislation

Legislation is that source of law which consists in the declaration or promulgation of legal rules by an authority duly empowered by the Constitution in that behalf. It is sometimes called Jus scriptum (written law) as contrasted with the customary law or jus non-scriptum (unwritten law). Salmond prefers to call it as "enacted law". Statute law or statutory law is what is created by legislation, for example, Acts of Parliament or of State Legislature. Legislation is either supreme or subordinate (delegated).

Supreme Legislation is that which proceeds from the sovereign power in the State or which derives its power directly from the Constitution. It cannot be repelled, annulled or controlled by any other legislative authority. Subordinate Legislation is that which proceeds from any authority other than the sovereign power. It is dependent for its continued existence and validity on some superior authority. The Parliament of India possesses the power of supreme legislation. Legislative powers have been given to the judiciary, as the superior courts are allowed to make rules for the regulation of their own procedure. The executive, whose main function is to enforce the law, is given in some cases the power to make rules. Such subordinate legislation is known as executive or delegated legislation. Municipal bodies enjoy by delegation from the legislature, a limited power of making regulations or bye-laws for the area under their jurisdiction. Sometimes, the State allows autonomous bodies like universities to make bye-laws which are recognised and enforced by courts of law.

The rule-making power of the executive is, however, hedged with limitations. The rules made by it are placed on the table of both Houses of Parliament for a stipulated period and this is taken as having been approved by the legislature. Such rules then become part of the enactment. Where a

dispute arises as to the validity of the rules framed by the executive, courts have the power to sit in judgement whether any part of the rules so made is in excess of the power delegated by the parent Act.

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

Personal Law

In many cases, the courts are required to apply the personal law of the parties where the point at issue is not covered by any statutory law or custom. In the case of Hindus, for instance, their personal law is to be found in

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

Hindus are governed by their personal law as modified by statute law and custom in all matters relating to inheritance, succession, marriage, adoption, co-parcenary, partition of joint family property, pious obligations of sons to pay their father's debts, guardianship, maintenance and religious and charitable endowments.

The personal law of Mohammedans is to be found in

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

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

Secondary Source of Indian Law

Justice, Equity and Good Conscience: The concept of "justice, equity and good conscience" was introduced by Impey's Regulations of 1781. In personal law disputes, the courts are required to apply the personal law of the defendant if the point at issue is not covered by any statute or custom. In the absence of any rule of a statutory law or custom or personal law, the Indian courts apply to the decision of a case what is known as "justice, equity and good conscience", which may mean the rules of English Law in so far as they are applicable to Indian society and circumstances.

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

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

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

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

CLASSIFICATION OF LAWS

Civil v. Criminal Law

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

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

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

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

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

Territorial v. Personal Laws

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

India has two systems of law, one territorial and one personal. For example, the Special Marriage Act applies to all people in the territory of India. The fact that some persons or categories of persons are excluded from the provisions of the Act does not change its nature to personal. On

the other hand, the Hindu Succession Act applies to Hindus, and is therefore personal. The fact that it is also applicable in the territory of India does not make it territorial.

Procedural v. Substantive Laws

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

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

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

THEORIES OF LAW

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

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

Natural Law Theory

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

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

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

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

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

Legal Positivism

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

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

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

Exclusive Legal positivism says law is an independent authority. There is an obligation to obey the law. If norms and morals are given undue importance on the basis of inchoate idea of fairness

law losses its authoritativeness. Hence, the legal validity of the norm shall be located in its source not content.

Modern Age Positivism and Morality Debate by Hart, Devlin:

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

Functional Approach to Law

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

- Historical and
- Sociological School

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

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

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

OPERATIVE TOOLS OF LAW

Rights and Duties:

Bentham who is the forerunner of Analytical School of thought states that the relationship between State and its subjects and inter-se is governed law and law is nothing but distribution of

rights and obligation amongst them. In fact all modern legal systems are constructed on the edifice of this principle only.

General meaning of term Right and duty

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

Relationship between Right and duty

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

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

Legal Meaning of term Right

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

Classification of Rights

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

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

- Fundamental rights

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

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

Public Rights:

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

➔ **Right to Information**: To Promote Transparency and Accountability in the Working of every Public Authority, the Right to Information Act,2005 is enacted so as to provide for setting up the practical regime of right to information for citizens' to secure access to information under the control of public authorities. Any citizen can apply in writing or

through electronic means in English or Hindi or in the official language of the area, to the Public Information Officer, specifying the particulars of the information sought for. He needn't give reason for seeking information but one has to pay nominal fee as may be prescribed. The information must be furnished within thirty days from the date of application and it must be in forty eight hours in case of information concerning the life or liberty of a person. If there is failure to provide information within the specified period is a deemed refusal. If information sought is covered by exemption from disclosure u/S.8 or if it infringes copyright of any person other than the State as per S.9, information need not be given. There is an appellate authority which and Central and State information commission to ensure the functioning of the Act. The law imposes penalties on officer who fail furnish information.

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

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

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

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

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

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

➔ **Right to marriage:** Every person has right to marry subject to fulfillment of certain conditions laid down under Hindu Marriage Act 1955. Possession of Capacity to Marry and performance of necessary formalities of marriage are necessary conditions of a legally recognizable marriage.

This Capacity constitutes several aspects: a) not having living spouse at the time of marriage, b) Age of marriage, c) Spouse shall not be in Prohibited degree of relationship or Sapinda relation unless custom permits, d) Sound State of mind. Even if in sound state of mind and Capable of giving valid consent but suffering from mental disorder to such an extent as to be unfit for marriage and the procreation of children or subject to recurrent attacks of insanity or epilepsy, person is disqualified to undergo marriage.

Age of marriage: According to Prohibition of Child Marriage Act, 2006, No girl below 18 years and boy below 21 years of age shall marry. It is applicable to all religions. It is void under Special Marriage Act but not under any other personal laws. If a minor Hindu marries, it shall be neither void nor voidable but valid.

If marriage occurred in violation of Bigamy, Prohibited degree of relationship or Sapinda relation, such marriage is null and void

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

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

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

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

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

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

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

REMEDIES UNDER LAW

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

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

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

Other Remedies under Civil Law

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

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

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

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

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

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

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

manner as the son and will have the same rights and liabilities in the coparcenary property like a son and as such she can also file suit for partition.

- Grant of succession certificate.

Remedies under Criminal Law:

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

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

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

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

LAW REFORMS

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

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

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

CLASSIFICATION OF GLOBAL LEGAL SYSTEM

Although each country has its own legal system, yet all of them are connected to each other on the basis of common traits and features. These features are common because their sources are very few and can be counted on fingers, and there lies the basis of classification of legal systems. There exist different Legal Systems around the world based on broad classifications on the basis of common traits and features. On the basis of such classification, the Legal Systems of the

world can be divided into four broad categories: (a) Common Law System, (b) Civil Legal System, (c) Religious Legal System, and (d) Customary legal System.

1. Common Law System:

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

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

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

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

In its historical origin, common law was taken to mean the whole of the law of England including equity. Statute law was referred to separately because of its authority. In modern times,

statute law was developed to a very great extent and even certain portions of the common law are undergoing a slow transformation into statute law by the process known as codification. The term Common law is still used to mean the whole of the law of England when it is contrasted with the foreign systems of law like Roman law or French law.

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

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

(b) *Composition of Judicial Institutions:* Second common feature of the Common Law family is that the judges of the Courts are highly skilled persons who have specially studied the discipline of law and possess practical experience in legal administration either as advocates or judges. A judge, in other words, cannot be a lay person or even a scientist. He must be a person of legal background, either as an advocate or a judge or at least with a degree in law. This feature of Common Law makes the judicial institutions a separate set of professional persons. This might

be one of the reasons why the judgments rendered by them are technical and based upon the finer details of the bare provisions of law. This leads to a better quality of judgment due to which these judgments carry authority when they are rendered by experienced judges or advocates. As an example, you can say that in India the judges at the trial Court or District Court are selected on the basis of an entrance examination where the minimum eligibility is a degree in law and the judges of High Courts and Supreme Court are selected from among those with at least 10 years of practice as advocates or judges. Persons outside the legal background cannot become judges of the State or Central government. So, the social background of judges in Common Law system is not diverse, but very limited.

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

(d) *Acts, Statutes passed by Competent Authorities*: A very important feature of Common Law system is that though the legislations passed by competent authorities such as the Parliament and Legislatures are given an authoritative place which is binding on the judges, whenever the judges find any gaps in the Acts or Statutes passed by the Parliament, they can make suitable interpretations to fill the gap in these Acts. In other words, the judges and advocates of the Common Law system would think that the Acts are very abstract and the rules contained in those Acts are very general in nature. These general and abstract rules are incapable in themselves to be applied in all facts and circumstances. Facts of every case would be so peculiar that it would

be very difficult to apply the general and abstract form of rule which may need suitable additions and interpretations. That addition and interpretation is as important as the bare provision of general and abstract law. For example, the punishment prescribed by the Act passed by Indian Parliament for the commission of murder ranges from life imprisonment to death penalty. However, it has not been prescribed in what situations punishment would be life imprisonment or death. The judges have filled this gap and made their own addition into the law by holding that the 'rarest of rare cases' would be suitable for the death penalty whereas the others would only get life imprisonment.

2. Civil Legal System

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

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

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

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

A prominent example of civil law would be the Napoleonic Code, named after French emperor Napoleon Bonaparte. The Code comprises three components: the law of persons,

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

property law, and commercial law. Rather than a catalog of judicial decisions, the Code consists of abstractly written principles as rules of law.[2]

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

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

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

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

In later times, civil law became codified as customary law that were local compilations of legal principles recognized as normative. Sparked by the age of enlightenment, attempts to codify

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

private law began during the second half of the 18th century, but civil codes with a lasting influence were promulgated only after the French Revolution, in jurisdictions such as France.

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

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

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

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

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

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

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

2. Religious Legal System

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

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

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

These early Islamic legal treatises covered the application of Islamic ethics, Islamic economic jurisprudence and Islamic military jurisprudence to international law, and were concerned with a number of modern international law topics, including the law of treaties; the treatment of diplomats, hostages, refugees and prisoners of war; the right of asylum; conduct on the battlefield; protection of women, children and non-combatant civilians; contracts across the lines of battle; the use of poisonous weapons; and devastation of enemy territory.[7] The Umayyad and Abbasid Caliphs were also in continuous diplomatic negotiations with the Byzantine Empire on matters such as peace treaties, the exchange of prisoners of war, and payment of ransoms and tributes.

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

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

Islamic law also introduced "two fundamental principles to the West, on which were to later stand the future structure of law: equity and good faith", which was a precursor to the concept of *pacta sunt servanda* in civil law and international law. Islamic law also "introduced it to

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

international relations, making possible the systematic development of conventional law, which became a partial substitute for custom."[8]

Islamic law also made "major contributions" to international admiralty law, departing from the previous Roman and Byzantine maritime laws in several ways. These included Muslim sailors being "paid a fixed wage "in advance" with an understanding that they would owe money in the event of desertion or malfeasance, in keeping with Islamic conventions" in which contracts should specify "a known fee for a known duration", in contrast to Roman and Byzantine sailors who were "stakeholders in a maritime venture, in as much as captain and crew, with few exceptions, were paid proportional divisions of a sea venture's profit, with shares allotted by rank, only after a voyage's successful conclusion." Muslim jurists also distinguished between "coastal navigation, or cabotage," and voyages on the "high seas", and they also made shippers "liable for freight in most cases except the seizure of both a ship and its cargo." Islamic law also "departed from Justinian's Digest and the Nomos Rhodion Nautikos in condemning slave jettison", and the Islamic Qirad was also a precursor to the European commenda limited partnership. The "Islamic influence on the development of an international law of the sea" can thus be discerned alongside that of the Roman influence.[9]

Hindu Law: Hinduism is a way of life, a Dharma. The word Dharma is derived from the Sanskrit word “dhri” which means “to hold together.” Those who profess the Hindu Dharma and seek to follow it are guided by spiritual, social, legal and moral rules, actions, knowledge and duties which are responsible for holding the human race together. Dharma does not mean religion: it is the law that governs all actions. The Hindu religion not only consists of rules encompassing the rights and duties of kings and warriors, but also provides norms of Desa Dharma that govern inter-State relations. Hinduism is based on numerous texts.[10]

The laws of armed conflicts were founded in ancient India on the principle of humanity. The ancient Hindu texts clearly recognized the distinction between military targets, which could be

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

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

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

attacked, and non-military persons and objects, which could not be attacked. Warfare was thus largely confined to combatants, and only the armed forces were legitimate targets.[11]

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

It is sufficiently clear that in terms of the ideals of humanitarianism of ancient India the laws of war were more progressive. The modern laws of war were developed mainly by The Hague Peace Conferences of 1899 and 1907, and in the four Geneva Conventions of 1949 and the two 1977 Additional Protocols thereto. India is party to the four Geneva Conventions of 1949 and has incorporated them into its municipal law. Although it did not sign the two Additional Protocols, the non-formal nature of its adoption of them has not hindered the effective implementation of international humanitarian law in India. Hinduism believes that war is undesirable and must be avoided because it involves the killing of fellow human beings.[12]

4. Customary Law

Today, hardly any political entity in the world operates under a legal system which could be said to be typically and wholly customary. Custom can take on many guises, depending on whether it is rooted in wisdom born of concrete daily experience or more intellectually based on great spiritual or philosophical traditions. Be that as it may, customary law still plays a sometimes

[11] The humanitarian principles are largely articulated in The Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949 and their two Additional Protocols. For the texts see Handbook of the International Red Cross and Red Crescent Movement, ICRC, Geneva, 1994.
[12] V. S. Mani, "International humanitarian law: An Indo-Asian perspective", International Review of the Red Cross, No. 841, 2001, pp. 59-76.

significant role, namely in matters of personal status, in a relatively high number of political entities with mixed legal systems. This obviously applies to a number of African countries but is also the case, albeit under very different circumstances, as regards the law of China or India, for example. Customary international laws are those aspects of international law that are derived from custom.

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

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

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

A peremptory norm is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted. Examples include various international crimes; a state which carries out or permits slavery, genocide, war of aggression, or crimes against humanity is always violating customary international law.

[13] "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply international custom, as evidence of a general practice accepted as law."
[14] http://www.burneylawfirm.com/international_law_primer.htm

Other examples accepted or claimed as customary international law include the principle of non-refoulement, immunity of visiting foreign heads of state, and the right to humanitarian intervention.

LEGAL SYSTEM AMONGST INTERNATIONAL INSTITUTIONS AND COUNTRIES INTER SE

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

a) *Role of Treaties:* Treaties are a form of agreement between or amongst countries and international organizations which are regulated by International Law. There are around two hundred countries and several hundreds of international organizations, such as the United Nations, World Trade Organization, World Intellectual Property Organization. You might wonder how these countries and international organizations would interact with each other? Do you not think that mutual agreement is one possible way out to achieve that objective? This kind of agreement is called by various names such as Treaty, Convention, Pact, Covenant, Protocol, Charter, and even simply an Agreement. You might know the names of several such Treaties. The famous examples may be: Versailles Treaty, Kyoto Protocol, Pact of Paris, Charter of the United Nations, and International Covenant on Civil and Political Rights. These Treaties bind the Nations to carry out their

responsibilities according to their provisions. If they would not observe those responsibilities, it would amount to breach of a treaty and some kind of compensation would have to be paid by the violating country. There is a fundamental principle in this legal system which says: "Treaties must be observed in good faith". This principle has become a guiding factor in the continued observance of treaties in International Legal System.

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

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

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

IMPACT OF GLOBALIZATION ON LEGAL SYSTEMS

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

Globalization is reshaping the fixed and firm boundary between domestic and international spheres and changing our conceptions of the proper domain of domestic and international politics and law. In reformulating the entrenched disciplinary assumptions underlying these

[15] LAW AND GLOBALIZATION, http://www.uiowa.edu/ifdebook/issues/globalization/readingtable/law.shtml

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

An example can be taken from the Polish scenario in which, first of all it is important to understand that Polish legal system is based on the civil law system developed in Europe over many years. Poland has codified law and that is why the main sources of that law are Constitution, codes, statues and international treaties. The Polish legal system is divided into public and private law categories. Public law, mainly which is constitutional, criminal and administrative laws, is a type of law where exists relation between some government department or agency and people and their organizations. Private law regulates relations between private individuals and organizations. Because of the globalization process, Poland needed to transform its legal system to be more coherent with international relations. That's why currently it is not hard to run business activity in Poland for foreign entities. Also the Polish International Private

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

Law had to be transformed. The International Private Law includes principles of conflict of law which state will be used to a certain situation. Nationality, place of residence seat, situation of the object will affect on the choice of using concrete legal system.[17]

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

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

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

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

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

MODULE-II

Constitutional Law and Administrative Law

INTRODUCTION TO THE CONSTITUTION OF INDIA

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

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

DRAFTING OF THE INDIAN CONSTITUTION

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

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

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

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

Salient Features of the Government of India Act:

- *Provincial Autonomy:* The system of Dyarchy was abolished and with it the system of revenue and executive council also had to bid adieu. The council of ministers primarily administered all the provincial subjects barring few crucial exceptions like Law and Order for which the Head Government was responsible. These ministers were chosen from the elected members of the provincial legislature and were collectively responsible to it.
- *All India Federation States:* The enactment also proposed setting up of an All India Federation which would be primarily comprised of the British India and the Princely States. These units were further sub-categorized into eleven governor's provinces, six chief commissioner's provinces and all those princely states that had consented to become a part of the same. Such an accession was supposed to be completely voluntary and was to be executed through an Instrument of Accession in favour of the Crown.
- *Introduction of Dyarchy at the Central Level:* The federal subjects were further categorized into Reserved subjects and Transferred Subjects. Where the former included crucial subjects like Defence, Ecclesiastical Affairs, External Relations and Tribal Affairs, the remaining areas of governance formed a part of the latter. The Reserved Subjects were supposed to be administered by the Governor General along with the aid of three executive counselors. Transferred subjects were required to be administered by the Governor General with the aid of Council of Ministers.
- *Bicameral Legislature:* It also established a federal bicameral legislature consisting of a Upper House i.e. Council of States and a Lower House i.e. the Federal Assembly. The strength of the Upper house was fixed at 260 out of which 104 members were nominated

by the rulers to present the Indian states. 6 members were to be nominated by the governor-general whereas the remaining members were required to be elected. The lower house comprised of 375 members out of which 250 represented British India and 125 represented the Indian States. The members of the British India were indirectly elected enjoying a tenure of five years unless the house was dissolved earlier by the Governor General. Six provinces were given the Bicameral System of Legislature.

- *Establishment of a Federal Court:* Primarily function of this court was to adjudicate inter-state disputes and matters concerning the interpretation of the Constitution. However the Privy Council remained the final court of appeal.
- Division of Law Making Powers in to three lists
- Establishment of an Advisory Body in place of the Indian Council
- Separation of Burma from India w.e.f. April 1937

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

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

SALIENT FEATURES OF THE INDIAN CONSTITUTION

The constitution of a country essentially seeks to establish its fundamental or basic organs of the government and administration and describe their structure, composition and powers and

principle functions and define the inter-relationships of these organs with one another and regulate their relations with the people more particularly the political relation. Thus the constitution lays down the essential framework of a government.

The following are the Key Features of the Indian Constitution:

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

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

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

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

A Unique Blend of Rigidity and Flexibility

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

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

PREAMBLE

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

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

The Preamble to our Constitution serves, two purposes:

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

Crucial principles imbibed in the Preamble:

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

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

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

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

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

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

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

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

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

FUNDAMENTAL RIGHTS

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

The following are the fundamental rights guaranteed under our constitution:

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

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

Protective discrimination: A.14 of Constitution says all are equal before law and there shall be no discrimination on any grounds whatsoever. However, equality doesn't mean equality that is measured with scale. The rights guaranteed by Articles 15 to 18 emanate from Article.14. A.15 deals with discrimination on grounds of religion, race, caste, sex or place of birth. It also permits

State to undertake certain beneficial measures to Scheduled Castes, Scheduled Tribes, Socially and educationally backward classes, women and children. A.16 deals with equality of opportunity in matters of public employment and makes provision for reservation in favour of backward classes and Scheduled Castes. A.17 prohibits untouchability.

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

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

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

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

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

The Principles of Natural Justice is also one of the tools to ascertain absence of Arbitrariness. The Principles of Natural Justice says: No man shall be condemned unheard, Judge shall not

have any bias (Whether monetary, personal or subject matter), Justice should not only be done but appears to be done, every decision of state should be based on reasons (Speaking order).

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

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

A question has sometimes been asked as to what would happen if the Government–be it State or Central–did not carry out the decisions of the Court. The question has been answered by Article 144 of the Constitution which inter alia says that all civil authorities in the territory of India shall act in aid of the Supreme Court.

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

believe that the danger apprehended is imminent. Constitutional framers are quiet conscious of right to

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

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

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

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

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

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

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

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

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

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

DIRECTIVE PRINCIPLES OF STATE POLICY

The Directive Principles of State Policy contained in Part IV, Articles 36-51 of the Indian constitution constitute the most interesting and enchanting part of the constitution. The Directive Principles may be said to contain the philosophy of the constitution. The idea of directives being included in the constitution was borrowed from the constitution of Ireland. As the very term "Directives" indicate, the Directive principles are broad directives given to the state in accordance with which the legislative and executive powers of the state are to be exercised. As Nehru observed, the governments will ignore the directives "Only at their own peril." As India

seeks to secure an egalitarian society, the founding fathers were not satisfied with only political justice. They sought to combine political justice with economic and social justice.

