All India Bar Examination 2010

Preparatory Materials

Book 2 of 2

Rainmaker
THE LEGAL PEOPLE

All India Bar Examination Preparatory Material

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All India Bar Examination: Preparatory Materials, Book 2

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Introduction

The advent of the modern welfare state has witnessed an expansion of the administrative and bureaucratic apparatus, its reach, functions and powers. The significance and growth of Administrative Law is the direct result of this growth in administrative powers and functions. If the State is to perform myriad functions to discharge its socio-economic duty towards citizens, it needs a huge administrative apparatus or bureaucracy to implement these policies.

In practice, it is not sufficient to merely pass Acts of Parliament laying down general principles and guidelines, and then leave it to the courts to enforce them in particular situations. Because different situations involve problems of detail and issues which cannot all be anticipated and planned for in advance, the practical application of laws and enactments may require delegation of power to expert or local bodies, or may necessitate discretionary power being vested in an authority to take decisions on behalf of the State in individual cases. Consequently, when such extensive powers to affect the life, liberty, and property of citizens are conferred upon the administration, it becomes necessary to evolve rules of Administrative Law to protect citizens from a potential overreach of power by the administration.

Seen in this light, the most apt definition of Administrative Law is given by Prof. Wade when he pithily describes it as "the law relating to control of governmental power" (Wade and Forsyth, *Administrative Law*, 8th Edn., p.4). As stated by Prof. Sathe, Administrative Law deals with the following questions (S. P. Sathe, *Administrative Law*, 6th Edn., p.4):

- What sort of powers does the State exercise?
- What are the limits on such power?
- What procedures does it have to follow in exercise of its powers?
- What are the methods by which the State can be kept within those limits?
- What remedies are available to the individual against abuse of power by the State?

Sources of Administrative Law

Administrative law is essentially judge-made law, and is not contained in any single legislative enactment. A Constitutional basis for Administrative Law can be found on a conjoint reading of the Fundamental Rights chapter (Aa.12 – 35 in Part III), liability of the State (A.299), and the system of paramount judicial review of administrative action (Aa. 32, 226, and 227). The Constitution has also recognised the concept of tribunals as instruments of quasi-judicial administrative adjudication (Aa.323-A and 323-B), Public Sector (A.298 read with A.19(6)) and the principle of the Executive's accountability towards the Legislature as the supreme law making body (A.74).

While in England there are several major enactments and studies dealing with various facets of Administrative Law such as the Donoughmoure Committee Report on Minister's Powers, 1932, the Statutory Instruments Act, 1946, the Tribunals and Inquiries Act, 1958, and the Crown Proceedings Act, 1947, in India there has been comparative legislative inertia in the matter of codifying principles of Administrative Law. Consequently, the rules of Administrative Law prevalent in India have to be pieced together using judicial decisions, Law Commission Reports, Reports of Parliamentary and other Committees, and individual Statutes with Rules, Regulations, and Orders framed thereunder. This has led to a degree of adhocism in the development of Administrative Law in India.

Classification of Administrative Action: Traditional and Emerging Approaches

Although it is difficult to categorise various forms of administrative action, the traditional

theoretical framework of Administrative Law is organised in the following three-fold classification:

- *Legislative Function*, in the form of delegated legislation, sub-delegation of legislative power, directions and administrative instructions, and control / judicial review of the above. The chief characteristics of legislative functions are that they involve overall rule formulation; are of general nature; and that they operate prospectively.
- Quasi-*Judicial Function* is exercised by an authority when (a) it is empowered under a statute to do any act; (b) the act will affect the civil rights of a citizen; (c) ~~whether~~ the act is done in the context of resolving a dispute between two citizens, or whether the dispute is between a citizen and the authority itself; and (d) the authority is required to act judicially and in accordance with rules of natural justice (*Indian National Congress (I)* v. *Institute of Social Welfare*, (2002) 5 SCC 685). The Donoughmoure Committee Report stated that a judicial decision presupposed a dispute between parties, and then involved 4 prerequisites: (i) presentation (not necessarily oral) of their case by the parties; (ii) if dispute involved a question of fact, the ascertainment of the fact by adducing of evidence by parties often with the assistance of argument; (iii) if dispute involved a question of law, submission of legal argument by parties; and (iv) a decision which disposes of the matter by a finding on facts of the case and application of law of the land to facts so found. A *quasi*-judicial decision involved stages (i) and (ii), but does not necessarily involve (iii), and never involves (iv). The place of (iv) is taken by administrative action (*Report of Committee on Minister's Powers, 1932, pp. 73-74).*

  Illustration: Where registration of a child welfare agency was cancelled without hearing, the action was held bad as the Government was exercising a *quasi*-judicial function. (*Laxmikant Pandey* v. *Union of India*, AIR 1992 SC 118)

- *Administrative Function*, which involves implementation of policies laid down directly by the legislature, or by administrative bodies in exercise of their legislative function, or of a decision reached in exercise of its *quasi*-judicial function. "A legislative act is the creation of a general rule of conduct without reference to particular cases; an administrative act cannot be exactly defined, but it includes adoption of a policy, making and issue of a specific direction, and the application of a general rule to a particular case in accordance with requirements of policy expediency or administrative practice" *(*Woolf, Jowell and Le Sueur, *De Smith's Judicial Review*, (2009) 6th Edn., p. 980)

  Illustration: ~~Where~~ Sec. 47(3), Motor Vehicles Act empower~~sed~~ the Regional Transport Authority to limit the number of stage carriage permits.~~, it was~~ This is not a *quasi*-judicial function but an administrative one, as the Authority's decision~~s was~~are based on an official policy. (*Mohd. Ibrahim* v. *S. T. A. Tribunal, Madras*, AIR 1970 SC 1542)

In practice however, administrative actions tend to be a mixture of legislative, *quasi*-judicial and administrative functions, and it can be difficult to identify or classify them in watertight categories.

Illustration: Wage fixation by a Statutory Wage Board may be classified as legislative function as it affects a large number of employers and employees and operates prospectively, but it may also be considered as a *quasi*-judicial function as it chooses between competing claims put forth by employers and employees akin to a Labour Tribunal. The Supreme Court, after considering this question at length, ultimately left it undecided in *Express Newspapers* v. *Union of India*, AIR 1958 SC 578. Moreover, the same power given to one body may be classified as administrative in one situation, and legislative or quasi-judicial in another.

Illustration: S.3 of the Essential Commodities Act empowers the Central Government to

issue 'Orders' to ~~regulate various things~~ supply and sell any commodity that is defined as an 'Essential Commodity' in this Act. Such an order may have a legislative character if it is general or affecting a class of persons, in which case it must be published in the Gazette, but it may also be administrative if it is directed to a specified individual in which case general publication is not necessary. This has led to an emerging modern trend of abandonment of this formalistic classification in favour of an approach which is based on the merits of each individual case. This modern approach to Administrative Law is firmly established in the U.K. through case law (Notion that fair hearing reserved for *quasi*-judicial function "scotched as heresy" per Lord Denning in *R* v. *Gaming Board Ex p. Benaim and Khaida*, [1970] 2 QB 417 at 430; "Fancied distinction" between administrative and quasi-judicial function rejected in *Leech* v. *Parkhurst Prison Deputy Governor,* [1988] AC 533 at 566, 579) and in leading authorities like *De Smith's Judicial Review*, *6th Edn.*, where the chapter on "Classification of Functions" has been removed from the main text and included only as an appendix of historical interest.

In India, however, despite some judgments bypassing the classificatory approach (*S. C. & Weaker Section Welfare Association* v. *State of Karnataka*, (1999) 2 SCC 604: In a challenge to the rescinding of a prior notification, the Supreme Court ignored the legislative nature of an administrative action, and applied the test of fair hearing and natural justice normally reserved for actions of quasi-judicial nature), the predominant approach remains the classificatory one.

As each of these functions involve their own effects and characteristics, classification assumes practical significance for the following reasons, which are illustrative but not exhaustive:

- *Publication*: Legislative orders need to be published in Official Gazettes as they are of general application, whereas *quasi*-judicial and administrative orders being specific, need only to be communicated to the affected individuals.
- *Procedure*: *Quasi*-judicial functions require observance of rules of natural justice like the provision of fair hearing, whereas authorities discharging legislative or administrative functions normally need not adhere to natural justice but only to procedure required by their parent statute or law.
- *Scope of Judicial Review*: In general, the broadest review is conducted of adjudicatory functions, while narrower review is possible of administrative action, and even narrower review of legislative function.

Delegated Legislation

The majority of administrative actions which affects our day-to-day life ~~is~~are effectuated through delegated legislation. Salmond describes delegated legislation as "that which proceeds from any authority other than the sovereign power and is therefore dependent for its continued existence and validity on some superior or supreme authority" (Salmond, *Jurisprudence*, 12th Edn. p.6).

The rationale for delegating legislative power has been explained by the Supreme Court:

- Technical complexity of the subject matter which may make it impossible for the legislature to plan for all eventualities;
- Executive may require time to experiment, and then fill gaps left by original legislation;
- Time saving by passing skeletal legislation and leaving details to be worked out by local authorities on the ground.

(*Agriculture Market Committee* v. *Shalimar Chemical Works Ltd.*, (1997) 5 SCC 516)

In practice, the term 'delegated legislation' is used in two senses:

- The exercise by a subordinate agency or its further sub-delegate, of legislative power delegated to it by the legislature;
- The subsidiary rules themselves made by the subordinate agency pursuant to clause

(i).

Administrative Law concerns itself with the first sense, that is, the *process* of exercise of delegated power, rather than the *content* of the power itself.

Delegated legislation can take various forms, such as Rules, Regulations, Bye-Laws, and Orders. These expressions are sometimes used interchangeably. In a reply to the Committee on Subordinate Legislation, the Ministry of Law explained the difference between these terms as follows: "Generally, statutes provide for power to make Rules where the general policy has been specified in the statute but the details have been left to be specified by the Rules. Usually, technical or other matters, which do not affect the policy of the legislation, are included in Regulations. Bye-laws are usually matters of local importance, and the power to make bye-laws is generally given to the local authorities." (7th Report VI Lok Sabha p.3) It has been opined that 'Rules' denote delegated legislation generated by government departments, whereas 'Regulations' and 'Bye-Laws' denote delegated legislation framed by statutory corporations. (M.P. Jain and S.N. Jain, *Principles of Administrative Law*, Vol.1, 6th Edn., p.53)

Delegated Legislation: Origin and Principles

Prior to Independence, delegated legislation in India was on an unsure legal footing. Although upheld by the Privy Council (*Queen* v. *Burah*, (1878) 5 IA 178), the Federal Court of India narrowed the scope of delegated legislation (*Jatindra Nath* v. *Province of Bihar*, AIR 1949 FC 175; *Emperor* v. *Benorilal Sharma*, AIR 1943 FC 36). This narrow interpretation created practical problems in administration and required correction upon attaining Independence and the coming into force of the Constitution.

The President of India by reference under A. 143 sought the opinion of the Supreme Court on this issue. The Supreme Court firmly established the validity of delegated legislation in *In Re Delhi Laws Act (1912)*, AIR 1951 SC 332. In upholding delegated legislation, the Supreme Court introduced the concept of "Essential Legislative Function" which could not be delegated, while the power to fill up details or supplement legislation could be validly delegated.

Essential Legislative Function and Excessive Delegation

"Essential Legislative Function" means the determination of legislative policy and legal principles which are to control given cases, and which must provide a standard to guide delegated officials who implement the law (*Harishankar Bagla* v. *State of M.P.*, AIR 1954 SC 465, 468). The delegated authority must only implement stated policy, but if there is abdication of legislative power by transferring policy formulation role to the delegate, then there is excessive delegation, which will be invalidated by the court. (*Mahe Beach Trading Co.* v. *Union Territory of Pondicherry*, (1996) 3 SCC 741)

Put simply, the test is to examine whether the policy has been fixed by the legislature, and the delegated authority has been given sufficient guidance and channeliation for exercise of power of delegated legislation (*Consumer Action Group* v. *State of Tamil Nadu*, (2002) 7 SC 425). This guidance may be found in the enabling provision which permits delegation, subject-matter, scheme, other provisions of the Statute including its preamble, and the facts and circumstances in the background of which the Statute is enacted.

Illustration: S.5(2)(b), Gold Control Act, 1968 which authorised the Administrator to regulate various activities related to gold "so far as it appeared to him necessary and expedient for carrying out the provisions of the Act" was held invalid for excessive delegation, as power delegated was 'legislative' in nature and was controlled by no guidance or canalization in scheme, context or other sections of the Act. (*Harakchand* v. *Union of India*, AIR 1970 SC 1453)

The concept of Excessive Delegation will now be examined in the context of some typical instances of delegated legislation:

- *Power to modify an Act*: Power to modify an Act can be delegated, subject to the safeguards that the parent Act lays down the policy according to which the power is to be exercised. The delegate cannot use the power to change the policy provided by the statute itself.

Illustration: A local government Act stated that no municipal tax could be imposed upon a locality without giving residents a hearing. By a notification under this Act, the Governor subjected residents to municipal taxation, but excluded the operation of provisions providing for hearing. The notification was invalidated as it modified an essential feature of the Act, namely the right of hearing before decision. (*Raj Narain Singh* v. *Patna Administration Committee*, AIR 1954 SC 569)

- *Power to Repeal*: In *In Re Delhi Laws Act*, the Supreme Court held that power to repeal an Act could not be delegated as it was an essential legislative function. However, a virtually identical provision in the Life Insurance Corporation Act which authorised the Central Government to make Rules to carry out the purposes of the Act "notwithstanding the Industrial Disputes Act" and other laws in force, was upheld despite the delegated legislation impliedly repealing the other Acts in its sphere of operation. (*A. V. Nachane* v. *Union of India*, (1982) 1 SCC 205)
- *Power to Remove Difficulties*: Such clauses, also called 'Henry VIII clauses', typically confer wide powers upon the delegated authority to make Orders to remove difficulties in implementing the parent Act, but in practice are upheld only when used for making minor changes not affecting policy.

Illustration: S.34, Contract Labour (Regulation & Abolition) Act, 1970 contained a clause authorising the making of provisions to remove difficulties in implementation. The clause was upheld, subject to the safeguards that no power to modify the Act would be exercised and it would be subject to judicial review as to its consistency with the parent policy. (*Gammon India Ltd.* v. *Union of India*, AIR 1974 SC 960)

- *Power to Exempt and Include*: In this form of delegation, the parent Act lays down the policy and indicates the spheres of operation, but gives power to the administration to subsequently include or exclude people from its operation. Such clauses are justified as providing flexibility to adapt to changing circumstances, so long as the inclusion or exemption is done in furtherance of purpose of the parent Act.

Illustration: S.27, Minimum Wages Act authorises the addition of categories of industries to which the provisions of the Act will apply. A challenge to this section on the ground of excessive delegation was repelled as it provided flexibility and advanced social purpose of the Act. (*Edward Mills Co.* v. *Ajmer*, AIR 1955 SC 25) However, S.16(2)(9), Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 which empowered the Central Government to add to the list of diseases and conditions to which the Act would apply was held to be excessive delegation, as the parent Act prescribed no criteria or guidance on the basis of which new diseases could be added. (*Hamdard Dawakhana* v. *Union of India*, AIR 1960 SC 554)

- *Delegation of Fiscal Power*: While the power to tax is an essential legislative function (A. 265, Constitution), it is impossible to legislate on all aspects of taxation and some amount of delegation is inevitable. It has been held permissible to delegate the power to select persons on whom, or goods and transactions on which the tax is to be levied, or even rates of taxation, provided the parent Act gives intelligible guidelines for the exercise of such power. However, courts normally do a stricter scrutiny of delegated legislation when it involves a taxation or fiscal element.
- *Skeletal Legislation*: 'Skeletal legislation'

denotes a statute which delegates legislative power without laying down sufficient policy for the guidance of the delegate. While such legislation should be invalid as it violates the principles of delegation, in modern practice there are a number of statutes which lay down only the barest possible policy guidance and leave enormous discretion to the delegate not only on matters of detail, but also on matters of policy choice. Courts sometimes uphold skeletal legislation, which can only be justified on the ground of expediency.

Illustration: S.3(1)(a), Imports & Exports Control Act, 1947 authorised the Central Government to prohibit or restrict import and export of goods of any specified description, despite the Act not explicitly stating any policy. The Supreme Court upheld the delegation of power by referring to the predecessor Act, which contained a policy statement. (*Bhatnagars & Co.* v. *Union of India*, AIR 1957 SC 478)

Judicial Control of Delegated Legislation: *Ultra Vires*

Delegated Legislation can be judicially assailed on two grounds: as being unconstitutional, and as being *ultra vires* its parent Act. A challenge on the basis of constitutionality is more properly a subject of Constitutional Law, and will not be dealt with here. The doctrine of *ultra vires* has two forms: substantive and procedural.

Substantive Ultra Vires

This doctrine is concerned with the scope and extent of power conferred by the parent statute, and envisages that power conferred by delegated legislation which goes beyond what is authorised by the parent Act can be declared void. Delegated legislation must satisfy the following tests: (i) it must conform to the provisions of the statute under which it is framed, and (ii) it must come within the scope and purview of the rule-making power conferred by the parent Act on the authority framing the rule. (*General Officer, Commanding-in-Chief* v. *Subhash Chandra Yadav*, (1988) 2 SCC 351)

In applying this principle, courts undertake a three-stage analysis: First, they determine the meaning, scope and extent of rule-making power conferred by the Act. In doing so, they make reference to the provisions, Preamble, Objects and Reasons, and background of the legislation. Second, they determine the meaning and scope of the delegated legislation. Finally, they test the delegated legislation against the parent Act to examine whether the Rule in question has some nexus with the underlying policy of the Act.
It is important to note that while adjudging the *vires* of delegated legislation, courts do not make a subjective evaluation of the policy underlying the Act, and will not substitute their opinion as to policy for that of the legislature. Courts are only concerned whether the impugned delegated legislation falls within the rule making power conferred on the delegate by the Statute. (*Shri Sitaram Sugar Co. Ltd.* v. *Union of India*, (1990) 3 SCC 230, 254-57)

If a Rule is wrongly stated to be framed under a particular provision of a statute, but otherwise falls within the competence of the rule making authority, wrong labelling will not render the Rule *ultra vires*. (*Indian Aluminium Co* v. *Kerala S. E. B.*, AIR 1975 SC 1967)

It is important to note that in practice, there is a presumption of validity of delegated legislation, and courts lean towards interpreting delegating provisions in parent statutes broadly so as to uphold Rules framed thereunder. (*Hoffman La Roche* v. *Secretary of State for Industry*, (1975) AC 295, 366)
Moreover, delegating provisions in Acts are themselves framed in broad, general terms, giving ample scope and discretion to delegated authority.

A common method of delegation is to first give a general Rule-making power for the purposes of the Act, and then to lay down without prejudice to the generality of the previous clause, specific heads for which the delegate may make Rules. It has been held

that the specificity in the second clause is only illustrative, and does not restrict the generality of the Rule-making power. So if a Rule does not fall under a specific head, but can be justified under the general Rule-making power, it will be upheld. (*Emperor* v. *Sibnath Banerji*, AIR 1945 PC 156, 160) However, the reverse is not true, so if the specific head itself does not relate to the general power conferred by the Act, such delegation will be *ultra vires*. (*Regina* v. *St Aloysius Higher Elementary School*, AIR 1971 SC 1920)

Keeping these principles in mind, the following are some illustrations of operation of this principle:

Cases where delegated legislation held Ultra Vires:

- Licensing power under the Cinematograph Act was given to District Magistrates, who could grant licenses "subject to control of the Government". The Government framed Rules in effect transferring the licensing power to itself and rendering the Magistrate virtually redundant. Such a Rule was *ultra vires* as the Act contemplated a licensing authority distinct from the Government. (*State of Gujarat* v. *Krishna Cinema*, AIR 1971 SC 1650)
- Under the Land Ceiling Act, a State government framed Rules prohibiting transfer of any land subservient to tea plantations. This Rule held *ultra vires* as the Act did not delegate any power to enact prohibition on transfers of land, nor did such prohibition advance any purpose of the Act. (*Kunj Behari Lal Butail* v. *State of Himachal Pradesh, (2000) 3 SCC 40*)

Cases where delegated legislation held Intra Vires:

- Rule 8-C of the Tamil Nadu Mines and Minerals Rules banned mining leases in favour of private persons and conferred a monopoly on government corporations. It was contended that Act only gave power to regulate, not prohibit, and grant of monopoly being a legislative function, the same could not be achieved through subordinate legislation. The Court upheld the Rules on the ground that it furthered the policy objectives of the Act. (*State of Tamil Nadu* v. *Hind Stone*, (1981) 2 SCC 205)
- Rule 41-A of the Karnataka Cinema (Regulation) Rules imposed a restriction on cinemas on only showing four shows in a day. S.19 of the parent Act conferred a power to frame Rules to carry out the purposes of the Act. The Rule was upheld as covered by S.19, as the power was wide enough to cover all aspects related to film exhibition, including the number of hours films could be exhibited. (*Minerva Talkies* v. *State of Karnataka*, (1988) Supp SCC 176)

Procedural Ultra Vires

There are various procedures to be followed in the process of rule-making, some of which are mandatory and some of which are merely directory. Directory procedural norms can be substantially complied with, but mandatory norms must be strictly observed, failing which delegated legislation will be held bad for procedural *ultra vires*. While exhaustive instances of procedural *ultra vires* cannot be given, and each case must be considered on its own merits to determine whether the specific procedure concerned is mandatory or directory, some recurring examples may be examined:

- *Publication*

Unlike the Statutory Instruments Act, 1946 in the U.K., there is no general statute in India regulating publication of delegated legislation. Many statutes, however, require publication of rules in the Official Gazette, and even otherwise rules are published as a matter of practice. The Supreme Court has settled the issue by holding that publication in Official Gazette is a mandatory requirement in *Harla* v. *State of Rajasthan*, AIR 1951 SC 467. Further, in case of delegation by the Central Government, Rule 319 of the Lok Sabha Rules of Procedure requires all delegated legislation created as a result of delegation by Parliament to be numbered centrally and published immediately.

If no mode of publication is prescribed then

the usual mode of publication in the Gazette can be followed (*State of Maharashtra* v. *Mayer Hans George*, AIR 1965 SC 722), but if a specific mode is prescribed then it is mandatory to adhere to that mode. (*Govind Lal Chaggan Lal Patel* v. *Agriculture Produce Marketing Committee*, AIR 1976 SC 263)

Publication has the following advantages: (i) authenticity to the Rules by official publication; (ii) certainty for citizens as to what the law is; and (iii) ease of access to the law for citizens. In practice, however, the situation in India with regard to publication is dismal, and it is difficult to access delegated legislation.