FUNDAMENTAL DUTIES

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

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

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

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

- to abide by the constitution and respect its ideal and institutions;
- to cherish and follow the noble ideals which inspired our national struggle for freedom;
- to uphold and protect the sovereignty, unity and integrity of India;
- to defend the country and render national service when called upon to do so;
- to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional diversities, to renounce practices derogatory to the dignity of women;
- to value and preserve the rich heritage of our composite culture;
- to protect and improve the natural environment including forests, lakes, rivers, and wild-life and to have compassion for living creatures;

- to develop the scientific temper, humanism and the spirit of inquiry and reform;
- to safeguard public property and to abjure violence;
- to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavor and achievement.

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

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

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

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

RELATIONSHIP BETWEEN CENTRE AND STATE

After independence India adopted the federal structure for, perhaps, administrative convenience. There is dual policy, with the Union Government at the centre and the state governments at the periphery—each enjoying powers assigned to them. The autonomy of the states is so adjusted with the centre that the latter can perform its function of ensuring unity of the country. The legislative relations between the centre and the states determined in accordance with the

provisions of the Article 246 of the Constitution. The legislative powers are categorized in three lists—Union List with 97 subjects, States List with 66 and Concurrent List with 47 subjects. Residuary legislative powers rest with the Parliament. Moreover when there is state of emergency, Parliament can make laws on the subjects given under Union List. In the case of a conflict between the laws made by the state and the laws passed by the centre the central law will prevail.

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

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

INDIAN JUDICIARY

Indian Justice System: A unique feature of the Indian Constitution is that, despite its Federal system and the existence of the Central and State laws with their predefined spheres of application, there exists a single integrated system of Courts which administers both the central and the state laws. Hierarchy of the Courts in India: The Supreme Court of India and the High Courts are the two constitutional courts that are vested with major powers to protect the Fundamental Rights of the citizens and also to interpret the Constitution and other laws.

The Supreme Court is the highest court in the country. It has original, appellate and advisory jurisdiction. Its exclusive original jurisdiction extends to Central-State and inters State disputes. In addition, Article 32 of the Constitution gives an extensive original jurisdiction to the Supreme Court for the enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto and*

certiorari to enforce them. The Supreme Court, if satisfied that cases involving substantially the same questions of law of general importance are pending before it and the High Courts, it may withdraw such case and dispose them by itself. It has many benches for litigation and its exclusive original jurisdiction extends to any dispute between the Government of India and one or more States; or between the States themselves. It also has an advisory jurisdiction wherein the President can always seek advice on any matter of law. The Law pronounced by this court is binding on all courts within India and the Court has the power to punish anybody for its contempt.

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

The purpose of Civil Justice system is to adjudicate rights of the parties in case of their violation and apprehension of violation. The rights can be by way statute, custom, common law,

constitution, equity etc., We find the civil rights of the parties in various laws like contract law, transfer of property, easements, partition law, Hindu succession.

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

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

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

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

Evidence act we find when a fact alleged in said to be proved, who has to prove, with what facts it must be proved and mode of recording evidence.

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

EMERGENCY PROVISIONS

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

The Constitution of India recognizes three forms of Emergency:

- National Emergency
- State Emergency
- Financial Emergency

National Emergency: The Constitution of India has provided for imposition of emergency caused by war, external aggression or internal rebellion. This is described as the National Emergency. This type of emergency can be declared by the President of India if he is satisfied that the

situation is very grave and the security of India or any part thereof is threatened or is likely to be threatened either

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

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

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

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

Imposition of National Emergency has the following effects:

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

- ➔ All fundamental right except the Right to Life and Personal Liberty stand suspended during the period of emergency.

Emergency due to failure of Constitutional Machinery of State

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

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

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

Imposition of State Emergency has the following effects:

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

- ➔ The President can make any other incidental or consequential provision necessary to give effect to the object of proclamation.

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

Imposition of Financial Emergency has the following effects:

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

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

AMENDMENT PROVISIONS

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

The amendment provision of the constitution refers to the process of altering the provisions of the Indian Constitution. The said procedure is laid down under Article 368 of the Indian constitution. The amendment provision was included by the drafters in an attempt to ensure the

sanctity of the constitution of India and consequently provide a safeguard from the exercise of arbitrary power by the Parliament.

The Constitution provides procedures for three categories of amendments:

- ➔ Amendment by Simple Majority: Constitutional Provisions laid down under Article 4 (i.e. admission and establishment of new states), Article 169 (i.e. power to abolish or create legislative councils in states), Para 7(2) of Schedule V (administration and control of the Schedule Areas and Scheduled Tribes) and Para 21(2) of Schedule VI(power of the Parliament to enact laws amending the Sixth Schedule which contains provisions for the administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram) can be altered by way of a Simple Majority such as that required for the passing of any ordinary law.
- ➔ Amendment by Special Majority: Amendment by Special Majority along with Ratification by State Legislature: If the amendment seeks to make any change in any of the provisions mentioned in the proviso to article 368, it must be ratified by the Legislatures of not less than one-half of the States. These provisions relate to certain matters concerning the federal structure or of common interest to both the Union and the States viz., the election of the President (articles 54 and 55); the extent of the executive power of the Union and the States (articles 73 and 162); the High Courts for Union territories (article 241); The Union Judiciary and the High Courts in the States (Chapter IV of Part V and Chapter V of Part VI); the distribution of legislative powers between the Union and the States (Chapter I of Part XI and Seventh Schedule); the representation of States in Parliament; and the provision for amendment of the Constitution laid down in article 368. Ratification is done by a resolution passed by the State Legislatures.

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

The role of the States in constitutional amendment is limited. State Legislatures cannot initiate any Bill or proposal for amendment of the Constitution. They are associated in the process of the amendment only through the ratification procedure laid down in article 368, in case the

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

FUNDAMENTAL PRINCIPLES OF CONSTITUTIONAL LAW

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

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

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

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

judicial functions must be performed by the independent Magistrate, free from the influence of the Monarch.

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

Montesquieu had visited England and was thoroughly impressed by the sense of liberty enjoyed by their people. Witnessing the administration of the three main areas of law by three separate departments led him to conclude that the liberty and freedom enjoyed by them were a result of the absence of a single monarch in whom the power to enact, implement and enforce laws rests. He thus advocated for the theory of separation of powers in order to make the government safe for the governed. He argued that whoever has unfettered and unrestricted power would invariably abuse it. He advocated for three distinct departments of government with distinct staff who will be responsible for administration of three different but equally important aspects of governance. Thus the legislative organ of the state shall be authorized to make laws, the executive organ of the state shall be authorized to implement laws and the judicial organ of the state will be authorized to enforce the same if violation occurs. His teachings gave boost to the French Revolution and led to the adoption of the Declaration of Rights in 1789. The Declaration provided that:

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

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

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

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

Doctrine of Pith and Substance: One of the proven methods of examining the legislative competence of a legislature with regard to an enactment is by the application of the doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. This doctrine is

an established principle of law in India recognized not only by this Court, but also by various High Courts. Where a challenge is made to the constitutional validity of a particular State Act with reference to a subject mentioned in any entry in List I, the Court has to look to the substance of the State Act and on such analysis and examination, if it is found that in the pith and substance, it falls under an entry in the State List but there is only an incidental encroachment on any of the matters enumerated in the Union List, the State Act would not become invalid merely because there is incidental encroachment on any of the matters in the Union List.

Doctrine of Severability: It provides that only that part of the law will be declared invalid which is inconsistent with the fundamental rights and the rest of the law will stand. However, invalid part of the law will be severed only if it is severable, i.e., if after separating the invalid part, the valid part is capable of giving effect to the legislature's intent, then only it will survive otherwise the court shall declare the entire law as invalid.

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

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

INTRODUCTION TO ADMINISTRATIVE LAW

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

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

The rapid growth of administrative Law in modern times is the direct result of the growth of administrative powers. The ruling gospel of the 19th century was Laissez faire which manifested

itself in the theories of individualism, individual enterprise and self-help. The philosophy envisages minimum government control, maximum free enterprise and contractual freedom. The state was characterized as the law and order state and its role was conceived to be negative as its internal extended primarily to defending the country from external aggression, maintaining law and order within the country dispensing justice to its subjects and collecting a few taxes to finance these activities. It was era of free enterprise. The management of social and economic life was not regarded as government responsibility. But laissez faire doctrine resulted in human misery. It came to be realized that the bargaining position of every person was not equal and uncontrolled contractual freedom led to the exploitation of weaker sections by the stronger e.g. of the labour by the management in industries. On the one hand, slums, unhealthy and dangerous conditions of work, child labour wide spread poverty and exploitation of masses, but on the other hand, concentration of wealth in a few hands, became the order of the day. It came to be recognized that the state should take active interest in ameliorating the conditions of poor. This approach gave rise to the favoured state intervention in and social control and regulation of individual enterprise. The state started to act in the interests of social justice; it assumed a " positive" role. In course of time, out of dogma of collectivism emerged the concept of " Social Welfare State" which lays emphasis on the role of state as a vehicle of socio-economic regeneration and welfare of the people.

Thus the growth of administrative law is to be attributed to a change of philosophy as to the role and function of state. The shifting of gears from laissez faire state to social welfare state has resulted in change of role of the state. This trend may be illustrated very forcefully by reference to the position in India. Before 1947, India was a police state. The ruling foreign power was primarily interested in strengthening its own domination; the administrative machinery was used mainly with the object in view and the civil service came to be designated as the "steel frame". The state did not concern itself much with the welfare of the people. But all this changed with the advent of independence with the philosophy in the Indian constitution the preamble to the constitution enunciates the great objectives and the socioeconomic goals for the achievement of which the Indian constitution has been conceived and drafted in the mid-20th century an era when the concept of social welfare state was predominant. It is thus pervaded with the modern outlook regarding the objectives and functions of the state. it embodies a distinct philosophy which regards the state as on organ to secure good and welfare of the people this concept of state

is further strengthened by the Directive Principles of state policy which set out the economic, social and political goals of Indian constitutional system. These directives confer certain non-justiceable rights on the people, and place the government under an obligation to achieve and maximize social welfare and basic social values of life education, employment, health etc. In consonance with the modern beliefs of man, the Indian constitution sets up machinery to achieve the goal of economic democracy along with political democracy, for the latter would be meaningless without former.

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

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

NEED FOR THE ADMINISTRATIVE LAW: ITS IMPORTANCE AND FUNCTIONS

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

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

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

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

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

• Has adequate control mechanism been developed so as to ensure that the administrative powers are kept within the bounds of law, and that it would not act as a power drunk creature, but would

act only after informing its own mind, weighing carefully the various issues involved and balancing the individual's interest against the needs of social control?

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

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

NATURE AND DEFINITION OF ADMINISTRATIVE LAW

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

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

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

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

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

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

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

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

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

A famous jurist **Hobbes** has written that there was a time when the society was in such a position that man did not feel secured in it. The main reason for this was that there were no such things as

administrative powers. Each person had to live in society on the basis of his own might accordingly to Hobbes, " In such condition, there was no place for industry, arts, letters and society. Worst of all was the continual fear of danger, violent death and life of man solitary poor, nasty and brutish and short.

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

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

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

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

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

produced a rich wealth of legal norms and added a new dimension to the discipline administrative law.

CAUSES FOR GROWTH OF ADMINISTRATIVE LAW

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

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

RELATIONSHIP BETWEEN ADMINISTRATIVE LAW AND CONSTITUTIONAL LAW

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

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

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

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

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

Constitutional Law viewed through Administrative Eyes: Since the English Constitution is unwritten, the impact of constitutional law upon administrative law in England is insignificant and blurred. As Dicey observes, the rules which in other countries form part of a constitutional code are the result of the ordinary law of the land in England. As a result, whatever control the

administrative authorities can be subjected to, if any, must be deduced from the ordinary law, as contained in statutes and judicial decisions. But, in countries having written constitutions, there is an additional source of control over administrative action. In these countries there are two sources or modes of exercising judicial control over the administrative agencies – constitutional and non-constitutional. The written constitution imposes limitations upon all organs of the body politic. Therefore, while all authors attempt to distinguish the scope of administrative law from that of constitutional law, they cannot afford to forget not to mention that in a country having written constitution with judicial review, it is not possible to dissociate the two completely.

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

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

An administrative act, whether statutory or non-statutory, will be void if it contravenes any of the mandatory and justiciable provisions of the Constitution, falling even outside the realm of

fundamental rights – like Articles 265, 301, 311 and 314. In cases of statutory administrative actions, there is an additional constitutional ground upon which its validity may be challenged, namely, that the statute, under which the administrative order has been made, is itself unconstitutional. Where the impugned order is quasi-judicial, similarly, it may be challenged on the grounds, inter alia,that the order is unconstitutional; that the law under which the order has been made is itself unconstitutional.

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

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

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

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

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

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

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

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

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

Constitutional Impact on Administrative Adjudication: In order to provide speedy and inexpensive justice to employees aggrieved by administrative decisions, the Government set up the Central Administrative Tribunal (CAT) in 1985, which now deals with all cases relating to service matters which were previously dealt with by courts up to and including the High Courts. Establishment of the Central Administrative Tribunal under the Administrative Tribunals Act, 1985 is one of the important steps taken in the direction of development of administrative law in India. The Administrative Tribunals Act while stimulating the development of administrative law, drew its legitimacy and substance from the constitutional law and was passed by Parliament in pursuance of Article 323-A of the Constitution. Dr. Rajeev Dhavan comments on the new tribunal system envisaged under Art. 323-A: "The Forty-second Amendment envisaged a tribunal structure and limited review powers by the High Courts. In the long run, this could mean

a streamlined system of tribunal justice under the superintendence of the Supreme Court. Properly worked out such a system is not a bad one. It would be both an Indian and a common law adaptation of the French system of droit administratif."

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

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

CLASSIFICATION OF ADMINISTRATIVE ACTION

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

especially relating to judicial review freely employs conceptual classification of administrative action.

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

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

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

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

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

Rule-making action or quasi-legislative action – Legislature is the law-making organ of any state. In some written constitutions, like the American and Australian Constitutions, the law making power is expressly vested in the legislature. However, in the Indian Constitution though

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

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

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

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

gratuity. 10. Authority granting or refusing permission for retrenchment. 11. Grant of permit by Regional Transport Authority.

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

Rule-application action or administrative action – Though the distinction between quasi-judicial and administrative action has become blurred, yet it does not mean that there is no distinction between the two. If two persons are wearing a similar coat, it does not mean that there is no difference between them. The difference between quasi-judicial and administrative action may not be of much practical consequence today but it may still be relevant in determining the measure of natural justice applicable in a given situation. In A.K. Kraipak v. Union of India, the Court was of the view that in order to determine whether the action of the administrative authority is quasi-judicial or administrative, one has to see the nature of power conferred, to whom power is given, the framework within which power is conferred and the consequences. Therefore, administrative action is the residuary action which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide a right though it may affect a right. However, it does not mean that the principles of natural justice can be ignored completely when the authority is exercising "administrative powers". Unless the statute provides otherwise, a minimum of the principles of natural justice must always be observed depending on the fact situation of each case.

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

act fairly, impartially and reasonable. Therefore, at this stage it becomes very important for us to know what exactly is the difference between Administrative and quasi-judicial Acts.

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

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

DOCTRINE OF SEPARATION OF POWERS

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

given a base and made popular by French jurist, Montesqeu through his great work Esprit Des Lois (The spirit of Laws) in the year1748.

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

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

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

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

Thus, it is rightly pointed out by the C.K.Takwani in his book that "on the whole, the doctrine of separation of powers in the strict sense is undesirable and impracticable and, therefore, it is not fully accepted in any country. Nevertheless, its value lies in the emphasis on those checks and

balances which are necessary to prevent and abuse of enormous powers of the executive. The object of the doctrine is to have a government of law rather than of official will or whim".

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

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

RULE OF LAW

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

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

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

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

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

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

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

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

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

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

Important Components of Rule-of-Law Reforms:

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

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

b) Legal Rules - Another important rule-of-law reform goal is to build the legal rules. As Fuller stated, "laws must exist."

c) Institutional Encouragement on the Global Level - To encourage additional country-specific development, in the early 1990s the World Bank and the International Monetary Fund (IMF) began conditioning financial assistance on the implementation of the rule of law in recipient countries. These organizations had provided aid to support initiatives in legislative drafting, legal information, public and legal education, and judicial reforms, including alternative dispute resolution. By conditioning funds on the establishment of the rule of law, the World Bank and the IMF also hope to reduce corruption, which undermines economic development by scaring away investors and preventing the free flow of goods and capital. Currently, in its Sustainable

Development Goals (SDG), the United Nations (UN) also champions the rule of law as a vehicle to bring about more sustainable environmental practices.

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

PRINCIPLE OF NATURAL JUSTICE

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

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

The principles of natural justice are firmly grounded under various Article of the Constitution. With the introduction of the concept of substantive and procedural due process in Article – 21 of the Constitution all that fairness which is included in the principles of natural justice can be read into Article – 21 when a person is deprived of his life and personal liberty In other areas it is

Article – 14 which incorporates the principles of natural justice. Article – 14 applies not only to discriminatory class legislation on but also to arbitrary or discriminatory State action. Because violation of natural justice results in arbitrariness therefore violation of natural justice is violation of Equality Clause of Article – 14. Therefore, now the principle of natural justice cannot be wholly disregarded by law because this would violate the fundamental rights guaranteed by Articles – 14 and 21 of the Constitution. There are mainly two Principles of Natural Justice.

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

Rule against Bais

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

Personal Bias: Personal Bias arises from a certain relationship equation between the deciding authority and the parties which incline him/her unfavourably or other-wise on the side of one of

the parties before him/her. Such equation may develop out of varied forms of personal or professional hostility or friendship. How-ever, no exhaustive list is possible.

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

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

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

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

the ground that the Secretary of the Transport Department who gave hearing was interested in the subject-matter.

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

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

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

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

unless the strength of the preconceived notions is such that it has the capacity of foreclosing the mind of the judge, administrative action would not be vitiated.

Rule of Fair Hearing

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

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

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

The test of adequacy of 'Notice' will be whether it gives sufficient information and material so as to enable the person concerned to put up an effective defence. Therefore, the contents of notice, persons who are entitled to 'Notice' and the time of giving 'Notice' are important matters to ascertain any violation of the principles of natural justice. Sufficient time should also be given to comply with the requirement of notice. Thus, when only 24 hours were given to demolish a

structure alleged in a dilapidated condition, Court held that notice is not proper. In the same manner where notice contained only one charge, the person cannot be punished for any other charge for which notice was not given. However, the requirement of notice will not be insisted upon as a mere technical formality, when the concerned party clearly knows the case against him and is not thereby prejudiced in any manner in putting up an effective defence.

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

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

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

and disciplinary proceedings against civil servants also, the right to cross-examination is included in the rule of fair hearing.

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

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

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

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

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

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

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

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

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

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

Reasoned Decisions or Speaking Orders

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

The other aspect of the matter is that the party, against whom an order is passed, in fair play, must know the reasons of passing such order. It has a right to know the reasons. The orders against which appeals are provided must be speaking orders. Otherwise, the aggrieved party will

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

Exceptions to the Rule of Natural Justice

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

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

Exclusion in Cases of Confidentiality: In a case the Supreme Court held that the maintenance of surveillance register by the police is a confidential document. Neither the person whose name is entered in the register nor any other member of the public can have access to it. Furthermore,

the court observed that the observance of the principles of natural justice in such situation may defeat the very purpose of surveillance and Techniques of Law there is every possibility of the ends of justice being defeated instead of being served. Same principle was followed in S.P. Gupta v. Union of India where the Supreme Court held that no opportunity of being heard can be given to an Additional Judge of a High Court before his name is dropped from being confirmed. It may be pointed out that in a country like India surveillance may provide a very serious constraint on the liberty of the people, therefore, the maintenance of the surveillance register cannot be so utterly administrative and non-judicial that it is difficult to conceive the application of the rules of natural justice.

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

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

Exclusion in Cases of Interim Preventive Action: If the action of the administrative authority is a suspension order in the nature of a preventive action and not a final order, the application of the principles of natural justice may be excluded. In a case where the institution passed an order

debarring the student from entering the premises of the institution and from attending classes till the pendency of a criminal case against him for stabbing a co-student. The Delhi High Court held that such an order could be compared with an order of suspension pending enquiry which is preventive in nature in order to maintain campus peace and hence the principles of natural justice shall not apply. Therefore, natural justice may be excluded if its effect would be to stultify the action sought to be taken or would defeat and paralyse the administration of the law. The Supreme Court in *Maneka Gandhi v. Union of India* observed : "Where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action, especially action of a preventive or remedial nature, right of prior notice and opportunity to be heard may be excluded by implication."

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

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

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

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

DELEGATED LEGISLATION

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

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

I. Certain emergency situations may arise which necessitate special measures. In such cases speedy and appropriate action is required. The Parliament cannot act quickly because of its political nature and because of the time required by the Parliament to enact the law.
II. The bulk of the business of the Parliament has increased and it has no time for the consideration of complicated and technical matters. The Parliament cannot provide the

society with the requisite quality and quantity of legislation because of lack of time. Most of the time of the Parliament is devoted to political matters, matters of policy and particularly foreign affairs.

III. Certain matters covered by delegated legislation are of a technical nature which require handling by experts. In such cases it is inevitable that powers to deal with such matters is given to the appropriate administrative agencies to be exercised according to the requirements of the subject matter. "Parliaments" cannot obviously provide for such matters as the members are at best politicians and not experts in various spheres of life.

IV. Parliament while deciding upon a certain course of action cannot foresee the difficulties, which may be encountered in its execution. Accordingly various statutes contain a 'removal of difficulty clause' empowering the administration to remove such difficulties by exercising the powers of making rules and regulations. These clauses are always so worded that very wide powers are given to the administration.

V. The practice of delegated legislation introduces flexibility in the law. The rules and regulations, if found to be defective, can be modified quickly. Experiments can be made and experience can be profitability utilized.

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

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

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

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

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

ADMINISTRATIVE DISCRETION AND ITS JUDICIAL CONTROL

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

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

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

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

(1) *Control at stage of delegation of discretion* - The court exercise control over delegation of discretionary powers to the administration by adjudicating upon the constitutionality of the law under which such powers are delegated with reference to the fundamental rights enunciated in Part III of the Indian Constitution. Therefore, if the law confers vague and wide discretionary power on any administrative authority, it may be declared ultra vires Article 14, Article 19 and other provisions of the Constitution. In certain situations, the statute though it does not give discretionary power to the administrative authority to take action, may give discretionary power to frame rules and regulations affecting the rights of citizens. The court can control the bestowal of such discretion on the ground of excessive delegation.

(2) *Control at the stage of the exercise of discretion* - In India, unlike the USA, there is no Administrative Procedure Act providing for judicial review on the exercise of administrative discretion. Therefore, the power of judicial review arises from the constitutional configuration of

courts. Courts in India have always held the view that judge-proof discretion is a negation of the rule of law. Therefore, they have developed various formulations to control the exercise of administrative discretion.

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

I. Abuse of Discretion

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

i. Use for improper purpose: - The discretionary power is required to be used for the purpose for which it has been given. If it is given for one purpose and used for another purpose. It will amount to abuse of power.
ii. Malafide or Bad faith: - If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court. Malafide exercise of discretionary power is always bad and taken as abuse of discretion. Malafide (bad faith) may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently. If its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest.
iii. Irrelevant consideration: - The decision of the administrative authority is declared void if it is not based on relevant and germane considerations. The considerations will be irrelevant if there is no reasonable connection between the facts and the grounds.
iv. Leaving out relevant considerations: - The administrative authority exercising the discretionary power is required to take into account all the relevant facts. If it leaves out relevant consideration, its action will be invalid.

v. Mixed consideration: - Sometimes the discretionary power is exercised by the authority on both relevant and irrelevant grounds. In such condition the court will examine whether or not the exclusion of the irrelevant or non-existent considerations would have affected the ultimate decision. If the court is satisfied that the exclusion of the irrelevant considerations would have affected the decision, the order passed by the authority in the exercise of the discretionary power will be declared invalid but if the court is satisfied that the exclusion of the irrelevant considerations would not be declared invalid.

vi. Unreasonableness: - The Discretionary power is required to be exercised by the authority reasonably. If it is exercised unreasonably it will be declared invalid by the court. Every authority is required to exercise its powers reasonably. In a case Lord Wrenbury has observed that a person in whom invested a discretion must exercise his discretion upon reasonable grounds. Where a person is conferred discretionary power it should not be taken to mean that he has been empowered to do what he likes merely because he is minded to do so. He is required to do what he ought and the discretion does not empower him to do what he likes. He is required, by use of his reason, to ascertain and follow the course which reason directs. He is required to act reasonably

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

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

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

II. Failure to exercise Discretion

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

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

ii. Acting under Dictation: - Where the authority exercises its discretionary power under the instructions or dictation from superior authority. It is taken, as non-exercise of power by the authority and its decision or action is bad. In such condition the authority purports to act on its won but in substance the power is not exercised by it but by the other authority. The authority entrusted with the powers does not take action on its own judgement and does not apply its mind. For example in *Commissioner of Police v. Gordhandas* the Police Commissioner empowered to grant license for construction of cinema theatres granted the license but later cancelled it on the discretion of the Government. The cancellation order was declared bad as the Police Commissioner did not apply his mind and acted under the dictation of the Government.

iii. Imposing fetters on the exercise of discretionary powers: - If the authority imposes fetters on its discretion by announcing rules of policy to be applied by it rigidly to all cases coming before it for decision, its action or decision will be bad. The authority entrusted with the discretionary power is required to exercise it after considering the individual cases and if the authority imposes fetters on its discretion by adopting fixed rule of policy to be applied rigidly to all cases coming before it, it will be taken as failure to exercise discretion and its action or decision or order will be bad.

Legitimate expectation as ground of judicial review: Besides the above grounds on which the exercise of discretionary powers can be examined, a third major basis of judicial review of administrative action is legitimate expectation, which is developing sharply in recent times. The concept of legitimate expectation in administrative law has now, undoubtedly, gained sufficient

importance. It is stated that the legitimate expectation is the latest recruit to a long list of concepts fashioned by the courts for the review of administrative action and this creation takes its place besides such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future, perhaps, the unreasonableness, the proportionality.

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

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

very concept. The courts should restrain themselves and restrict such claims duly to the legal limitations.

ADMINISTRATIVE ADJUDICATION AND ADMINISTRATIVE TRIBUNALS

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

The main characteristics of Administrative Tribunals are as follows:

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

Structure of the Tribunals: The Administrative Tribunals Act 1985 provides for the establishment of one Central Administrative Tribunal and a State Administrative Tribunal for each State like Haryana Administrative Tribunal etc; and Joint Administrative Tribunal for two or more states. The Central Administrative Tribunal with its principal bench at Delhi and other benches at Allahabad, Bombay, Calcutta and Madras was established on Ist November 1985. The Act vested the Central Administrative Tribunal with jurisdiction, powers and authority of the adjudication of disputes and complaints with respect to recruitment and service matters pertaining to the members of the all India Services and also any other civil service of the Union or holding a civil post under the Union or a post connected with defense or in the defense

services being a post filled by a civilian. Six more benches of the Tribunal were set up by June, 1986 at Ahmedabad, Hyderabad, Jodhpur, Patna, Cuttack, and Jabalpur. The fifteenth bench was set up in 1988 at Ernakulam.

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

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

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

Appointments: The Chairman, Vice-Chairman and every other members of a Central Administrative Tribunal shall be appointed by the President and, in the case of State or joint

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

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

Resignation or Removal: The Chairman, Vice-Chairman or any other member of the Administrative Tribunal may, by notice in writing under his hand addressed to the President, resign, his office; but will continue to hold office until the expiry of three months from the date of receipt of notice or expiry of his terms of office or the date of joining by his successor, whichever is the earliest. They cannot be removed from office except by an order made by the President on the ground of proven misbehavior or incapacity after an inquiry has been made by a judge of the Supreme Court; after giving them a reasonable opportunity of being heard in respect of those charges (vide Sec. 9(2). Act No. 13 of 1985).

Jurisdiction, Powers and Authority: Chapter III of the Administrative Tribunal Act deals with the jurisdiction, powers and authority of the tribunals. Section 14(1) of the Act vests the Central Administrative Tribunal to exercise all the jurisdiction, powers and authority exercisable by all the courts except the Supreme Court of India under Article 136 of the Constitution. One of the main features of the Indian Constitution is judicial review. There is a hierarchy of courts for the enforcement of legal and constitutional rights. One can appeal against the decision of one court to another, like from District Court to the High Court and then finally to the Supreme Court, But there is no such hierarchy of Administrative Tribunals and regarding adjudication of service matters, one would have a remedy only before one of the Tribunals. This is in contrast to the French system of administrative courts, where there is a hierarchy of administrative courts and

one can appeal from one administrative court to another. But in India, with regard to decisions of the Tribunals, one cannot appeal to an Appellate Tribunal. Though Supreme Court under Article 136, has jurisdiction over the decisions of the Tribunals, as a matter of right, no person can appeal to the Supreme Court. It is discretionary with the Supreme Court to grant or not to grant special leave to appeal.

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

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

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

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

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

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

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

a. Constitutional;
b. Statutory;
c. Ordinary or Equitable.

JUDICIAL REVIEW & ITS EXCLUSION

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

The provisions of Article 13 are: Article 13 (1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution of India, in so far as they are inconsistent with the provision of Part III dealing with the fundamental rights shall, to the extent of such inconsistency, be void. Article 13 (2) provides the State Shall not make any law which takes away or abridges the fundamental rights and any law made in contravention of this clause

shall, to the extent of the contravention, be void. Article 245 makes it clear that the legislative powers of Parliament and of the State Legislatures are subject to the provisions of the Constitution. Parliament may make laws for the whole or any part of the territory of India and the legislature of State may make laws for the whole or any part of the State. No law made by Parliament shall be deemed to be invalid on the ground that it would have been extra-territorial operation. The State Legislature can make law only for the State concerned and, therefore, the law made by the state Legislature having operation outside the State would be beyond its competence and, therefore ultra vires and void.

The doctrine of ultra vires has been proved very effective in controlling the delegation of legislative function by the legislature and for making it more effective it is required to be applied more rigorously. Sometimes the Court's attitude is found to be very liberal. Supreme Court has held that the legislature delegating the legislative power must lay down the legislative policy and guideline regarding the exercise of essential legislative function, which consists of the determination of legislative policy and its formulation as a rule of conduct. Delegation without laying down the legislative policy or standard for the guidance of the delegate will amount to abdication of essential legislative function by the Legislature. The delegation of essential legislative function falls in the category of excessive delegation and such delegation is not permissible. The power of judicial review controls not only the legislative but also the executive or administrative act. The Court scrutinizes the executive act for determining the issue as to whether it is within the scope of the authority or power conferred on the authority exercising the power. For this purpose the ultra vires rules provides much assistance in the Court. Where the act of the executive or administration is found ultra virus the Constitution or the relevant Act, it is declared ultra virus and, therefore, void. The Courts attitude appears to be stiffer in respect of the discretionary power of the executive or administrative authorities. The Court is not against the vesting of the discretionary power in the executive, but it expects that there would be proper guidelines or normal for the exercise of the power. The Court interferes when the uncontrolled and unguided discretion is vested in the executive or administrative authorities or the repository of the power abuses its discretionary power. The judicial review is not an appeal from a decision but a review of the manner in which the decision has been made. The judicial review is concerned not with the decision but with the decision making process.

The Supreme Court has expressed the view that in the exercise of the power of judicial review the Court should observe the self-restraint and confine itself the question of legality. Its concern should be:

1. Whether a decision making authority exceeding its power?
2. Committed an error of law. 3. Committed a breach of the rules of natural justice.
3. Reached a decision which no reasonable tribunal would have reached, or
4. Abused its power.

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

The aforesaid grounds may be classified as under: (i) Illegality (ii) Irrationality (iii) Procedural impropriety. Mala fide exercise of power is taken as abuse of power : Mala fides may be taken to mean dishonest intension or corrupt motive. In relation to the exercise of statutory power it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently. If its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest. The burden to prove mala fide is on the person who wants the order to be quashed on the ground of mala fide.

ADMINISTRATIVE FRAMEWORK OF AVIATION SECTOR IN INDIA

Regulatory Agencies

A. **Directorate General of Civil Aviation**: The Directorate General of Civil Aviation (DGCA) is the regulatory body in the field of Civil Aviation, primarily dealing with safety issues. It is established under the Ministry of Civil Aviation is the main regulatory body that supervises civil aviation in India. It is responsible for regulation of air transport services to/from/within India and for enforcement of civil air regulations, air safety, and airworthiness standards. The DGCA also co-ordinates all regulatory functions with the International Civil Aviation Organisation (ICAO).

Private operators were allowed to provide air transport services. However, no foreign airline could directly or indirectly hold equity in a domestic airline company. By 1995, several private airlines had ventured into the aviation business and accounted for more than 10 percent of the domestic air traffic. Today, Indian aviation industry is dominated by private airlines and these include low cost carriers, who have made air travel affordable. The Government nationalized nine airline companies vide the Air Corporations Act, 1953. These government-owned airlines dominated Indian aviation industry till the mid-1990s. In April 1990, the Government adopted open-sky policy and allowed air taxi- operators to operate flights from any airport, both on a charter and a non charter basis and to decide their own flight schedules, cargo and passenger fares. As part of its open sky policy in 1994, the Indian Government ended the monopoly of IA and AI in the air transport services. Private operators were allowed to provide air transport services. However, no foreign airline could directly or indirectly hold equity in a domestic airline company. By 1995, several private airlines had ventured into the aviation business and accounted for more than 10 percent of the domestic air traffic. Today, Indian aviation industry is dominated by private airlines and these include low cost carriers, who have made air travel affordable.

- Registration of civil aircraft;
- Formulation of standards of airworthiness for civil aircraft registered in India and grant of certificates of airworthiness to such aircraft
- Licensing of pilots, aircraft maintenance engineers and flight engineers, and conducting examinations and checks for that purpose;
- Licensing of air traffic controllers
- Certification of aerodromes and CNS/ATM facilities;
- Granting of Air Operator's Certificates to Indian carriers and regulation of air transport services operating to/from/within/over India by Indian and foreign operators, including clearance of scheduled and non-scheduled flights of such operators;
- Conducting investigation into accidents/incidents and taking accident prevention measures including formulation of implementation of Safety Aviation Management programmes.

- Carrying out amendments to the Aircraft Act, the Aircraft Rules and the Civil Aviation Requirements for complying with the amendments to ICAO Annexes, and initiating proposals for amendment to any other Act or for passing a new Act in order to give effect to an international Convention or amendment to an existing Convention;
- Coordination at national level for flexi-use of air space by civil and military air traffic agencies and interaction with ICAO for provision of more air routes for civil use through Indian air space;
- Keeping a check on aircraft noise and engine emissions in accordance with ICAO Annex 16 and collaborating with the environmental authorities in this matter, if required;
- Promoting indigenous design and manufacture of aircraft and aircraft components by acting as a catalytic agent;
- Approving training programmes of operators for carriage of dangerous goods, issuing authorizations for carriage of dangerous goods, etc.

B. Bureau of Civil Aviation Security: The Bureau of Civil Aviation Security (BCAS) was initially set up as a Cell in the DGCA in January 1978 on the recommendation of the Pande Committee. The BCAS was reorganized into an independent department under the Ministry of Civil Aviation on 1st April, 1987. The main responsibilities of BCAS include laying down standards and measures with respect to security of civil flights at international and domestic airports in India. BCAS Head quarter is located at "A" Wing, I-III floor, Janpath Bhavan, Janpath, New Delhi-110001. It has got four Regional Offices located at International airports i.e. Delhi, Mumbai, Kolkata and Chennai.

- Laying down Aviation Security Standards in accordance with Annex 17 to Chicago Convention of ICAO for airport operators, airlines operators, and their security agencies responsible for implementing AVSEC measures
- Monitoring the implementation of security rules and regulations and carrying out survey of security needs.
- Ensure that the persons implementing security controls are appropriately trained and possess all competencies required to perform their duties.
- Planning and coordination of Aviation security matters.
- Surprise/Dummy checks to test professional efficiency and alertness of security staff.

- Mock exercise to test efficacy of Contingency Plans and operational preparedness of the various agencies.

C. **Airports Authority of India**: The Airports Authority of India ("**AAI**") was established by the Airports Authority of India Act, 1994 formed by the merger of International Airports Authority of India and National Airports Authority through the Airports Authority Act, which came into existence on 1st April 1995 with a view to accelerate the integrated development, expansion and modernization of the operational, terminal and cargo facilities at the airports in the country conforming to international standards, the AAI is entrusted with the task of regulating airports all over India.

D. **Commission of Railway Safety – CRS:** The Commission of Railway Safety (CRS) , working under the administrative control of the Ministry of Civil Aviation of the Government of India, deals with matters pertaining to safety of rail travel and train operation and is charged with certain statutory functions as laid down in the Railways Act (1989), which are of an inspectorial, investigatory & advisory nature. The Commission functions according to certain rules viz. statutory investigation into accidents rules framed under the Railways Act and executive instructions issued from time to time. The most important duties of the Commission is to ensure that any new Railway line to be opened for passenger traffic should conform to the standards and specifications prescribed by the Ministry of Railways and the new line is safe in all respects for carrying of passenger traffic. This is also applicable to other works such as gauge conversion, doubling of lines and electrification of existing lines. Commission also conducts statutory inquiry into serious train accidents occurring on the Indian Railways and makes recommendations for improving safety on the Railways in India.Airports Economic Regulatory Authority.

E. **Airports Economic Regulatory Authority:** Airports Economic Regulatory Authority ("**AERA**"), regulates tariffs and other aeronautical charges, as well as monitors airport's performance standards. It creates a level playing field and fosters healthy competition amongst all major airports (government owned, public private partnership – based, Private), encourage investment in airport facilities, regulation of tariffs of aeronautical services, protection of reasonable interests of users, operation of efficient, economic and viable airports

MODULE III

Indian Judicial and Legal System

HISTORICAL EVOLUTION OF THE INDIAN LEGAL SYSTEM

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

Hindu Law- Dharma

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

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

ADMINISTRATION OF JUSTICE IN INDIA

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

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

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

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

Till 1687, Surat was the hub of company's activities in India but gradually the company started establishing other Presidencies i.e. Madras, Bombay and Calcutta. In the early seventeenth century, the Crown, through a series of Charters, established a judicial system in the Indian towns of Bombay, Madras and Calcutta, basically for the purposes of administering justice within the establishments of the British East India Company. The Governor and the Council of these towns formulated these judicial systems independently. The Courts in Bombay and Madras were called Admiralty Courts, whereas the court in Calcutta was called Collector's Court. These courts had the authority to decide both civil and criminal matters. Interestingly, the courts did not

derive their authority from the Crown, but from the East India Company. The Charter issued by King George I on 24 September 1726 marks an important development in Indian legal history. This Charter forms the basis for the establishment of Crown's courts in India. The British East India Company requested King George to issue a Charter by which special power could be granted to the Company. Accepting the Letters Patent of 1726 and the subsequent Charters, had, in effect, applied English law to British India as will be discussed here after.

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

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

Charter of 1774: Establishment of Supreme Court in Calcutta: It was to consist of a Chief Justice and three puisne judges who were appointed by the King and would hold the office during his pleasure. Only barristers with a minimum experience of five years were qualified to

become a judge in these chambers. The court enjoyed jurisdiction in civil, criminal, admiralty, ecclesiastical matters. In criminal cases the court was required to act as a Court of Oyer, terminer and gaol delivery for the Calcutta Presidency. The territorial jurisdiction of the court was to extend to all the persons from Bihar, Orissa and Bengal. The court was not allowed to hear cases against the Governor-General in Council unless the matter pertained to felony or treason. The appeals from the Supreme Court would lie before the King's Court in England within a period of sixty days. The Supreme Court used to review the law even before it became the law.

DEVELOPMENT OF LEGAL PROFESSION IN INDIA

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

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

However the approach of the East India Company was very discouraging towards the legal profession as they feared growth of law suits against the company resulting from the arbitrary

and discriminatory means of their governance in the country. Consequently the various charters which started experimenting with various forms of judiciary at various levels barely touched upon the provision of the legal profession leading to haphazard development of the profession. The fact that none of the early attorneys had legal training did not add to the prestige of the profession. Interestingly the first person to work as a qualified advocate of the Court of Judicature was the judge of an Admiralty Court i.e. Dr. John.

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

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

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

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

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

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

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

With emergence of various classes of practitioners various forms of procedural rules and regulations started to develop. Rules regarding receiving of retainers, execution of vakalatnama and amount of fees, the number of lawyers who could be engaged for each case, and distribution of fees, punishment of legal practitioners by fine, suspension, and dismissal, disrespect of court,

promoting and encouraging litigious suits, fraud, willful delaying of suits, accepting gifts of more than the authorized amount of fees from a client, or dropping a client after receiving a retainer also gradually getting codified with the first one being in Regulation VII.

Sardar Dewani Adalats: Were also empowered to take action only after establishment of a charge. Legal agents were liable to prosecution by their clients for malpractice. Besides providing for discipline of the profession the Regulation offered greater opportunities for lawyers by requiring the appointment of Government pleaders. These Government pleaders were to be paid at the same rate, and had the privilege of working as private pleaders in other suits in which Government was not a party. Subsequent legislation concerning the profession followed the general pattern laid down in 1793. The rather lengthy and detailed Regulation XXVIII of 1814 extended the provisions for licensing, discipline, and removal of vakils to the Provincial Courts. Rules concerning fees, practice, government pleaders, and malpractice were considerably more detailed than before. The new sections of the 1814 Regulation indicate the kind of problems the courts were having with this rising profession. Section VIII stipulated that pleaders must take precaution to ascertain the real names of parties giving vakalatnama and would be liable for dismissal if a vakalatnama under a fictitious name were accepted. Furthermore, the pleader was warned to study plaints before they were filed and make sure that groundless, irrelevant point were not included, that useless witnesses were not summoned, and that all exhibits were examined previous to being filed. If a vakil continued, after warning, to produce irrelevant exhibits or witnesses he was to be fined Rs20 or made to forfeit his fee. Other provinces passed regulations almost identical to those of Bengal.95 Regulations provided that all pleadings were first to be completely written and then read out.96 Then the court could make inquiries to clarify issues, and call witnesses if necessary.