- *Previous Publication*

Some statutes require rules to be framed only after "previous publication" (S.59(1), Mines Act, 1952; S.85(1), Estate Duty Act, 1953). The procedure for this is laid down in S.23, General Clauses Act, which requires that before the finalisation of rules, they be published and given publicity to enable stake holders to submit objections or suggestions which can be considered by the rule-making authority. Courts have held that the requirement of pre-publication is mandatory if it is required by the statute.

Illustration: A provision requiring a Municipality to previously publish draft rules imposing a tax on the municipality in order to consult local inhabitants was held to be mandatory. (*Raza Buland Sugar Co.* v. *Municipal Board, Rampur*, AIR 1965 SC 895)

- *Consultation*: While consultation with interested stakeholders increases public participation in the democratic process, statutory provisions for the same are normally held as directory by courts. (*Hindustan Zinc Ltd.* v. *Andhra Pradesh State Electricity Board*, (1991) 3 SCC 299; *T. B. Ibrahim* v. *Regional Transport Authority*, AIR 1953 SC 79). In some cases where consultation was with an expert body, courts have held the requirement to be mandatory. (*Banwarilal Aggarwala* v. *State of Bihar*, AIR 1961 SC 849)

- *Laying*

'Laying' of delegated legislation is a form of legislative control over the delegation process. Laying is used to inform both Houses of Parliament about the content of delegated legislation made from time to time. However, the laying requirement is directory, and failure to lay does not invalidate Rules. (*V. C. Shukla* v. *State (Delhi Administration*, (1980) Supp SCC 249) Equally, the fact that a piece of delegated legislation has been laid before Parliament does not exclude judicial review thereof or affect its legal validity in any way.

Retrospective Operation of Delegated Legislation

In general, delegated legislation operates prospectively and cannot be given retrospective effect. In order to give retrospective effect to delegated legislation, the power to do so must be explicitly and clearly conferred by the parent enactment (*Process Technicians and Analysts Union* v. *Union of India*, AIR 1997 SC 1288), and in the absence of the same, delegated legislation operating retrospectively will be held *ultra vires*. A general power to make rules to carry out the purposes of the Act will not suffice to give delegated legislation retrospective effect.

Exclusion of Judicial Review

Some statutes seek to insulate delegated legislation made thereunder from judicial review by inserting clauses excluding judicial review such as "these rules shall not be called into question in any court", or "rules made shall have effect as if enacted in this Act itself". Judicial review being part of the basic structure of the Constitution, courts have held such clauses do not protect delegated legislation from review. (*State of Kerala* v. *K. M. C. Abdullah & Co*, AIR 1965 SC 1585)

Administrative Instructions and Directions

An important innovation of the administrative process is the issuance of

directions or instructions through various means, such as Circulars, Orders, Memoranda, Policy statements, Manuals, and Press Notes. These have been called '*quasi-*legislation' (Megarry, *Administrative Quasi-Legislation*, 60 LQR 125 (1944)).

Directions are nowadays regularly used to prescribe procedural norms and to fill gaps in the field of discretionary power of officials. The important characteristics of administrative instructions are that (i) unlike delegated legislation, they need not be issued under statutory power but under the general executive power under A.73 (for the Union) or A.162 (for the States); (ii) they are subordinate to delegated legislation - that is, a Rule can override a direction, but a direction can only supplement a Rule, not override it; and (iii) while delegated legislation binds both the administration and citizens, directions / administrative instructions in general are not binding or enforceable through a court, subject to some exceptions.

Directions are sometimes treated by courts as enforceable when they contain a statement of administrative policy and are not repugnant to any statutory provision, or when they have been continuously acted upon by the government and it would be unfair not to give a citizen the benefit of estoppel based on such directions.

Illustration: (i) Where a Memorandum promised certain benefits to ex-servicemen who accepted re-employment, the Respondent, who was re-employed thereunder, was entitled to claim salary fixation according to the Memorandum, even though it was in the nature of administrative instruction only. (*Union of India* v. *K. P. Joseph*, AIR 1973 SC 303); and (ii) Rights acquired by employees over a period of 20 years, though under Directions only, cannot be withdrawn by the Government, which is estopped from doing so. (*P. Tulsi Das* v. *Government of Andhra Pradesh*, (2003) 1 SCC 364)

Sub-Delegation of Legislative Powers

Sub-delegation is the further delegation of power by a delegate to another person or agency. The basic principle in this process is summarised by the maxim '*Delegatus Non Potest Delegare*', that is, a delegate cannot further delegate unless expressly or impliedly authorised to do so by the parent law.
Illustration: Even though no express power to sub-delegate was granted by the Andhra Pradesh Markets Act, 1966, the High Court upheld sub-delegation by implication from S. 57(3) thereof. (*Alapati Seshadri Rao* v. *Agriculture Marketing Committee, Guntur*, AIR 1977 AP 322)

However, as sub-delegation dilutes both accountability and oversight of the original administrative authority, safeguards are necessary. The sub-delegate should not act beyond the scope of the power delegated to him, the sub-delegation should not be vague and should be canalized, and sub-delegated legislation should be mandatorily published to be operative. (*Narendra Kumar* v. *Union of India*, AIR 1960 SC 430)

Having considered various aspects of the legislative function of the administration, we will now consider the non-legislative aspects.

Natural Justice

Rules of Natural Justice are essentially procedural rules that ensure fairness in the process of exercise of governmental power. As stated by the United States Supreme Court, "the history of liberty has largely been the history of observance of procedural safeguards" (*Per* Jackson, J, in *Shaughnessy* v. *United States*, 345 US 206 (1953)).
In Administrative Law, natural justice is a well defined concept that embraces two fundamental rules of fair procedure: (i) Every man has the right to be heard in his defence, or '*audi alteram partem*'; and (ii) No man shall be a judge in his own cause, or '*nemo debit esse judex in propria causa*'.

While earlier the tendency was to confine applicability of the rules of natural justice to administrative actions classified as "*quasi-*judicial", since the decision in *Ridge* v. *Baldwin*, [1964] AC 40, the need to restrict

expanding governmental power has resulted in an imposition of requirements of procedural fairness on almost all administrative proceedings without having to classify them as administrative or *quasi*-judicial. (*Re H. K. (Infant)*, [1967] 2 QB 617) In India, the liberal approach was introduced in *A. K. Kraipak* v. *Union of India*, AIR 1970 SC 150, and is now well established (*Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597; *Mohinder Singh Gill* v. *Chief Election Commissioner*, (1978) 1 SCC 405). The practical test now is to examine the 'nature of function' exercised, and not the 'nature of the authority' exercising it. If administrative action affects the rights of citizens, it imposes a duty to act judicially in accordance with natural justice.

Principles of Audi Alteram Partem

'*Audi alteram partem*' literally means 'Hear the other side', and this far-reaching principle embraces almost every aspect of fair hearing and due process.

The ingredients of fair hearing cannot be put in a straitjacket, and their scope and applicability depends on the context, facts and circumstances of each case. Some situations, like disciplinary proceedings, may require extensive hearing practically akin to a trial, while in other cases where time is of the essence, even a post-decisional hearing may suffice. Nevertheless, the following key principles may be identified:

Notice

Notice means communication of charges, and it is mandatory before action can be taken against a person. Notice must give the affected person sufficient time to prepare a case. It should be adequate and must mention all grounds taken against the person so he is made aware of allegations against her, failing which it will be quashed. The adequacy of a Notice is determined by courts, and the following are some other illustrative examples of when Notice is inadequate:

- Notice contains allegations of fraud without substantiating the particulars of such fraud;
- Notice is not specific as to details of occurrence of incident attributed to noticee, or otherwise vague.

Illustration: Notice of disconnection of telephone line did not contain specific reason but only used vague expression "unauthorised use", it was held bad. (*Kuldeep Dhingra* v. *Municipal Corporation of Delhi*, AIR 1992 Del 228)

- Notice is not specific as to action proposed to be taken.

Illustration: Notice did not specifically indicate that the authority proposed to debar person from taking any future contract with department, such notice held bad. (*Joseph Vilangan* v. *Executive Engineer*, (1978) 3 SCC 56)

- Notice either does not mention grounds on which action is proposed to be taken, or mentions only one of several grounds actually taken, or mentions several grounds without specifying which ground pertains to which proposed adverse action.

Illustration: In preventive detention cases, notice must be given at the earliest opportunity. If grounds are vague or insufficient for the detenu to make a representation, notice will be quashed. (*Madhab Roy* v. *State of West Bengal*, AIR 1975 SC 255)

The requirement of notice has, however, been dispensed with by courts where the affected person intentionally avoids service of notice, or in rare cases, where the court feels the person was not prejudiced by a lack of notice. *Illustration*: In an action against students guilty of violence on campus, notice could not be served as they were absconding. The High Court held that the failure to serve notice would not affect the validity of proceedings. (*U. P. Singh* v. *Board of Governors, Maulana Azad College*, AIR 1982 MP 59)

Hearing

'Hearing' means giving an opportunity to the

accused person to rebut the charges made against her. Such opportunity may be given through personal hearing, or through written representation. Administrative authorities are required to give reasonable opportunity of being heard, but what constitutes reasonable opportunity in a given circumstance is a flexible concept, and the same will be adjudged by courts depending upon the context, facts, and circumstances of the case.

There is no right of oral hearing in all circumstances, and in many cases courts have held that the submission of a written representation is sufficient compliance of natural justice. (*Union of India* v. *Jesus Sales Corporation*, (1996) 4 SCC 69) The necessity of oral hearing would depend on the nature of the enquiry, the nature of facts involved, the circumstances of the case, and the nature of the deciding authority. For example, where complex questions of fact involving technical problems arise, or when detailed evidence is required to be taken from witnesses, an oral hearing may become necessary. Some instances where oral hearing were required are given as follows: (i) When excise duty was imposed on a company on the ground that it manufactured a particular chemical composition, and the company disputed the same, but the government did not give an opportunity for personal hearing before upholding levy of duty, such action was quashed, *inter alia*, as it raised technical questions which should have been decided after taking expert evidence. (*Travancore Rayons* v. *Union of India*, AIR 1971 SC 862); (ii) When determining the question of Indian citizenship of a person and passing a deportation order against her, a personal hearing is necessary. (*Union of India* v. *Chand Putli*, AIR 1973 All 362); (iii) Disciplinary proceedings against civil servants normally require a personal hearing. (*Chandra Kanti Das* v. *State of Uttar Pradesh*, (1981) 2 SCC 704); (iv) Personal hearing is normally insisted upon in disciplinary actions against professionals by their concerned association. (*In Re: An Advocate*, AIR 1989 SC 245); *Institute of Chartered Accountants of India* v. *L. K. Ratna*, AIR 1987 SC 71); and (v) In tax matters, since tribunals discharge *quasi*-judicial functions, they must give adequate right of personal hearing so that the assessee can fully object to the proposed assessment. (*Dhakeshwari Cotton Mills Ltd.* v. *C. I. T.*, AIR 1955 SC 65)

Disclosure of Materials

An adjudicatory body must decide a case only on the basis of relevant materials placed before it, and the affected person should be apprised of such materials and given an opportunity to rebut and explain the same. Whether copies of the material relied upon must be supplied, or whether it is sufficient to convey the gist or allow inspection of the material, will depend on the facts of the case. For example, in disciplinary proceedings against civil servants, the relevant material and even a preliminary inquiry report must be supplied to the accused officer if relied upon by the disciplinary authority. (*Union of India* v. *Mohd. Ramzan Khan*, (1991) 1 SCC 588) However, the principle of disclosure is limited to relevant and material documents alone, and documents not relied upon by the adjudicating body need not be supplied to the affected person. (*Krishna Chandra Tandon* v. *Union of India*, (1974) 4 SCC 374) Natural justice is also infringed if the adjudicatory body decides a matter on the basis of confidential information not disclosed to the affected party (Officer denied a senior certain information, on the basis of a confidential report which was not supplied to him, while juniors were given that information. The Court quashed the order for non-disclosure of relevant material. (*Vijay Kumar* v. *State of Maharashtra*, AIR 1988 SC 2060)

Right of Cross-Examination

Whether this right is available to a person undergoing an administrative adjudication will depend on the facts and circumstances of each individual case. In general, the right to cross examine has been given in the following cases: (i) Inquiry by employer for taking disciplinary action against employees in labour matters (*Rohtas Industries v. Workmen*, (1977) 2 SCC 153); (ii) Disciplinary proceedings against government servants; (iii) Disciplinary proceedings by a statutory

corporation against its employees; and (iv) Tax cases. If the adjudicatory authority allowed taking of oral evidence, right of cross-examination would be available to the opposite party.

Right to Legal Representation

In general, the right to counsel is not considered a mandatory part of the right to fair hearing. (*H. C. Sarin* v. *Union of India*, AIR 1976 SC 1686) Where complicated questions of fact and law arise in an adjudicatory proceeding, however, denial of counsel may result in the party being unable to fully defend she, and this will be violative of natural justice. (*Zonal Manager, Life Insurance Corporation* v. *City Munsif, Meerut*, AIR 1968 All 270) There are several statutory provisions prohibiting the presence of lawyers at adjudicatory proceedings: Ss.36(2)(a), (b), and 36(4), of the Industrial Disputes Act restrict the conditions under which a lawyer can appear before an Industrial Tribunal; Rule 15(5) of the Central Civil Service (Classification, Control & Appeal) Rules 1957 provides that government servants cannot appoint lawyers unless permitted by the disciplinary authority; A.22 (3)(b) of the Constitution prohibits detenues in preventive detention cases from engaging counsel, although the Advisory Board may permit the same. If the government or adjudicating authority is represented through a lawyer, then the concerned person or detenu will have the right of legal representation. (*Nand Lal Bajaj* v. *State of Punjab*, (1981) 4 SCC 327)

Reasoned Decisions

Decisions of administrative bodies must disclose reasons, so that reviewing authorities can examine whether they were taken on basis of relevant considerations or suffer from erroneous factual or legal foundations. This is an important check on the abuse of administrative discretion, and promotes transparency and public confidence in the administrative process. (*S. N. Mukherjee* v. *Union of India*, AIR 1990 SC 1984)
In some limited cases, however, the requirement to give reasons can be excluded either explicitly by statute, or impliedly by surrounding circumstances.
Illustration: In cases of review of an externment order, reviewing authorities will not insist on reasons for rejecting an appeal, as that would involve a discussion of evidence which may lead to danger to witnesses. (*State of Maharashtra* v. *Salem Hasan Khan*, (1989) 2 SCC 316) Similarly, a Court Martial is not required to give reasons under the Army Act (*Som Datt Datta* v. *Union of India*, AIR 1969 SC 414), and in certain cases, it has been held that the disciplinary authority, if it agrees with reasons given by the Inquiry Officer, need not separately give reasons (*Tara Chand Khatri* v. *Municipal Corporation of Delhi*, (1977) 1 SCC 472).

Administrative and adjudicatory bodies are not expected to write judgments like courts of law and courts will not intensely scrutinise the adequacy of reasons, but will look for an outline of reasoning from which the logic of the decision-maker can be understood. Mechanical or stereotyped reasons, or a mere repetition of statutory language will not make the order a reasoned one.

Illustration: (i) An application for registration of a trademark was refused on the grounds of public interest and development of indigenous industry; this was held as insufficient reasoning as it merely repeated the words of the statute. (*Imperial Chemical Industries Ltd.* v. *Registrar of Trademarks, Bombay*, AIR 1981 Del 190); (ii) "Reply found to be unsatisfactory" was held not to be sufficient reason for cancelling a factory license, even though grounds were stated in the show cause notice. (*Cycle Equipments Ltd.* v. *Municipal Corporation of Delhi*, (1982) 21 DLT 445)

Rule against Bias

The second limb of natural justice is the rule against bias. This principle, first stated by Lord Coke in *Dr. Bonham's Case*, (1610) 8 Co Rep 1142, means that no man shall be a judge in his own cause, and guarantees the impartiality of the adjudicator. This rule applies not only when the decision-maker is

she party to the dispute, but also when she has some pecuniary, personal, or other interest in the dispute.

Pecuniary Bias

Pecuniary interest in the outcome of a dispute, no matter how small or insignificant, will disqualify the decision-maker from adjudication. Actual bias need not be shown; the mere likelihood of bias is sufficient as it is a cardinal principle that justice should not only be done but also seen to be done.

Personal Bias

If the adjudicator is a friend, relative, or business associate of some party to the dispute, or if he has prior animosity towards such person, this personal bias will operate to disqualify the adjudicator from hearing the dispute.

The standard upon which to adjudge claim of bias is that of "reasonable likelihood" laid down in *A. K. Kraipak* v. *Union of India*, AIR 1970 SC 150, that is, a standard above mere unfounded suspicion. In some cases, however, even if the court finds no "reasonable likelihood" of bias, it may still disqualify the adjudicator on the principle that justice should be seen to be done.

Illustration: In a disciplinary proceeding before the Bar Council of India, the Chairman of the disciplinary committee had earlier represented the Respondent in a case. Even though the Chairman had no recollection of the Respondent, and it was held there was no reasonable likelihood of bias, Chairman was nonetheless disqualified. (*Manak Lal* v. *Prem Chand*, AIR 1975 SC 425)

Exclusion of Bias

A statute may exclude the rule of bias and obligate an official to adjudicate upon a matter irrespective of her own interest therein.

Illustration: When a statutory provision required the complainant-management itself to enquire and take disciplinary action, the argument that no man can be a judge in his own cause was rejected as natural justice cannot override statute. (*B. K. Mehra* v. *Life Insurance Corporation*, AIR 1991 Cal 86)

The Doctrine of Necessity is an important exception to the rule of bias. Necessity is a rule of last resort where law permits certain things to be done which it would otherwise not countenance. An adjudicator, otherwise disqualified for bias, may nevertheless have to adjudicate if: (i) no other person competent to adjudicate is available; (ii) *quorum* cannot be formed without her; (iii) no other competent tribunal can be formed. While upon an application of the doctrine of necessity, the rule of bias is given a go by, if it is not applied it would result in a situation of deadlock where adjudication will be stalled and the defaulting party would benefit. Where alternative arrangements can be made, however, the doctrine of necessity will not be applied.

Illustration: In a challenge to adjudication of disqualification of a member of a legislature, when bias was alleged against the Chief Election Commissioner on the ground that he was close to the complainant, the court held that as there was a suspicion of bias, the Chief Election Commissioner should excuse himself from participating in the decision in the first instance, and let the other two Election Commissioners decide the point. If, however, there were to be a difference of opinion between the two Election Commissioners, then the Chief Election Commissioner would have to participate on the ground of necessity. (*Election Commission of India* v. *Subramaniam Swamy*, (1996) 4 SCC 104)

A person may also waive her objections to an adjudicator on the ground of bias, but such waiver should be explicit and with knowledge of consequences, and it should not be inferred lightly. (*King* v. *Essex Justices*, (1927) 2 KB 475) But after private waiver, if the authority acts in a patently biased manner, it may still be disqualified on the ground of public interest in clean administration. (*Rattan Lal Sharma* v. *Managing Committee, Hari Ram Higher Secondary School*, (1993) 4 SCC 10)

Instances of application of Rules of Natural Justice

Having examined in detail the specific content of the two limbs of natural justice, the practical application of the rules of natural justice may be illustrated:

- *Formation of* Prima Facie *opinion and Grant of Sanction*: In general, there is no provision for being heard at the stage of formation of opinion. For example, at the stage of forming a *prima facie* opinion regarding guilt leading to the registration of an F.I.R., there is no right of hearing before the investigating officer. Similarly, with regard to a grant of sanction to prosecute officials, it has been held that this is a purely administrative act not involving a *lis* between parties, and as such there is no right of hearing at that stage. (*State of Bihar* v. *P. P. Sharma*, (1992) Supp (1) SCC 222, 268)
- *Academic Discipline*: Disciplinary actions against students such as expulsion, suspension, or cancellation of examination result, entail severe civil consequences for students, and consequently courts have normally required the right of hearing to be given to the affected student.

Illustration: When a student's examination was cancelled by the School Board on the ground that she did not have sufficient attendance, the court quashed the order as the student had not been given a hearing before the decision which affected her academic career. (*Board of High School & Intermediate Education, Uttar Pradesh* v. *Chitra*, AIR 1970 SC 1039)

- *Dismissal from Service*: The important distinction to be drawn here is between 'office', which gives its holder a status the law will protect specifically, and mere 'employment' under a contract of service. Under the former category fall government servants protected by A.311(2) of the Constitution, whose office is governed by statutory rules, as well as other employees of statutory corporations in respect of whom service rules may not have been framed. The latter are people employed by private parties. The former category cannot be removed without following the due process of law, including the observance of rules of natural justice and hearing, failing which they legally remain in office, while the latter enjoy no such protection.

Illustration: An order passed by the Chancellor of a University against a teacher on the recommendation of the University Service Commission without affording an opportunity of hearing to the affected teacher was held bad for violating natural justice. (*Jagdish Pandey* v. *Chancellor, Kurukshetra University*, AIR 1968 SC 353)

Illustration: The benefit of the rules of natural justice was extended to employees of a statutory corporation, despite the fact that they did not have any rules governing their service. (*Uttar Pradesh Warehousing Corporation* v. *Vijaya Narain Vajpayee*, 1980 (1) LLJ 222)

Courts have, however, held that orders of compulsory retirement in public interest not amounting to dismissal, and orders refusing to extend probation, can be passed without extending the right of hearing, as it is neither a punishment nor is any stigma attached to such order. (*Baikuntha Nath Das* v. *Chief Medical Officer, Baripada*, AIR 1992 SC 1029)

- *Licensing and Commercial Regulation*: Licensing is an extensively used administrative tool to regulate many activities, ranging from trade and commerce to membership of professional associations. Courts show a strong disposition to bring the various aspects of licensing, such as grant, renewal, revocation, and suspension, within the ambit of natural justice.

Illustration: An order refusing to grant license for liquor manufacture was challenged; the Court quashed the order even though it characterised it as 'administrative', as insufficient right of

hearing was given to the party whose rights were affected. (*Chingleput Bottlers* v. *Majestic Bottling Co.*, (1984) 3 SCC 258) However, the power of the transport authorities to limit the number of carriages under the Motor Vehicles Act, 1939, was held not to be *quasi*-judicial, and was held to be a matter of policy, thereby denying the operators any right of hearing. (*Mohd. Ibrahim* v. *S. T. A. Tribunal*, (1970) 2 SCC 233) This decision, which appears constrained by the pre-*Ridge* v. *Baldwin* classificatory approach, may be contrasted with *R* v. *Liverpool Corporation*, (1972) 2 QB 299, wherein a decision of a local authority to increase the number of taxicabs without giving the local taxicab association a right of hearing was quashed by Denning, M. R. for non-compliance with natural justice.

- *Blacklisting*: Blacklisting means disqualifying a person guilty of some wrongdoing for certain future purposes. As blacklisting has severe civil consequences for the future business of the affected person, the prevailing judicial view is that she must get a right of hearing before a final decision is taken. (*Eurasian Equipment Co. Ltd.* v. *State of West Bengal*, (1975) 1 SCC 70)
- *Property Rights*: Property rights being constitutional rights under A.300-A, natural justice must be afforded to persons whose property rights are affected by administrative action, such as land acquisition notifications or property demolition orders.

Illustration: Notifications were issued under a Slum Area Improvement Act, upon issuance of which residents of that area were subjected to severe restrictions on property rights. The notifications and *vires* of the Act were challenged, and the Supreme Court upheld the Act subject to an implied condition that residents would be given hearing before any such notification was issued. (G*overnment of Mysore* v. *J. V. Bhat*, AIR 1975 SC 596)

Illustration: The Land Acquisition Act, 1894 gives a right of hearing and filing of objections against proposed acquisition to land owners under S.5-A, and imposes a duty upon the Collector to hear and adjudicate these judicially. (*H. P. C. L.* v. *Darius Shapur Chenai*, AIR 2005 SC 3520)

- *Powers of Search and Seizure*: Search and seizure are drastic instances of sovereign policing power, and constitute a grave invasion of personal property and the reputational rights of a person. On account of a need for prompt action, the power to search can be exercised without following the rules of natural justice, but power to confiscate cannot be exercised without observance of such rules.

Illustration: Under S.110, Customs Act, customs officials may search and seize imported goods if they have "reason to believe" they were illegally imported. However, if no notice of confiscation is served upon the owner within six months, the goods must be returned. This six-month period can be extended "on sufficient cause" being shown, and the power to extend time is to be exercised *quasi*-judicially with due regard for the principles of natural justice. *Assistant Collector of Customs, Calcutta* v. *Charan Das Malhotra*, AIR 1972 SC 689)

Judicial Control of Administrative Adjudication

Administrative adjudication means the system of deciding disputes by bodies other than regular courts. This alternative form of adjudication can take the form of tribunals, or even administrative officers exercising *quasi*-judicial powers. 'Tribunal' has been given a wide interpretation, and it has been held to include any body displaying the following three characteristics: (i) it should have the trappings of a court; (ii) it should be constituted by the State; and (iii) it should be invested with the State's inherent judicial power (*Per* Gajendragadkar, CJ in *Engineering Mazdoor Sabha* v. *Hind Cycles*, AIR 1963 SC 874) Tribunals can be of the following types:

- Tribunals constituted under A.323A of the Constitution to decide disputes pertaining to recruitment and conditions of service of

government servants, such as the Central and State Administrative Tribunals;
- Tribunals constituted under A.323B of the Constitution to decide disputes pertaining to taxes, foreign exchange, customs, industrial and labour disputes, land reforms, urban land ceiling, election of legislators, foodstuffs and incidental matters; and
- Other tribunals established by statutes such as the Competition Commission, the National Company Law Tribunal, and the Consumer Disputes Redressal Commission.

These tribunals and administrative officers must act judicially in the discharge of their duties. They are bound by the same principles of natural justice, fair hearing, lack of bias, and reasonableness in action as other administrative agencies, only with greater judicial scrutiny thereof. Their constituent enactments may lay down certain procedural guidelines, but apart from these they are also bound to follow the principles of the Evidence Act and the Civil Procedure Code and the normal judicial canons of *res judicata* and *stare decisis* to ensure uniformity.

Although tribunals enjoy the same status as that of a High Court and comprise a mix of judicial and administrative persons, the question arises whether tribunals are a substitute for High Courts. In *S. P. Sampath Kumar* v. *Union of India*, (1987) 1 SCC 124, A. 323-A was assailed as violative of the basic structure of the Constitution on the ground that it took away judicial review by High Courts under Aa.226 and 227. A division bench of the Supreme Court held that tribunals were intended as a substitute for High Courts, and therefore judicial review was not being denied. As this decision caused some disquiet, the question came up again before a Constitution Bench of the Supreme Court in *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261. It was held that the portion of A.323-A that excluded the jurisdiction of High Courts under A.226 was unconstitutional, and that writs and appeals would lie against decisions of a tribunal to the High Court concerned, from which appeal could further be preferred to the Supreme Court under A.136. Thus, the Court took the view that tribunals could not be a complete substitute for High Courts, and their decisions would remain reviewable in writ jurisdiction.

Some principles of judicial review of decisions of tribunals and administrative adjudicatory bodies, emerging from judicial dicta can be summarised as follows:

- The fundamental principle of judicial review of tribunals and administrative officials acting *quasi*-judicially, is that review power is not akin to appellate power. Courts do not re-examine the findings of fact reached on an appreciation of evidence, and it has been said that tribunals have the power to decide rightly as well as wrongly.
- However, a writ of *certiorari* can be issued to correct errors of jurisdiction committed by inferior courts or tribunals; these are cases where orders are passed by inferior courts or tribunals wrongly assuming jurisdiction where they have none, or acting in excess of jurisdiction conferred, or as a result of failure to exercise jurisdiction.

Illustration: Where an industrial tribunal entertained a dispute which was not industrial, it was held to act in excess of its jurisdiction. (*Newspapers Ltd.* v. *State Industrial Tribunal*, AIR 1957 SC 532)

- In order to determine whether a tribunal has committed an error of jurisdiction, it is essential for reviewing courts to determine the scope of its jurisdiction. Jurisdiction may be dependent on the existence of certain facts, which are called "jurisdictional facts", or may be dependent on the interpretation of a legal provision, an error in construing which is referred to as "error of law going to jurisdiction".
- If a tribunal wrongly decides a jurisdictional fact, then it would be assuming a jurisdiction not vested in it and its actions will be quashed in judicial review.

Illustration: Where a rent tribunal having power to reduce rents of dwelling houses

mistakenly makes a factual finding that a property is a dwelling house whereas it is actually let for commercial purposes, its orders will be void as it has wrongly assumed jurisdiction by incorrectly deciding a jurisdictional fact. *R* v. *Hackney Rent Tribunal Ex p. Keats*, [1951] 2 KB 15)

- If a tribunal commits an error of law which goes to its jurisdiction, courts will judicially review and quash the action.

Illustration: Where a rent tribunal had power to reduce rent in cases where premium had been paid, but payments made to a landlord were on account of work done by her, which in the eyes of law were not premium, then the treatment of such amounts as premium for purpose of rent reduction was an error of law going to jurisdiction, and the order was quashed. (*R* v. *Fulham Rent Tribunal Ex p. Phillipe*, [1950] 2 All ER 211)

- A tribunal may also commit errors of law that are "within its jurisdiction", that is, which do not vitiate jurisdiction. The traditional approach to such errors of law within jurisdiction was that they were judicially reviewable only if they were "apparent on the face of the record". This phrase is hard to define, but it may be said to include such errors as are self-evident and demonstrable from the record before the court, which do not require detailed examination to unearth and which cause prejudice to the affected party.

Illustration: When the transport authority rejected an application for issuance of a stage permit on the ground that the applicant company had a branch office at another place, but having a branch office at another place was not made a disabling condition by the statute, the decision was vitiated by an error apparent on the face of the record and quashed. (*K. M. Shanmugam* v. *SVS (P.) Ltd.*, AIR 1963 SC 1626)

The modern trend, however, firmly established in the U.K. and gaining currency in India, is to eliminate the distinction between errors of law going to jurisdiction and errors of law within jurisdiction, and to make all errors of law by tribunals subject to judicial review. This approach was first adopted in *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 2 AC 147, which has now become firmly entrenched in the U.K. (*Boddington* v. *British Transport Police*, [1999] 2 AC 143; *Pearlman* v. *Harrow School Governors*, [1979] QB 56) and has been cited by our Supreme Court as well (*Mukand Ltd.* v. *Mukand Staff & Officers Association*, AIR 2004 SC 3905).

- With regard to non-jurisdictional facts, in general, incorrect findings by tribunals will not be interfered with as they have the liberty to decide rightly and wrongly. However, if the error of fact is wholly perverse, or if the tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding (*Syed Yakoob* v. *K. S. Radhakrishnan,* AIR 1964 SC 477), or if its finding is based on no evidence (*Gopala Genu Wagaley* v. *Nageshwardeo*, (1978) 2 SCC 47), then such errors of non-jurisdictional fact will be corrected in judicial review. It must be borne in mind that the adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the tribunal, and these cannot be agitated before a court.

Judicial Control of Administrative Discretion

Administrative action is inevitably discretionary to some extent, but discretionary power has the potential of being abused. There are two grounds on which discretionary power may be invalidated: (i) abuse of discretionary power, and (ii) failure to exercise discretionary power.

Abuse of Discretionary Power

The classical statement of the grounds of judicial review of abuse of discretion was made in *Council of Civil Service Unions* v.

Minister for Civil Service, [1985] AC 374 (also called the *G. C. H. Q. case*), which has been adopted by our Supreme Court in a number of cases (*Tata Cellular* v. *Union of India*, (1994) 6 SCC 651; *Siemens Public Communication* v. *Union of India*, AIR 2009 SC 1204):

- *Illegality*: The decision-maker should correctly understand the scope of her power given by law, and must not exceed those limits;
- *Irrationality*: or '*Wednesbury* unreasonableness', which will be discussed subsequently; and
- *Procedural Irregularity*: Failure to act with procedural fairness or against natural justice.

The first and third grounds above are governed by the same principles that have already been discussed under the heads of excessive delegation and substantive *ultra vires*, and procedural *ultra vires* respectively. The second ground, that is, irrationality or unreasonableness, is discussed hereinafter.

Irrationality or 'Wednesbury' Unreasonableness

The standard of unreasonableness as a ground for judicial review is one of the most important substantive rules of Administrative Law. It gained currency in the case of *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*, [1948] 1 KB 223, 229, and was stated as ground (ii) for judicial review in the *G. C. H. Q. case* cited above, albeit using the term 'irrationality', which is synonymous with unreasonableness. Today, 'Wednesbury unreasonableness' has become accepted legal shorthand which includes in its scope a number of specific types of abuses of discretion which are used interchangeably.

Before examining some instances of abuse of discretion leading to a finding of unreasonableness, it is important to note that courts do not interfere with the merits of an administrative decision; they are only concerned with examining the decision-making *process* (*Sterling Computers Ltd.* v. *M. N. Publications Ltd.*, (1993) 1 SCC 445). In practice, courts also adopt a policy of judicial restraint in reviewing administrative action. Some illustrations of abuse of discretion are as follows:

Mala Fides

An authority acts *mala fide* when it is motivated by bias, malice, or bad faith. As there is normally a presumption of good faith in governmental actions, the onus of establishing *mala fides* is on the person who asserts it.

Illustration: A chargesheet served on a government servant was found to be vitiated by bias, malice, and *mala fide*, and was struck down. (*State of Punjab* v. *K. K. Khanna*, AIR 2001 SC 343)

Colourable Exercise Of Power

Exercise of discretion for a purpose not authorised by law is colourable exercise of power. This form of abuse of discretion overlaps with *mala fide* and improper use of power.

Illustration: (i) If the power of detention is used as a substitute for criminal prosecution, this is colourable exercise of power (*Lal Kamal Das* v. *State of West Bengal*, AIR 1975 SC 753); and (ii) Where a statute authorises land acquisition for 'public purpose', but the authority exercises power motivated by 'private purpose', such exercise of discretion is for a purpose not authorised by law (*R. K. Agarwalla* v. *State of West Bengal*, AIR 1965 SC 995).

Relevant and Irrelevant Considerations

Discretion must be exercised only on relevant grounds, reasons and considerations. If all relevant factors are not considered, or irrelevant factors are considered, then the decision will be quashed in judicial review.
Illustration: (i) Under the Industrial Disputes Act, the government has power to refuse to refer an industrial dispute to the tribunal for adjudication. Where the government refused to refer a bonus-related dispute in order to discipline workmen who had resorted to go-

slow, this reason was held irrelevant and extraneous to the purpose of power conferred by the Act. (*State of Bombay* v. *K. P. Krishnan*, AIR 1960 CS 1223)

Absence of Material

Taking a decision in the absence of cogent material upon which to form a subjective opinion is indicative of non-application of mind and will be invalid. While Courts will not scrutinise the sufficiency of materials, they can examine whether any material existed before the authority on the basis of which an impugned decision could be taken.

Illustration: Under the Foreign Exchange Regulation Act, the Director of Enforcement was empowered to send a case for trial, if in her subjective discretion, the penalty she was empowered to impose was insufficient. It was held that discretion to send the case could only be exercised on the basis of cogent materials before the Director. (*Rayala Corporation Ltd.* v. *Director of Enforcement*, AIR 1970 SC 494)

Absurdity or Perversity

Courts will quash administrative decisions which are palpably oppressive, absurd or perverse if they are such as no reasonable man would reach on the basis of materials before the authority.

Inconsistency and Legitimate Expectation

'Legitimate expectation' is a doctrine evolved by courts to guard against inconsistency in governmental policy and approach, and is a species of estoppel against the government. It arises when there is an express promise by an authority by word or deed, or on account of regular conduct by the authority which a person reasonably expects will continue (*Food Corporation of India* v. *Kamdhenu Cattle Feed Industries*, AIR 1993 SC 1601). However, when there is change in policy or in public interest, the doctrine of legitimate expectation will become inapplicable, subject to any equities that may have arisen in favour of an individual.

Illustration: Pursuant to an advertisement, a person applied to the Development Authority for the allotment of a house plot. While others who applied after him got plots, he was not allotted land. The court held he had a legitimate expectation that he would be allotted land in accordance with the Authority's policy. (*Sachindra Kumar* v. *Patna Regional Development Authority*, AIR 1994 Pat 128)

Failure to Exercise Discretion

The second ground for invalidating exercise of discretionary power is failure to exercise the same. This has various aspects:

Mechanical Exercise of Power

If an authority passes orders without considering the facts and circumstances of the case, or solely on the recommendation of some other person, it is said to act mechanically.

Illustration: A preventive detention order passed by the Home Secretary solely on the recommendation of the police without independently analysing the case was struck down as mechanical exercise of power. (*Emperor* v. *Sibnath Banerji*, AIR 1945 PC 156)

Acting Under Dictation

A governmental authority must exercise discretionary power independently and without being influenced by guidance or dictation from superior authorities. Surrender or abdication of discretion to some other body by the authority empowered to decide a matter will render the entire decision-making process invalid.

Illustration: When a county council gave a license to a cinema on the condition that it would only show films certified by an association formed by the film industry, it was held to have illegally surrendered discretion vested in itself to the film industry association. (*Ellis* v. *Dubowski*, [1921] 3 KB 621)

Fettering Discretion by Policy

Administrative authorities illegally fetter their own discretion when they impose policies on themselves to regulate their exercise of discretion and seek to apply such policies rigidly to all cases, irrespective of the merits of individual cases. This principle does not preclude the government from issuing general policies to guide discretion, particularly when it has to process multiple cases, but such a policy should be reasonable, just, and non-arbitrary, and should provide flexibility to consider individual cases if required.
Illustration: When a college principal adopted an inflexible rule to only consider those medical certificates submitted contemporaneously with illness for the purpose of exemption from attendance, it was held that she had fettered her discretion. (*Kumkum Khanna* v. *Mother Aquinas, Principal, Jesus & Mary College*, AIR 1976 Del 35)

Remedies

Having discussed the rules of Administrative Law, judicial remedies for redressal of breach of these rules are briefly outlined:

Writ Jurisdiction of High Courts

Under A.226 of the Constitution, every High Court has the power throughout the territories where it exercises jurisdiction, to issue to any person, administrative authority or Government, appropriate directions, orders or writs, including writs in the nature of *mandamus*, *certiorari*, *habeas corpus*, *quo warranto*, and prohibition, for the enforcement of rights or for any other purpose.
High Courts have expansive powers to correct errors in administrative action, and unlike the Supreme Court, which can only be approached against violations of fundamental rights, High Courts can be approached for violations of all legal rights. (*Bengal Immunity Co.* v. *State of Bihar*, AIR 1955 SC 661)
Writ jurisdiction, however, is discretionary jurisdiction, and unlike an appellate court, a writ court has discretion to refuse to grant relief in appropriate cases if it feels that the infraction by the government is not serious enough.

When a High Court considers a violation of fundamental rights, the subject of the writ must be 'State' as understood for the purposes of Part III of the Constitution. But while considering an infraction of any other legal right, the jurisdiction of the High Court is more expansive and writs will lie against private bodies providing public utility service or other public function, or to private persons or companies when they discharge some duty under a statute.

High Courts are also bound by the normal rules of writ jurisdiction, such as *res judicata*, exhaustion of remedies, *locus standi*, laches, and question of fact.

Writ and Appellate Jurisdiction of the Supreme Court

The power of the Supreme Court under A.32 to protect fundamental rights through its writ jurisdiction are plenary and not fettered by legal restraints. A.142 empowers the Supreme Court to do complete justice in all cases, and it can adopt any procedure to protect fundamental rights.

The distinction from High Courts is that the Supreme Court's jurisdiction is restricted to cases of violations of fundamental rights, which can only be filed against parties coming within the expanded definition of State and its instrumentalities under A.12 of the Constitution, but within this jurisdiction, the power of the Supreme Court to hear matters and mould relief is untrammelled.
Apart from its extraordinary original writ jurisdiction, the Supreme Court has appellate jurisdiction under A.136, wherein special leave to appeal against decisions of the High Courts can be sought.

The salient features of typical prerogative writs are as follows:

- *Habeas Corpus*: This writ is used to secure the release of a person unlawfully detained

by governmental authorities, and flows from the fundamental right to life and liberty.

- *Quo Warranto*: This writ is used to review executive action in matters of making appointments to public offices under statutory provisions. The appointment of a specific person can be challenged on the ground that she is not qualified to hold the office or suffers from some other legal flaw.
- *Mandamus*: This writ is a command issued by the Court directing a public authority to perform her public duty required of her by the law, which that authority was refusing to perform.
- *Certiorari*: This writ is in the nature of supervisory jurisdiction, wherein a High Court or the Supreme Court can quash a decision of a public authority which has transgressed its jurisdiction.
- Prohibition: This writ is similar to *certiorari*, but only differs as to the stage when it is issued. It pertains to the stage before proceedings complained of have been completed, and the object is to prevent wrong before it can happen.

x-x

Notes:

All India Bar Examination
Preparatory Materials

Subject 13: Company Law

The Indian Companies Act, 1956, as amended ("**the Act**"), together with the rules and regulations framed thereunder, is the principal legislation regulating matters relating to companies in India.

Chapter 1: Introduction

Definition of a Company

The word "company" has no strictly technical or legal meaning. (*Stanley, Re*, [1906] 1 Ch 131)

In general, "company" refers to a group of persons who have incorporated themselves into a distinct legal entity for purposes of achieving identified common targets.

The Act defines the term 'company' to mean a company formed and registered under the Act. (S.3(1))

Features of a Company

Upon incorporation, a company has an independent corporate existence. A company is a 'legal person' and is capable of having its own assets and liabilities. A company has the capacity to own property, to sue and be sued, borrow money, have a bank account and enter into contracts in its own name.

A company has perpetual succession; that is, even if the membership of a company changes from time to time, such changes will not affect the company's continuity.

Illustration: X, a company, has three shareholders. Upon the death of one of the shareholders named A, the shares held by A were inherited by her son. The change in shareholding structure will not have any impact on the existence of company.

Lifting of the Corporate Veil

A company has a separate and distinct legal identity from the members who compose it.

Illustration: S owned 99.9% shares of a company X, and the remaining shares of the company were owned by the family members of S. Upon liquidation, the creditors of the company claimed that S and X were the same entity. The court held that, upon incorporation, X would have a separate identity distinct from S, who was the owner of company X. Due to this, S would not be liable for debts incurred by X. (*Salomon* v. *Salomon*, 1897 AC 22)

In certain exceptional circumstances, however, the courts ignore the separate identity of the company and impose liability on the members or managers who are responsible for the actions of the company. This is known as the doctrine of "*lifting of the corporate veil*".

Certain instances where courts have applied the doctrine of lifting of the corporate veil are:

- If there is a danger to public interest.

  Illustration: A company, X, was incorporated in England to sell tyres manufactured in Germany by a German company. The shares of X were held by the German company and all the directors of X were German nationals, resident in Germany. During the First World War, X instituted a suit for recovery of trade debts from an English customer. The court held that though X was incorporated in England, it was controlled by residents of an enemy nation. Allowing X to recover trade debts would amount to transferring money to an enemy nation which would be against the public policy. (*Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co. Ltd.*, [1916] 2 AC 307)

- To avoid tax evasion or circumvention of tax obligation.

  Illustration: D, a wealthy person, held her investments through various companies for purposes of avoiding tax liabilities. The companies had no business apart from holding investments on D's behalf. The court disregarded the corporate identity of

the companies and imposed a tax liability on D. (*Dinshaw Maneckjee Petit, Re.*, AIR 1927 Bom 371).

- In case of fraud or improper conduct.

Illustration: L agreed to sell a certain land to J. Subsequently L changed her mind. To avoid selling the land to J, L incorporated a company and transferred the land to the company. In a suit for specific performance, the court disregarded the corporate identity of the company and ordered the company to transfer the land to J. (*Jones* v. *Lipman*, (1962) All ER 342)

- If the statute itself contemplates lifting of the corporate veil.

Illustration: Provisions of the Foreign Exchange Regulation Act, 1973 ("**the FERA**") permitted non-resident Indians to hold up to 1% shares of Indian companies. S, a non-resident Indian, incorporated 13 companies and used the companies to purchase shares of an Indian company beyond the permissible limit of 1%. The court ignored the corporate identity of the companies and held the transactions to be in violation of the provisions of the FERA. (*Life Insurance Corporation* v. *Escorts Ltd.*, [1986] 1 SCC 264)

Chapter 2: Kinds Of Companies

Private Company and Public Company

S.3(1)(iii) of the Act defines a private company to mean a company which has a minimum paid-up capital of one lakh rupees or such higher amount as may be prescribed, and which, by its articles of association:

- Restricts the right of members to transfer its shares;
- Limits the number of its members to fifty. In determining this number of fifty, employee-members and ex-employee members are not considered;
- Prohibits an invitation to the public to subscribe to its shares or the debentures; and
- Prohibits any invitation or acceptance of deposits from any persons other than its members, directors, or their relatives.

A private company must have a minimum of two members.

The Act defines a public company to mean a company which is not a private company. (S.3 (1)(iv))

A public company must have a minimum of seven members. There is no limit to the maximum number of members that a public company may have. Moreover, a public company is required to have a minimum paid-up capital of five lakh rupees or such higher amount as may be prescribed; furthermore, the term 'public company' includes a private company which is a subsidiary of a company other than a private company.

Limited and Unlimited Company

A limited company may be of two kinds: (a) company limited by shares; or (b) company limited by guarantee.

In companies limited by shares, the liability of the members of the company is restricted to the amount of share capital unpaid by the members. Members have no liability when they hold fully paid-up shares. Note that most companies are incorporated as a company limited by shares.