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

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

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

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

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

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

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

There were six grades of legal practice in India after the founding of the High Courts; advocates, attorneys (solicitors), and vakils of the High Courts; and pleaders, mukhtars and revenue agents

in the lower courts. The High Court's set up standards of admission for vakils which were much higher than requirements for the old vakil-pleader of the zilla courts. Vakil became a distinct grade above the pleader.

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

After independence, there was a growing opinion that there should be one bar for all of India. It repealed the Legal Practitioners Act of 1879 and stipulated that no more pleaders be enrolled. Those already practicing, who were law graduates, could become advocates by paying a fee of Rs250 to the Bar Council. Even law graduates not practicing as pleaders were given opportunity to take an advocates' examination, pay the fee and receive the grade. Pleaders who could not qualify were allowed to remain practicing as previously. Though the Act continues the dual system of advocates and attorneys prevailing in the High Courts of Calcutta and Bombay,

elsewhere it recognizes for the future only one class of legal practitioner, advocates." An advocate must have a law degree from an Indian university, or must be a barrister. He must pass a State Bar Council examination and then will be admitted to the bar not by the court but by the bar association made up largely of advocates. Admission, practice, ethics, privileges, regulations, discipline and improvement of the profession as well as law reform are now all in the hands of the profession itself.

INDIAN ADVOCATES ACT 1961

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

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

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

- Recognize foreign qualifications in law obtained outside India for admission as an advocate.
- Manage and invest funds of the Bar Council.
- Provide for the election of its members who shall run the Bar Councils
- Organize and provide legal aid to the scheduled cast.

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

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

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

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

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

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INDIAN JUDICIARY UNDER THE INDIAN CONSTITUTION

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

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

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

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

APPOINTMENT, TRANSFER AND REMOVAL OF JUDGES

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

judge of the High Court upon due consultation with the CJI, the State Governor and the Chief Justice of that High Court.

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

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

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

b) Constitutional functionaries must act collectively in Judicial Appointments.

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

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

The Supreme Court, while upholding the Independence of Judiciary in appointment of Judges of the Supreme Court and High Court, on the basis of the term “consultation” under Article 217(1)* and 222 of the constitution in the formation of the opinion of the Chief Justice of India after consultation has to be sent to the President. Two senior most Judges of the Apex Court have to assist the Chief Justice of India to form an opinion. However, the question regarding political interference in the matter of appointment of Supreme Court and High Court Judges, still exists

and after, the court has been striving to maintain the Independence. But in 93rd Constitutional Amendment Bill of 2003, it will provide for establishment of National Judicial Commission.

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

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

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

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

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

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

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

the Executive. But the Independence of the Judiciary as contemplated in the constitution is without any interference in any manner what so ever. The Independence of Judiciary is a basic structure of the constitution as held by the Supreme Court in *Kesavananda Bharathi Vs State of Kerala.*

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

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

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

JUDICIAL COURTS AND PROCEDURES

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

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

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

A magistrate of second class may not pass a sentence exceeding imprisonment of one year. Similarly, a magistrate of first class may not pass a sentence of more than 3 years. A session judge can pass an order of execution but the same has to be necessarily confirmed by the

concerned High Court. The civil branch of lower judiciary is headed by a district court. As is clear by the name itself a district court is to be established in each district according to the Civil procedure Code. Other courts subordinate to the district courts are the sub-divisional court and Munsiff's court with the latter being subordinate to the former.

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

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

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

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

Sessions Court - Every state is required to establish a court of session for every sessions division which will be presided over by a judge appointed by the HC. The HC may also appoint

Additional Session Judges and Assistant Sessions Judges to exercise jurisdiction in the court of the session. An assistant sessions judge is subordinate to the sessions judge.

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

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

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

Civil Court Procedure:

Adjudicatory Process	
Addressing Grievance	Every suit commences by presentation of plaint. In common law tradition they are numbered as Original suits and whereas in Civil law tradition they are called Original Petitions. Every Plaint must satisfy the rules laid down under OVI and VII of CPC and Chapter I of Civil Rules of Practice. All these rules talk about mode

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

INTERLOCUTORY PETITION IN A CIVIL SUIT ADJUDICATORY PROCESS

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

Writ Petition - Adjudicatory Process:

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

Criminal Case - Adjudicatory Process:

Adjudicatory Process Criminal	**CRIMINAL**

Method of addressing grievance & rules relating to it	Most of the Criminal cases commence by filing Charge-sheet by the Police. The Charge-sheet is the summary of investigation. It contains the following:
	• Offence committed and method of commission and against whom it is committed and date of report of offence.
	• The approach of investigation so to collect the relevant and admissible evidence and
	• finally the persons with whom and what evidence Investigating officer (IO) wants to prove the guilt of the accused. S.154 Cr.P.C to S.176 Cr.P.C clothes IO with several powers he can exercise in the course of investigation. Charge-sheet has following enclosures:
	  • FIR,
	  • S.161 Cr.P.C or
	  • S.164 Cr.P.C statements,
	  • Scene of offence Panchanamma,

	• Inquest/wound certificate/ Post-Mortem, • Confession & recovery Panchnamma,
Cognizance & Summons	On receipt of Charge-sheet the Magistrate if he is of the opinion that allegation made in the Charge-sheet coupled with documents filed make out prima-facie case, cognizance will be taken against the offence. Upon taking cognizance usually summons will be issued to the accused and this summons must be signed by Magistrate. This is served through the concerned police.
Appearance of accused	On appearance of accused it is the duty of the court to furnish copies of Documents and ask him whether he has means to engage an advocate or otherwise court shall engage legal aid counsel. At this stage accused has an opportunity to file discharge petition by stating that allegation made out in the charge-sheet fail to make out any case against him.
Charge	If no discharge petition is filed or it is dismissed. the next step is examination of the accused w.r.t allegation made against him by police by framing charge. The framing of charge must be in accordance with S.211 to 226 of Cr.P.C. During examination if the accused admits guilt court may convict him or if he doesn't admit matter will be posted for trial by issuing summons to the witness listed in the charge-sheet.
Prosecution Evidence	Generally in cases initiated by police the first examined would be person who reported the offence to the police. It is followed by eye witness, witness to scene, inquest, PME, confession and recovery and finally Investigation officer. The prosecution witnesses are called as PW1, PW2…. and documents marked on behalf of prosecution are called as ExP1, P2….. . In case of witness examined by accused are called DW1, DW2…. And documents marked are called as ExD1, D2….
S.313 Cr.P.C	On completion of prosecution evidence accused will be examined u/s.313 Cr.P.C w.r.t. incriminating evidence in the prosecution evidence. This examination shall not be on oath. Any document can be filed and whatever said in S.313 Cr.P.C shall not be foundation for conviction.
Defense evidence	Upon completion of S.313 Cr.P.C accused can produce his evidence, however, generally in criminal cases no accused would venture to produce defense witness.

Arguments	If there is no defense evidence or on completion of defense evidence matter will be posted for arguments and party on either side submit oral or written arguments and upon completion of the same matter will be posted for judgment.
Judgment and Sentence.	The judgment of court would be either acquittal or conviction. If matter ends in acquittal, accused will be set at liberty. If the matter ends in conviction, accused will hear on sentence. Upon hearing the accused and prosecution on sentence punishment will be imposed i.e, fine or imprisonment or both.

Difference between various kinds of Adjudicatory Forums:

	Writ	**Suit (Civil Court)**	**Complaint (Criminal Court)**
Kind	Original proceedings	Original proceedings	Original Proceedings
Court	High Court and Supreme court	Jr. Civil judge to District judge	JMFC to Sessions Judge
Object of procedings	To ensure that every state organ and its agency work within the frame work of law, which also means there, is no violation of fundamental or legal rights of citizens and persons. Remember, protection of rights is incidental object.	Determination of right or liability	Determine innocence or Guilt of the accused
Court fee	Nominal, ex: Rs 100 or 200 only.	It is based on value of the right claimed.	No court fee.
Time period	No time limitation. However. Laches, bonafides, acquiescence, waiver are	Limitation Act applies	Limitation Act applies for offences less than

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

QUASI-JUDICIAL FRAMEWORK

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

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

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

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

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

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

Complaint:

a. An unfair trade practice or a restrictive trade practice has been adopted by any trader;
b. The goods bought by him or agreed to be bought by him suffer from one or more defects;
c. The services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.
d. A trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods.

e. Goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods.

Who can file a complaint?

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

No stamp or court fee is needed

Grounds of Complaint:

a. Any unfair trade practice or restrictive trade practice adopted by the trader.
b. Defective goods.
c. Deficiency in service.
d. Excess price charged by the trader.
e. Unlawful goods sale which is hazardous to life and safety when used.

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

The remedy under the Consumer Protection Act is an alternative in addition to that already available to the aggrieved persons/consumers by way of civil suit. In the

complaint/appeal/petition submitted under the Act, a consumer is not required to pay any court fees but only a nominal fee.

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

On receipt of such complaint -

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

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

(d) Upon receiving laboratory's report, its copy will be forwarded by the District Forum to the opposite party along with its own remarks.
(e) In the event of any party disputing the correctness of the findings, or the methods of analysis or test adopted by the appropriate laboratory, the District Forum shall require the objecting party to submit his objections in writing.
(f) The District Forum will give an opportunity of hearing to the objecting party.
(g) The District Forum shall issue appropriate order after hearing the parties.

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

(a) On receiving the complaint, the District Forum should refer a copy of the complaint to the opposite party directing him to give his version of the case within a period of thirty days which can be extended to forty five days.

(b) The opposite party on receipt of a complaint referred to him may-

   i. admit the complaint
   ii. deny or dispute the allegations contained in the complaint, or
   iii. omits or fails to respond within the time given by the District Forum.

(c) Where the opposite party admits the allegation, the District Forum should decide the matter on the basis of the merits of the case and the documents before it.

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

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

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

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

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

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

In case, any amount is due from any person under an order of Consumer Court. The person entitle to that amount can apply to consumer court and court can issue a certificate for the said

amount to the Collector of the District (by whatever named called) and the Collector after receiving that certificate from court shall proceed to recover the amount in the same manner as arrear of land revenue. After recovery by Collector, the amount is paid to entitle person.

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

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

ADMINISTRATIVE TRIBUNALS

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

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

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

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

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

TELECOM DISPUTE SETTLEMENT AND APPELLATE TRIBUNAL

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

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

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

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

COMPANY LAW BOARD

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

In terms of Section 10F of the Companies Act, any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of

communication of the decision or order of the Company Law Board to him on any question of law arising out of such order.

NATIONAL GREEN TRIBUNAL

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

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

INCOME TAX APPELLATE TRIBUNAL

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

each of a class and it may a bench of any two members, Judicial or Accountant. A provision was also made for the constitution of special three-member Benches (consisting of two members of one class and one of the other) and enabling a single member (judicial or accountant) authorised in that behalf, to dispose of small appeals.

DEBT RECOVERY TRIBUNAL

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

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

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

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

ALTERNATE MEANS OF DISPUTE RESOLUTION

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

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

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

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

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

a. to comprehensively cover international and commercial arbitration and conciliation as also domestic arbitration and conciliation;
b. to make provision for an arbitral procedure which is fair, efficient and capable of meeting the needs of the specific arbitration;
c. to provide that the arbitral tribunal gives reasons for its arbitral award;
d. to ensure that the arbitral tribunal remains within the limits of its jurisdiction;
e. to minimize the supervisory role of courts in the arbitral process;
f. to permit an arbitral tribunal to use mediation, conciliation or other procedures during the arbitral proceedings to encourage settlement of disputes;

g. to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court;
h. to provide that a settlement agreement reached by the parties as a result of conciliation proceedings will have the same status and effect as an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal; and
i. to provide that, for purposes of enforcement of foreign awards, every arbitral award made in a country to which one of the two International Conventions relating to foreign arbitral awards to which India is a party applies, will be treated as a foreign award."

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

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

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

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

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

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

a. for any interim measure of protection or injunction or for any appointment of receiver etc.; or
b. for the appointment of an arbitrator in the event a party fails to appoint an arbitrator or if two appointed arbitrators fail to agree upon the third arbitrator. In such an event, in the case of domestic arbitration, the Chief Justice of a High Court may appoint an arbitrator, and in the case of international commercial arbitration, the Chief Justice of the Supreme Court of India may carry out the appointment. A court of law can also be approached if there is any controversy as to whether an arbitrator has been unable to perform his functions or has failed to act without undue delay or there is a dispute on the same. In such an event, the court may decide to terminate the mandate of the arbitrator and appoint a substitute arbitrator.

Jurisdiction of the arbitrator - The Act provides that the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. The arbitration agreement shall be deemed to be independent of the contract containing the arbitration clause, and invalidity of the contract shall not render the arbitration

agreement void. Hence, the arbitrators shall have jurisdiction even if the contract in which the arbitration agreement is contained is vitiated by fraud and/or any other legal infirmity. Further, any objection as to jurisdiction of the arbitrators should be raised by as party at the first instance, i.e., either prior to or along with the filing of the statement of defence. If the plea of jurisdiction is rejected, the arbitrators can proceed with the arbitration and make the arbitral award. Any party aggrieved by such an award may apply for having it set aside under Section 34 of the Act. Hence, the scheme is that, in the first instance, the objections are to be taken up by the arbitral tribunal and in the event of an adverse order; it is open to the aggrieved party to challenge the award.

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

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

Governing Law - In an international commercial arbitration, parties are free to designate the governing law for the substance of the dispute. If the governing law is not specified, the arbitral tribunal shall apply the rules of law it considers appropriate in view of the surrounding

circumstances. For domestic arbitration, however, (i.e., between Indian parties), the tribunal is required to decide the dispute in accordance with the substantive laws of India.

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

MEDIATION

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

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

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

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

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

OMBUDSMAN

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

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

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

been instituted by most governments and by some intergovernmental organizations such as the European Union.

LEGAL SERVICES

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

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

First, Institutional structures created and their composition. There is a National Legal Services Authority at the national level and there is State Legal Services Authority at State level and District Legal service authority at District level. Lastly, Taluk or Mandal Legal service committee at Mandal level. The National level and State level bodies lay down policies and principles for making legal services available under the provisions of the Act and to frame most effective and economical schemes for legal services including funds etc.,. The uniqueness of

institutions created under this statute is that there is a conglomeration of all three wings of the state. To illustrate, at the lower where LSA is functioning one can find presence of senior most judge as Chairman and Sub-divisional Revenue officer and police officer as members of the Taluk Legal services Committee. Whereas at District level we find Principal District judge as Chairman of District legal service authority and members being District collector and superintend of police. Further, members of non-governmental organizations and senior advocates are members of this committee. As result of this kind of conglomeration, disputes can be sorted out and remedied in a very conducive atmosphere especially in a quick and inexpensive manner. However, in a reality there is hardly any Sub-divisional Revenue or police officers who are aware of these provisions. Though very few judicial officers are aware of this kind arrangement they hardly took any take initiative in this regard.

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

Under the Act any person who wishes to receive legal service and eligible to receive legal service can give a written application before legal service committee. It is important to note that such legal assistance sought can be pertaining to pending litigation or pre-litigation. This application can be made before any legal service authority i.e., Taluk legal service committee or District legal service committee. On receipt of such application legal service committees shall refer to such matter to Lok-adalat which has jurisdiction to try the case and resolve the matter.

The Taluk Legal service committee or District legal service committee can create as many Lok-Adalath Benches for the disposal of applications. In this connection it is pertinent to mention the novelty of this kind of resolution mechanism is that there is no court-fee, flexible and simplified procedure to resolve the dispute, the LoK-Adalat bench has powers of civil court so as to summon any person to attend and give evidence and produce documents. More importantly, the award passed by Lok-adalath is as good as decree passed by civil court and as such it can be enforced like a civil court decree.

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

Lok Adalat System in India: ADR is a suitable alternative mechanism to resolve disputes in place of litigation. The Committee for implementing Legal Aid Schemes (CILAS) constituted by the Ministry of Law and Justice, Govt. of India in 1980 recommended the establishment of Lok Adalat. Consequently, Lok Adalat movement is accepted to be one of the components. It has assumed great importance and attained a statutory recognition under the Legal Services Authorities Act, 1987, which was enforced w.e.f. November 9, 1995. They are not akin to regularly constituted courts but they supplement the existing justice administration system. They provide adequate and effective means of disputes resolution at reasonable costs. Special status has been assigned to the Lok Adalat under the Legal Services Authorities Act which provides statutory base to such Lok Adalat, which are regularly organized primarily by the State Legal Aid and Advice Boards with the help of District Legal Aid and Advice Committees. Some of the Lok Adalats are being sponsored by the various voluntary legal aid agencies. The whole

emphasis in the Lok Adalat proceedings is on conciliation rather than adjudication. A Lok Adalat has jurisdiction to determine and arrive at a compromise or settlement between the parties to a dispute in respect of any matter falling within the jurisdiction of any civil, criminal, or revenue courts or of any tribunal constituted under any law for the time being in force for the area for which the Lok Adalat is being organized. In a case where a pending action or proceeding is referred to Lok Adalat by a Joint Application of the parties, the Lok Adalat is to proceed to dispose of that proceeding or matter and arrive at compromise or settle the disputes between the parties. In doing so, the Lok Adalat must be guided by legal principles and principles of justice, equity and fair play. In a case where no compromise or settlement can be arrived at, it is open to the parties to the proceeding, to request for transfer of their proceedings before the courts at a later stage from which it was transferred. Every award of the Lok Adalat is a civil decree and every award made by the Lok Adalat is deemed to be final and binding on all parties to the proceedings or disputes. No appeal lies to any court against such an award. The Lok Adalat is empowered to exercise substantive powers vested in a civil court under the Code of Civil Procedure while trying a suit or proceeding.

MODULE IV

Funademental Aspects of Law and its Relevance to Air Law

Introduction

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

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

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

LAW OF TORTS

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

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

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

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

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

Volenti Non Fit Injuria

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

Ex Turpi Causa Non Oritur Actio

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

Damnum sine injuria

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

Injuria sine damno

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

Negligence

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

Nuisance

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

Defamation

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

Assault

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

Battery

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

False Imprisonment

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

Trespass to Land

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

Malicious Prosecution

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

Fraud

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

Remedies

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

Judicial remedies are of three types:

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

Damages

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

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

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

d) Contemptuous damages -

Injunction

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

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

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

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

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

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

Aviation Torts

Civil Liability for Aircraft Accidents: Damages under tort law can be sought in the field of aviation law in multiple instances through the operation of ordinary courts of law. Remedies under tort law can be sought for air carrier accidents, on the basis of the principle of causation. The law relating to contribution and indemnity also applies under Indian Tort Law, wherein if an accident is caused by an act or omission of a third party, such as a manufacturing defect in the aircraft, then indemnity for tort liability can be sought from the manufacturer.

Tort law in India would also govern the question of accidents and injuries caused to individuals on ground by an aircraft accident, as India, though a signatory to the Rome Convention on Damage Caused By Foreign Aircraft to Third Parties on the Surface, has not ratified the same.

The law regarding product liability would also be applicable in this regard. Product liability suits can be filed under Indian tort law, for the provision of defective products and services by manufacturers. Although there is no universal treaty in this area, the Hague Convention of 1973 on the Law Applicable to Products Liability lays down the applicable law in this regard. Tort law is important here, as it serves to establish the standard of care that ought to be taken when product liability in aviation law is considered, as well as the types of damages to be awarded.

Aviation Noise and Environmental Torts: Aviation Noise has led to a tremendous increase in noise pollution. However, aside from the environmental aspect of the same, aviation noise may also be construed as a tort law violation, which can be injuncted through an action before a court. This may be interpreted as an interference with the use or enjoyment of one's land, as it is a nuisance. The primary right affected by aviation noise is the right to non-interference in personal comfort. However, this would require a balancing of rights, since a nuisance is only actionable if it is unreasonable or unlawful. The law of torts nonetheless provides an important remedy in the field of aviation noise, particularly since the defence of volunti non fit injuria cannot be claimed in this regard, since individuals cannot be precluded from living in areas adjacent to airports.

Unmanned Aerial Vehicles: Prior to the ban on the use of drones in India for civilian commercial purposes, such vehicles were used for purposes such as the delivery of goods and services, in multiple cities across India. The tort law liability would likely be the question of an

infringement of infringement of the use and enjoyment of the property, especially due to the low flying altitude of such vehicles, when compared to airplanes.

LAW OF CONSUMER PROTECTION

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

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

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

The Consumer Protection Act enshrines the following ***rights*** of the consumer:

a. right to be protected against the marketing of goods and services which are hazardous to life and property;
b. (b) right to be informed about the quality, quantity, potency, purity, standard and price of goods or services so as to protect the consumers against unfair trade practices;
c. (c) right to be assured, wherever possible, access to a variety of goods and services at competitive prices;
d. (d) right to be heard and to be assured that consumers' interests will receive due consideration at the appropriate for a;
e. (e) right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and
f. (f) right to consumer education

A written complaint can be filed before the District Consumer Forum for pecuniary value of up to Rupees twenty lakh, State Commission for value upto Rupees one crore and the National Commission for value above Rupees one crore, in respect of defects in goods and or deficiency in service. The service can be of any description and the illustrations given above are only indicative. However, no complaint can be filed for alleged deficiency in any service that is rendered free of charge or under a contract of personal service.