In companies limited by guarantee, the liability of the members of the company is limited to the fixed amount, as prescribed in the Memorandum of Association of the company, which the members of the company undertake to pay upon liquidation of the company. The liability of the members to pay the guaranteed amount as specified in the Memorandum of Association arises only when the company goes into liquidation.

In unlimited companies, the liability of its members in unlimited.

Government Company

A government company is a company in which at least 51 percent of the total paid-up share capital is held by the Central Government, one or more State Government (s) or jointly by the Central Government and one or more State Governments. (S.617)

Illustration: The following are some examples of 'government companies': Bharat Heavy Electricals Limited, Coal India Limited, Food Corporation of India, National Aviation Company of India Limited, Oil and Natural Gas Corporation, and Steel Authority of India.

In the recent past, several government companies have been in the news due to the efforts of the Central Government to reduce its shareholding in such companies (generally referred to as "disinvestment").

The Act stipulates several special provisions for the governance of government companies. For instance, the auditor of a government company must be appointed by the Comptroller and Auditor General of India. (S. 619)

Holding Company and Subsidiary Company

A company is deemed to be subsidiary of another company (that is, the parent company) if: (a) the composition of its board of directors is controlled by the parent company; or (b) more than half, in face value, of its equity share capital is held by the parent company; or (c) where it is the subsidiary of a company which is subsidiary of the parent company.

Illustrations:

If Company A holds 51% of the share capital of Company B, then Company B is the subsidiary of Company A.

If Company A has the right to appoint more than half of the directors on the board of directors of Company B, then Company B is a subsidiary of Company A.

If Company B is a subsidiary of Company A, and Company C is a subsidiary of Company B, then Company C and Company B are both subsidiaries of Company A.

Listed Company

A listed company is a public company whose shares or other securities (like debentures) are listed on a stock exchange in India and can be freely traded through the stock exchange on which they are listed.

Illustration: The following are examples of listed companies: Reliance Industries Limited, whose shares are listed on the Bombay Stock Exchange Limited ("**BSE**") and the National Stock Exchange Limited ("**NSE**"), and the State Bank of India Limited, whose shares are listed on the BSE and the NSE.

A company that intends to have its securities listed on a stock exchange must comply with the listing conditions prescribed by such stock exchange. The Listing Agreements of stock exchanges generally prescribe several disclosure obligations on the companies. For instance, the Listing Agreements of the BSE and the NSE require every listed company to make a public disclosure of the outcome of every meeting of the board of directors and shareholders of the company and any material information disclosed therein. The companies are also under an obligation to maintain a minimum level of public shareholding in the company, and to disclose quarterly and yearly audited financial information within certain prescribed periods.

Foreign Company

A company incorporated outside India but which has a place of business in India is referred to as a "foreign company". (S.591)

Foreign companies must furnish certain specified documents, such as, copies of charter documents, and details of directors, to the Registrar of Companies ("**RoC**") within 30 days of establishing a place of business in India. (S.592)

Foreign companies must also submit copies of their account statements to the RoC within the stipulated time. (S.594)

Chapter 3: Incorporation and Constitutional Documents of a Company

To obtain registration of a company, its founding members must file an application, along with the prescribed documents, with the relevant RoC. Upon satisfaction of all conditions, the RoC issues a Certificate of Incorporation to the Company. In the Certificate of Incorporation, the RoC certifies that the company is incorporated and, in case of a limited company, that the company is limited. (S.34(1))

The Certificate of Incorporation is conclusive evidence of the fact that all the requirements of the Act have been complied with in respect of the company's registration. (S.35)

A private company can commence business from the date of its incorporation. (S.149(7))

A public company can commence business only upon receipt of a Certificate for Commencement of Business from the RoC. (S. 149(4))

*Memorandum of Association ("*MoA*")*:

The MoA of the company contains the fundamental conditions upon which the company is allowed to be incorporated. It sets forth the area of operation of the company.

The Act prescribes that the MoA of the Company must contain the following provisions:

- *Name*: The first clause of the MoA must state the name of the company. The Act prescribes that the last word of the name of a limited company must be "Limited" and the last words of the name of a private company must be "Private Limited".

  Illustration: The name "XYZ Industries Limited" suggests that it is a limited company. Similarly, the name "ABC Private Limited" suggests that the company is a private company.

  A company may change its name upon approval from its shareholders and the Central Government. (S.21)

- *Registered Office*: The second clause of the MoA must specify the State in which the registered office of the company will be situated.

  A company may change its registered office within a State upon approval from its shareholders. Shifting of the registered office from one State to another requires approval from the shareholders of the company and the Company Law Board. (S.17)

- *Objects*: In the third clause, the MoA must state the objects for which the company is proposed to be established. The Objects clause must be divided into three sub-clauses, namely: the main objects, the other objects, and the States to which the objects extend.

  A company can change its objects only in so far as the change is necessary to (S.17(1)):

  - Carry on the business of the company in a more economically or efficient manner;

    Illustration: A company sought to amend its MoA to enable it to pay remuneration to its managers. The court allowed such an amendment on the ground that it was necessary for efficient management of the company. (*Scientific Poultry Breeders Association, Re*, 1933 Ch 227)

  - Attain the main purpose of the company by new or improved means;
  - Enlarge or change the local area of operation of the company;
  - Carry some business which, under the existing circumstances, may be combined with the company's business; the new business must not be inconsistent with the existing business.

Illustration: A company was engaged in the business of providing protection to cyclists on public roads. The company sought to amend its objects for purposes of undertaking the business of providing protection to motorists. The court did not allow the amendment as the cyclists had to be protected against the motorists and both the businesses were contradictory. (*Cyclists' Touring Club, Re*, (1907) 1 Ch 269)

- Restrict or abandon any of the objects specified in the memorandum;
- Sell or dispose of the whole or any part of the undertaking, or of any of the undertakings, of the company; or
- Amalgamate with any other company or body of persons.

Since there are restrictions on the purposes for which the objects clause of the MoA may be altered, most companies prefer to draft the objects clause in a broad manner such that it facilitates wide operations of the company.

- *Liability*: The fourth clause must state the nature of liability that the members of the company will incur; for instance, whether or not the members of the company have limited liability, and whether the liability is limited by contribution towards share capital or guarantee. (S.13)
- *Capital*: The last clause of the MoA must state the amount of nominal capital of the company and the number and value of the shares into which the capital is divided. (S. 13)

The capital clause of the MoA may be changed upon approval of the shareholders of the company.

Articles of Association

The Articles of Association ("**the Articles**") contain the rules, regulations, and the bye-laws of the company that govern the internal management and administration of the company.

Schedule I of the Act contains various model forms of Articles. A company may either frame its own Articles or adopt any of the model forms of the Articles contained in Schedule I.

The Articles contain various provisions governing various areas, such as: issue and transfer of shares, alteration of capital, borrowing powers, accounts, and powers of directors. Any provision that aims to regulate the relation between a company and its members and between the members *inter se* may be incorporated in the Articles.

In the event of a conflict between the provisions of the Articles and the Act, the provisions of the Act prevail. (S.9)
S.36 of the Act imparts contractual force to the Articles. It provides that the Articles, when registered, bind a company and its members, as if they had been signed by the company and each member. The Articles regulate only such rights of the members of the company which can be enforced through the company. (*Khusiram* v. *Hanutmal*, [1948] 53 CWN 505)

Illustration: A and B are members of a company named ABC Pvt. Ltd. A and B have disputes regarding (i) transfer of the shares of ABC Pvt. Ltd.; and (ii) transfer of a commercial land owned by A to a third party. The dispute regarding the transfer of shares will be governed by the provisions of the Articles. The dispute over transfer of land, however, will not be governed by the Articles since it does not concern the rights of A and B with respect to the company ABC Pvt. Ltd.

The Articles may be amended upon approval of the shareholders of the Company. (S.31)

Doctrine of Constructive Notice

The MoA and the Articles of a company are public documents available with the RoC. They are accessible to all. The doctrine of constructive notice provides that every outsider who deals with a company is deemed to have notice of the contents of the MoA and the Articles.

Illustration: The Articles of a company stipulated that all deeds of the company must be signed by the managing director, the secretary and a working director of the company. The plaintiff accepted a deed from the company that was signed only by the secretary and a working director and was not signed by the managing director. The court held that the deed was invalid and the plaintiff had no remedy, because had the plaintiff consulted the Articles of the company, the plaintiff would have detected the defect in the deed. (*Kotla Venkataswamy* v. *Rammurthy*, AIR 1934 Mad 597)

Doctrine of Indoor Management

The doctrine of indoor management is an exception to the doctrine of constructive notice. As per this doctrine, an outsider dealing with a company is entitled to presume that the internal working of the company is in conformity with the provisions of the public documents of the company. (*Royal British Bank* v. *Turquand*, [1856] 119 ER 886)

Illustration: The Articles of a company provided that its directors may borrow funds from time to time, subject to authorisation by the shareholders of the company. The directors of the company borrowed funds from the plaintiff without obtaining proper sanction from the shareholders. The shareholders of the company challenged the borrowing transaction. The court held that since the Articles authorised the directors to borrow funds, the plaintiff had the right to infer that the directors were acting within their authority and had approval of the shareholders. The transaction was held to be binding on the company. (*Royal British Bank* v. *Turquand*, (1856) 119 ER 886)

This doctrine does not provide protection in certain cases, such as where the affected party had knowledge of irregularity, where the act of an officer of a company is clearly outside the powers of such an officer, or in case of forgery.

Illustration: The Articles of a company stipulated that the company could issue debentures only with the approval of the shareholders of the company by way of a shareholders' resolution. The directors of the company issued debentures to themselves without obtaining the sanction of the shareholders. The court held that the directors could not claim remedy pursuant to the doctrine of indoor management because as directors of the company, they had the knowledge about restrictions on the borrowing powers of the company. (*Howard* v. *Patent Manufacturing Co.*, (1888) 38 Ch D 156)

Chapter 4: Share Capital

A company's Capital must be divided into shares of a fixed amount. The Act permits issuance of two kinds of shares, namely "equity shares" and "preference shares".

Every person holding share(s) in a company is entitled to receive a Share Certificate from the company certifying the number of share(s) held by such person in the company. A Share Certificate is issued under the common seal of the company and is *prima facie* evidence of the title of the member to such shares. (S.84)

In accordance with the provisions of the [Indian] Depositories Act, 1996, as amended, companies have the option of issuing shares in "dematerialised form". Dematerialisation refers to the process under which Share Certificates of the shareholders are converted into electronic form and credited to the shareholder's account that is maintained with a depository participant. Thus, no Share Certificate is issued to the shareholder in case of dematerialised shares. Such shares exist in the form of entries in the books of the relevant depository.

Equity Shares

Equity share capital is defined under the Act as meaning all share capital which is not preference share capital. (S.85(2))

Equity shares are also referred to as "ordinary shares". Companies also have the right to issue different classes of equity shares with differential rights as to dividend or voting,

subject to certain specific prescriptions.

Preference Shares

Preference shares are shares that fulfil the following conditions:

- They carry preferential rights to dividend; that is, the preferential dividend payable to shareholders holding preference shares must be paid before distribution of any dividend to the ordinary shareholders; and
- They carry a preferential right to be paid in case of liquidation of the company; this means that in case of winding up, the amount paid-up on preference shares must be paid to the preference shareholders prior to distribution of any funds to the ordinary shareholders.

The dividend payable on preference shares may be "cumulative" or "non-cumulative", depending on the terns of issue of the preference shares.

In case of cumulative preference shares, where no dividend is issued in a year, due to lack of profits, the arrears of dividends must be carried forward and paid out of the profits of subsequent years. In case of non-cumulative preference shares, the dividends lapse if no dividend is declared in any year.

Preference shares are presumed to be cumulative unless clearly specified otherwise in the terms of issue of the preference shares or the Articles of the company.

The Act prohibits issuance of irredeemable preference shares or shares that are redeemable after expiry of a period of 20 years from the date of their issue. (S.80-A)

The terms of issue of the preference shares may stipulate when the preference shares will be redeemable and whether they will be redeemable at the option of the shareholder or the company. Prior to redemption of the preference shares, the following conditions must be satisfied:

- The preference shares to be redeemed must be fully paid-up;
- The preference shares must be redeemed out of the profits of the company or by utilising the proceeds of a fresh issue of shares for redemption; and
- If redemption is made out of the profits of the company, then a sum equal to the redemption amount must be transferred to the Capital Redemption Reserve Account of the company.

Sweat Equity Shares

The Act enables companies to issue shares for consideration other than cash. Shares issued to the directors or employees of a company in lieu of services rendered, intellectual property provided or other value addition are known as "sweat equity shares".

Voting Rights on Shares

Every equity share carries one voting right. An equity shareholder is entitled to vote on all matters of the company.

A preference shareholder is entitled to vote on only such matters which have a direct impact on the rights of the preference shareholders. However, preference shareholders obtain general voting rights if dividend on the preference shares held by them remains unpaid beyond a defined time period (which varies depending on whether the preference shares are cumulative or non-cumulative).

Transfer of Shares

Shares of a company are movable property and are capable of being transferred in the manner provided by the Articles of the company. (S.82)

In a private company, the Articles may impose restrictions on the rights of the members of the company to transfer shares. A private agreement between the shareholders of a private company, that imposes restrictions on the members' right to transfer shares, is binding on the company only if the provisions of the agreement are incorporated in the Articles. (*V. B. Rangaraj* v. *V. B. Gopalakrishnan*,

(1992) 1 SCC 160)

Illustration: The Articles of a private limited company provided that the shares of the company could not be transferred to persons who were not members of the company. The shares of the company were transferred to non-members under a court auction. Upon being challenged, the court held that the transfer of shares was in violation of the provisions of the Articles. (*S. A. Padanabha Rao* v. *Union Theatres Pvt. Ltd.*, (2002) 108 Comp Cases 108 (Kant))

There are diverse case laws on the issue of restriction on transfer rights of members of a public company. S.111 states that shares or debentures, and any interest therein of a public company shall be "freely transferable". Some courts have held that in case of public companies, if the restriction on transfer is incorporated in the Articles, it would be binding on the members. However, the prevalent view is that shares of a public company are freely transferable, and any restriction on right to transfer such shares is not valid. (S.111A, *Western Maharashtra Development Corporation Ltd.* v. *Bajaj Auto Limited*, (2010) 154 Comp Cases 593 (Bom))

A transfer of share(s) of a company becomes effective only when it is recorded in the books of the company and the name of the new shareholder is recorded in the Register of Members of the company.

Shares, being movable property, may be mortgaged or pledged by the shareholders.

Forfeiture of Shares

A company has the right to "call" upon its members to make payment towards full value of the shares as held by them.

If any member, after being called upon to do so, defaults in making payment towards the full value of the share held by such member, the company has the right to take action against such member. In practice, the Articles of most companies entitle them to forfeit the shares of such defaulting members. The right to forfeit shares can be exercised by a company only if (a) there is a clear provision in this regard in the Articles; (b) due advance notice of forfeiture has been given to the concerned member; and (c) the board of directors of the company have approved a resolution in this regard.

Chapter 5: Directors

A company, being an artificial person, does not have a mind or body of its own. Therefore, it is important that the company's management must be entrusted to human agents. In practice, directors are the professional persons engaged by the company to manage the business of the company. Directors are officers of the company and are sometimes described as agents or trustees.

The Act does not provide a definite definition for the term "directors" and merely states that "director includes any person occupying the position of a director, by whatever name called". (S.2(13))

Only an individual can be appointed as a director of a company. Thus, a company or a firm or association cannot be appointed as a director. (S.253)

A person cannot be appointed as a director, if the person:

- Is of unsound mind;
- Is an undischarged insolvent
- Has applied to be adjudicated as an insolvent
- Has been sentenced to at least six months of imprisonment for an offence involving moral turpitude, and five years have not lapsed from the date of expiration of the sentence;
- Has not paid any "call" on her shares for six months;
- Has been disqualified under the Act for the purpose of preventing fraudulent persons from managing companies; or
- Is a director of a public company which has (i) not filed its annual return and annual accounts for three continuous years; and (ii) failed to repay its deposits or interest on

it on the date due, or redeem its debentures on the date due, or pay dividends, and such failure continues for more than one year.

A private company must have a minimum of two directors and a public company must have a minimum of three directors.

Term of Appointment

In private companies, the term of appointment of the directors may be fixed by the shareholders at the time of appointment or it may be specified in the Articles. Unless specified otherwise in the Articles, directors of private companies are not liable to retire by rotation. In public companies, only one-third of the total number of directors can be appointed on permanent basis. The remaining directors are liable to retire on rotational basis. (S.255)

The shareholders of a company have the right to remove a director from her office prior to expiration of her period of office. (S.284)

Kinds of Directors

- *Whole-time Director*: Whole-time directors are directors who are in whole-time employment of the company.
- *Independent Directors*: Independent directors are directors who, apart from receiving director's remuneration, do not have any material pecuniary relationship or transaction with the company, its management or its subsidiaries which may affect their independence of judgment.

The Listing Agreements of the stock exchanges in India mandate that every listed company in India must have a certain minimum number of independent directors on its board of directors. (Clause 49 of the Listing Agreement)

The Listing Agreement provides that if the chairman of the board is an executive director, then at least half of the directors on the board must be independent directors. If the chairman of the board is a non-executive director, then at least one-third of the board of directors must comprise of independent directors.

The Listing Agreements specify the criterion that must be satisfied for a person to be deemed as an independent director.

- *Managing Director*: A managing director is a whole-time director who is entrusted with substantial powers of management of the company which would not otherwise be exercisable by her. (S.2(26))

A managing director can be appointed only if the Articles of the company provide for such appointment. The powers and duties of a managing director may be enumerated in the Articles of the company, the board resolution pursuant to which the managing director is appointed, or in the agreement executed by the company in relation to the appointment of the managing director.

Powers of Directors

The Act authorises the board of directors to exercise all such powers and to do all such acts and things as the company is authorised to exercise and do. (S.291)

The directors have wide powers over the operation and management of the company, subject only to such restrictions as are contained in the Act and the MoA or the Articles of the company.

The Act prescribes that the following powers can be exercised by the directors only by means of a board resolution, approved at a meeting of the board of directors:

- To make "calls" on shareholders in respect of money unpaid on their shares.
- To authorise buy-back of securities.
- To issue debentures.
- To borrow moneys otherwise than on debentures.
- To invest the funds of the company.
- To make loans.

The Act imposes certain restrictions on the

powers of the board of directors of a public company.

The board of directors of a public company cannot exercise the following powers unless specifically authorised by the shareholders of the company in a general meeting:

- Sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking of the company.
- Remit, or give time for the re-payment of, any debt due by a director.
- Invest the amount of compensation received by the company in respect of compulsory acquisition in securities other than trust securities.
- Borrow moneys, where the moneys to be borrowed together with the moneys already borrowed by the company, will exceed the aggregate of the paid-up capital of the company and its free reserves. This excludes temporary loans obtained from the company's bankers in the ordinary course of business.
- Contribute, to charitable and other funds, not directly relating to the business of the company or the welfare of its employees, any amount exceeding Rupees Fifty Thousand Only in one financial year.

Duties and Liabilities of Directors

The Act prescribes various statutory obligations that must be performed by the directors of a company. Such statutory obligations include the duty to make statutory filings within the time prescribed by the Act, duty to attend board meetings (S.283(1)(g)), duty to convene shareholders meetings (Ss. 165, 166 and 169), duty to approve the annual financial statement of the company (S.215), and the duty to appoint auditors of the company (S.233B). The Act imposes liability on the directors in case they fail to comply with their obligations stipulated under the Act.

Apart from the statutory obligations, the duties of directors include:

- *Duty of Good Faith*: A director of a company has a fiduciary obligation towards the company and is under a duty to act in the best interest of the company. Duty of good faith implies that all the actions of the directors must be for the benefit of the company and the shareholders of the company.

If a director takes an action which is not beneficial for the company or its members, the director can be held liable for breach of her fiduciary duty towards the company.

Illustration: X, a director of a company, was aware that the value of the assets of the company was 650,000 Pounds. She, however, allowed the assets of the company to be sold for a consideration of 350,000 Pounds. Thus, the assets of the company were sold at lesser value and the company incurred a loss. X was held liable for breach of fiduciary duty towards the company. (*Aviling Barford Ltd.* v. *Perion Ltd.*, 1989 BCLC 626 Ch D*)*

- *Duty of Care, Diligence and Skill*: A director is under an obligation to perform her duties with reasonable care, skill and diligence. The courts have held that a director is not expected to exhibit extraordinary skill or diligence. The director, however, is expected to exhibit such "skill as may reasonably be expected from a person of his knowledge and experience".

A director can be held liable for negligence if she fails to discharge her duties with reasonable diligence.

Illustration: The directors of a company released funds of the company to pay the company's debts without ascertaining whether or not the company was under any obligation to pay any debts. The directors were held liable for negligence. (*Selanjor United Rubber Estates Ltd.* v. *Cradock*, (1968) 2 All ER 1073)

- *Duty to disclose interest*: A director is under an obligation to ensure that she does not place she in a situation where her personal

interests may conflict with her duties towards the company.

A director who is interested in any matter that is being discussed by the board of directors, must disclose her interest to the other directors on the board. The interested director must not take part in any discussion pertaining to such matters and must refrain from voting on the same. (Ss.299 and 300)

Illustration: X was a director in Company A. X was also the chairman of Company B. The board of directors of Company A considered and approved a resolution for purchasing office furniture for Company A. During the board meeting, X did not disclose that she was the chairman of Company B and thus, had substantial interest in the purchase contract being awarded to Company B. Upon being challenged, the court set aside the purchase contract and held that X had breached her duty to disclose her interest in the matter. (*Aberdeen Railway Ltd.* v. *Blaikie*, (1854) 1 Mcy 461)

S.201 of the Act provides that any provision in the Articles of a company that seeks to exclude the liability of the directors for negligence, default, misfeasance, breach of duty or breach of trust, is void.

At the same time, S.633 of the Act provides statutory protection to the directors against liability of actions taken in good faith.

Illustration: The managing director of a company failed to file the cost audit report of the company within the prescribed time. The delay of 24 days was, however, attributable to labour problems within the company. The managing director was not held liable for the delay in filing the report. (*G. Ramesh* v. *Registrar of Companies*, (2007) 112 Comp Cases 450 (Mad))

The directors can be held personally liable for their actions that are *ultra vires*; that is, beyond the scope of the Act or the Articles and MoA of the company.

Illustration: The directors of Company X entered into certain transactions on behalf of the company despite having the knowledge that such transactions were not authorised by the Articles of the Company. Upon being challenged by the shareholders, the court directed the directors to restore the funds of the company. (*Jehangir R. Modi* v. *Shamji Ladha*, [1866-67] 4 Bom HCR 185)

A director may also be held criminally liable for offences committed by the company, if it can be proved that the directors actively aided in commission of the offence.

Illustration: The directors of Company X issued cheques for payments to the customers of the company despite having the knowledge that the company did not have funds in its bank accounts. In a case for dishonour of cheques, the directors shall be liable and may be prosecuted under the relevant provisions of the Negotiable Instruments Act, 1881.

Chapter 6: Management of a Company

Meeting of the Board of Directors of the Company

A meeting of the board of directors of the company must be held at least once in every three months and at least four such meetings must be held in each year. The Articles govern the manner in which a board meeting must be called and conducted.

The Act authorises companies to hold board meetings at any location as the directors may deem fit, including outside India. The Act provides that the physical presence of at least two directors or one-third of the total strength of the board, whichever is higher, is compulsory to constitute a quorum for a Board meeting. (S.287)

The Act does not authorise conducting of board meeting by way of teleconferencing or video conferencing.

Unless the Articles specify otherwise, decisions at board meetings are taken by a majority vote.

The Act specifies that minutes of all meetings

of the board of directors must be duly recorded in the books of the company.

Shareholders' Meeting

Shareholders' meetings are also referred to as "general meetings".

Every company is under an obligation to hold at least one meeting of its shareholders every year, in which meeting the annual financial statement of the company is placed before the shareholders. This meeting is known as the "annual general meeting" or "**AGM**". The Act prescribes that the gap between two AGMs must not exceed fifteen months. The AGM must be held during business hours on a day which is not a public holiday, and at the registered office of the company or at a place within the city where the registered office of the company is located.

All shareholder meetings, other than an AGM, are known as "extra-ordinary general meetings" or "**EGMs**". An EGM may be called at any time as the board of directors may deem fit.

Requisites of a Valid Shareholders' Meeting

- A shareholders' meeting must be called by proper authority.

Illustration: The Articles of Company A provide that every shareholders' meeting must be called by way of a board resolution. If valid quorum was not present at the board meeting at which the resolution to call the shareholders meeting was approved, then the shareholders meeting would be deemed to be improperly convened.

- Due notice of the proposed shareholders' meeting must be given to all the members of the company. The Act stipulates that the notice must be in writing and, unless specifically waived by the shareholders by way of a resolution or a provision in the Articles, must be given at least 21 day's prior to the date of meeting.
- The notice must clearly specify the following: the time and place where the meeting will be held, the businesses that are proposed to be transacted at the meeting and a statement setting forth all material facts regarding, and the rationale for, each of the businesses proposed to be transacted at the meeting.
- The Act specifies that in case of a public company, at least five members, and in the case of a private company, at least two members of the company, must be physically present to constitute a valid quorum.

Illustration: In a shareholders' meeting, only one member was physically present. The member, however, held valid proxies for other members of the company. The court held that a valid quorum was not present for the shareholders' meeting. (*Sharp* v. *Dawes*, 36 LT 188)

Voting at a Shareholders' Meeting

Shareholders are entitled to discuss each proposed resolution and suggest amendments to it, prior to it being put to vote.

Every equity shareholder is entitled to vote on all shareholder resolutions. To begin with, voting on resolutions takes place by show of hands. Upon show of hands, each member has one vote.

If the shareholders are not satisfied by the results of the voting by show of hands, then a requisite number of shareholders may demand a "poll"; the number of votes cast for and against a resolution must be recorded. In case of a poll, the voting right of shareholders is proportionate to the respective paid-up shares held by them.

A member may vote either in person or through a proxy. (S.176)

Ordinary and Special Resolutions

A resolution is said to be an ordinary resolution when the total number of votes cast in favour of the resolution, is more than the number of votes cast against the resolution.

Illustration: Company A comprises of 100 members holding one share each. At a shareholders meeting of the company, 80 shareholders are present and voting. If 45 shareholders vote in favour of an issue and 35 shareholders vote against it, then the said resolution shall be deemed to be approved by way of an ordinary resolution. Note that members who are not present and voting are not relevant for calculation of votes.

A special resolution is a resolution that requires the approval of at least three-fourth majority of the shareholders present and voting at a shareholders' meeting.

Illustration: Company A comprises of 100 members holding one share each. At a shareholders' meeting, 80 shareholders are present and voting. For a resolution to be approved by way of a special resolution, at least 60 members (¾ of 80,) must vote in favour of the resolution. Note that members who are not present and voting are not relevant for calculation of votes.

Matters that must be approved by way of a special resolution include amendment to the Articles or MoA of the company, change in name of the company, and to shift the registered office of the company from one State to another.

The Act specifies that minutes of all meetings of the board of directors must be duly recorded in the books of the company.

Chapter 7: Compromise, Arrangement and Reconstruction

The Act authorises companies to enter into a "compromise" or "arrangement" with their creditors or members (Ss.391-393), or to undergo reconstruction or amalgamation with other companies. (S.394)

Note that the Act does not define 'mergers' or 'amalgamations' anywhere, even though the term 'amalgamation' is used in the Act in certain provisions (*See* Ss.394, 396, and 396A of the Act). These terms, however, are prevalent in common usage; the terms 'merger' and 'amalgamation' are also usually used interchangeably.

The term "compromise" is not defined in the Act, but is understood to refer to the process where an existing dispute between the company and its members or creditors is resolved by drawing up a scheme of compromise.

"Arrangement" has a wider connotation, and includes reorganisation of the share capital of a company by the consolidation of shares of different classes, or by the division of shares into share of different classes or by both these methods. (S.390(b))

S.390 of the Act lays the ground for the law relating to mergers and amalgamations in India. The Section recognises that a variety of different agreements may be arrived at between a company, its creditors, and its shareholders, and tries to emphasise that the rights and interests of each class of creditors and shareholders must be kept in mind when entering into such agreements. Note that the emphasis is on 'classes' of creditors and shareholders, rather than individual creditors or shareholders. This illustrates the commonly accepted view that the law relating to mergers in India goes by the maxim 'rule of the majority', so that one or two creditors or shareholders cannot prevent the progress of the company in a merger process.

An application for a compromise or arrangement may be filed before the relevant court by the company, its creditors, members or the liquidator (in case the company is being wound up).

For a scheme of compromise or arrangement to be effective, it must first be proposed before the court under S.391 of the Act. The court may, on the application of the company, or, in the case of a company that is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be to be called, held and conducted in such manner as the court may direct. (S.391(1))

The scheme must then be approved by a majority representing three-fourths in value of the creditors or members, as the case may be, of the company and, thereupon, sanctioned by the court. (S.391(2)) Such an order of the court sanctioning the scheme is binding on all the creditors or class of creditors, all the members or class or members, as the case may be, and also on the company, or, in the case of a company which is being wound up, on the liquidator and contributories of the company. (S.391(2))

A scheme sanctioned by the court does not operate as a mere agreement between the parties; it becomes binding on the company, the creditors and the shareholders, and has statutory force. It cannot be altered except with the sanction of the court, even if the shareholders and creditors acquiesce in such alteration. (*J. K. (Bombay) Pvt. Ltd.* v. *New Kaiser-I-Hind Spinning and Weaving Co. Ltd.*, 1970 (40) Comp. Cas 689)

The Act gives wide discretionary powers to the court in sanctioning of a scheme of compromise or arrangement, including the power to convene meetings of members or creditors, to examine the reasonableness of the scheme, to request for further information or documents, and to enforce the scheme.

As a summary, S.391 provides the method which has to be followed to put a scheme between a company and its creditors or any class of creditors, or its members or any class of members, or, in the case of a company being wound up, its liquidator, into effect. The courts have wide discretion in deciding whether or not to allow a scheme under S.391, since this is necessary to protect the minority's interests and to ensure that the scheme is otherwise fair and legal, and that it is not motivated by some illegitimate or unfair reasons. Once the court sanctions the scheme, and the order of the court is filed with the Registrar of Companies, the scheme is given effect from the date it was arrived at.

Illustration: Two companies took deposits from the public at an interest rate of 12%. When the deposits began to mature the companies informed the depositors that the companies were running at a loss. A scheme of arrangement was drawn up which envisaged payment to depositors at lesser interest. The depositors approved the scheme. The court, however, held that the approval of the depositors was obtained by giving inadequate information. The court further held that the scheme was unreasonable, and was intended to defraud the depositors. Consequently, the court did not sanction the scheme. *(Premier Motors (P.) Ltd.* v. *Ashok Tandon*, (1971) 41 Comp Cases 656 All)

Reconstruction refers to a process where a company's business and undertaking are transferred to another company, formed for that purpose, such that the new company carries substantially the same business as the old company, and the same persons are interested in it as in the case of the old company.

A company may decide to undergo reconstruction for various reasons, such as, to extend its operations, reorganise the rights of its members or creditors, amalgamation with one or more companies.

Amalgamation refers to the process where two or more companies are joined to form a third entity, or one is absorbed into or blended with another company. (*Somayajula* v. *Hope Prudhomme & Co. Ltd.*, [1963] 2 Comp LJ 61*)*

Upon completion of the amalgamation, the assets and liabilities of the amalgamating company are transferred to and vested in the amalgamated company in accordance with the terms of the scheme.

Illustration: Company A owed Company X Rupees Ten lakhs. Company X amalgamated into Company Y. Upon amalgamation, Company X ceased to exist, and all the rights and liabilities of Company X were transferred to Company Y. Pursuant to the amalgamation, Company Y will have the right to recover Rupees Ten lakhs from Company A.

Wide powers are given to the courts under S. 394 to facilitate the reconstruction and

amalgamation of companies. This Section acts as the 'Single-Window Clearance' for merger and amalgamation activities, rather than have parties making a number of different applications before the courts for the purposes of each different activity. S.394 relieves the burden upon the parties to a scheme of having to make a number of different applications before the court. The court may, however, enquire into the various circumstances surrounding the scheme, to ensure that nothing that is being done through the scheme is against public interest.

Chapter 8: Dividends, Accounts and Audit

Dividends

Dividend refers to that portion of the corporate profit that is set aside by the company, and declared as liable to be distributed amongst the shareholders of the company. (*Bacha F. Guzdar* v. *Commissioner of Income Taxes*, AIR 1955 SC 74)

Dividends can be paid only out of the profits of the company. The Act provides that dividends may be paid out of the following sources:

- Profits of the company, for the year for which dividends are to be paid;
- Undistributed profits of the company, of the previous financial years; and
- Money provided by the Central or State Government for payment of dividends, pursuant to a guarantee.

Prior to declaration or payment of any dividend, a certain percentage of the profits of the company, as prescribed by the Act but not exceeding 10%, must be transferred to the reserves of the company. (S.205(2-A))

Once declared, a dividend becomes a statutory debt of the company to its shareholders, and must be paid within thirty days. (S.205(2-A))

If the dividend is not paid, or if the dividend is not claimed within thirty days, the company must transfer the unpaid dividend to the "Unpaid Dividend Account" of the company.

If the dividend amount remains unclaimed for seven years, it is transferred to the *Investor Education and Protection Fund* established by the Central Government. Amounts accrued in this Fund are utilised by the Government to promote investor awareness, and to protect the interests of investors.

Illustration: Funds from the *Investor Education and Protection Fund* are being utilised to support a case filed on behalf of the public shareholders of Satyam Computer Services Ltd., who are seeking damages for loss incurred, due to the financial fraud committed by the promoters of Satyam Computer Services Ltd.

Accounts and Audit

Every company is under an obligation to keep proper books of account at its registered office. (S.209)

The books of account of the company must explain the transactions and the financial position of the company, in a true and fair manner.

The auditors of a company have an obligation to examine the books and accounts of the company and issue a report stating whether or not the accounts have been kept in accordance with the provisions of the Act and whether or not they give a true picture of the affairs of the company.

A company's auditors are appointed by the shareholders at the AGM of the company, and hold office until the conclusion of the next AGM of the company. Removal of auditors prior to expiration of their term requires prior approval of the Central Government.

Chapter 9: Rights of Minority Shareholders

The management of companies is based on majority rule. The general rule regarding administration of companies is that "courts will not, in general, interfere with the management of a company by its directors so

long as they are acting within the powers conferred on them under the Articles". (*Foss* v. *Harbottle*, (1843) 67 ER 189)

Illustration: Company A made a profit in a year. The directors of the company, however, decided to invest the profits for the benefit of the company, instead of paying dividends to the shareholders. The minority shareholders challenged this action. The court refused to intervene in the matter. (*Burland* v. *Earle*, (1902) AC 83)

There are the certain exceptions to the rule of majority supremacy, and shareholders can bring a suit against the company and its officers in the following circumstances:

- When the acts of the officers are *ultra vires* the Act, the Articles, or the MoA.

Illustration: The directors of Company A invested the funds of the company in a manner that was contrary to the provisions of the MoA. A, a shareholder, brought a suit against the directors, challenging their actions. The suit was decreed in the favour of the plaintiff. (*Bharat Insurance Co. Ltd.* v. *Kanhaiya Lal*, AIR 1935 Lah 792)

- When the majority shareholders act in a fraudulent manner.

Illustration: The majority of the members of Company A were substantial shareholders in Company B. In a general meeting of Company A, the majority shareholders approved a resolution authorising compromise of an action against Company B. The resolution approved by the majority shareholders was prejudicial to Company A, and favourable to Company B. Upon being challenged by the minority shareholders of Company A, the court set aside the actions of majority shareholders. (*Menier* v. *Hooper's Telegraph Works Ltd.*, (1874) 9 Ch App 350)

- When an act that requires a special resolution as per the Articles is done on the basis of a mere ordinary resolution.
- When the rights of a shareholder, such as the right to vote, or the right to have access to company's statutory records, is infringed.

The Act provides for special provisions to safeguard the interests of minority shareholders and prevent mismanagement of a company.

Prevention of Oppression

If the affairs of the company are being conducted in a manner prejudicial to the public interest or in a manner oppressive to any member(s), then the minority shareholders may seek appropriate remedy from the court. (S.397)

Illustration: The life insurance business of Company A was acquired by Company B on payment of compensation. The majority shareholders of Company A refused to distribute the compensation to all the shareholders and passed a new shareholders resolution approving investment of the compensation funds into new business of Company A. Upon being challenged, the court held the actions of the majority shareholders of Company A to be "oppression". (*Mohan Lal Chandumall* v. *Punjab Co. Ltd.*, AIR 1961 Punj 485)

Minor acts of mismanagement are not regarded as "oppression".

Illustration: The minority shareholders of Company A filed a case against the directors and majority shareholders of the company on the ground that petrol consumption was not being checked properly. The court held that this could not be a ground for "oppression". (*Lalita Rajya Lakshmi* v. *Indian Motors Co.*, AIR 1962 Cal 127)

Prevention of Mismanagement

S.398 of the Act provides relief in cases of "mismanagement" of the company. In an action for "mismanagement", the petitioner must establish that the affairs of the company are being conducted in a manner prejudicial to the interests of the company, or to public interest.

Illustration: The shareholders of a company filed a petition against the directors of a company, alleging mismanagement. Upon investigation, the court found that the Vice-Chairman of the company had grossly mismanaged the affairs of the company and had drawn substantial funds of the company for her personal use. The court held this to be sufficient evidence of "mismanagement". (*Rajahmundry Electric Supply Corporation* v. *A. Nageshwara Rao*, AIT 1956 SC 213)

Unlike in cases of "oppression", relief in cases of "mismanagement" is in favour of the company and any member of the company. The courts have wide powers to grant appropriate relief in cases of "mismanagement", including the power to order for conduct of the company's affairs in a manner that the court may direct.

Illustration: In a case where "mismanagement" was established, the court appointed a special officer along with an advisory board and directed that the affairs of the company will be managed by the special officer and the directors and shareholders of the company will not have any say in the management. (*Life Insurance Corporation* v. *Haridas Mundra*, AIR 1959 Cal 695)

Chapter 10: Winding Up

A company, being an artificial person, cannot die. A company can, however, be dissolved and struck off the Register of Companies. The proceeding by which a company is dissolved is known as "winding up".

A company may be wound up in any of the following manners:

Compulsory Winding Up by the Court

A process where a company is wound up, upon an order of the court, is known as 'compulsory winding up'. An application for compulsory winding up of a company may be brought by the company, its creditors, its members, the RoC, Central Government or the State Government on any of the following grounds (S.433 of the Act):

- If the company, by way of a special resolution, has resolved to be wound up by the court.
- In case of a public company, if such company has failed to deliver its statutory report to the RoC, or has failed to hold the statutory meeting of its members.
- If the company fails to commence business within one year of its incorporation, or if the company suspends its business for one year. This ground is not available if there are reasonable prospects of the company starting its business within a reasonable time or if there are good reasons for the company to suspend its business.
- If in case of a public company, the number of its members is reduced below seven or in case of a private company, the number of its members is reduced below two.
- If the company is unable to pay its debts. To invoke this provision, it must be established that there is a debt, there is no *bona fide* dispute regarding the debt and the company has failed to pay the debt, despite a notice to pay.
- On just and equitable grounds. This ground gives wide powers to the court.

In the past, courts have ordered winding-up of companies on just and equitable grounds when:

- There is a deadlock amidst the members of the management of the company.

Illustration: A company had two directors and shareholders with equal management and voting rights. The two directors became hostile to each other and disagreed on all the decisions pertaining to the company. The court held that there was a complete deadlock in the management and the company must be wound-up. (*Yenidje Tobacco Co. Ltd., Re*, (1916) 2 Ch 426)

- When the object for which a company was incorporated, has failed.

Illustration: A company was incorporated for purposes of manufacturing coffee from

dates, under a patent to be issued by the Government. The patent was never granted. The court held, that since it was impossible to carry out the objects for which the company was incorporated, it was just and equitable to wind-up the company. (*German Date Coffee Co., Re*, (1882) 20 Ch D 169)

- When it has been proved that carrying on the business of the company will lead to further losses.
- When the company was formed to carry a fraudulent activity.

Illustration: Company X was engaged in the business of purchasing and developing land and selling the same as plots. Upon investigation, it was discovered that the company was involved in fraudulent transactions and was selling plots over which it did not have valid title. The court ordered winding up of Company X on the ground that since it was involved in large-scale public deception, it had no right to exist.

- When "oppression" or "mismanagement" has been established.
- When it is important to do so, in public interest.

Illustration: Company X was engaged in the business of purchasing and developing land, and selling the purchased land as plots. Upon investigation, it was discovered that the company was involved in fraudulent transactions, and was selling plots of land over which it did not have valid title. The court ordered winding up of Company X on the ground that since it was involved in large-scale public deception, it had no right to exist.

In case of compulsory winding up, the court appoints an official liquidator for carrying the winding up proceedings. The official liquidator is an officer of the court and is entrusted with the responsibility of realising money from the properties of the company and discharging the liability of the company towards such stakeholders as workmen, creditors, and the Government.

Voluntary Winding Up

A company may be wound up voluntarily by approving a shareholders resolution to the effect that the company be wound up voluntarily.

If the Articles of a company prescribe a duration for operation of the company, or if the Articles provide that the company shall be dissolved upon occurrence of an event, then upon satisfaction of such a condition, only an ordinary shareholders' resolution will be required for commencing the winding up proceedings. In all other cases a special resolution of the shareholders is required to commence voluntary winding up.

The primary difference between voluntary and compulsory winding up is that almost the entire process in the case of voluntary winding up does not require court supervision. Only the relevant documents are required to be filed with the court to obtain an order of dissolution when the winding up is complete.

Illustration: The Articles of Company A provide that the company shall be dissolved upon termination of the shareholders' agreement between the shareholders of the company. Upon termination of the shareholders' agreement, voluntary winding up proceedings may be initiated by the shareholders following an ordinary resolution in this regard.

Voluntary winding up is of two kinds: members' winding up, and creditors' winding up.

If, at the time of commencing winding up proceedings, the board of directors of the company gives a declaration certifying that the company shall be able to pay its debts within a specified time, then such a winding up proceeding is known as 'members' winding up'. If the board of directors is unable to give such a declaration, then the proceedings are known as 'creditors' winding up'.

In case of voluntary winding up, the members or the creditors (as the case may be), appoint a liquidator to carry out the winding up proceedings.

Payment of Liabilities

Upon liquidation, after retaining funds to meet the costs and expenses of winding up, all revenues, taxes, cesses and rates due to the Central or State Government, or any other local authority and all wages and amounts due to the employees of the company, must be made in priority to all other debts and liabilities. (S.530)

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Notes:

All India Bar Examination
Preparatory Material

Subject 14: Environmental Law

Chapter I: Constitutional Provisions and the Environment

Directive Principles of State Policy and Fundamental Duties

Courts in India have developed the concept of environmental rights, to ensure that the Directive Principles of State Policy, and the fundamental right to life, as enshrined in the Constitution of India ("**the Constitution**"), are enforced. A.21 confers the right to life as a fundamental right; this has been interpreted by the Supreme Court to include the right to a wholesome environment.

Enjoyment of life, including the right to live with human dignity, encompasses within its ambit the protection and preservation of the environment, ecological balance free from pollution of air and water, and sanitation, without which life cannot be enjoyed. (*Virender Gaur* v. *State of Haryana*, 1995 (2) SCC 577)

Illustration: Certain companies obtained mining leases for the excavation of limestone. The operation of these mines and uncontrolled quarrying were causing danger to the adjoining lands, water resources, forests, wildlife, ecology, environment, and inhabitants of the area. The lessees of the limestone quarries were directed to close down operations permanently, after the consideration of the review committee. The court held that the lessees had invested large sums of money and expended time and effort, but that heed had to be paid to protecting and safeguarding the right of the people to live in a healthy environment, with minimal disturbance of ecological balance and undue affectation of air, water, and environment. The directions to close operations were valid. (*Rural Litigation and Entitlement Kendra* v. *State of Uttar Pradesh*, AIR 1988 SC 2187 (*Dehradun Quarrying case*))

The right to life includes the right to livelihood. This right has been used to check governmental actions with an environmental impact that threaten to dislocate poor people and disrupt their lifestyle.

Illustration: Certain tribal forest dwellers were ousted from their forestland by a government agency in order to implement a power project. The court permitted the acquisition of the land only after that agency agreed to provide certain court-approved facilities to the ousted forest dwellers. (*Banawasi Seva Ashram* v. *State of Uttar Pradesh*, AIR 1987 SC 374)

The Constitution provides protection against arbitrary permissions, granted by the Government, that do not provide an adequate consideration of environmental impact. (A.14 of what law-Article 14 of the Constitution is with regard to Equality before the law)

The Constitution (Forty Second Amendment) Act, 1976, added A.48A to the Directive Principles of State Policy and A.51A(g) to the fundamental duties for protection and improvement of the environment:

- A.48A declares; "The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country".
- A.51A(g) imposes a responsibility on every citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.

Illustration: X, an individual, ran a factory which discharged effluent water on roads and/or into the public drainage system. The municipal commission sent a notice to remind X of her fundamental duty to protect the environment. X cannot assert her right to carry on business without any regard to her fundamental duty. Such restriction placed on fundamental rights under A.19(1)(g), to carry on trade or business, are in the interest of the general public, and are constitutionally valid and no citizen can claim an absolute right to carry on business, without complying with the restrictions placed in this way. (*Abhilash*

Textile v. *Rajkot Municipal Corporation,* AIR 1988 Guj 57)

The 42nd Amendment also moved 'forest' and 'protection of wildlife and birds' from the State List to the Concurrent List.