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

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

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

Consumer Law and Aviation

India has the fastest growing number of air passengers in the world. The various problems viz., denial of boarding despite holding confirmed ticket, delay, re-scheduling, cancellation of flight without due intimation, refunds, misguidance by travel agents, failure of Airlines to provide lodging, medical facilities etc., to stranded travelers, deficiency in food service in flight, deficiency in handling the visa, passport documents, poor facilities at airports, and unfair trade practices by Airlines/agents are some examples where the passengers/consumers are exploited for lack of awareness of their rights.

Consumer Protection Laws is one of the widely invoked laws as far as the aviation sector is concerned. This is so for many reasons. Firstly, aviation or rather carriage of passengers or cargo by air is essentially a service provided by the airlines. If our goods or luggage is damaged, lost or destroyed or any passenger either dies or gets injured due to any deficiency in services provided by the airlines, then the aggrieved person can approach a consumer forum with a complaint against the airlines on the grounds of deficient services provided by the airlines.

Consumer Protection and Aviation: Disputes

In *Air Canada v. S.K. Malhotra and Others*, it was held that rescheduling of flights without prior intimidation and failure to provide proper services including accommodation facilities for the stranded passengers amounted to deficiency in services.

In *Gururaj Joshi v. Gulf Air Co. & Anr.* delay of one and a half month in receipt of a cargo and a pilferage in the same cargo by the airlines was considered to be being deficient in services and respondents were required to heavy compensation.

A popularly known as "*Delhi Airport escalator's death case*". A little girl was trapped in a faulty airport escalator and consequently died of the injuries sustained. When a complaint against the airport authorities was filed they contended that the airline company on whose flight the passenger travelled was responsible. Rejecting the argument, the National Commission held that Passengers or visitors who use amenities provided in Airport are consumers of the airport facilities and services and their

complaints are maintainable under the Consumer Act. Thus, the Airport Authority of India was held liable to pay compensation. Upon appeal the Supreme Court upheld this judgment.

In a case *Mrs. Anita Bhatia & Ors V/s Kenyan Airways I* , it was observed that the compensation payable in the case of air accidents should be arrived at as per the law of the country.

In the case of *Lufthansa German Airlines V/s Rish Bajoria & Others,* the complainants alleged that they found good number of glass pieces embedded in the food served to them in the flight. The National Commission held that the deficiency in rendering air travel services stood proved on account of failure to serve proper, healthy and safe meal fit for human consumption and confirmed compensation of Rs 5 Lakhs.

In *Air France v. OP Srivastava,* the National Commission provided a compensation of Rs 4 Lakhs each to three consumers, for denying boarding on a Paris-Delhi flight. The Commission held that not permitting a passenger holding a confirmed ticket to board a flight amounted to deficiency of service on part of the airline. The court held that the practice of "over-boarding" the flight by the airline resulted in a violation of Consumer Laws, and the airline was thus liable to pay a compensation for the same. Furthermore, the court also assumed jurisdiction of Indian Law over this case, even though the cause of action primarily arose at the Charles De'Gaulle Airport in Paris.

Thus, if we trace the aviation disputes taken place in India so far, we can notice that a majority of those disputes have been brought under the Consumer Protection Act 1986 which protects the rights of the consumers in India. Complaints regarding damage or destruction or loss of goods or cargos or undue delay, lack of adequate information in change of flight timings, etc. are treated as deficiency in services provided by the airlines within the meaning of Section 2 (g) of the said Act is treated as being deficient in the service.

Over the years even the jurisdiction of the consumer forums have been repeatedly upheld and it is settled that the consumer forums have jurisdictions to decide aviation disputes as long as the disputes relate to any deficiency in the services provided by the airline companies.

Consumer Protection Measures By DGCA:

(i) On 6 of August, 2010 a Civil Aviation Rule (CAR) has been issued which provides for compensation and facilities to the passengers in case of denied boarding, cancellations and delays. The violation of this CAR is punishable under the provisions of scheduled VI to the Aircraft Rules, 1937. This will be a category III offence attracting a maximum penalty of 6 months in prison or Rs. 2 lac fine or both

(ii) On 31 July, 2010 CAR has been issued in order to promote fair competition in the airline sector and to ensure that consumers do not receive inaccurate or misleading information on airline services, by strengthening the computer reservation system/global distribution system

(iii) On 3 September, 2010 the relevant Rule has been amended and circular issued to provide that the Pilot-In-Command may permit the use of cellular/mobile phones after the aircraft has

landed and cleared active runway. However, this facility will not be available during low visibility conditions.

(iv) The CAR issued by the DGCA (Section 3, Series M, Part I) provides for special arrangements to be made for individuals requiring special assistance, such as providing such passengers with the highest priority in services and providing additional services at the departing airport and at the point of off-loading. Furthermore, Airport operators are to mandatorily provide automated buggies free of charge at airports with annual aircraft movements of 50,000 or more, for the benefit of aged, disabled and pregnant passengers.

Other Government Initiatives for Consumer Protection

i. The Ministry of Civil Aviation has set up an online dispute redressal mechanism to allow an ease in filing of consumer complaints against airlines. The Air Seva Portal also provides for a live tracking of airlines, and other air travel related information, in order to ensure that consumers are provided with requisite information on a timely basis.

ii. Recently, in 2018, the Aviation Minister proposed certain draft regulations on commercial air travel. One of the primary issues addressed is that of the payment of cancellation fee by the passengers, upon cancelling a flight ticket. There is to be a 24-hour lock in period after the booking of the ticket, within which any ticket can be cancelled free of charge, provided that it is 96 hours before the flight. Furthermore, there is also a provision to be made for WiFi connectivity in the flights.

iii. The Parliament has enacted the Carriage by Air (Amendment) Act, 2009, by virtue of which India would accede to the requirements of the Montreal Convention signed in 1999. The Convention provides for rules of procedure and compensation on the loss of baggage by airlines, which would supplant the provisions of the Consumer Protection Act, as a such a loss would also be classified as a deficiency in service.

iv. The Consumer Protection Act also contains provisions against unfair pricing. In this regard, the Consumer Affairs Minister made a declaration in 2016 regarding the over-pricing of water-bottles and other products at airports. The declaration sought a strict enforcement of the rules on the Maximum Retail Prices of products.

CRIMINAL LAW

Criminal Law is that category of law which relates to crime. It regulates social conduct and prescribes threatening, harming, or otherwise endangering the health, safety, and moral welfare of people. It includes the punishment of people who violate these laws. The criminal law is the

foundation of the criminal justice system. The law defines the acts that may lead to an arrest, prosecution, and imprisonment. States punish a range of acts in their criminal codes. An important feature of criminal law is that it attracts a punishment or sanction. With civil law damages are imposed with the aim to compensate the injured party for loss suffered whereas with criminal law the aim is to punish the offender and deter others from carrying out the same acts.

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

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

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

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

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

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

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

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

Crimes against Women: Although Women may be victims of any of the general crimes such as murder, robeery or cheating, etc. there are certain set of crimes which are directed specially at

women i.e. only a woman can be a victim to those crimes. Thus these set of crimes are categorized as Crimes against Women. IPC recognizes seven types of such crimes:

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

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

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

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

Criminal Law and Aviation

The relationship between the criminal law and the operation of aviation is very old. Though the Indian Penal Code does not consider any specific provision or chapter on aviation crimes per se; however over the last few years it has been witnessed that new forms of crimes have started emerging which are being committed on board a aircraft like hijacking or unlawful seizure of aircraft.

India in pursuance of its international commitments under the Tokyo Convention enacted the Tokyo Convention Act which is applicable to any offence against penal law and to any acts jeopardizing the safety of persons or property on board civilian aircraft while in-flight and engaged in international air navigation. The Act, for the first time in the history of Indian aviation law, recognizes certain powers and immunities of the aircraft commander who on international flights may restrain any person he has reasonable cause to believe is committing or is about to commit an offence liable to interfere with the safety of persons or property on board or who is jeopardizing good order and discipline.

However despite attempting to correct the fault prevalent in the Tokyo Convention, the Montreal Convention failed to completely address the issue of hijacking. To begin with it failed to criminalize acts of unlawful seizure of aircrafts which was finally addressed in the Hague Convention 1970. The convention does not apply to customs, law enforcement or military aircraft, thus it applies exclusively to civilian aircraft. The convention only addresses situations in which an aircraft takes off or lands in a place different from its country of registration. The convention sets out the principle of *aut dedere aut judicare*—that a party to the treaty must prosecute an aircraft hijacker if no other state requests his or her extradition for prosecution of the same crime

However, in the international sphere, this convention was found to be insufficient and inadequate to deal with the new age crimes or unlawful acts against the safety of civil aviation. The convention tried of criminalize the commission of any act of violence against a person on board an aircraft in flight if it is likely to endanger the safety of the aircraft, destroying an aircraft being serviced or damaging such an aircraft in such a way that renders it incapable of flight or which is likely to endanger its safety in flight, or committing an act of violence against a person on board an aircraft in flight or placing or causing to be placed on an aircraft a device or substance which is likely to destroy or cause damage to an aircraft or destroying or damaging air navigation facilities or interfering with their operation if it is likely to endanger the safety of aircraft or communicating information which is known to be false, thereby endangering the safety of an aircraft in flight. India in consequence of its international commitment under the said convention incorporated the provisions of the conventions in the Indian Domestic laws.

In a number of countries, pilots, technicians and mechanics may be criminally liable for certain acts related to their discharge of duties. The earliest such incident was the conviction of an Air France captain in 1956 for involuntary manslaughter after the death of 56 passengers in a DC-6 visual approach incident. The development of law allowing such aviation professionals has since surged in countries including the U.S., U.K., S., the U.K., Japan, New Zealand, China, Libya, Korea, Yugoslavia, France, Argentina, Romania, Taiwan, Italy, Switzerland, Canada, Brazil, Indonesia, the Netherlands, Russia, Kenya, Turkey, Venezuela, Portugal, India, Spain, and Iran. Around half of the criminal cases related to aviation since this incident have been brought since 2000, showing a strong recent trend towards criminalization.

An example of such an incident in India occurred in 2000. On 17 July, 2000, an Alliance Air Boeing 737-200 flying from Calcutta to New Delhi with a scheduled stop at Patna crashed at Patna airport while attempting to land. 55 passengers and crew and 5 people on the ground were killed. After an inquiry found that the crash occurred due to pilot error, charges were levelled against the two deceased pilots but subsequently dropped.

Another example is of Itek Air Flight 6895 flying from Bishkek, Kyrgyzstan to Tehran, which on August 24 2008 crashed soon after its departure. The aircraft had attempted to return to the airport after encountering a technical problem, but failed to maintain height and stability and crashed, killing 64 of the 90 people on board. The captain was sentenced to five years' and two months' imprisonment and the co-pilot to five years.

LAWS OF ENVIRONMENT

Environmental law means the laws that regulate the impact of human activities on the environment. Environmental law covers a broad range of activities that affect air, water, land, flora or fauna. It includes laws that relate to protection of animals and plants and includes within its wide ambit laws for planning for the use and development of land mining, exploration and extractive industries, forestry, pollution, fisheries, land and fire management, agriculture and farming, waste management, climate change and emissions, water resource management (lakes, wetlands, rivers and oceans), chemicals and pesticides, weeds and invasive species, marine life conservation of natural and cultural heritage.

The general functions of most environmental laws are to:

- set offences and penalties for causing harm to the environment which is not authorized
- assess, control or stop certain activities (such as land use and development) before they are carried out
- set policies and standards for how activities will be controlled and how environmental decisions and approvals will be made
- enable members of the public to take part in environmental decision-making
- create regulatory structures for environmental management, such as regulatory agencies
- create specialist courts and tribunals

Laws of Environment and Aviation

Aviation is a critical part of our national economy, providing for the movement of people and goods throughout the world, enabling our economic growth. In the last 35 years there has been a six-fold increase in the mobility provided by the U.S. air transportation system. At the same time there has been a 60% improvement in aircraft fuel efficiency and a 95% reduction in the number of people impacted by aircraft noise.

Despite this progress, and despite aviation's relatively small environmental impact in the United States, there is a compelling and urgent need to address the environmental effects of air transportation. Because of strong growth in demand, emissions of some pollutants from aviation are increasing against a background of emissions reductions from many other sources. In addition, progress on noise reduction has slowed. Millions of people are adversely affected by these side effects of aviation. As a result of these factors and the rising value being placed on environmental quality, there are increasing constraints on the mobility, economic vitality and security of the nation. Airport expansion plans have been delayed or cancelled due to concerns over local air quality, water quality and community noise impacts.

However unlike the legislations on aviation criminal laws, in India, there are no laws addressing the issues on aviation and environment. In India, various environmental concerns are addressed in various specific legislations.

Environmental Protection Act 1986 was expected to fill the lacuna and provide a blue print for a progressive policy for protecting the ecosystem. The Act seeks to supplement the existing laws on control of pollution by enacting a general legislation for environmental protection and to fill

the gaps in regulations of major environmental hazards. The Environment Protection Act is an umbrella legislation enacted to provide for the Central Government coordination over the central and State authorities established inter-alia under the Water Act, 1974 and the Air Act, 1981.

To implement the Stockholm Declaration, Government of India enacted the Water (Prevention and Control of Pollution) Act 1974. Under this Act, the Central Pollution Control Board and the State Pollution Control Boards were created to regulate and control pollution through issuing of permits or 'consent' for discharging trade effluents, setting standards for emissions and effluents and imposing penalty for violation of the provisions of the Act. The green revolution and rapid industrialization and urbanization have resulted in a profound deterioration of India's water quality. The main objective of this Act is to provide for the prevention and control of water pollution and maintaining or restoring of wholesomeness of water (in the streams of well or on land).

As far as the aviation operation is concerned the most important act is the Air Act 1981. The Act aims to prevention, control and reduction of air pollution. To enable an integrated approach to environmental problems, the Air Act expanded the authority of the central and state boards established under the Water Act, to include air pollution control.

Environmental Aviation Laws in India

Airline Emissions Regulations

Aside from the legislations passed in the field of environmental law, there are multiple policies and circulars issued by the government specifically for aviation environmental laws. One of the most important issues that aviation environmental laws have to deal with is those of curbing airline emissions, both toxic and non-toxic. The DGCA circular of April 2011 mandated airlines to submit its fuel consumption data on a monthly basis, so as to regulate carbon dioxide emissions. The DGCA also released a circular in 2013, requiring airlines to submit their fuel and electricity consumption data, as well as information regarding their carbon footprint.

Furthermore, in 2009, the DGCA set up an Aviation Environment Unit that seeks to address environmental issues under aviation law, such as emissions, noise pollution, fuel efficiency etc. This initiative is thus crucial in ensuring that grave environmental violations do not occur as a result of commercial aviation. This unit is also proactive in its membership of international

organisations such as the International Civil Aviation Organisation and other such international fora.

Additionally, environmentally beneficial Air Navigation Services Initiatives have also been launched, which work in reducing flight distance, and towards the development of operational procedures, technologies and best practices, establishment of performance indicators, development of systematic processes, and communication initiatives. These initiatives are dedicated towards improving the efficiency and sustainability of aviation. In addition to this, the aviation sector in India has also taken an active step towards incorporating biofuel into their technology and supplies.

The impact of toxic emissions by aircrafts is particularly crucial, due to the proximity of the emissions being released to the stratosphere, which exemplifies the contribution of such emissions to climate change. However, the prevention of such emissions becomes particularly difficult due to the corporate nature of the civil aviation industry.

Airport Regulations

Several initiatives have also been undertaken by Indian airports, with multiple airport premises being LEED (Leadership in Energy and Environment Design) certified. The Bangalore, Delhi, Hyderabad and Mumbai Airports have also been participating in the Airport Carbon Accreditation program, with the former three being accredited with an Optimization level.

Under the Environmental Impact Notification of 14th September, 2006, it is mandatory to obtain an environmental impact assessment for scheduled developmental projects, which include airports. Apart from the operational impact, such an assessment would also take into account the geographic impact of the airport project. This impact would assess what the effects of the project are on a local scale, given the airport capacity as well as the on site location, to assess the aviation environment. Post the impact assessment, there shall also be a mandatory monitoring for such projects, which shall submit a half-yearly report to the regulatory authority concerned.

LAWS OF INTELLECTUAL PROPERTY

Intellectual Property refers to creation of mind i.e. inventions, industrial designs for article, literary & artistic work, symbols etc. used in commerce. It is essentially categorized into two

segments i.e. industrial property which includes within its ambit inventions (patents), trademarks, industrial designs, and geographic indications of source and Copyright which entails literary and artistic works such as novels, poems, plays, films and musical works etc.

Need for Intellectual Property Rights

IP provides a proprietary right in intangible products of the human mind, which are also known as "knowledge" goods or "creations''. IP is ownership of property that is distinct from real estate or personal property as these are products of human intellect or mind. Though ownership is similar, the kinds of goods are different: tangible and intangible goods

One of the most significant agreements of the WTO was its Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). The agreement for the very first time brought the laws on intellectual property rights into the international trading system. This agreement narrowed down the differences existing in the extent of protection and enforcement of the Intellectual Property rights (IPRs) around the world by bringing them under a common minimum internationally agreed trade standards. The member countries are required to abide by these standards within stipulated time-frame. India, being a signatory of TRIPS has evolved an elaborate administrative and legislative framework for protection of its intellectual property.

The various forms of intellectual property covered under the TRIPS Agreement are:

Copyrights and related rights

These are the rights given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. It is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work. Copyright protection shall extend to expressions and not to ideas, procedures, and methods of operation or mathematical concepts as such.

Trade Marks

Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. The owner of a registered trademark shall have the exclusive right to prevent all third parties not

having the owner's consent from using in the course of trade identical or similar signs for goods or services.

Geographical Indications

These are the indications which identify a good as originating in the territory of a member country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

Patents

These are the exclusive rights granted by a country to the inventor to make, use, manufacture and market the invention that satisfies the conditions of novelty, innovativeness and usefulness. Patents shall be available for any such inventions, whether products or processes, in all fields of technology. The members may exclude from patentability:- (i) diagnostic, therapeutic and surgical methods for the treatment of humans or animals; (ii) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. A patent shall confer on its owner the following exclusive rights:-

- Where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of making, using, offering for sale, selling, or importing such those products;
- Where the subject matter of a patent is a process, then, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.

Industrial Designs

It refers to creative activity, which result in the ornamental or formal appearance of a product. But it does not include any mode or principle or construction or anything which is in substance a mere mechanical device.

Layout Designs of Integrated Circuits

Protection of Undisclosed Trade Secrets

A trade secret or undisclosed information is any information that has been intentionally treated as secret and is capable of commercial application with an economic interest.

Plant Varieties

Legislations on IPR in India

The Patents Act 1970

This enactment was a landmark step for the industrial development in India. The main purpose behind the legislation was to grant patents in order to encourage inventions and to further ensure that these inventions are worked on a commercial scale without undue delay.

Thus the legislation granted an exclusive right to the owner of the invention to make, use, manufacture and market his or her invention provided it satisfies certain conditions stipulated in the law. Broadly speaking, these conditions would include the requirements of novelty, inventiveness and usefulness. However this right has been awarded only for a limited period of time and its use and exploitation is subject to the laws of the other countries where the patent is awarded. The Patent right is territorial in nature and the owners have to file separate applications in the countries of their interests along with necessary fees for obtaining patents in their countries. The act also lays down a list of non-patentable inventions.

The time period for the enjoyment of patent was revised in 2002 and now a patentee can enjoy his or her patent for a period of 20 years. The procedure to obtain a patent and the documents that are required to be submitted in this regard are laid down in the act.

Copyright Act 1957

Copyright seeks to protect the expression of original ideas that are expressed in material form. The owner of the copyrighted work can copy the work, issue copies of the work to the public, rent or lend the work to the public, communicate his or her work to the public in the form of written or oral broadcast or electronic transmission or make an adaptation of the work. Copyright ownership can either arise automatically or by means of transfer of ownership through an assignment, assignation or licence. It recognizes the copyright of the owner in written work,

computer generated work, the work generated in an employer and employee relationship, work of staff, work generated in collaborative research and copyright ownership of students.

Unlike patents, the duration of copyright protection is dependent upon the nature of work. For instance literary, dramatic, musical and artistic work is protected for a period of 70 years. However computer generated works is protected for 50 years. Detailed list of works along with the duration of protection is provided under the Act.

The act provides detailed procedure with regards to filing an application for copyright work.

Trademarks Act 1999

This legislation has been enacted to amend and consolidate the law relating to trade marks, to provide for registration and better protection of trade marks for goods and services and for the prevention of the use of fraudulent marks. It repealed the earlier Trade & Merchandise Marks Act, 1958.

Under the Act, the Controller-General of Patents, Designs and Trade Marks under Department of Industrial Policy and Promotion, Ministry of Commerce and Industry is the 'Registrar of Trade Marks'. The Controller General of Patents, Designs & Trade Marks directs and supervises the functioning of the Trade Marks Registry (TMR). The 'Trade Marks Registry' administers the Trade Marks Act, 1999 and the Rules thereunder. TMR acts as a resource and information centre and is a facilitator in matters relating to trade marks in the country. The main function of the Registry is to register trade marks which qualify for registration under the Act and Rules.

Any person claiming to be the proprietor of a trade mark used or proposed to be used by him, who is desirous of registering it, shall apply in writing to the Registrar in the prescribed manner for the registration of his trade mark. A single application may be made for registration of a trade mark for different classes of goods and services and fee payable thereof shall be in respect of each such class of goods or services. An application for trademarks can be rejected only for the reasons listed in the act which are categorized into absolute and relative grounds. Provisions are also made under the act for the purposes of receiving applications for opposing the grant of trademark.

Geographical Indication of Goods (Registration and Protection) Act 1999

This act has been enacted to provide for the registration and better protection of geographical indications relating to goods. Under the Act, the Controller-General of Patents, Designs and Trade Marks under Department of Industrial Policy and promotion, Ministry of Commerce and Industry is the 'Registrar of Geographical indications'. The Controller General of Patents, Designs & Trade Marks directs and supervises the functioning of the Geographical Indications Registry (GIR). It lays down the detailed procedure regarding filing an application for the purposes of seeking protection of geographical indications relating to goods along with the procedure for file an opposition to the application.

Semiconductor Integrated Circuit Layout Design Act 2000

This legislation has been enacted to provide for the protection of semiconductor integrated circuits layout-designs and for matters connected therewith or incidental thereto. The Act is implemented by the Department of Information Technology, Ministry of Information Technology. The Act is applicable for Integrated Circuits Layout-Design IPR applications filed at the Registry in India. The Semiconductor Integrated Circuits Layout-Design Registry (SICLDR) is the office where the applications on Layout-Designs of integrated circuits are filed for registration of created IPR. The Registry has jurisdiction all over India.

It lays down the grounds on which the registration for layout designs can be prohibited. When an application for registration of a layout-design has been accepted, the Registrar shall, within fourteen days after the date of acceptance, cause the application as accepted to be advertised in the prescribed manner. Provisions are also made for opposition for the grant of the said registration. The registration of a layout-design shall be only for a period of ten years. Any person who contravenes knowingly and willfully any of the provisions of the Act or falsely represent a layout-design as registered, shall be punishable with imprisonment or with fine or with both.

Aviation Industry and Protection of IPRs

Air Transport and protection of IPR has been a topic of hot debate in the recent times. There are innumerable numbers of hazards that can be associated with the need for protection of IPR in

the era of very developed air transportation system. IPR protection in civil aviation has been extended to all possible rights that fall under such category. The Chicago Convention on International Civil Aviation signed at Chicago on 7 December, 1944 is still considered the basic treatise on international civil aviation. The Chicago Conference, 1944 covers the air transport, air navigation and technical phases of aviation, and establishes a basis of common air practice throughout the world. The Convention provides for the establishment of an **International Civil Aviation Organization (ICAO)** comprising both a Council and an Assembly. It one of the international instruments which make reference to IP issues in respect to trademark and patent exemption.

Trademark Protection: **Article 20** the Convention states about trademark protection. It states that the display of marks should be done by every aircraft which is engaged in international air navigation shall bear its appropriate nationality and its registration marks. Patent Exemption - **Article 27 (a) & (b)** talk of exemption from seizure of patent claims and exemption and protection to the storage of spare parts and the spare equipments for the aircraft. The former has been incorporated under our national law under Section 49 of Patent Act, 1970.

The above comprises of something known as **"Chicago Exception"** by which the aircrafts have a right to come and go by leaving a very less possibility for interference. It has led to the creation of parallel patent rights and the problem of stock-piling.

IPR protection in case of airplanes is specifically in relation to patents, trademarks, copyright, geographical indications and industrial designs. The main basic treatise on civil aviation is Convention on International Civil Aviation, 1944. On the point of trademark recognition Article 20 of the Convention states that every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks. Art. 27 which talks about exemption from seizure on patent claims has been incorporated in national legislations also. One of the very recent and important case in this regard is the case of *US v. China,* which was bought before WTO and was decided in 2009. In this case US plead before the panel to create a body for checking the disposal of the confiscated infringement goods by China's custom force which they had in their possession, which were later being used for trademark infringement and copyright counterfeit goods. Patents: Under the World Trade Organization's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights, patents should be available in WTO member

states for any inventions, in all fields of technology, and the term of protection available should be the **minimum twenty years**. (Article 33, TRIPS)***Wright Co. v. Herring-Curtiss Co.,* 1914 -** The **Wright brothers** received a patent for their method of flight control and fiercely defended it in the years afterward, suing foreign and domestic aviators and companies, especially Glenn Curtiss, in an attempt to collect licensing fees. The case was won by the Wright Brothers. The legal threat suppressed development of the U.S. aviation industry. Today the concern is more with regard to licensing where major airlines like Boeing and Douglas maintain a separate website for patent claims and complains. **Copyright:** It is important in relation to aviation industry especially with regard to protection in case of artistic work including drawings. Part II Section 1 **(Article 9 to Article 14) of the TRIPS** agreement deals with the minimum standard in respect of copyrights. The various literatures regarding commercial and aviation law are also protected by such. The term of protection provided is for 50 years.

Trademarks: Part II Section 2 **(Article 15 to Article 21) of the TRIPS** agreement contains the provisions for minimum standards in respect of Trademarks. The attachment of goodwill along with the mark makes it worth fighting for in case of infringement. One of the very recent controversies with regard to trademarks was the Jet Airways. In this case Jet Airways incorporated in India was using the trademark of "JET AIRWAYS: JOY OF FLYING." It was blocked from use by Jet Airways incorporated in Bethselda, Maryland. Till date it is an unresolved case blocking the flying of Jet Airways aircrafts in US. Another right in relation to such is industrial designs and geographical indications. The protection is awarded in both cases. The Hague Agreement Concerning the International Deposit of Industrial Designs protects such a right. Art. 25 and 26 of TRIPS also deal with the same for 10 years. With regard to geographical indications the airlines embody the quality of the people by representing the region it belongs to.

The difficulty with the exclusive rights guaranteed is that such is protected by national laws and also international instruments like TRIPS but however, they are not protected under Article 27 of the Chicago Convention, 1944 and such amounts to exemption. Such is against the spirit of the exclusive rights.

Air transport and protection of IPR can be viewed in two angles, one being that infringement may be in case of loss of cargo during transit by way of air transport and the other being the infringement of IPR strictly confined to aircrafts and aviation industry. **EUROPA** in its press

releases of 2009 has stated that infringing consignments have significantly increased in the field of postal and air transport which in turn is a threat to IPR.The main idea behind better trade among nations was felt by diminishing the barrier free trade flows. But such gives rise to striking problem of "parallel imports" which are imports that run parallel to the authorized distribution network in a country, which an IPR-holder controls in the state of import. One potential threat to the smooth operation of the single market is created if a patent holder in one state seeks to ban parallel imports of her patented good from another Member State, relying on her monopoly rights under the patent.

The **TRIPS Agreement** only establishes minimum standards and fails in certain areas to establish uniform rules.

In relation to patents in international traffic there is a limitation on the right of the patent owner in special circumstances, is contained in **Article 5ter of Paris Convention for the Protection of Industrial Property, 1883**. It deals with the transit of devices on ships, aircraft or land vehicles through a member country in which such device is patented. Where ships, aircraft or land vehicles of other member countries enter temporarily or accidentally a given member country and have on board devices patented in that country, the owner of the means of transportation is not required to obtain prior approval or a license from the patent owner. Temporary or accidental entry of the patented device into the country in such cases constitutes no infringement of the patent for invention.

The ever growing field of aviation must take up the issue of IPR protections seriously. As the opening of the open skies to all and the growing number of airlines at a triple rate than that of the past is an indication of the fact that the intellectual rights of one can be easily copied and hence infringed. Currently even though there are some provisions in various international instruments which talk about protection being afforded in case of IPR infringement a lot is still left to be dealt with. The liberalized air agreements have led to greater market access, minimal capacity regulation and reduced governmental control and so a check is must. There must be some kind of protection which should be provided to the patent holders as the Chicago Convention, 1944 provides exemption clause. The other areas of IPR are also not elaborately and properly mentioned.

Recent times have experienced aggressive rises in protection of intellectual property in the context of Airlines. For example, OEMs have become more aggressive in protecting their intellectual property, with one insisting that its technical data and work cards generated from this data not be shared outside the airline, or warranty protection will be withheld. For example, some organizations that repair aircraft such as the Aeronautical Repair Stations Association have argued that information must be provided for the maintenance of the aircraft, but the FAA has stated that mere directions for the removal or replacements of parts of an aircraft by the OEM are sufficient. Some OEMs have expressed a desire to collect operating data from airlines and sell it back to them, which purchasers of aircraft do not feel comfortable with. To combat this problem, in 2011, the FAA issued a draft "Policy Statement on Inappropriate Design Approval Holder Restrictions on the Use and Availability of Instructions for Continued Airworthiness". Aggressiveness by OEMs may not only run counter to this policy but also violate antitrust laws.

Intellectual property controversies have similarly arisen in global collaborations between aircraft manufacturers and companies from other States. For example, in March 2012, Cessna Aircraft announced its intention to collaborate with Chinese partners for the manufacturing of new and existing jet designs. Operations by foreign aircraft manufacturers in China have provoked such concerns due to the legal requirement that companies partner with Chinese firms, many of which are partially owned by the Chinese government. Nonetheless, it has been noted that aeronautics companies rarely pay much heed to these concerns, possibly due to arguments that the technology of aircraft is so complicated that individuals wishing to steal these designs would nonetheless have to go through a robust process of research and development, which would be both challenging itself and may eventually result in products that have become obsolete. Nonetheless, recent developments regarding accusations of theft of intellectual property by States across the world have highlighted the importance of taking such concerns seriously, which is unfortunately not happening. It is therefore clear that intellectual property today is not a concern only with those companies that operate in the aviation industry, but also those that manufacture aircraft.

CYBER LAWS

Cyber Law is a rapidly evolving area of civil and criminal law as applicable to the use of computers, and activities performed and transactions conducted over internet and other networks.

This area of law also deals with the exchange of communications and information thereon, including related issues concerning such communications and information as the protection of intellectual property rights, freedom of speech, and public access to information.

Cyber law is the area of law that deals with the Internet's relationship to technological and electronic elements, including computers, software, and hardware and information systems. Cyber law is also known as Cyber Law or Internet Law

The main objective of the Information Technology Act 2000 is to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as E-commerce, which involve the use of alternatives to paper-based methods of communication and storage of information to facilitate electronic filing of documents with the government agencies. The Act has extra-territorial jurisdiction to cover any offence or contravention committed outside the country by any person.

The Act totally has 13 chapters and 90 sections (the last four sections namely sections 91 to 94 in the ITA 2000 dealt with the amendments to the four Acts namely the Indian Penal Code 1860, The Indian Evidence Act 1872, The Bankers' Books Evidence Act 1891 and the Reserve Bank of India Act 1934). The Act begins with preliminary and definitions and from thereon the chapters that follow deal with authentication of electronic records, digital signatures, electronic signatures etc.

Elaborate procedures for certifying authorities (for digital certificates as per IT Act -2000 and since replaced by electronic signatures in the ITAA -2008) have been spelt out. The civil offence of data theft and the process of adjudication and appellate procedures have been described. Then the Act goes on to define and describe some of the well-known cyber-crimes and lays down the punishments therefore. Then the concept of due diligence, role of intermediaries and some miscellaneous provisions have been described.

Cyber security and the Aviation Sector

Rules and procedures mentioned in the Act have also been laid down in a phased manner, with the latest one on the definition of private and sensitive personal data and the role of

intermediaries, due diligence etc., being defined as recently as April 2011. Cybersecurity in the aviation sector is an important area, primarily due to the proliferation of Data Protection laws across the world. After the Supreme Court's decision in the *Puttaswamy* case, the right to privacy has also been recognized as a fundamental right in India. Therefore, the issue of data protection is crucial, particularly since airlines collect and store huge amounts of personal data, including sensitive personal data.

Cybersecurity is an essential aspect of the aviation industry, given the digitization of the entire process of commercial aviation. The recent incident of a hacking of the Air India Frequent Flyer Database demonstrates that cybersecurity is of extreme financial importance not only to airline corporations, but also to the consumers, since data is considered to be an important asset in the information age. An expert committee on data protection was set up by the Indian government, to invite recommendations on the issue of cybersecurity. One of the committee recommendations was the setting up of an Indian Cyber Crime Coordination Centre, to tackle the problem of cybercrime.

As per the Information Technology Rules of 2011, any data collecting 'body corporate' must ensure that the security measures in place conform to the ISO 27001 standards on 'Information Technology – Security Techniques'. Furthermore, the recently implemented General Data Protection Regulations (GDPR) of the European Union applies to any entity that collects the personal data of European citizens. Therefore, Indian airline corporations which offer airline services to European citizens would have to conform to the security and data protection requirements as laid down in the GDPR, which involves the encryption of personal data.

Artificial Intelligence and Aviation

The primary integration of artificial intelligence with aviation laws occurs in the field of Unmanned Aerial Vehicles or drones, which affect a variety of other legal principles in their functioning. The presence of "autopilot" signals that artificial intelligence has existed in the aviation sector for several years currently. However, under the provisions of the Chicago Convention, such vehicles cannot be operated without a pilot, regardless of its capacity to be so operated.

With the increase in the instances in Unmanned Aerial Vehicles (UAV) being used for various domestic, non-passenger travel purposes, a variety of legal areas are affected, even under Indian law. Such vehicles or drones can also be construed to violate property laws and constitute an unlawful interference with the use or enjoyment of property by individuals. Therefore, the domain of tort laws would also be infringed. Furthermore, it would also impose questions of criminal and civil liability under the various laws, particularly if they cause harm or injury to individuals arising from malfunctioning.

Drones, or UAVs in India have extensively been used by the Indian military. However, the DGCA had initially banned the use of drones in civil aviation through its notice on October 7th, 2014, stating that the same was in interest of national security. Subsequently in 2017, the DGCA released draft guidelines on the functioning of drones, and such a policy is set to come into effect from the 1st of December 2018 onwards.

Under the DGCA Guidelines, unpiloted vehicles would need to satisfy the requirements of Rule 15A and Rule 133A of the Aircraft Rules, 1937, as they would require a Unique Identification Number and an Unmanned Aircraft Operator Permit for their functioning.
Furthermore, such drones cannot be flown within 5 km of the Mumbai, Delhi, Chennai, Kolkata, Bengaluru and Hyderabad airports, and within 3 km of any other airport. The regulation also states that Eco-sensitive zones around National Parks and Wildlife Sanctuaries cannot be flown over by such vehicles, without prior permission. Drones also cannot be flown within 50 km of any international border, including the Line of Control.

All drones which are not classified as nano-drones, i.e. weigh over 250 grams and can fly higher than 50 feet, would be covered under the drone policy of the DGCA. The policy further classifies different kinds of drones on the basis of their weight and flying height, with drones that are over 2 kgs requiring an air defence clearance.

Additionally, artificial intelligence is also increasingly being used in other software aspects of aviation, including in the development of airplane simulation mechanisms, and in the development of GPS Navigation software.

MODULE V

Fundamental Aspects of Corporate Laws and its Relevance to Air Laws

INTRODUCTION

In order to regulate business of aviation in India, the varied ranges of corporate laws that are applicable to regular business enterprises are also applicable to aviation business. The dominance of private corporations including the aviation corporate enterprises over our economy and society is such that they have come to colonize our thinking. Aviation corporate law deals with the formation and operations of corporations and is related to commercial and contract law. The objective of this module is to make the participants of the course aware about the law relating to corporations application on aviation sector. It is significant for them to understand the fundamental law of business before entering into any aviation business.

The module focuses on the basic principles involved in the different areas of corporate laws and its relation with the aviation industry. Keeping in view the fundamental aspects of corporate laws the module is divided into six parts including contract law, Law of Property, Law of Company, Law of Insurance, Law of Competition, and Taxation Law.

LAW OF CONTRACTS

What is a contract?

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

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

Agreement

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

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

Essentials of a valid contract

Offer and Proposal

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

Consideration

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

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

Capacity

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

Consent

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

Void and Voidable Contracts

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

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

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

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

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

Discharge of contract

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

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

Law of Contracts and Aviation

Law of contracts is probably the most commonly used law in the aviation field. Almost every activity of aviation of governed by the law of contracts. Thus where a consumer purchase a ticket, they said to have entered into a contract with the airline company. Taking the present scenario of privatization of airports and airlines in India, it has now become the need of the hour that the parties are entering into a numerous contracts like, the Concession Agreements, Operation, Maintenance and Development Agreements (OMDA), Slots Agreements in airports, Aircraft Sale or Lease, Cargo, Aviation Fuel Agreements, Ground Handling, Flight Catering, Food and Beverages, Business Hotel, Retail and Duty Free Shops, Advertising, Lease and Finance of Aircraft, Insurance, Maintenance, Repair and Overhauling (MRO) etc. Under these circumstances, it is pertinent to say that every one must understand the law of contracts and then apply the general rules in drafting the agreement under the various provisions of the Indian Contract Act, 1872 while entering into aviation contracts, which may be airport or airlines contracts.

Examples of Contractual Agreements in Aviation Sector

Public Private Partnership (PPP Model), Design-Bid-Build (DBB), Build-Operate-Transfer (BOT), Design-Build for fixed fee on fixed time frame, Build-Own-Operate (BOO), Build-Own-Operate-Transfer (BOOT), Public Ownership and Operations, Public Ownership and Operations with Commercial Orientation, Regional Ownership and Operations, Public Ownership with Private Operations, Private Ownership and Operations … etc.

LAW OF PROPERTY

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

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

Property

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

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

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

Interests in Property

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

Requisites for Valid Transfer: Every person, who is competent to contract, is competent to transfer property, which can be transferred in whole or in part. He should be entitled to the transferable property, or authorised to dispose off transferable property which is not his own. The

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

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

Various Forms of Transfer of Property:

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

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

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

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

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

Aviation Law and Property Law

The number of issues of property law applicable to the aviation industry is immense. This is particularly clear in the case of airports. Individuals owning property near airports often complain that the noise generated by nearby aircraft significantly diminishes the value of their property, adversely affect their economic interests in their property and prevent their enjoyment of their property. Another issue is that landlocked airports often need to develop additional capacities as a result of which they must acquire surrounding property. Neighboring landowners may thus have no option but to sell their property to airport authorities due to eminent domain, or to accept an easement or encumbrance permitting airports to operate near their property which may predictably impact the economic value.

In M/s Khamal Trading Private Ltd., the Supreme court held that the hearing required under the Land Acquisition Act, 1894 was an essential part of the eminent domain principle, and that it is the minimum safeguard provided to an individual to point out that the requirement that the essential requirements, such as the acquisition of the property for a public purpose have not been satisfied. In *Ravi Khullars* case, the Supreme Court found that the planned development of Delhi,

for which certain land was acquired under the Land Acquisition act ought to be interpreted to include the expansion of the airport.

LAW OF COMPANY

The word “company” is derived from the Latin (Com = with or together; panis = bread), and originally referred to an association of persons who took their meals together. A company may be an incorporated company or a “corporation” or an unincorporated company. An incorporated company is a separate person distinct from the individuals constituting it whereas an unincorporated company, such as a partnership, is mere collection or aggregation of individuals. Therefore, unlike a partnership firm, a company is a corporate body and a legal person having status and personality distinct and separate from that of the members constituting it.

It is called a body corporate because the persons composing it are made into one body by incorporating it according to the law, and clothing it with legal personality, and, so turn it into a corporation (The word “corporation” is derived from the Latin term “corpus” which means “body”). Accordingly, “corporation” is a legal person created by the process other than natural birth. It is, for this reason, sometimes called artificial person. This corporate being is capable of enjoying many of the rights and incurring many of the liabilities of a natural person - a human being.

In the legal sense, a company is an association of both natural and artificial persons incorporated under the existing law of a country. As per the Companies Act, 1956 a “company means a company formed and registered under the Companies Act, 1956 or under the previous laws relating to companies" [Section 3(1)(ii)]. In common law, a company is a “legal person” or “legal entity” separate from, and capable of surviving beyond the lives of, its members. However, an association formed not for profit acquires a corporate life and falls within the meaning of a company by reason of a licence under Section 25(1) of the Act.

Company: Its Characteristics

The main characteristics of a company are as follow:

Corporate Personality: By incorporation under the Act, the company is vested with a corporate personality quite distinct from individuals who are its members. Being a separate legal entity it bears its own name and acts under a corporate name. It has a seal of its own. Its assets are separate and distinct from those of its members. It is also a different ‘person’ from the members who compose it. As such it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual. Its members are its owners but they can be its creditors simultaneously as it has a separate legal entity. A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital. The shareholders are not the

agents of the company and so they cannot bind it by their acts. The company does not hold its property as an agent or trustee for its members and they cannot sue to enforce its rights, nor can they be sued in respect of its liabilities.

Limited Liability: The company being a separate entity, leading its own business life, the members are not liable for its debts. The liability of the members of a company is limited to the extent of the nominal value of the shares held by them. In no event can a shareholder be asked to pay anything more than the unpaid value of his shares. In the case of a company limited by guarantee, the members are liable only to the extent of the amount guaranteed by them and not beyond, and only when the company goes into liquidation.

Perpetual Succession: Members may come and members may go but the company goes on for ever. Variation in members or their identity does not affect the legal existence and identity of a company. It is a creation of law and can be dissolved only under the law.

Transferability of Shares: The capital of a company is divided into parts, called shares. The shares are said to be movable property and, subject to certain conditions, freely transferable, so that no shareholder is permanently or necessarily wedded to a company. The shares of joint stock companies are freely transferable. In the case of a private company, the Companies Act requires it to put certain restrictions on the transferability of shares. Every member owing fully paid-up shares is at liberty to dispose them off according to his choice but subject to the articles of the company. Any absolute restriction on the right to transfer shares is void.