There is both, a constitutional indicator to the state and a constitutional duty of its citizens, not only to protect but also to improve the environment, and to preserve and safeguard forests, flora, and fauna, and rivers, lakes, and other water resources in the country.

Fundamental norms, recognised by the Supreme Court to guide the development of environmental jurisprudence, include:

- Environmental laws must be strictly enforced by the enforcement agencies. (*Indian Council for Enviro-Legal Action* v. *Union of India*, 1996 (5) SCC 281, 294, 301)
- *The polluter pays principle*: a polluter bears the remedial or cleanup cost as well as the amount payable to compensate the victims of pollution.

Illustration: A, a private company, which operated as a chemical company, was releasing hazardous wastes into the soil, thereby polluting a nearby village. The company was being run without licenses. On a motion initiated by B against A, the court found the activity to be hazardous or inherently dangerous, and ordered the person carrying on such activity to make good the loss caused to any other person by the activity, irrespective of whether or not she took reasonable care in carrying on the said activity.

Polluting industries are absolutely liable to compensate villagers in affected areas, for the harm caused by these industries to soil and underground water and hence, are bound to take all necessary measures to remove sludge and other pollutants lying in affected areas. *(Indian Council for Enviro-Legal Action* v. *Union of India*, AIR 1996 SC 1446)

- *The Precautionary Principle*: This requires government authorities to anticipate, prevent, and attack the causes of environmental pollution.

Illustration: The land in a particular area became unfit for cultivation and agriculture because of the operation of tanneries in that area. A forum filed an action to stop tanneries from discharging untreated effluents into agricultural fields. The Supreme Court of India strongly supported the application of the precautionary principle as a part of international customary law. The court held that the Central Government, vested with powers and authority to control pollution and protect the environment, had failed to exercise these powers, and directed that the Central Government ensure that all tanneries set up common effluent treatment plants, or individual pollution control devices, and that failure to do so would authorise the Superintendent of Police and the Collector / District Magistrate / Deputy Commissioner in each of the respective districts to close the plants down. No new industries were to be permitted within listed prohibited areas. Reversing the burden of proof, the court directed that the proponents of the activity demonstrate that such activity is environmentally benign. (*Vellore Citizens Welfare Forum* v. *Union of India*, AIR 1996 SC 2715, 2721)

Government development agencies charged with decision making ought to give due regard to ecological factors including: (a) the environmental policy of the Central and state government; (b) the sustainable development and utilisation of natural resources; and (c) the obligation of the present generation to preserve natural resources and pass on to future generations an environment as intact as the one we have inherited from the previous generation. (*State of Himachal Pradesh* v. *Ganesh Wood Products*, AIR 1996 SC 149, 159, 163)

Implementation of India's International Obligations in Domestic Law

A.253 of the Constitution empowers Parliament to make laws implementing India's international obligations, as well as any decision made at an international

conference, association, or other body.

Entry 13 of the Union List covers participation in international conferences, associations, and other bodies, and implementing decisions made thereat. A.253 read with Entry 13 would thus empower Parliament to enact laws on virtually any entry contained in the State List.

Parliament, under A.253 read with Entry 13, has enacted the Air (Prevention, Control, and Abatement of Pollution) Act, 1981, and the Environmental (Protection) Act, 1986. The preamble to each of these provides that these Acts were passed to implement the decisions reached at the United Nations Conference on the Human Environment held at Stockholm in 1972.

Illustration: State laws proved inadequate to protect coastal ecology. The Central Government used the power vested in it by A. 253 read with Entry 13, List I, to impose stringent national coastal development norms. The norm restricted the nature of development on 3000 sq.km. of land along the entire Indian coast. The affected states questioned such assumption of power by the Centre, since the subject was part of delegated legislation. The Centre's norms were upheld and the ruling further recognised that the coastal regulations would have overriding effect, and would prevail over the law made by the legislatures of states. *(S. Jagannath* v. *Union of India*, AIR 1997 SC 811, 846, (*Shrimp culture case*))

Constitutional Remedies

Writ Jurisdiction

Aa.32 and 226 of the Constitution empower the Supreme Court as well as the high courts to issue writs, directions, or orders. Any person complaining of an infringement of fundamental rights may seek redress in either forum. Writs of *mandamus*, *certiorari*, and prohibition are generally resorted to in environmental matters.

Illustration: A certain locality lacked a proper drainage system for discharge of water, as a result of which, dirty water from houses and rainwater was accumalating in its lanes. Growth of moss and insects in the area increased the possibility of an epidemic. Y, a local resident, filed a writ of mandamus to enforce the municipal corporation's function of constructing sewers and drains for discharge of water. The writ petition was allowed and the municipal corporation was directed to remove the water and filth collected in the locality by constructing sewers and drains, within three months. (*Rampal* v. *State of Rajasthan*, AIR 1981 Raj 121)

Illustration: A writ of *certiorari* will lie against a municipal authority that permits construction contrary to development rules, or acts in excess of jurisdiction or in violation of rules of natural justice, for instance, wrongly sanctioning an office building in an area reserved for a garden.

When a fundamental right, which includes the right to a wholesome environment, is violated, Aa.32 and 226 provide an appropriate remedy. A.21, which guarantees the fundamental right to life, includes the right to a wholesome environment. A litigant's right to a healthful environment may be enforced by a writ petition to the Supreme Court or to a high court.

Illustration: A, an individual, was troubled by the excessive noise pollution and vibrations caused by electrical motors, diesel engines, and generators used by a hotel, B. The high court held that an affected person can maintain a writ petition, while rejecting B's plea that a civil suit would be a proper remedy. Further, it issued several directions to abate nuisance, with directions to the authorities to periodically inspect B. (*E. Sampath Kumar* v. *Government of Tamil Nadu*, 1998 AIHC 4498)

Courts have decided cases, including *M. C. Mehta* v. *Union of India and Others*, 1988 SCR (2) 530 (*the Ganga Pollution case*), *M. C. Mehta* v. *Union of India*, AIR 1987 SC 1086 (*the Shriram Gas Leak Case*), and the *Bhopal Gas Leak case*, under writ jurisdiction.

A rapid increase in the complexity of environmental laws and the need for expertise in environmental disputes has resulted in the establishment of special tribunals. The Supreme Court has also recommended the establishment of environmental courts on a regional basis. (*M. C. Mehta* v. *Union of India*, AIR 1987 SC 1446)

The National Environment Tribunal Act, 1995 ("NETA"), covers areas of strict liability for damages arising out of hazardous industrial accidents. The National Environment Appellate Authority Act, 1997 ("NEAAA"), covers appeals on restrictions or safeguards under the Environment (Protection) Act, 1986 ("EPA").

Public Interest Litigation ("***P.I.L.***")

Public interest cases involve grievances against the violation of basic human rights or based on the content or conduct of government policy. A Petitioner could be any person, not necessarily the aggrieved, who approaches the Supreme Court or a high court for legal redress, in public interest.

The principle features of environmental public interest litigation are:

- Generating awareness, educating citizens, and creating values in society;
- Preventing an illegitimate policy from continuing in the future;
- Corrective rather than compensatory relief sought; and
- Resolution of intra- and inter-sectoral conflicts of law on mandatory delimitation.

Illustration: Several tanneries are discharging effluents into the river Ganga thereby polluting it. A, interested in protecting the lives of people who make use of the water flowing in the river Ganga, files a petition in this regard alleging that the nuisance caused by the pollution of of the river Ganga is a public nuisance. A's right to maintain the petition cannot be disputed and the petition is entertained as a public interest litigation. (*Ganga Pollution (Municipalities) Case,* AIR 1988 SC 1115)

Illustration: A makes an offer to B, a steel plant, for carrying away slurry, with an intention of making profit. The steel plant refuses A's offer. A files a public interest litigation petition under A.32, claiming that the slurry discharged from B's plant was polluting the Bokaro river and was a serious health risk to the neighbouring community. A asked the court to prohibit B's discharges and filed an application seeking permission to carry away the slurry flowing into the river. The court found the real intent of A and finding no merit in the allegation of pollution, held that the Petitioner A was out to harass the company B with a view to making a profit. The petition was dismissed on the ground that personal interest in the garb of public interest litigation cannot be enforced under A.32 of the Constitution. (*Subhas Kumar* v. *State of Bihar*, AIR 1991 SC 420)

Illustration: A journalist complained to the Supreme Court that the national coastline was being sullied by unplanned development that violated a Central Government directive. The Supreme Court registered the letter as a petition, requested the court's legal aid committee to appoint a lawyer for the petition, and issued notice to the Union Government and the governments of all the coastal states. (*Mahesh R. Desai* v. *Union of India*, WP 989 of 1988)

To construct a complete framework of facts, a judge often requires the concerned public officials to furnish detailed, comprehensive affidavits. In cases where the impartial assessment of facts is needed and the official machinery is unreliable, slow, or biased, the court appoints special commissions to gather facts and data. The power to appoint an assessment agency or commission is an inherent power of the Supreme Court under A.32 of the Constitution and of the high courts under A.226.

Illustration: The public challenged the development of a resort in Goa in a petition. The High Court of Bombay appointed a commissioner to inspect and report on the extent of construction. (*Sergio Carvalho* v. *State*

of Goa, 1989 (1) Goa Law Times 276, 302)

Illustration: In pollution cases, the Supreme Court frequently relies on the National Environment Engineering Research Institute, Nagpur ("NEERI"), to submit its field report. The *Nilay Choudhary Committee* was requested to advise the court on whether Shriram's hazardous chemical plant should be allowed to recommence operations in Delhi.

A monitoring committee was set up in the *Dehradun Quarrying case* to oversee the running of three limestone mines that had been allowed to continue operations, and to monitor reforestation measures.

Relief in most P.I.L. cases is obtained through interim orders until a final decision is reached for redressing public grievances.

The courts do not encourage all public interest litigation. The Supreme Court in *State of Uttaranchal* v. *Balwant Singh Chaufal*, (Civil Appeal No 1132 -1134 of 2002) in its judgment dated January 18, 2010, issued the following guidelines:

- Courts must encourage genuine and *bona fide* P.I.L. and effectively discourage and curb those filed for extraneous considerations.
- Courts must, before entertaining a P.I.L., *prima facie* verify the credentials of a petitioner and the correctness of the contents of the petition.
- Courts entertaining a P.I.L. must ensure that the P.I.L. is aimed to redress genuine public harm or public injury, and that there is no personal gain, or private or oblique motive behind filing the P.I.L.
- Courts must also ensure that petitions filed by busybodies for extraneous and ulterior motives are discouraged by imposition of exemplary costs or by adopting similar novel methods to curb frivolous petitions and petitions filed for extraneous considerations.

Chapter II: Environmental Laws in India

Spreading awareness and consciousness, and international conferences on environmental protection resulted in Parliament enacting comprehensive laws on matters related to forest, wildlife, environmental protection, and water, air, and land pollution.

Environmental statutes are regarded as 'beneficial' legislation, enacted to advance the Directive Principles of State Policy, contained in A.48A of the Constitution.

The Water (Prevention and Control of Pollution) Act, 1974 ("the Water Act")

The enactment of the Water Act was India's first attempt at dealing with an environmental issue. The Act prohibits the discharge of pollutants into water bodies beyond a given standard, and lays down penalties for non-compliance with its provisions.

The Water Act was amended in 1988 to conform with the provisions of the EPA, 1986. It set up the Central Pollution Control Board ("**the C.P.C.B.**"), which lays down standards for the prevention and control of water pollution. At the state level, the State Pollution Control Board ("**the S.P.C.B.**") functions under the direction of the C.P.C.B. and the state government.

The preamble to the Water Act lays down its objectives, which include the prevention and control of water pollution, the maintaining of wholesome water, and the establishment of Boards to carry out its objectives.

Illustration: A river supports an overwhelming majority of people in a town. Some industries, through the discharge of sewage in the river, were ruining the quality of water. The court prohibited the discharge of industrial effluents into the river, and directed the establishment of monitoring stations on each of the drains leading to the river, and also directed the administration to take effective measures against such industries. (News item, *'Hindustan Times,' A. Q. F. M.*; *Yamuna* v. *C. P. C. B.*, 1999 (5) SCALE 418, 419)

S.2(a) defines the Board to mean the Central Board or the State Board.

As *per* S.2(e) of the Water Act, "pollution" means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, gaseous, or solid substance into water (whether directly or indirectly) as may, or is likely to, create a nuisance or render such water harmful or injurious to public health or safety, or to domestic, commercial, industrial, agricultural, or other legitimate uses, or to the life and health of animals, plants, or of aquatic organisers.

The word "sewage effluent" is defined in S.2 (g) as effluent from any sewage system or sewage disposal works, and includes sullage from open drains; and S.2(k) defines "trade effluent" to include any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any industry, operation or process, or treatment and disposal system" other than domestic sewage

The Water Act provides for a permit system or 'consent' procedure to prevent and control water pollution. The Act generally prohibits disposal of polluting matter in streams, wells, and sewers, or on land, in excess of the standards established by the state boards.

Ss.3 and 4 of the Act establish the Central and State Pollution Control boards at the Central and State levels, respectively, and confer board members with powers required by them to carry out the purposes of the Act. The Central and State boards perform functions as set out in Ss.16 and 17 of the Water Act.

The Central Board may perform the following functions (S.16):

- Promote cleanliness of streams and wells in different areas of the country;
- Advise the Central Government on water pollution issues;
- Co-ordinate the activities of state pollution control boards;
- Sponsor investigation and research relating to water pollution; and
- Develop a comprehensive plan for the control and prevention of water pollution.

In conflicts between the Central Board and a state board, the Central Board prevails.

The State Boards may perform the following functions (S.17):

- Lay down standards for discharge of sewage and trade effluents;
- Plan a comprehensive programme for abatement and control of water pollution and training of persons engaged in such a programme;
- Collect, compile, publish, and disseminate information and technical data relating to water pollution;
- Conduct and participate in investigations and research on water pollution problems;
- Inspect facilities for sewage and trade effluent treatment;
- Advise state governments on the location of any industry which may pollute water; and
- Perform such other functions as may be prescribed under the Water Act.

S.21 of the Act provides detailed procedures for sampling effluents. The analysis of a sample is not admissible as evidence in any legal proceeding under the Water Act, unless the sample is taken in accordance with this section.

Illustration: A, a company, was suspected of discharging effluents into a river. Without complying with the requirements of S.21 of the Water Act, representatives of the board got the sample analysed from a laboratory not recognised by the state administration. The court ruled that the samples are inadmissible as evidence and that therefore, the board failed to prove that **A's** discharge exceeded the limits prescribed. (*Delhi Bottling Co. Pvt. Ltd.* v. *C. B. C. P.*, AIR 1986 Del 152)

S.24 prohibits the use of a stream or well for disposal of polluting material. The polluter violating S.24 is subject to criminal penalty under S.43 of the Water Act.

S.25 is an important section; it imposes restrictions on new outlets and new discharges. A person must obtain consent from the state board before taking steps to establish any industry, operation, or process, any treatment and disposal system, or any extension or addition to such a system, which might result in the discharge of sewage or trade effluent into a stream, well, or sewer, or onto land.

Illustration: P, a company, was charged with releasing untreated effluents into a nearby canal. The state board consented to the operation on condition that P set up effluent treatment plants within a prescribed time limit. However, mere consent orders obtained by P cannot insulate it against the requirement of putting up the effluent treatment plants and complying with the standards of tolerance limits prescribed. (*Narula Dyeing and Printing Works* v. *Union of India*, AIR 1995 Guj 185, 191)

S.26 is with regard to existing discharge of sewage or trade effluents.

Contravention of S.25 or S.26 of the Water Act shall be punishable with imprisonment for a term, which shall not be less than one and half year, but which may extend to six years with a fine under S.44 of the Water Act.

S.27 empowers the state board to decide on whether or not to grant its consent to the bringing into use of a new or altered outlet, unless the outlet is so constructed as to comply with any conditions imposed by the board to enable it to exercise its right to take samples of the effluent.

S.28 gives a remedy to any person aggrieved by orders issued by the state board under Ss. 25, 26, and 27. An appeal is provided against the order under S.28, and S.58 bars the jurisdiction of civil courts to entertain any suit or proceeding against an order passed by the appellate authority.

The Board can issue directions for closure of an industry and disconnection of electricity in case of persistent defiance by any polluting industry under S.33A of the Water Act. Prior to the adoption of S.33A, a state board could issue direct orders to polluters under S.32 of the Act. A state board can exercise this power if the pollution arose from any accident or other unforeseen act or event.

Illustration: The S.P.C.B. issued directions to Z, an industry, to ensure proper treatment and storage of effluents in lagoons. Z did not comply with some of the directions, and as a result, some effluent reached the river Yamuna and polluted the water. Despite enough time given by the S.P.C.B., Z did not take any remedial steps, and the S.P.C.B. directed the closure of the industry under S. 33A of the Water Act.

The reluctance of courts to exercise broad injunctive power under S.33 may be one reason for granting state boards the authority to issue directions under S.33.

The state board can also apply to the courts for injunctions to prevent water pollution under S.33 of the Act.

Under S.41, the penalty for failure to comply with a court order under S.33, or a direction from the board under S.33A, is punishable by fines and imprisonment.

Illustration: The S.P.C.B. directed closure of an industry under S.33A. The industry refused to obey its closure order. The state board directed the deputy commissioner to seize the unit and secure compliance. The commissioner's office moved the magistrate, who ordered closure. In revision, the high court quashed the magistrate's order holding that the board had no power to get its closure orders executed through the Deputy Commissioner, but that it could initiate penalty proceedings under S.41. (*Executive Apparel Processors* v. *Taluka Executive Magistrate*, ILR 1997 Kar 2020)

Amendments in 1988 modified S.49 to allow citizens to bring actions under the Water Act. A complaint under the Act can be made by a board, or by any person authorised on its behalf, or by any person who has given a

notice of 60 days of her intention to make a complaint. Now a state board must make relevant reports available to complaining citizens, unless the board determines that the disclosures would harm 'public interest'.

Courts are still involved in enforcing S.33A as the boards have no direct power to exact fines, order imprisonment, or otherwise compel compliance with their directions.

The use of water in a manner detrimental to others creates a cause of action, which is challengeable in a court of law. Regulation and control of water by the state creates rights and obligations between states *inter se*. Any violation of such rights gives rise to a variety of litigation – civil and criminal.

Civil and Criminal Liability

The Water Act establishes criminal penalties of fines and imprisonment for noncompliance with S.33 orders, S.20 directions concerning information, S.32 emergency orders, and S. 33A directions issued by a state board.

The Supreme Court, in *Uttar Pradesh Pollution Control Board* v. *Mohan Meakins Ltd.*, 2000 (2) SCALE 532, held that those who discharge noxious polluting effluents into streams, may be unconcerned about the enormity of the injury they inflict on public health at large, the irreparable impairment they cause on the aquatic organisms, and the deleteriousness they impose on the life and health of animals, but that courts must deal with the prosecution for offences in such cases, in a strict manner.

The statutory remedies for violation of water rights are found in the EPA, the Water Act, the Indian Penal Code, 1860 ("**the I.P.C.**"), and the Criminal Procedure Code, 1973 ("**the Cr.P.C.**").

Injunctive relief can be obtained under S.133 of the Cr.P.C. against public nuisance caused due to water pollution, so long as it does not interfere with an order of a state pollution control board issued under the Water Act. (*Nagarjuna Paper Mills Ltd.* v. *Sub-divisional Magistrate*, AIR 1980 SC 1622)

A writ petition can also be filed under A.32 in the Supreme Court or under A.226 in a high court, seeking remedy against violation of water rights.

Pollution of water of a spring is punishable under S.277 of the I.P.C., whereas, pollution of waters other than springs or reservoirs will be covered by S.290. The offence of water pollution also comes within the purview of mischief punishable under S.426 of the I.P.C.. Mischief, as defined in S.425 of the I.P.C., is causing destruction of any property or any change in the property, destroying or diminishing its value or utility, or affecting it injuriously.

S.47 of the Water Act pins liability on persons responsible for a company and the conduct of its business, where such company has committed any offence under the Water Act.

Illustration: A, a manager of a company, was prosecuted for violation of Ss.25 and 26 of the Water Act. The manager argued that the complaint was defective and that she was not responsible for operation of the plant. The court observed that a person designated as manager of a company is *prima facie* liable under S.47 whether or not the person designated as 'manager' was in fact overall in charge of the affairs of the factory or whether or not the manager had any knowledge of the violations of the Water Act.

The Act extends liability to heads of government departments, unless the departmental head can prove that the offence was committed without her knowledge or that she exercised due diligence to prevent the commission of the offence.

The Air (Prevention and Control of Pollution) Act, 1981 ("the Air Act**")**

To implement the decisions taken at the United Nations Conference on the Human Environment held in 1972 (also known as "*the Stockholm Conference*"), and to counter the problems associated with air pollution, Parliament enacted the Air Act under A.253 of

the Constitution. The Act provides means for the control and abatement of air pollution, and establishes air quality standards.

Air Pollutants are defined under S.2(a) as any solid, liquid, or gaseous substance (including noise) present in the atmosphere in such concentrations as may be or tend to be injurious to human beings or other living creatures or plants or to the environment.

S.2(b) defines air pollution as the presence in the atmosphere of any air pollutants.

The Air Act follows the basic structure of the Water Act with a Central Board and state boards monitoring activities and enforcing the Act. Central and state boards are constituted under Ss.3 and 4 of the Act. They were deemed Central and state boards for prevention and control of air pollution.

The salient features of the Air Act:

- The Central Board and the state boards are to perform the functions set out in Ss.16 and 17 of the Air Act. S.17(1)(g) empowers the state boards to independently notify emission standards. However, by operation of S.24 of the EPA, the Environment Protection Rule norms take precedence over standards laid down by state boards.

Illustration: X, a company, was operating in an air pollution control area. The state board found that anti-pollution devices installed in X's plant were ineffective and directed closure of the plant under S.31A of the Act. XYZ argued that the state board had failed to prescribe any standards for emission. The high court found that the state board had not prescribed emission standards as required under S.17(1)(g) of the Air Act. The court held that in the absence of any such standards, no fault could be found in X's operation. The standards have to be prescribed so that industries may ensure necessary safeguards. (*Mahabir Coke Industry* v. *Pollution Control Board*, AIR 1998 Gau 10)

- Under S.19 of the Air Act, the State Government in consultation with the S.P.C.B. is vested with power to declare an area as an 'Air Pollution Control Area', in which provisions of the Air Act shall be applicable. The board must notify such declaration in the Official Gazette. Currently the whole state of Uttar Pradesh has been declared an 'Air Pollution Control Area.'