Separate Property: As a corporate person, the company is entitled to own and hold property in its own name. No member can claim ownership of any item of the company's assets.

Common Seal: On incorporation, a company acquires legal entity with perpetual succession and a common seal. Since the company has no physical existence, it must act through its agents and all such contracts entered into by its agents must be under the seal of the company. The common seal of the company is of very great importance. It acts as the official signature of a company. The name of the company must be engraved on its common seal. A rubber stamp does not serve the purpose. A document not bearing common seal of the company is not authentic and has no legal force behind it.

Capacity to Sue and Be Sued: A company being a body corporate, can sue and be sued in its own name. All legal proceedings against the company are to be instituted in its own name. Similarly, the company may bring an action against anyone in its own name. In case of unincorporated association an action may have to be brought in the name of the members either individually or collectively.

Company as Distinguished from other Associations of Persons

Though there are a number of similarities between a limited company and other forms of associations, there are many dissimilarities. In both the cases individuals are the subjects, and trading is generally the object. In the following paragraphs a limited company is distinguished from a partnership firm, a Hindu Joint Family business, a club and a registered society. Though there are a number of similarities between a limited company and other forms of associations, there are a great number of dissimilarities as well. In both the cases individuals are the subjects, and trading is generally the object. In the following paragraphs, a limited company is distinguished from a partnership firm, a Hindu Joint Family business and a registered society.

Distinction between Company and Partnership

The principal points of distinction between a company and a partnership firm, are as follows:

1. A company is a distinct legal person. A partnership firm is not distinct from the several persons who compose it.
2. In a partnership, the property of the firm is the property of the individuals comprising it. In a company, it belongs to the company and not to the individuals comprising it.
3. Creditors of a partnership firm are creditors of individual partners and a decree against the firm can be executed against the partners jointly and severally. The creditors of a company can proceed only against the company and not against its members.
4. Partners are the agents of the firm, but members of a company are not its agents. A partner can dispose of the property and incur liabilities as long as he acts in the course of the firm's business. A member of a company has no such power.
5. A partner cannot contract with his firm, whereas a member of a company can.
6. A partner cannot transfer his share and make the transferee a member of the firm without the consent of the other partners, whereas a company's share can ordinarily be transferred.
7. Restrictions on a partner's authority contained in the partnership contract do not bind outsiders; whereas such restrictions incorporated in the Articles are effective, because the public are bound to acquaint themselves with them.
8. A partner's liability is always unlimited whereas that of shareholder may be limited either by shares or a guarantee.
9. A company has perpetual succession, i.e. the death or insolvency of a shareholder or all of them does not affect the life of the company, whereas the death or insolvency of a partner dissolves the firm, unless otherwise provided.
10. A company may have any number of members except in the case of a private company which cannot have more than fifty members (excluding past and present

employee members). In a public company there must not be less than seven persons and in a private company not less than two. On the other hand, a partnership firm cannot have more than 20 members in any business and 10 in the case of banking business.

11. A company is legally required to have its accounts audited annually by a chartered accountant, whereas the accounts of a firm are audited at the discretion of the partners.
12. A company, being a creation of law, can only be dissolved as laid down by law. A partnership firm, on the other hand, is the result of an agreement and can be dissolved at any time by agreement.

Distinction between Company and Hindu Joint Family Business

1. A company consists of heterogeneous members, whereas a Hindu Undivided Family Business consists of homogenous members since it consists of members of the joint family itself.
2. In a Hindu Joint Family business the Karta (manager) has the sole authority to contract debts for the purpose of the business, other coparceners cannot do so. There is no such system in a company.
3. A person becomes a member of Joint Hindu Family business by virtue of birth. There is no provision to that effect in the company.
4. No registration is compulsory for carrying on business for gain by a Hindu Joint Family even if the number of members exceeds twenty [Shyamlal Roy v. Madhusudan Roy, AIR 1959 Cal. 380 (385)]. Registration of a company is compulsory.

Distinction between a Company and a Club

1. A company is a trading association. A club, on the other hand, is a non- trading association.
2. Registration of a company is compulsory. Registration of a club is not compulsory.

Distinction between a Company and a Corporation (i.e. Company vis-à-vis Body Corporate)

Generally speaking, an association of persons incorporated according to the relevant law and clothed with legal personality separate from the persons constituting it is known as a corporation. The word ‘corporation’ or words ‘body corporate’ is/are both used in the Companies Act, 1956. Definition of the same which is reproduced below is contained in Clause (7) of Section 2 of the Act: “Body corporate” or “corporation” includes a company incorporated outside India but does not include—

(a) a corporation sole;

(b) a co-operative society registered under any law relating to co-operative societies; and
(c) any other body corporate not being a company which the Central Government may, by notification in the Official Gazette, specify in this behalf."

The expression "corporation" or "body corporate" is wider than the word 'company'.

A corporation sole is a single individual constituted as a corporation in respect of some office held by him or function performed by him. The Crown or a Bishop under the English law are examples of this type of corporation. It may be noted that though a corporation sole is excluded from the definition for the purposes of the Companies Act, it continues to be a legal person capable of holding property and becoming a member of a company.

A society registered under the Societies Registration Act has been held by the Supreme Court in Board of Trustees v. State of Delhi, A.I.R. 1962 S.C. 458, not to come within the term 'body corporate' under the Companies Act, though it is a legal person capable of holding property and becoming a member of a company.

Advantages of Incorporation

As compared to other types of business associations, an incorporated company has the following advantages:

A. Corporate Personality: Unlike a partnership firm, which has no existence apart from its members, a company is a distinct legal or juristic person independent of its members. Under the law, an incorporated company is a distinct entity, even the one-man company as discussed above in Salomon & Co. Ltd., case is different from its shareholders. Section 34(2) of the Companies Act, 1956 provides that from the date of incorporation, the subscribers to the memorandum and other members shall be a body corporate by the name contained in the Memorandum, capable of exercising all the functions of an incorporated company and having perpetual succession and a common seal.

B. Limited Liability: The Companies Act provides that in the event of the company being wound-up, the members shall have liability to contribute to the assets of the company in accordance with the Act [Section 34(2)]. In the case of companies limited by shares, no member is bound to contribute anything more than the nominal value of the shares held by him which remains unpaid. The privilege of limiting the liability is one of the principal advantages of doing business under the corporate form of organisation.

C. Perpetual Succession: As stated in Section 34(2) of the Companies Act, an incorporated company has perpetual succession. Notwithstanding any change in its members, the company will be the same entity with the same privileges and immunities, estate and possessions. The death or insolvency of individual members does not in any way, affect the corporate entity, its existence or continuity. The company shall continue to exist indefinitely till it is wound-up in accordance with the provisions of the Companies Act. "Members may come and members may go but the company can go on forever".

D. Transferable Shares: Section 82 of the Companies Act provides "The shares or other interest of any member in a company shall be movable property, transferable in the manner provided by the articles of the company". This encourages investment of funds in the shares, so that the members may encash them at any time. Thus, it provides liquidity to the investors as shares could be sold in the open market and in stock exchange. It also provides stability to the company.

E. Separate Property: A company as a legal entity is capable of owning its funds and other assets. "The property of the company is not the property of the shareholders, it is property of the company" [Gramophone & Typewriter Co. v. Stanley, (1906) 2 K.B. 856 at p. 869]. "The company is the real person in which all the property is vested, and by which it is controlled, managed and disposed of". In the eyes of law, even a member holding majority of shares or a managing director of a company is held liable for criminal mis-appropriation of the funds or property of the company, if he unauthorisedly takes it away and uses it for his personal purposes.

F. Capacity to Sue: As a juristic legal person, a company can sue in its name and be sued by others. The managing director and other directors are not liable to be sued for dues against a company.

G. Flexibility and Autonomy: The company has an autonomy and independence to form its own policies and implement them, subject to the general principles of law, equity and good conscience and in accordance with the provisions contained in the Companies Act, Memorandum and Articles of Association. The company form of management of business disassociates the "ownership" from the "control" of business, and helps promote professional management and efficiency. The directors and managers can carry on the business activities with freedom, authority and accountability in accordance with the Company Law. Precisely this is the reason why the Government has generally adopted the company form of management for its various undertakings in preference to management through the departmental undertakings.

Disadvantages of Incorporation

There are, however, certain disadvantages and inconveniences in Incorporation. Some of these disadvantages are:

1. Formalities and expenses: Incorporation of a company is coupled with complex, cumbersome and detailed legal formalities and procedures, involving considerable amount of time and money. Such elaborate procedures have been laid down to deter persons who are not serious about doing business, as a company enjoys various facilities from the community. Even after the company is incorporated, its affairs and working must be conducted strictly in accordance with legal provisions. Thus various returns and documents are required to be filed with the Registrar of Companies, some periodically and some on the happening of an event. Certain books and registers are compulsorily required to be maintained by a company. Approval and sanction of the

Company Law Board, the Government, the Court, the Registrar of Companies or other appropriate authority, as the case may be, is necessarily required to be obtained for certain corporate activities. Certain corporate activities such as corporate meetings, accounts, audit, borrowings, lending, investment, issue of capital, dividends etc. are necessarily required to be conducted and carried out strictly in accordance with the provisions of the Act and within the prescribed time. Any breach of the legal provisions is followed by severe penal consequences. Other forms of business organisations are comparatively free from these legal complexities and procedural formalities.

2. Corporate disclosures: Notwithstanding the elaborate legal framework designed to ensure maximum disclosure of corporate information, the members of a company are having comparatively restricted accessibility to its internal management and day-to-day administration of corporate working.
3. Separation of control from ownership: Members of a company are not having as effective and intimate control over its working as one can have in other forms of business organisation, say, a partnership firm. This is particularly so in big companies in which the number of members is too large to exercise any effective control over its day-to-day affairs. No member of a company can act in his individual capacity for and on behalf of the company. The members of a company are neither the owners nor the agents of the company. Thus, the position of ownership of members is more passive in nature. The members may not have an active and complete control over the company's working as the partners may have over the firm's affairs.
4. Greater social responsibility: Having regard to the enormous powers wielded by the companies and the impact they have on the society, the companies are called upon to show greater social responsibility in their working and, for that purpose, are subject to greater control and regulation than that by which other forms of business organisation are governed and regulated.
5. Greater tax burden in certain cases: In certain circumstances, the tax burden on a company is more than that on other forms of business organisation. A company is liable to tax without any minimum taxable limit as is prescribed in the cases of registered partnership firms and others. Also it has to pay income-tax on the whole of its income at a flat rate whereas others are taxed on graduated scale or slab system. These tax implications may have crucial bearing on a decision regarding the selection of any form of business organisation and the time when the existing form of business organisation should be changed to a new one. Thus, tax implications may direct the adoption of the partnership form of business organisation as expedient at the initial stage to be converted into a company later on, when the tax implications may be more favourable because of the size of the organisation and its scale of operations.
6. Detailed winding-up procedure: The Act provides elaborate and detailed procedure for winding-up of companies which is more expensive and time consuming than that which is applicable to other forms of business organisation.

COMPANIES ACT 2013

The Indian Companies Act 2013 replaced the Indian Companies Act, 1956. The Companies Act 2013 makes comprehensive provisions to govern all listed and unlisted companies in the country. The Companies Act 2013 implemented many new sections and repealed the relevant corresponding sections of the Companies Act 1956. This is a landmark legislation with far-reaching consequences on all companies incorporated in India.

Salient features of the Companies Act 2013

1. **Class action suits for Shareholders:** The Companies Act 2013 has introduced new concept of class action suits with a view of making shareholders and other stakeholders, more informed and knowledgeable about their rights.
2. **More power for Shareholders:** The Companies Act 2013 provides for approvals from shareholders on various significant transactions.
3. **Women empowerment in the corporate sector:** The Companies Act 2013 stipulates appointment of at least one woman Director on the Board (for certain class of companies).
4. **Corporate Social Responsibility:** The Companies Act 2013 stipulates certain class of Companies to spend a certain amount of money every year on activities/initiatives reflecting Corporate Social Responsibility.
5. **National Company Law Tribunal:** The Companies Act 2013 introduced National Company Law Tribunal and the National Company Law Appellate Tribunal to replace the Company Law Board and Board for Industrial and Financial Reconstruction. They would relieve the Courts of their burden while simultaneously providing specialized justice.
6. **Fast Track Mergers:** The Companies Act 2013 proposes a fast track and simplified procedure for mergers and amalgamations of certain class of companies such as holding and subsidiary, and small companies after obtaining approval of the Indian government.
7. **Cross Border Mergers:** The Companies Act 2013 *permits* cross border mergers, both ways; a foreign company merging with an India Company and vice versa but with prior permission of *RBI.*
8. **Prohibition on forward dealings and insider trading:** The Companies Act 2013 prohibits directors and key managerial personnel from purchasing call and put options of shares of the

company, if such person is reasonably expected to have access to price-sensitive information.

9. **Increase in number of Shareholders:** The Companies Act 2013 increased the number of maximum shareholders in a private company from 50 to 200.
10. **Limit on Maximum Partners:** The maximum number of persons/partners in any association/partnership may be upto such number as may be prescribed but not exceeding *one hundred.* This restriction will not apply to an association or partnership, constituted by professionals like lawyer, chartered accountants, company secretaries, etc. who are governed by their special laws. Under the Companies Act 1956, there was a limit of maximum 20 persons/partners and there was no exemption granted to the professionals.
11. **One Person Company:** The Companies Act 2013 provides new form of private company, i.e., one person company. It may have only one director and one shareholder. The Companies Act 1956 requires minimum two shareholders and two directors in case of a private company.
12. **Entrenchment in Articles of Association:** The Companies Act 2013 provides for entrenchment (apply extra legal safeguards) of articles of association have been introduced.
13. **Electronic Mode:** The Companies Act 2013 proposed E-Governance for various company processes like maintenance and inspection of documents in electronic form, option of keeping of books of accounts in electronic form, financial statements to be placed on company's website, etc.
14. **Indian Resident as Director:** Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year.
15. **Independent Directors:** The Companies Act 2013 provides that all listed companies should have at least one-third of the Board as independent directors. Such other class or classes of public companies as may be prescribed by the Central Government shall also be required to appoint independent directors. No independent director shall hold office for more than two consecutive terms of five years.
16. **Serving Notice of Board Meeting:** The Companies Act 2013 requires at least seven days' notice to call a board meeting. The notice may be sent by electronic means to every director at his address registered with the company.

17. **Duties of Director defined:** Under the Companies Act 1956, a director had fiduciary (legal or ethical relationship of trust)duties towards a company. However, the Companies Act 2013 has defined the duties of a director.
18. **Liability on Directors and Officers:** The Companies Act 2013 does not restrict an Indian company from indemnifying (compensate for harm or loss) its directors and officers like the Companies Act 1956.
19. **Rotation of Auditors:** The Companies Act 2013 provides for rotation of auditors and audit firms in case of publicly traded companies.
20. **Prohibits Auditors from performing Non-Audit Services:** The Companies Act 2013 prohibits Auditors from performing non-audit services to the company where they are auditor to ensure independence and accountability of auditor.
21. **Rehabilitation and Liquidation Process:** The entire rehabilitation and liquidation process of the companies in financial crisis has been made time bound under Companies Act 2013.

LAW OF INSURANCE

Insurance may be described as a social device to reduce or eliminate risk of life and property. Under the plan of insurance, a large number of people associate themselves by sharing risk, attached to individual. The risk, which can be insured against include fire, the peril of sea, death, incident, & burglary. Any risk contingent upon these may be insured against at a premium commensurate with the risk involved.

Insurance is actually a contract between 2 parties whereby one party called insurer undertakes in exchange for a fixed sum called premium to pay the other party on happening of a certain event.

Insurance is a contract whereby, in return for the payment of premium by the insured, the insurers pay the financial losses suffered by the insured as a result of the occurrence of unforeseen events. With the help of Insurance, large number of people exposed to similar risks makes contributions to a common fund out of which the losses suffered by the unfortunate few, due to accidental events, are made good.

An insurer is a company selling the insurance; an insured or policyholder is the person or entity buying the insurance. The insurance rate is a factor used to determine the amount to be charged for a certain amount of insurance coverage, called the premium.

Need for insurance

All assets have some economic value attached to them. There is also a possibility that these assets may get damaged/destroyed or become non-operational due to risks like breakdowns, fire, floods, earthquake etc. Different assets are exposed to different types of risks like a car has a risk of theft or meeting an accident, a house is exposed to risk of catching fire, a human is exposed to risk of death/accident. Hence insurance is required for the following reasons:

Aviation Insurance

In principle, insurance is a system of spreading risk so that the burden of a large claim, does not fall on one person but is spread among many—the assured, the direct underwriters, and the reinsuring underwriters. In transport sector, risks involving the transportation of passenger and goods as well as those connected with equipment used in their carriage are nowadays insurable. From a financial point of view, a comprehensive insurance policy has become indispensable to air carriers, given the high market value of aircraft and the great financial risks involved in aviation. In aviation, the risks are enormous in the sense that one casualty can give rise to very large payments, the importance of spreading the risk is obvious, for no airline and no single insurer or reinsurer can accept responsibility for more than a small proportion of a large claim.

Aviation insurance is a very specialized branch of insurance. This unique class of business is characterized by high risk, high values and sophisticated technology. Aviation technology has developed rapidly during the last few decades. As a result, air travel these days had grown to be significantly safer than was the case a few decades ago. Emerging complexities in finance and lease arrangements, coupled with the criticality of optimum management of finances in this capital-intensive field, lend more challengers to the Aviation Insurer than ever before. This field of insurance has turned truly global in view of its inherent nature and characteristics.

Aviation insurance policies offer a wide variety of cover ages to take care of almost every conceivable situation that may bear an adverse financial impact. The aviation portfolio encompasses cover normally availed of by airline operators which includes

(1) Aircraft Hull All Risks;
(2) Aircraft Liabilities;

(3) Aircraft Hull War Risks;
(4) Spare Risks;
(5) Personal Accident Cover for Crew; and
(6) Loss of Licence covers for Pilots.

There also exist cost effective insurance covers that are available to agencies allied to aviation industry.

Since nationalization of General Insurance Business in India, Aviation business has been under-written by the General Insurance Corporation of India (GIC) and its four Subsidiary Companies—National insurance Co. Ltd., Calcutta, New India Assurance Co. Ltd., Bombay, Oriental Insurance Co. Ltd., New Delhi, and United India Insurance Co. Ltd., Madras. While GIC writes the aviation insurance business of Air India Ltd., Indian Airlines Ltd., Vayudoot Ltd., all the divisions of the Hindustan Aeronautics Ltd., (HAL), and the Airport Liability Cover of the Airports Authority of India (AAI), the four subsidiary companies write aviation business pertaining to all other aircraft operators and Allied Agencies including Pawan Hans Ltd., and other private operators.

GIC has insured the national flag carriers since their infancy from the time they operated with small sized fleets and has seen them through their growth and acquisition of the modern and technologically advanced fly-by-wire aircraft. During this period, GIC had gained considerable technical expertise and have a proven track record tested by time and circumstances in this class of business.

However, currently, many private insurance agencies such as ICICI Lombard, Bajaj Allianz, Iffco Tokyo General Insurance and Reliance General Insurance are significant market players aside from the insurance companies already mentioned above. Bajaj Allianz and ICICI Lombard are especially active in the reinsurance field of aviation law, which is a growing segment. Since India acceded to the Montreal Convention under a formal legislation in 2009, the compensation levels for passengers for injury, death, damage, delay and loss has significantly increased. However, the primary problem with aviation insurance is estimating the correct proportion of insurance premium to be paid to the insuring agency, since the industry has recently been incurring significant losses due to the unpredictable nature of aviation damages.

The importance of environmental aviation law is demonstrated by the increasing effects of climate change, which are caused particularly due to the greenhouse effect, to which airline emissions contribute directly. Furthermore, since the emissions cannot be contained within the specific territorial limits of a single State, there is an additional problem in determining liability for the effects of aviation pollution. It is thus important for individual States to establish their own environmental protection measures, particularly in the field of aviation law.

Another new area of aviation insurance is insurance policies offered to individual consumers for ticket cancellation and for the loss of and damage to luggage, which is offered upon each individual ticket upon the payment of a small premium. Such policies are for the benefit of consumers, to ensure that there is an alternative source of compensation available in the event that there is a deficiency in airline service leading to a heavy individual loss.

Furthermore, aviation insurance is one of the areas in which premiums and compensation payments can be issued in foreign currency, but with the prior approval of the Reserve Bank of India, provided that such a payment is not made to an Indian resident.

LAW OF COMPETITION

Competition is a process of economic rivalry between market players to attract customers. Competition also refers to a situation in a business environment where businesses independently strive for the patronage of customers in order to achieve their business objective. Free and fair competition is one of the pillars of an efficient business environment.

In the recent years the Indian economy has been one of the best performers and is on high growth path. Infusion of greater degree of competition can play a catalytic role in unlocking the fuller growth potential in many critical areas of the economy. In the interest of consumers, and the economy as whole, it is necessary to promote an environment that facilitates fair competition outcomes in the market, restrain anti-competitive behavior and discourage market players from adopting unfair trade practices. Therefore, competition has become a driving force in the global economy.

Laws of competition are those laws which promote and seek to maintain market competition by regulating anti-competitive conduct by companies. Modern competition law has historically

evolved on a country level to promote and maintain fair competition in markets principally within the territorial boundaries of nation-states.