Illustration: A company cannot be prosecuted under the Air Act if the state board fails to produce before the court the Official Gazette declaring the concerned area an 'Air Pollution Control Area' and is unable to produce the newspaper notifying the declaration. (*Dahyabhai Solanki* v. *N. J. Industries*, 1996 (1) GLH 466)

- Every industrial operator, within a declared air pollution control area, must obtain a permit (consent order) from the state board. (Ss.21(1) and (2))
- The board has power to grant or refuse consent, yet it cannot apply discretion to exempt any industrial plant emitting pollutants. The state government or the state board cannot keep such industry out of the purview of the Air Act. The court can review the board's decision for consent when the interest of the community at large is at stake. (*Sugarcane G. & S.S. Association* v. *Tamil Nadu Pollution Control Board*, AIR 1998 SC 2614)
- Within a period of four months from the date of application for the permit, the board must complete the formalities to either grant, or refuse consent. During the course of processing a consent application, the board may seek any information about the industry after giving notice in Form II.
- Central and state boards are empowered to give directions to industries, which, if not followed, can be enforced under S.31A by the board closing down the industry or withdrawing its supply of water and power. (S.22)

Illustration: A ran an iron-casting unit in residential premises without obtaining consent under the Air Act. The matter came to the knowledge of the state board. The state board directed the magistrate to seal the unit.

Mr. A challenged the order in an appeal under S.31. The court held that though S.31A enables the state board to direct closure or discontinuance of the objectionable activity, sealing the unit and preventing access is unauthorised. (*Gopi Nath Pvt. Ltd.* v. *Department of Environment*, 1998 (72) DLT 536)

Powers of the State Board

Besides providing consultation to the State Government for declaring or restricting an area as an 'Air Pollution Control Area,' a State Board is vested with the following powers:

- *Power of entry and inspection*: Any person empowered by the State Board shall have the right to enter the industry premises for determining the status of pollution control equipment or if otherwise necessary for compliance with the Act, and the person concerned from the industry shall be bound to render assistance as deemed necessary for ensuring measures, and carrying out functions laid down in the Act. (S.24)
- *Power to take samples*: The State Board or any person empowered by it shall have the power to take samples of air or emission from any chimney, flue, any duct, or any other outlet in such manner as may be prescribed. (S.26)
- *Power to give direction*: The State Board may issue any direction to any person, authority including closure, prohibition, or regulation of any industry, and can also issue directives for the stoppage or regulation of the supply of electricity, water, or any other services. The direction should however be preceded by a proposed directive in writing giving the opportunity of being heard unless grave injury to the environment is likely, in which case a proposed directive may be avoided. (S.31A)

Civil and Criminal Penalties

Whoever fails to comply with provisions of Ss.21 and 22, or with directions as *per* S.31(A), shall be punishable with minimum imprisonment of one-and-a-half years and extending up to 6 years, and with fine, in case the failure continues, and an additional fine extending to five thousand rupees for every day during which such failure continues. The above terms of imprisonment in an extreme case may extend to seven years with fine. (S. 37)

Penalty shall also be imposed in the following cases:

- Tampering with the Board's notice;
- Obstructing the act of the person authorised by the Board;
- Damaging any work or property of the Board;
- Failure to intimate emission of air pollutant in excess of prescribed norms; and
- Making false statements.

Appeals

Any person aggrieved by an order made by a state board under the Air Act may appeal within 30 days of receipt of the order. The appeal shall be made to an appellate authority constituted by the state government. On receipt of an appeal, its disposal shall be ensured as expeditiously as possible. The rules made under the Air Act provide procedures for filing an appeal.

In *M. C. Mehta* v. *Union of India*, AIR 1997 SC 734 (the *Taj Trapezium case*), air pollution studies were conducted. The studies contained the status of ambient air quality, current emission scenarios, and the predicted ambient air pollutant concentrations in and around the growth centres in the region, along with an effective air quality management plan to protect all sensitive receptors within the redefined trapezium, including the Taj Mahal. The case brought to notice such preventive measures as are necessary for controlling air pollution, including:

- The introduction of the use of natural gas in the replacement of dirtier fuels such as coke and coal to clean the air;
- The lessening of the use of diesel generators, and requiring the state to improve power supply to the city; and

- The shifting of industrial plants to suburban areas.

Vehicular Pollution

Emission statistics indicate that vehicular pollution is responsible for a shocking 64% of total air pollution from various sources in Delhi, 52% in Mumbai, and 30% in Kolkata. Alarmed by this amount of unchecked pollution and its health-related concerns, a P.I.L. was filed in the Supreme Court in 1985, (*M. C. Mehta and others* v. *Union of India and others*, 1991 (2) SCC 353 (*Vehicular Pollution Case*)), charging that existing environmental laws obligated the government to take steps to help reduce Delhi's air pollution in the interest of public health.

The Court acknowledged that heavy vehicles including trucks, buses, and defence vehicles are the main contributors to air pollution.

- In its first action to regulate the type of fuel used in the buses, the court mandated the phasing out of lead from all fuel in India's four largest cities - Delhi, Bombay, Calcutta, and Madras.
- In 1996, the court ruled that all government vehicles in the city be converted to Compressed Natural Gas, a technology known to reduce vehicular air pollution, and also sought technical solutions to reduce harmful emissions from two and three wheelers and diesel trucks and buses.
- In 1998, the court on its own motion, mandated elimination of leaded petrol, converting auto rickshaws and buses to Compressed Natural Gas, and thereby strengthening the clean fuel distribution network.
- The court further required all private vehicles to conform to Bharat Stage II norms.

The Environment Protection Act, 1986

The objective of the Environment Protection Act, 1986 ("**the EPA**") is to implement the decisions of the Stockholm Conference, in so far as they relate to the protection and improvement of the human environment, and to the prevention of hazards to human beings, other living creatures, plants, and property.

Environment, as defined in the EPA, includes water, air, and land, and the inter-relationship between water, air, and land on the one hand, and human beings, other living creatures, plants, micro-organisms, and property on the other hand. (S.2(a), EPA)

An environmental pollutant is any solid or gaseous substance present in such concentration as may be, or tend to be, injurious to the environment. Environmental pollution means the presence in the environment of any environmental pollution. (Ss. 2(b) and 2(c), EPA)

S.3 empowers the Central Government to take necessary measures to protect and improve the quality of the environment and to control environmental pollution. These measures include setting standards for emissions and discharges of environmental pollutants, planning, and execution of nationwide programmes, regulating the location of industries, management of hazardous wastes and laying of procedures for prevention of accidents and remedial measures, doing investigations and research relating to problems of environmental pollution, collection, and dissemination of information with respect to matters relating to environmental pollution, and such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act.

Illustration: A court dealing with a case that involved the extent of the damages caused by untreated effluents discharged by tanneries,led the Central Government to constitute an authority under S.3(3) of the EPA to identify the persons who had suffered because of the pollution, to name the polluters liable to compensate, and to assess the compensation to be paid and the cost of remedial measures. (*Vellore Citizens' Welfare Forum* v. *Union of India*, AIR 1996 SC 2715)

The Central Government may constitute an

authority or authorities for the purpose of exercising and performing such of the powers and functions (including the power to issue directions under S.5) of the Central Government under the EPA, and for taking measures in respect of the matters mentioned above. The delegation of functions to such authorities, however, is subject to the supervision and control of the Central Government.

Illustration: Ss.5 and 3 of the EPA confer on the Central Government all such powers as are necessary or expedient for the purpose of protecting and improving the quality of the environment like issuing directions, undertaking remedial measures, and also imposing the cost of sponsoring remedial measures on the offender. If the government is reluctant to perform its task in a given case, the court can give directions to take such directions as are necessary, such as setting up an authority under S.3(3) to implement the provision of the Act. (*Indian Council for Enviro-Legal Action* v. *Union of India*, 1996 (5) SCC 281, 296)

The Central Government may, in the exercise of its powers and in the performance of its functions under this Act, issue directions in writing to any person, officer, or any authority. The power to issue directions under this section includes the power to direct the closure, prohibition, or regulation of any industry, or the stoppage of the supply of electricity, water, or any other service. (S.5, EPA)

The Environment (Protection) Rules, 1986 ("the EPR"**)**

To implement the provisions of the EPA, the Central Government is empowered under Ss. 6 and 25 of the EPA to make rules in respect of a variety of things including pollution control, emissions or discharge standards, hazardous waste, and procedural safeguards. The central government, by notification in the Official Gazette, has made the EPR for the betterment of the environment.

The EPR were framed to implement the mandate provided by S.7 of the EPA. S.7 prohibits any industry, operation, or process which discharges or emits any environmental pollution in excess of the standards prescribed. The EPR provides such standards which restrict the source from emitting or discharging environmental pollutants, fixes the pollution norms for product manufacturing units, and guides maintenance of environmental quality.

The schedules to the EPR lay down the specific industry standards with which compliance is mandatory for the listed industries.

Illustration: Schedule I lists 89 industries, and the effluent discharge and emission standards for them. Schedule IV lays down emission standards and noise limits for motor vehicles. Schedules III and VII prescribe national ambient air quality standards ("**NAAQS**") in respect of noise and air pollutants.

The Central Government has the power to impose prohibition or restriction on the location of industries and the carrying on of processes and operations in different areas. (Rule 5(3)(d) of the EPR)

The EPR are supplemented by Noise Pollution (Regulation and Control) Rules, which prescribe standards in respect of noise for industry, commercial, and residential areas, as well as for silence zones.

Hazardous Substance Regulation

S.8 of the EPA necessitates compliance with procedures and safeguards prescribed under the rules regarding hazardous substances.

The Hazardous Waste (Management and Handling) Rules, 1989, fix responsibility for the proper handling, storage, and disposal of hazardous waste on the person generating such waste.

The Manufacture, Storage, and Import of Hazardous Chemicals Rules, 1989, cast a responsibility on industries handling hazardous substances (other hazardous

waste) to identify major accident hazards, take necessary preventive measures, and submit a safety report to the designated authority.

Environment Impact Assessment

On January 27, 1994, the Union Ministry of Environment and Forests ("**MoEF**"), Government of India, under the EPA, promulgated an Environmental Impact Assessment ("**EIA**") notification making Environmental Clearance ("**EC**") mandatory for expansion or modernisation of any activity or for setting up new projects listed in Schedule 1 of the notification.

The MoEF notified a new EIA legislation in September 2006. The notification makes it mandatory for various projects such as mining, thermal power plants, river valley, infrastructure (road, highway, ports, harbours, and airports), and industries including very small electroplating or foundry units, to get environmental clearance.

Unlike the EIA Notification of 1994, however, the 2006 EIA notification has put the onus of clearing projects on the state government depending on the size / capacity of the project.

EIA is an important management tool for ensuring the optimal use of natural resources for sustainable development. Its purpose is to identify, examine, assess, and evaluate the likely and probable impacts of a proposed project on the environment, and to thereby, work out remedial action plans to minimise the adverse impact on the environment.

EIA in reports contain:

- Scientifically analysed environmental impacts or effects of a proposed project / activity;
- The views of affected local people and others who have a plausible stake in the environmental impact of the project or activity, which are ascertained through a public consultation process; and
- A plan for mitigating the adverse impact on the environment.

The EIA report, an environmental plan, and a project report is then assessed by an impact assessment agency for clearance. The EIA regulations apply to 29 designated projects / industries which are enumerated in Schedule I to the notification.

In India, environmental clearance is a big issue for upcoming infrastructure projects, and invariably, large power, steel, and oil and gas projects need a proper environmental pre-positioning for an effective environmental clearance.

The Coastal Regulations

In the exercise of the power vested by Rule 5 (3)(d) (prohibition and restriction on location), the Central Government through the Coastal Zone Regulations, 1991, imposed prohibition and restriction on development activities in the Coastal Regulation Zone ("**C.R.Z.**")

The Government declared a strip of 500 meters from the seashore, along the entire coast of India as a C.R.Z. The notification imposes restriction on the setting up and expansion of industries, operations, or processes. While some activities like setting up of new industries and expansion of the factories are completely prohibited, other types of commercial activities are restricted.

S.10 of the EPA empowers any person appointed by the Central Government to enter any place, at all reasonable times, for ensuring compliance with the Act, and for examining and testing any equipment, industrial plant, record, register, document, or any other material object, and to seize any such article which may furnish evidence of the commission of a punishable offence, or if the seizure is necessary to prevent or mitigate environmental pollution.

Every person dealing with hazardous substances shall be bound to render all assistance to the person empowered to carry out the inspection. Any failure to render such assistance without a reasonable cause, or

wilful delay or obstruction by such person shall be punishable under legislation.

S.11 of the EPA empowers the Central Government or an officer empowered by it, to take samples of air, water, soil, or other substance from any premises in such manner as may be prescribed for the purpose of analysis. The result of such analysis is admissible in legal proceedings provided the sample is taken in the manner prescribed in the Act.

S.23 of the EPA empowers the Central Government to delegate, by notification, such functions as it may deem necessary or expedient.

Illustration: The state government gave direction under S.5 of the EPA to an industrial unit A to shut down operation and take necessary steps to conform to standards specified by the state pollution control board. A challenged these directions A on the ground that the directions were issued without giving A any opportunity of being heard. It was observed by the court that the right to file objections or to be heard can be dispensed with if the Central Government is of the opinion that continuance of the activity in question would cause grave injury to the environment. By a notification, the Central Government had delegated its power to the state government. Therefore, the state government has not over stepped its jurisdiction in giving directions to A. (*Narula Dyeing & Printing Works* v. *Union of India*, AIR 1995 Guj 185)

Penalty for Contravention of the Provisions of the Act and the Rules, Orders, and Directions

S.15 of the EPA provides that whoever fails to comply with or contravenes the provisions of the Act, shall be punishable with imprisonment for a term which may extend to five years with fine which may extend to one lakh rupees, or with both.

For any offence committed by a company, the person in charge of the business of such company shall be deemed to be guilty of the offence and be liable to be proceeded against and punished accordingly. (S.16, EPA)

Where an offence under the EPA has been committed by any Department of Government, the Head of the Department shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. (S.17, EPA)

Courts shall take cognizance of any offence under this Act only when a complaint is made by:

- The Central Government or any authority or officer authorised in this behalf by that Government; or
- Any person who has given notice of not less than sixty days, in the manner prescribed, of the alleged offence and of her intention to make a complaint, to the Central Government or the authority or officer authorised as aforesaid.

The National Environment Appellate Authority Act, 1997 ("NEAA"**)**

The NEAA requires the Union Government to establish a body known as the National Environment Appellant Authority to hear appeals against orders granting environmental clearance in designated areas where industry activity is proscribed or restricted by regulations framed under the EPA.

S.11 of the NEAA requires an appeal to be filed within 30 days of the impugned order granting conditional or unconditional environmental clearance or within 90 days where the delay is explained.

The appellate jurisdiction is restricted to cases where clearance is granted and does not extend to cases where clearance is refused.

The category of aggrieved persons includes a person likely to be affected by the environmental clearance and an association of persons likely to be affected by such order.

S.15 limits the jurisdiction of civil courts such

that they cannot entertain any appeal in matters falling within the jurisdiction of the Appellate Authority.

The Indian Forest Act, 1927 ("the Forest Act**")**

The Forest Act was enacted to preserve and safeguard the forests in India. The Forest Act deals with four categories of forests:

- Reserved Forests;
- Village Forests;
- Protected Forests; and
- Non-Government Forests.

The first three categories deal with forests which are governmental property, while the last category refers to control over forests and lands which are not governmental property.

Reserved Forests

S.3 of the Forest Act empowers the state government to constitute any forest land and waste land, which is property of the government, as a reserve forest by making a notification in the Official Gazette.

In addition to notification under S.4, a notification under S.20(1) of the Forest Act is essential for the purpose of declaring a forest a reserved forest, and such notification must specify the limits of a forest and the date from which the forest constitutes a reserved forest. (*Mansed Oraon* v. *King*, AIR 1951 Nag 288)

Access to forests declared reserved forests becomes a matter of privilege, subject to permission of forest officials. Ss.6, 7, 9, and 10 of the Forest Act provide procedures for persons having right and title over land in the notified forest to make claims for compensation.

Village Forests

Under S.28 of the Forest Act, village forests are established when a state assigns to a village community the rights over any land which has been constituted a reserve forest. State governments make rules for managing village forests and prescribe conditions under which the village community is provided with timber, other forest products, and pastures. The rules may assign duties to the village for the protection and improvement of the forest.

Protected Forests

Under S.29 of the Forest Act, the state government may designate any forest or wasteland as a protected forest in which the government has proprietary right or rights to any part of the forest's products. Protected forests cannot be created from reserve forests.

There are fewer restrictions in a protected forest and a village community is provided with timber or other forest products.

S.31 of the Forest Act empowers the state government to regulate all rights and privileges relating to use of the protected forest.

Non-Governmental Forests

Under S.35 of the Forest Act, the state government may regulate or prohibit the use of such land or forests for activities including timber cutting, cultivation, grazing, and preservation of soil.

The Forest (Conservation) Act, 1980 ("the FCA**")**

In the last decade, the Supreme Court has played a major role in bolstering activism for forest conservation. In *T. N.Godavarman* v. *Union of India*, AIR 1997 SC 1228, the Apex court dealt with forest conservation and management. In this case, the specific instance of tree felling was enlarged in its scope to include all states and union territories. Through a series of directions, orders, and judgments, the Supreme Court, under its writ jurisdiction, has interpreted the FCA to ensure implementation in its true letter and spirit. Through the *Godavarman case*, the court has provided a forum to address a range of environmental issues, unparalleled in any earlier environmental litigation.

The courts have endeavoured to balance the

call for mining, infrastructure activities, and the genuine and *bona fide* needs of local inhabitants with the necessity of forest conservation. For example, wood-based industries, despite being the major cause of depletion of forests in the northeast states, were allowed, considering the dependence of local people.

The FCA was enacted to protect and conserve forests. The Act restricts the powers of the state in respect of de-reservation of forests and use of forestland for non-forest purposes. The term 'non-forest purpose' includes clearing any forestland for cultivation of cash crops, plantation crops, horticulture, or any purpose other than re-afforestation.

S.2, which forms the core of the FCA, reads thus:

"Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing:

- That any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved;
- That any forest land or any portion thereof may be used for any non-forest purposes;
- That any forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to any authority, corporation, agency, or any other Organisation not owned, managed, or controlled by Government.
- That any forest land or any portion thereof may be cleared of trees which have grown naturally in that land or portion, for the purpose of using it for afforestation.

For the purpose of this section, "non-forest purpose" means the breaking or clearing of any forest land or portion thereof for:

- The cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, and horticultural crops of medicinal plants;
- Any purpose other than re-afforestation.

""Non-forest purpose" does not include any work relating or ancillary to conservation, or development and management of forests and wildlife, namely, the establishment of check-posts, fire lines, wireless communications, and construction of fencing, bridges, and culverts, dams, waterholes, trench marks, boundary marks, pipelines, or other like purposes."

The Central Government framed the Forest (Conservation) Rules, 1981 ("**the FCR**"), to carry out the provisions of the FCA under the exercise of powers conferred by S.4 of the FCA.

Interpretation of FCA by Supreme Court in T. N. Godavarman Case

The Supreme Court undertook a purposive interpretation of the FCA, and held that:

- The word "forest" must be understood according to the dictionary meaning. The court clarified that this description covers all statutorily recognised forests, whether designated as reserved, protected or otherwise for the purpose of S.2(i) of the Act.
- The term "forest land" as occurring in S.2 will not only include "forest" as understood in the dictionary sense, but also any area recorded as forest in the government record, irrespective of ownership.
- The provisions enacted in the Act for the conservation of forests must apply clearly to all forests so understood, irrespective of the ownership of classification thereof.

The court directed each state government to constitute an expert committee to:

- Identify areas which are 'forests' irrespective of whether they are so notified, recognised, or classified under any law, and irrespective of the ownership of the land of such forest;
- Identify areas which were earlier forests but stand degraded, denuded, or cleared; and

- Identify areas covered by plantation trees belonging to the government and those belonging to private persons.

Combined implications of the *Godavarman* and *Centre for Environmental Laws* cases can be summarised as follows:

- All state governments are restrained from using forest land for non forest purposes without the prior approval of the Central Government in accordance with the provision of S.2(ii) of the Forest Conservation Act, 1980; and
- Restraint on the de-reservation of any National Park, Sanctuary, and forest. S.27 of the Indian Forest Act vests the state Government with the power to de-reserve a reserve forest but only after prior approval of the Central Government.

The Wildlife (Protection Act), 1972 ("the WPA"**)**

In 1972, India adopted a comprehensive national law, the WPA to protect wild animals, birds, and their habitat. The Act adopts a two-fold strategy of protecting:

1. Endangered species regardless of their location; and
2. All species in designated areas such as in national parks and sanctuaries.

The policy and object of laws of protection of wild life are the cumulative result of an increasing awareness of the compelling need to preserve fauna and flora, some species of which are becoming extinct at an alarming rate due to human intervention. (*State of Bihar* v. *Murad Ali Khan*, AIR 1989 SC 1)

The 42nd Constitutional Amendment in 1976 moved wildlife and forest from the State List to the Concurrent List.

In order to protect wildlife and its habitat, the State government can declare any area of adequate ecological, faunal, floral, geomorphological, natural, or zoological significance as a sanctuary under S.18 of the WPA, and as a national park under S.35. A person can enter a sanctuary or national park only upon grant of permit for purpose of investigation, photography, scientific research, tourism, and transaction of lawful business.

Illustration: An area was notified by the government of Mizoram to be a wildlife sanctuary, but the provisions of Chapter IV of the WPA were not followed. It was held that the authorities could not take follow-up action to evict the persons from an area declared a sanctuary, without adherence to the provisions of Chapter IV. (*Jaladhar Chakma* v. *Deputy Commissioner, Aizwal*, AIR 1983 Gau 18)

National parks enjoy a higher degree of protection than sanctuaries. For instance, grazing of live stock is prohibited within a national park (S.35(7), WPA) but permissible in a sanctuary (S.33, WPA).

The Central Government's national wildlife policy is given form in the National Wildlife Action Plan, 1982, for the conservation of wildlife, including the flora of our country.

Wildlife Offences

S.9 of the WPA prohibits hunting of wild animals specified in Schedule I, II, III, or IV.

Illustration: Y went to a forest, sighted a bison, shot it down, extracted its meat, and sold it in the open bazaar. The remaining carcass was buried in the ground. On receiving information about the incident and upon interrogation, Y admitted to killing of the bison, and was convicted for the offence of hunting under S.9 of the WPA. (*Forest Range Officer* v. *Aboobacker*, 1990 FLT 22 Ker HC)

The Chief Wildlife Warden may permit hunting in certain cases given under Ss.11 and 12 of the WPA.

Similarly, S.17 of the WPA provides protection to specified plants. It imposes such restrictions as are necessary for protection of any specified plant in a forest area.