Objectives of competition laws are:

- Ensure fair and healthy competition in the market.
- Level playing field.
- Faster and inclusive growth.

Competition law believes in the premise that the unrestrained interaction of the competitive forces in the market will yield the best allocation of economic resources, lower prices; improve quality and maximum material progress for the citizens. Thus, the principal objective of the Competition Law is to make the market economy work better by stopping vested interests from obstructing markets. The purpose, therefore, is to maintain and protect the competitive process.

The benefits of competition for economic growth and consumer welfare are well recognized and therefore, strict enforcement of competition law is a big challenge for any competition authorities.

With these objectives in mind the Competition Act 1999 was enacted replaced the age old MRTP Act. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations (acquisition, acquiring of control and Merger and acquisition), which causes or likely to cause an appreciable adverse effect on competition within India. The Act established the Competition Commission of India to prevent activities that have an adverse effect on competition in India

Competition Law and Aviation

With a growth rate of 18 per cent per annum, Aviation Industry in India is one of the fastest growing aviation industries in the world. With the liberalization of the Indian aviation sector, aviation industry in India has undergone a rapid transformation. Today air travel has become much cheaper and can be afforded by a large number of people. The government's open sky policy has lead to many overseas players entering the market and the industry has been growing both in terms of players and number of aircrafts. Indian carriers currently have a fleet size of 310 aircrafts, but have 480 aircrafts on order, scheduled for delivery by 2012. Airline, being a service

industry is facing intense competition after liberalization. As a result, the various airlines are engaged in consolidation, strategic alliance and privatization, with an aim of improving their competitive positions.

For competition authorities across the world, mergers pose a different kind of challenge altogether. Unlike regular cases of abuse of dominance or anti-competitive agreements which require an ex-post analysis, merger review is an ex-ante exercise. The question is to find out whether the combination of such merging parties will ultimately result in the creation of market power that is likely to be abused either unilaterally or in collusion. This issue needs to be focused as it directly affects on the growth and development of the aviation industry.

Yet, a competition policy must always use broad principles of application. Under India's Competition Act, 2002, factors have been laid down to determine whether a merger would have an appreciable adverse effect on competition in the relevant market. There should be a deep and through study of various factors include extent of barriers to entry, market share of enterprises individually and as a combination, competition through imports, level of concentration in the market, degree of countervailing power, availability of substitutes, likelihood of significant and sustainable increase in prices and profit margins after merger, likelihood of removal of a vigorous and effective competitor, likelihood of sustainability of effective competition, nature and extent of vertical integration, possibility of a failing business, nature and extent of innovation, relative advantage by way of the contribution to the economic development and whether the benefits of combination or merger outweigh the adverse impact of the combination.

However, the enforcement provisions of the Competition Act, including those relating to regulation of mergers and other forms of combinations, have not yet been notified and hence the Competition Commission of India cannot at this stage undertake inquiries under these provisions of the Act.

The aviation sector is still a small part of the travel and transportation services sector in India. The industry has already facing several challenges like inadequate infrastructure which is most crucial. The high cost of operations, intense competition, and unsustainably low fares are some reasons behind loses to the industry. While initiatives have been taken to remove the

abovementioned hurdles to growth, a need for further investments in capacity is felt more than ever.

In order to maintain the high growth trajectory of aviation industry in India, it is very important that competitive forces must continue to operate with in this sector. There are some characteristics inherent to this sector that is anti-competitive in nature. The Indian aviation sector has its own competition related issues that need to address. In India, regulations governing minimum fleet size; minimum equity requirements; route dispersal guidelines; minimum fleet & experience requirement of 5 years for International Operations; exclusive right to National carriers to fly to Gulf Routes etc are constraining new entry & strengthening incumbent's position. Some need to be addressed by the ministry where as some must be evaluated by the competition authorities.

A contentious aspect of the abovementioned rules is the requirement that Domestic Aircraft Corporations require at least 5 years of domestic experience, in addition to an aircraft fleet of at least 20 leased or purchased aircrafts. This was notified in the DGCA Circular on Operation of Scheduled International Air Transport Services in 2004, commonly known as the 5/20 Rule. However, this rule has not been replaced, and the requirement of 5 years of domestic experience has been done away with; thus, the rule is now the 0/20 Rule.

Anti-competitive practices or competition issues are creeping in the aviation industry not only in the India but in world at large. However, very little attention has been paid towards this issue; hence, these issues now becoming the main hurdles in the development and growth of the aviation industry, what is important is to prevent such practices before they strengthen their roots in the industry.

The current regulations seem to favor only the incumbents namely Air India-Indian Airlines and Jet-Sahara. None of the other players are allowed to operate internationally. Which is against the competition policy and has adversely affects on the development of the sector. There is need to pay attention towards the competition issues in aviation sector to foster the growth and development of the aviation industry. Prevention is better than cure.

There are some regulatory barriers inherent in our domestic air transport policy which may constrain new entry & have anti-competitive effects. There is need to pay attention towards the

competition issues in aviation sector to foster the growth and development of the aviation industry, moreover, of the country.

A number of competition law issues plague the aviation industry currently. For example, under the current legal framework, slots at Airports managed by the Airport Authority of India are allocated by itself, while private airports have slots provided by the concerned Special Purpose Vehicle in coordination with the airports authority of India. Domestic airlines that desire such slots must file for the same with the DGCA and the concerned entity managing the airport. Slots are allocated twice in a year, in six-month seasons. The allocation is based on "grandfather rights" and a "use it or lost it" policy. Under the "grandfather rights" aspect, slots that have been allocated to a particular carrier in the previous season and have been used to a significant extent are reverted to the same carrier; the large majority of slots are allocated by this method. When airlines merge with or acquire another airline, all of the latter's airport infrastructure, including its slots, transfer to the former; the "use it or lose it" rule finds that the former will be entitled to such slots so long as they are being used, and such rights will be lost as soon as they are no longer in use. 50 percent of whatever slots are left over after application of "grandfathering" and "use it or lose it" basis are allotted to new airlines. It has been noted that the process of "grandfathering" is a significant entry barrier to new airlines.

Another entry barrier exists in Route Dispersal Guidelines. Under the policy of the Ministry of Civil Aviation, routes are divided in Category I (Metros) Category II (North-East, Jammu and Kashmir, Andaman and Nicobar, and Lakshadweep) and Category III (all other routes). Any operator deploying scheduled Air Transport Services on one or more routes under Category I must deploy on Category II 10 percent of the capacity it deploys on Category I and must deploy on Category III 50 percent of the capacity it deploys on Category I. As uneconomical routes must be served by all airliners, and airliners may further be forced to buy different kinds of aircraft for different routes, this policy acts as a significant entry barrier to new airlines. Other challenges include cartelization, price collusion (such as collusive increases in fuel surcharges, which the Competition Commission of India has repeatedly penalized) and numerous mergers and acquisitions.

Competition Law Issues in Aviation Industry

The Competition Commission of India is therefore another important regulator in the sphere of the aviation industry and is empowered by the Competition Act, 2002 to ensure that participants do not indulge in anti-competitive practice. The CCI has kept a close watch and investigated a number of cases in the aviation sector under Section 3 and Section 4 of the Act. A few of the issues dealt with by the CCI are discussed below.

Cartels and Abuse of Dominance

In the case of *Uniglobe Mod Travels Pvt. Ltd. v. Travel Agents Federation of India & ors* ("Uniglode"). The CCI found the cartelization of travel agents and penalized them for breach of Section 3 of the Act. The issue arose when foreign airlines, such as Singapore Airlines etc. and domestic airlines such as Jet, Kingfisher etc. issued notices to the travel agents to move from the "commission" based model of remuneration to "transaction" based model. This was a shift from prior practice wherein the travel agents had been getting a fixed commission by the airlines on every ticket sold by them to a transaction fee model wherein the travel agent charge the passenger according to the services rendered and the bouquet of services offered. The travel agents were reluctant to adopt the new model since the commission based model ensured that they got an assured return on each ticket sold. Therefore, through their respective associations, travel agents formed an agreement to boycott the decision and subsequently stopped booking ticket for these Airlines. This particular action pressurized the domestic airlines operators into revoking their decision of switching to the transaction based model.

The foreign airlines hoeever maintained their stance. The Informant, Uniglobe Mod, a travel agent rendering various travel services, boycotted such an arrangement and continued to render services to the Foreign Airlines. This resulted in the informant's expulsion from the association on account of non-adherence to the terms and conditions laid down by them. The informant therefore filed a complaint under Section 19(1)(a) of the Competition Act alleging that the travel agents had entered into anti-competitive agreements amongst themselves. The CCI, on completing an investigation, found the Travel Agents association to be in contravention of Section 3(1) and 3(3)(b) of the Act given the fact that three fourth of the tickets were booked through agents. This established the fact that they held substantial market power. The CCI

therefore directed them to refrain from indulging in such anti-competitive practices in future and also imposed a penalty upon them. The parties aggrieved with the order approached the Competition Appellate Tribunal ('COMPAT") which upheld CCI's order.

Code-Sharing Agreements - Often, instead of entering into full-fledged mergers or acquisitions, airlines choose to achieve joint synergies by entering into mutual exchange contracts. One such contract is a Code-Sharing Agreement (CSA). CSAs have come into prominence with the advent and increase in the use of computer reservations systems on the internet. A CSA essentially allows for a flight operated by one carrier, also to be marketed by another carrier, under that other carrier's code and flight number. For instance, Indigo airlines (operating with flight no. IN 3204) may have a code-sharing agreement with Jet Airways (which operates with flight no. JT 2434) for a specific route. In such a situation, Jet Airways would be permitted to market and sell the seats on Indigo airlines under its flight number for a specific route. The carrier operating the flight is known as the "operating carrier" (Indigo airlines), while the carrier marketing the flight under its own code is known as the "marketing carrier" (Jet Airways).

The underlying motivation of airlines entering into such agreements is to broaden the number of destinations and flight timings they can offer their passengers without incurring the costs and difficulties associated with investing in additional equipment, or merging with another airline. CSAs also enhance the presence of an airline in markets where it would otherwise have no profile, and hence facilitate the marketing of its services, allowing its seats to be sold via a marketing carrier which may be much better known in that market.

It is important to note that the Government has recently addressed the issue of code-sharing agreements between domestic and foreign airline operators under the NCAP 2016. Specifically, the policy provides that all domestic carriers will be free to enter into code-share agreements with foreign carriers to any point in India available under the relevant ASA. Further, designated Indian carriers will be permitted to enter into international code-share agreements without obtaining the prior approval of the MCA.

Apart from code-sharing, it is pertinent to note that airlines can form cooperative marketing alliances which cover a wide array of joint activities. In general, alliances may include cost-reduction initiatives (sharing or consolidating airport facilities such as gates, lounges, sharing the

ground handling services, etc.), schedule and gate coordination to provide more convenient connections between flights of alliance partners, and frequent-flyer program and/or airport lounge reciprocity etc.

However, as in cases of mergers and acquisitions, if the purpose for entering into any of these agreements is to dominate or control and has an appreciable adverse effect on competition in the market, the CCI may pass orders directing parties to discontinue such agreements and impose monetary penalties.

LAW OF TAXATION

A tax may be defined as a pecuniary burden laid upon individuals or property owners to support the Government, a payment exacted by legislative authority. A tax is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority. Tax law in India consists of direct tax law and indirect tax law, and may be paid in money or as its labour equivalent (often but not always unpaid labour). India has a well-developed taxation structure. The tax system in India is mainly a three-tier system, divided between the Central, State and the Local Government organisations.

Direct tax law of India

Corporate Tax laws have been volatile and dynamic in the past decade. Today, it is imperative to strategise business, bearing in mind the fundamentals of Indian tax laws rather than its provisions. The new direct tax law is operational from April 2012. New statutes often promise to be simpler and less burdensome. Yet, taxes are an item of dynamic cost or outgo to the assessee and tax payers strive to garner tax saving opportunities. Hence assessees, resident and non-residents have to plan their activities in a prudent manner, which necessitates professional assistance.

The Central Board of Direct Taxes (CBDT) is a part of the Department of Revenue in the Ministry of Finance, Government of India. The CBDT provides essential inputs for policy and planning of direct taxes in India and is also responsible for administration of the direct tax law through Income Tax Department. The CBDT is a statutory authority functioning under the Central Board of Revenue Act, 1963.

Such assistance may encompass domestic and international income-tax matters, inbound investment structuring, tax efficient mergers and acquisitions compliant with Indian corporate and tax laws, expatriate taxation and transfer pricing.

Indirect tax law of India

Indirect taxes are taxes collected by an intermediary from the person who bears the ultimate economic burden of the tax. Direct taxes are collected directly from the person on whom tax is imposed. In India, both the Union Government at the federal level and the provincial or state governments impose various indirect taxes. Customs Duties, Excise Duties, Service Tax and Value Added Tax are examples of indirect tax that India levies. Indirect taxes occupied the numero uno position for a long time in the fiscal history of India. Being a major source of tax revenue for the governments at all tiers, administration of indirect taxes has been witness to different interpretations of provisions and consequential disputes. India is on the threshold of major reforms in this area as Goods and Services Tax (GST) is set to be introduced merging all indirect taxes.

The Central Board of Excise and Customs under the Department of Revenues in the Ministry of Finance deals with the task of formulation of policy concerning levy and collection of indirect tax. In exercise of the powers conferred, the Central Government makes for the purpose of the assessment and collection of indirect tax.

The indirect tax law is being administered by various Central Excise Commissione rates, working under the Central Board of Excise & Customs. There are six Commission rates located at metropolitan cities of Delhi, Mumbai, Kolkata, Chennai, Ahmedabad and Bangalore, which deal exclusively with work related to Service Tax. Directorate of Service Tax at Mumbai oversees the activities at the field level for technical and policy level coordination.

Taxation Law and Aviation

Corporate Income Tax - Income tax in India is levied under the Income Tax Act, 1961 ("ITA"). While residents are taxed on their worldwide income, nonresidents are only taxed on income arising from sources in India. A company is said to be resident in India if it is incorporated in India or its place of effective management is located in India.

Resident companies are taxed at the rate of 30% , while non-resident companies are taxed at the rate of 40%. A minimum alternative tax is payable by resident, and in certain circumstances, non-resident companies at the rate of around 18.5%.

The Indian Finance Minister in his budget speech in 2015 had proposed to reduce the headline domestic corporate tax rate from 30% to 25% over the next four years, accompanied by a corresponding phasing out of the various exemptions and deductions available under the ITA. The Finance Act, 2016 began this process by reducing the domestic corporate tax rate to 29%, for those companies whose total turnover or gross receipts in financial year 2014-15 (i.e., April 1, 2014 to March 31, 2015) does not exceed INR 50 million.

Dividends - Dividends distributed by Indian companies are subject to a dividend distribution tax ("DDT") at the rate of around 15% (calculated on a gross-up basis), payable by the company. However, no further Indian taxes are payable by the shareholders on such dividend income once 109. India introduced the 'place of effective management ("POEM") test for determining the residential status of a company in 2016. Under the POEM test, a company is said to be resident in India if it is incorporated in India or; if its place of effective management is in India. POEM has been defined to mean the place where key management decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made. Until the introduction of POEM, foreign companies were characterized as being tax resident of India only on the satisfaction of the 'control and management' test, which required that the foreign company's control and management be wholly situated in India. All tax rates are applicable to Financial Year 2016-17 and are exclusive of surcharge and education cess. DDT is paid. Accordingly, there should be no withholding tax applicable on the payment of dividends to a non-resident.

The Finance Act, 2016 has levied a tax at the rate of 10% on dividends received from a domestic company, by a resident individual or firm, where the amount of dividend received exceeds INR 1 million. Dividends received from a domestic company by a non-resident company should continue to be Indian tax exempt in the hands of the foreign company, provided that DDT has been paid by the distributing domestic company.

A. Interest, Royalties and Fees for Technical Services - Interest earned by a non-resident may be taxed at rates ranging between 5% to around 40%, depending on the nature of the debt

instrument. The withholding tax on royalties and fees for technical services earned by a non-resident is 10%. These rates are subject to available relief under an applicable tax treaty. In this context, it is important to note that the definition of royalties and fees for technical services under Indian domestic law is much wider than the definition under most tax treaties signed by India.

Capital Gains - Gains earned by a resident company from the transfer of capital assets situated anywhere in the world are taxable in India. In the case of non-residents, only those gains arising out of the transfer of a capital asset in India should be taxable. The tax treatment of capital gains depends mainly on whether the gains are short term or long term. Short term capital gains arise upon the transfer of assets held by a taxpayer for a period of 36 months or less before the date of transfer (12 months or less in the case of securities listed on a recognized stock exchange in India, and 24 months in the case of unlisted shares of an Indian company). Long term capital gains arise upon the transfer of a capital asset held for a period of more than 36 months (12 months in the case of listed securities and 24 months in the case of unlisted shares of an Indian company).

Short term capital gains arising from the transfer of a listed equity share are taxable at the beneficial rate of 15%, while long term capital gains arising from the transfer of listed equity share are tax exempt. Short term capital gains arising from the transfer of any other capital asset are taxed at the corporate tax rate of 30%, while long term capital gains arising from the transfer of such other capital assets are subject to tax at the rate of 20% . An Indian company would also be taxed at the rate of around 20% on gains arising to shareholders from distributions made in the course of a buy-back or redemption of shares.

Withholding Taxes - Tax would have to be withheld at the applicable rate on all payments made to a non-resident, which are taxable in India. The obligation to withhold tax applies to both residents and non-residents. Withholding tax obligations may also arise with respect to specific payments made to residents and the failure to withhold tax could result in tax, interest and penal consequences.

Double Tax Avoidance Treaties - India has entered into more than 80 treaties for avoidance of double taxation. A taxpayer may be taxed either under domestic law provisions or the tax treaty

to the extent it is more beneficial. Tax treaties generally provide that the business profits of a foreign enterprise are taxable in a State only to the extent that the enterprise has in that State a permanent establishment (PE) to which the profits are attributable. The definition of PE included in tax treaties is therefore crucial in determining whether a non-resident enterprise must pay income tax in another State.

Under the ITA, the taxation of foreign airline operators is undertaken on a 'presumptive basis' where the gross receipts of such operator are taxable at the rate of 5%. Whether a loss making airline would obligated to pay tax is a contentious issue. However, the Delhi High Court has held that a loss making foreign airline operator would not be required to pay tax.

However in terms of most tax treaties India has entered into, profits from the operation of aircraft in international traffic are taxable only in the country in which the airline operator is a resident. A non-resident claiming treaty relief would be required to file tax returns and furnish a tax residency certificate issued by the tax authority in its home country. Certain tax treaties such as the treaties with Mauritius, Singapore, and the Netherlands also provide significant relief against Indian capital gains tax and interest income in specific circumstances. Until recently, the treaties with Mauritius and Singapore provided such relief with respect to tax on all capital gains; however, the Governments of India and Mauritius have recently agreed upon a Protocol to the India-Mauritius tax treaty which provides for source-based taxation of capital gains arising on or after April 1, 2017 from the alienation of shares of and Indian company. The Protocol also provides for a grandfathering provision which exempts capital gains arising out of sale of shares of an Indian company that were acquired before April 01, 2017, and a transition period which allows for a beneficial tax rate for capital gains arising from the alienation shares between April 01, 2017 and March 31, 2019. As the India-Singapore tax treaty's capital gains benefits are linked with those under the India Mauritius tax treaty, the same source-based taxation of capital gains arising from the sale of Indian shares should be applicable from April 1, 2017. However, the full impact of the new Protocol on the India-Singapore tax treaty is still unclear, including whether the same grandfathering and transition period provisions provided under the India-Mauritius Protocol will also be applicable under the India-Singapore tax treaty. India is currently negotiating with Singapore to amend their treaty.

Anti-Avoidance - A number of specific anti-avoidance rules are enforced in India. Cross-border transactions between related parties would be viewed for tax purposes on an arm's length basis. Transfer pricing rules apply to certain domestic transactions as well. India does not have any thin capitalization rules at the moment. However, effective from April 1, 2017 wide general anti avoidance rules ("GAAR") shall be implemented to tax or disregard certain 'impermissible avoidance arrangements' that are abusive or lack commercial substance. GAAR is likely to impact some of the conventional tax optimization structures for India.

Indirect Taxes - Indirect taxes are imposed at the federal and state level on expenses incurred. This includes service tax, customs and excise duty, value added tax ("VAT") and central sales tax. The rate of these taxes vary depending on the product and/or service.

Service tax is payable by the service provider at the rate of 14.5% (to be increased to 15% from June 1, 2016) on all services except for services specified in a negative list. Services provided outside the taxable territory of India are not subject to service tax. Air transport services provided by an airline are taxable at 15% (however, an abatement of 60% is available in the case of economy class, and of 40% in the case of any other class Customs Duty would be applicable at the rate of 3% on the import of aeroplanes and other aircrafts (not being helicopters or space craftes), and at the rate of 10% on the import of ATF. Additional Duty, Countervailing Duty etc. may also be applicable. The Government has recently increased excise duty on Aviation Turbine Fuel from 8% to 14% for commercial airlines; however this increased rate will not be applicable to Scheduled Commuter Airlines operating from Regional Connectivity Scheme airports. In an effort to promote MRO services, the Government has also recently exempted tools and tool kits from customs and excise duty when they are imported / procured for MRO services, and has done away with the rule requiring that MRO service providers utilize duty free parts for maintenance, repair and overhauling within one year.