S.27 of the WPA provides that no person shall

cause any damage in a sanctuary or tease or molest any wildlife animal. Entry with a weapon, causing fire, or using injurious substances are all prohibited in a sanctuary or national park. (Ss.27 and 35(8), WPA)

S.40 of the WPA prohibits possession of wildlife and/or derivatives without valid authorisation. Thus, all animal articles, and trophy or uncured trophy, derived from any animal specified in Schedule I, or Part II of Schedule II, can only be kept if a written permission to do so has been obtained.

Illustration: The Range Officers of a wildlife sanctuary seized a number of captive animals, including a hyena and a leopard from the custody of H. H claimed that she was operating a zoo and was therefore entitled to possess the animals. H failed to establish that she acquired animals from an authorised person or another zoo. Therefore, the presumption under S.57 of the Act was that H was in unlawful possession. (*Jaydev Kundu* v. *State of West Bengal*, 97 CWN 403)

S.49 of the WPA imposes a prohibition on trade or commerce in scheduled species or derivatives.

Illustration: D was exhibiting for sale, articles made of snake and lizard skins. D could not produce a licence for dealing in such articles and admitted the recovery. It was found that the Act does not extend to all types of lizards and snakes but applies only to scheduled species. D was acquitted, since the articles were not made from the skins of scheduled species.

Illustration: Some petitioners challenged the provision banning trade in imported ivory and articles on the grounds that it violated their fundamental right to carry on trade guaranteed under A.19(1)(g) of the Constitution. The court held that the prohibition was justified since the sale of ivory by the dealers would encourage poaching and killing of elephants to replenish the stocks held by petitioners. Trade and business at the cost of disrupting life forms and linkages necessary for biodiversity and ecology cannot be permitted. Even the international ban on the trade of ivory of the African elephants was likely to exert pressure on the Indian elephant. (I*vory Traders and Manufactures Association* v. *Union of India*, AIR 1997 Del 267)

Illustration: The Bombay High Court was approached to prevent trafficking and cruel treatment of wild birds. The petition named places where the illegal market flourished. The court constituted a committee to ensure compliance with the Wildlife Act and directed police to take immediate steps to prevent trade in birds and animals. (*Viniyog Parivar Trust* v. *Union of India*, AIR 1998 Bom 71)

Where an offence against this Act has been committed by a company under S.58, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, would be deemed to be guilty of the offence, and would be liable to be proceeded against and punished accordingly, unless she proves that the offence was committed without her knowledge or that she exercised all due diligence to prevent the commission of such offence.

S.39 of the WPA provides that every wild animal, animal article, trophy or ivory in respect of which an offence is committed, and vehicle, vessel, weapon, or tool that has been used for committing an offence and that has been seized, shall be the property of the Government.

Penalties

General penalties for violation of the WPA, and for trade and offence committed in respect of animals in Schedule I, or Part II of Schedule I, include imprisonment of three to seven years with fine. The wildlife offences that involve species listed in the Schedule are non-bailable and cognizable.

The provision to eliminate human intervention within national parks and sanctuaries operates harshly against forest

communities. In recognition of the severe problems forced by displacement of forest dwellers, S.24 of the amended WPA enables persons having rights over the land within the limits of sanctuary, to enjoy such rights.

S.20 of the WPA protects forest dwellers by providing that no new rights can be acquired in or over the land comprised within the limits of the area specified. Thus, no interference can occur with the rights of the people who continue to stay in such area because of development activities.

Illustration: A well-reputed hotelier began renovating cottages and a reception centre within the national park to set up a forest lodge. The state government considered the project necessary to encourage eco-tourism. Later, the environmentalists and tribal-welfare N.G.O.'s urged that the project be scrapped, as it interfered with the ecological balance in the park and the welfare of the tribals. The court stopped the hotelier from proceeding with the renovation work as there was violation of Ss.20 and S.35(3) of the WPA, and S.2(iii) of the FCA. (*Nagarhole Budakattu Hakku Sthapana Samiti* v. *State of Karnataka*, AIR 1997 Kar 288)

Bhopal Gas Leak Disaster

The Bhopal gas leak case raises questiones about the liability of parent companies for the acts of their subsidiaries, the responsibility of multinational companies who are involved in hazardous activities, and the applicability of principles of liability. Till the Bhopal incident, courts in India had been applying common law principles of liability to compensate the victims of pollution. Bhopal was the inspirational factor for judicial innovation in the area of evolving principles of corporate liability for use of hazardous technology.

Facts: On December 1984, highly toxic Methyl Iso-Cyanate ("**MIC**"), which had been manufactured and stored in Union Carbide Corporation's ("**U.C.C.**") chemical plant in Bhopal, escaped into the atmosphere, and killed over 3,500 people and seriously injured about 2 lakh others.

Looking at the nature and extent of the damage and at the best advantage of the claimants, Parliament passed the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985 ("**the Bhopal Act**"). The Bhopal Act conferred the exclusive right on the Indian Government to represent all claimants, both within and outside India, and directed the Government to organise a plan to register and process victims' claims.

In the *Union Carbide gas leak disaster at Bhopal, India case*, a U.S. court rejected the claims of the victims made against U.C.C. on the ground of *forum non conveniens*. The court refused to take jurisdiction over the matter by saying that Indian courts were a more appropriate forum available to the parties.

The Indian Government sued U.C.C. in a Bhopal court. The case reached the Supreme Court through the separate appeals of the U.C.C. and the Indian Government. In February 1989, the Supreme Court brokered an overall settlement of the claims arising from the Bhopal disaster. The U.C.C. agreed to pay U.S. $470 million to the Indian Government as full and final settlement of all past, present, and future claims, both civil and criminal.

In December 1989, however, the Supreme Court acknowledged that the Bhopal Act entitles the victims to be heard on any proposed settlement. The February 1989 settlement had failed to give such a hearing. Therefore, the Supreme Court concluded that a post-decisional hearing would be in the interests of justice. The court noted that the hearings to be held during the review of the settlement, in review petitions filed by some of the victims, afforded a sufficient opportunity to the victims.

In *Keshub Mahindra* v. *State of Madhya Pradesh J.T.*, 1996 (8) SCC 136, criminal charges were brought against former Union Carbide India Limited employees for causing death by negligence. On June 7, 2010, eight officials of Union Carbide India Limited were convicted for the 1984 Bhopal gas disaster only for

criminal negligence, and each sentenced to two years' imprisonment and fined Rs.1 lakh, despite the enormity of the tragedy.

The Bhopal disaster raised complex legal, moral, and ethical questions about the liability of parent companies for their subsidiaries, of transnational companies engaged in hazardous activities, and of the government caught between attracting industry to invest in business development while simultaneously protecting the environment and citizens.

Parliament enacted the EPA in the wake of the Bhopal tragedy. The EPA confers the power to strengthen and regulate the operation of hazardous industries and to control pollution. The Public Liability Insurance Act, 1991, was also enacted to ensure that immediate relief is given through compensation to victims of industrial accidents.

Public Liability Insurance Act, 1991 ("the PLIA**")**

The Act covers accidents involving hazardous substances, insurance coverage for the persons affected by accidents occurring while handling any hazardous substances, and for matters connected therewith or incidental thereto.

The EPA defines 'hazardous substance' as any substance or preparation which, by reason of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organisms, property, or the environment.

To achieve this object, the act imposes no-fault liability upon the owner of the hazardous substance and requires the owner to compensate the victims irrespective of any default or neglect on the owner's part.

The maximum relief under the PLIA act for injury or death is Rs. 25,000/- and the limits for compensation in respect of damage to private property is Rs.6,000/-. A victim reserves the right, however, to claim additional relief under any other law.

The PLIA obligates every owner to be insured against potential liability from an accident.

The word 'accident' as defined in the PLIA includes an accident involving a fortuitous, sudden, or unintentional occurrence while handling any hazardous substance resulting in continuous, intermittent, or repeated exposure to death of or injury to any person, or damage to any property, but does not include an accident by reason only of war or radioactivity.

Along with the insurance premium, every owner must make a contribution to the Environmental Relief Fund established by the Central Government. The PLIA was amended in 1992, and the Central Government was authorised to establish the Environmental Relief Fund to make relief payments.

Chapter III: Judicial Remedies and Procedures

Citizens have three civil remedies to obtain redressal:

- A common law tort action against the polluter;
- A writ petition under Aa.2 and 226 of the Constitution of India; and
- In the event of damage from a hazardous industry accident, an application for compensation under the Public Liability Insurance Act, 1991, or the National Environment Tribunal Act, 1995.

The Law of torts provides for the oldest of the legal remedies to abate pollution. The majority of the cases under the law of torts are classified under the categories of:

- *Nuisance*: Remedy for private nuisance is by way of bringing an action for injunctive relief as well as damages.

Illustration: The smoke and fumes from Z's chimney, which were interfering with the comfort of Y (Z' s neighbour) were enough to constitute private nuisance. Z's defence that the nuisance existed long before Y came

to live in the neighbourhood, does not relieve the offender. The court ordered Z to seal the holes of the chimney facing Y's property. (*B. Venkatappa* v. *B. Lovis*, AIR 1986 AP 239)

- *Negligence*: A suit for damages can be instituted for losses that would result from the negligent act.
- *Absolute liability*: A company which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas, owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of the nature of the activity being undertaken.
- *Strict liability*: The rule in *Rylands* v. *Fletcher*, L.R 1 Ex. 265, holds a person strictly liable when she brings or accumulates on her land something likely to cause harm if it escapes, and for damage that arises as a natural consequence of its escape.

A plaintiff in a tort action may sue for damages or an injunction, or both. Damages are the pecuniary compensation payable for the commission of a tort. Damages are of two types:

- *Substantial damages*: These are compensatory in nature and compensate the plaintiff for the wrong suffered.
- *Exemplary damages*: These are punitive in nature and intend to punish the wrongdoer.

Illustration: A dangerous gas escaped from a unit of X, a company, which injured people living in the locality. Exemplary damages were awarded to the affected persons because the compensation must be punitive and have a deterrent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it. (*Shriram Gas Leak Case*)

An injunction is a judicial order whereunder a person who has infringed, or is about to infringe the rights of another, is restrained from pursuing such acts. Injunctions are of two types:

- Temporary; and
- Perpetual.

Public Nuisance

Remedies for a public nuisance are:

- A criminal prosecution for an offence under S.268 of the IPC;
- A criminal proceeding before a magistrate for removing a public nuisance under Ss. 133–144 of the Cr.P.C.; and
- A civil action by the advocate general or by two or more members of the public with the permission of the court, for a declaration, an injunction, or both under S. 91 of the Cr.P.C.

Class Actions and Representative Suits

In a class action, one or more members of a class that have suffered common injury, or that have a common 'interest', may sue or defend on behalf of themselves and all the other members of that class.

The purpose of a class action suit is to provide an economical and convenient forum to dispose of similar lawsuits, because, among other things, separate suits could result in the establishment of inconsistent obligations for persons opposing the class.

A 'representative' or a class action suit is recognised under Order I, Rule 8 of the Code.

Illustration: Where effluents discharged by an industry into a river kill fish and imperil the livelihood of several villagers downstream, the effect of pollution on any individual fisherman might be too small to justify a conventional lawsuit seeking compensation. In the aggregate, the impact on all the affected fishermen may be substantial enough to seek redress in a class action suit. On a practical level, while an individual fisherman might not be able to bear the cost of litigation, the group as a whole may find it easier to finance a single class action suit.

The advantages of a representative suit are:

- As a rule, courts do not grant monetary compensation in writ proceedings. Monetary recoveries from tortfeasors in environmental cases can only be obtained through a suit.
- The procedure in representative suits appears more suited than the writ procedure to accommodate detailed evidence, including cross-examinations.

Some key differences between representative suits and P.I.L.s include:

- P.I.L.s can be filed only against the state or public authorities, in the High Court and Supreme Court under A.226 and A.32 of the Constitution, respectively, whereas representatives suits can be filed against any entity, including private entities.
- The plaintiff in a representative suit must necessarily have suffered a legal injury and must have a financial interest in the suit, unlike a P.I.L. where the plaintiff is not required to have sustained damage due to the wrong doing alleged in the petition.

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Notes:

All India Bar Examination
Preparatory Materials

Subject 15: Family Law

Hindu Law

Hindu law in India is the set of personal laws that are applicable to Hindus. The term 'Hindu' has been defined broadly, and includes Buddhists, Jains, and Sikhs. It also applies, unless proved otherwise, to people domiciled in India who are not Muslim, Christian, Parsi, or Jewish by religion.

The Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955 ("**the HMA**") was enacted to amend and codify the laws relating to marriage among Hindus. The HMA does not apply to the Scheduled Tribes that are included within the meaning of A.366 of the Constitution of India ("**the Constitution**").

S.4 of the HMA gives overriding application to the provisions of the HMA in respect of any of the matters dealt with therein. It is a codifying enactment that supersedes all prior law and lays down the law relating to marriage. Thus, in matters governed by the enactment, appeal to any rule of law previously applicable to Hindus is now permissible only if no provision for the same is made in the HMA. (*Rohini Kumari* v. *Narendra Singh*, AIR 1972 SC 459)

Ss.5 and 7 of the HMA lay down the conditions and ceremonial requirements of a Hindu marriage:

- First, the marriage must be solemnised in accordance with the customary rites and ceremonies of either party. Unless the marriage is celebrated or performed with proper ceremonies and due form, it is not considered 'solemnised'. (*Priya Bala* v. *Suresh Chandra*, AIR 1971 SC 1153) There must be substantial compliance with those rites and ceremonies of marriage in the customary law of either party that are deemed absolutely necessary.

Illustration: A, a Hindu, married B, a Christian. The marriage was solemnised as *per* Christian rituals. Their marriage cannot be dissolved later under the provisions of the HMA. (*M. Vijayakumari* v. *K. Devabalan* AIR 2003 Ker 363)

- Second, if, at the time of the performance of the marriage rites, either of the parties has a spouse living and the earlier marriage had not already been set aside, the later marriage is void *ab initio*.
- Third, the parties should be mentally sound. This is important to ensure that parties are capable of giving consent to the marriage. There may arise situations, however, wherein a person may have been capable of consenting to the marriage but subsequently suffers from a mental disorder, thereby rendering that person unfit for marriage and procreation.

Illustration: A married B as *per* Hindu laws and customs. Subsequently, A has recurrent bouts of epilepsy. This marriage is now voidable at B's instance.

- Fourth, the bridegroom and bride should have completed the ages of 21 and 18, respectively. Marriages not satisfying this requirement may be annulled by a decree of nullity under S.12(1)(c). A marriage solemnised in violation of this requirement is not void or even voidable, but is punishable as an offence under S.18 of the HMA.
- Fifth, no marriage is valid if it is made between parties related to each other within the prohibited degrees of relationship (defined in S.2(g)) or by a *sapinda* relationship (defined in S.2(f)) unless such marriage is sanctioned by the custom or usage governing both the parties. The custom which permits a marriage between persons who are within the degrees of prohibited relationship must fulfil the requirements of a valid custom. (defined in S.3(a)) (*Shakuntala Devi* v. *Amar Nath*, AIR 1982 P&H 221)

There is an extremely strong presumption in favour of the validity of a marriage and the

legitimacy of its offspring, if, from the time of the alleged marriage, the parties are recognised by all persons concerned as man and wife, and are so described in important documents and on important occasions. This is the case even when looking into whether the formalities for solemnising a marriage were satisfied. (*Guru Charan* v. *Adikanda Behari*, AIR 1972 Ori 38)

Cohabitation leads to the presumption that the persons are living together as husband and wife. The fact that a woman was living with a man under her protection and this man acknowledged her children, raises the strong presumption that she is the wife of that man. This presumption may, however, be rebutted by proof of facts showing that no marriage could have taken place. (*Balasubramaniyam* v. *Suruttayan*, AIR 1992 SC 756)

A long period of cohabitation leads to the presumption that the formalities and customs of a valid marriage have been performed. (*Nirmala* v. *Rukminibai*, AIR 1994 Kant 247)

The HMA, under S.8, does not lay down any rules relating to registration, but empowers state governments to make rules relating to the registration of marriages between two Hindus solemnised in the ceremonial form. This is important to prove *factum* of marriage.

S.11 provides that a decree for nullity of marriage may be obtained in cases of bigamy or where the parties are within prohibited degrees of relationship or were *sapindas* of each other.

S.12 provides the following grounds under which a marriage is considered voidable:

- Impotence of the respondent;
- Mental incapacity of the respondent at the time of marriage;
- Consent of the petitioner or of the guardian in the marriage of the petitioner was obtained by force or fraud; and
- The respondent was, at the time of marriage, pregnant by some person other than the petitioner who was ignorant of that fact at the time of marriage.

By virtue of the legal fiction operative in S.16 (1), children born of a void marriage are treated as legitimate for all purposes including succession to the property of their parents. If either party challenges the validity of a voidable marriage, and if the marriage is not annulled, it would be a valid marriage, and the children of the parties would be legitimate. Under S.16(2), even if the marriage is annulled, the children born of such marriage are deemed to be legitimate offspring for all intents and purposes, except that by virtue of S.16(3), they cannot claim any rights in or over property of any person other than their parents.

Under S.10 of the HMA, the grounds on which a decree for judicial separation may be passed are identical to that required under S. 13 for a decree for divorce.

S.13 lists the grounds for divorce as the following:

- First, the respondent spouse has committed adultery. A petition for divorce on the grounds of adultery can lie at the instance of either the husband or the wife. There is always the presumption of innocence and it is for the petitioner to prove the allegations relied upon. Where any confession or admission of adultery is made, the court should be satisfied based on all the surrounding circumstances that it is true and that there is no collusion.
- Second, the respondent spouse treated the petitioner with cruelty. This includes mental cruelty. The legal concept of 'cruelty' and the degree of cruelty that is necessary to amount to a matrimonial offence has not been defined in Indian legislation. Thus, in deciding allegations of cruelty, courts will examine if the conduct so alleged is of such a character as to cause a reasonable apprehension, in the petitioner's mind, that it will be harmful or injurious for the petitioner to live with the respondent. The cruelty does not have to amount to danger to life, limb, or health. A reasonable apprehension of such danger is sufficient. (*Dastane* v. *Dastane*, AIR 1975 SC

1534) To amount to cruelty, the acts must be of a more serious nature than mere wear and tear of married life. (*Savitri Pandey* v. *Prem Chandra Pandey*, AIR 2002 SC 591)

Illustration: A and B have been married for 10 years. For the past 8 years, B has exhibited indifference to A's health in addition to treating her with callous neglect and extreme boorishness. B also uses every opportunity to harass A, sometimes even in public. B also ill-treats their children. A will be granted a decree of divorce on the ground of cruelty as the cumulative effect of these acts results in the reasonable apprehension in A's mind that cohabitation with B is detrimental to her.

Illustration: A and B are married. A wants to have children. The fact that B deliberately and consistently refuses to fulfil this wish amounts to cruelty. (*Forbes* v. *Forbes*, [1955] 2 All ER 774)

Illustration: A and B are married. B enjoys drinking with friends and gets inebriated twice a month. A will not be granted a divorce on grounds of cruelty as mere drunkenness does not amount to cruelty. (*Harjit Kaur* v. *Roop Lal*, AIR 2004 P&H 22) But, persistent drunkenness even after warnings that such action causes pain and misery on the other spouse may amount to cruelty.

- Third, the respondent spouse has deserted the petitioner for a continuous period of two years. The essence of desertion is the unilateral, intentional, and permanent abandonment of one spouse by the other without reasonable cause. The deserting spouse must prove *factum* of separation and the deserted spouse must show absence of conduct giving reasonable cause and absence of consent. The petitioner must prove the offence of desertion beyond all reasonable doubt. It is essential that the deserted spouse should, at all times, affirm the marriage; otherwise desertion ceases and becomes separation by consent.
- Fourth, the respondent spouse has ceased to be a Hindu by conversion to another religion. A person does not cease to be a Hindu merely because she professes a theoretical allegiance to another faith, or is an ardent admirer and advocate of such religion and its practices. If, however, she renounces her religion by a clear act of renunciation and adopts the other religion by undergoing a formal conversion, she would cease to be a Hindu within the meaning of S.13(1)(ii) of the HMA.
- Fifth, the respondent spouse has been of incurably unsound mind or suffering from a mental disorder as set out in S.13(1)(iii). The mental disorder must be of such a degree that it mitigates against the continuance of marriage. (*B. N. Panduranga Shet* v. *S. N. Vijayalakshmi*, AIR 2003 Kant 357) The onus of proving incurable unsoundness of mind rests with the petitioner. To bring a case within the ambit of this clause, it is not necessary that the mental disorder be incurable. It should, however, be of such magnitude and type that the petitioner cannot reasonably be expected to live with the respondent. Decisions on this topic turn on the peculiar facts and circumstances of each case.
- Sixth, the respondent spouse has been suffering from a virulent and incurable form of leprosy.
- Seventh, the respondent spouse has been suffering from a communicable venereal disease. It is not a defence to urge that the disease was innocently contracted or that it is curable. The ground is satisfied if it is shown that the disease is in a communicable form and it is not necessary that it should have been communicated to the petitioner.
- Eighth, the respondent spouse has renounced the world by entering any religious order. Under Hindu law, this action is tantamount to civil death. The respondent spouse must have performed the requisite rituals and formalities for entering that religious order.
- Ninth, the respondent spouse has not been heard of as being alive for a period of seven years or more. S.108 of the Indian Evidence Act, 1872, lays down that in the absence of evidence to the contrary, a person is deemed to be dead if she has not been seen nor heard from for a period of seven years

or more by people who would have ordinarily seen or heard from her.

- Tenth, there has been an irretrievable breakdown of the marriage between the parties. Pursuant to the Supreme Court's direction to the Central Government in *Naveen Kohli* v. *Neelu Kohli*, AIR 2006 SC 1675, the Marriage Laws (Amendment) Bill, 2010, amended the HMA to include 'irretrievable breakdown of marriage' as a ground for divorce in Hindu law.

In cases of court-ordered judicial separation, either party may apply to the court for a decree of divorce by showing that there has been no resumption of cohabitation between the parties for a period of one year or upwards after the passing of the decree for judicial separation. (S.13(1A)(i), HMA)

In cases of restitution of conjugal rights, either party may apply to the court for a decree for divorce by showing that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of the decree. (S13(1A)(ii), HMA)

In addition to the grounds mentioned above, a wife can seek divorce on the ground that the husband has, since the solemnisation of marriage, been guilty of rape, sodomy, or bestiality. It is not necessary that the husband be convicted of these offences; the wife may file for divorce at any time that the husband faces trial for such ofeences. However if the husband has been charged with, or convicted of, an attempt to commit these offences, that would not b ea ground for divorce.

S.13B of the HMA allows for divorce by mutual consent if the petition for divorce is jointly presented to the court by both parties to the marriage. This petition must clearly show that the parties have been living separately for a period of at least one year, that they have not been able to live together, and that they have mutually agreed that their marriage be dissolved.

There can be no petition for divorce within one year of marriage. This is to ensure that decisions to divorce are not taken rashly. The *proviso* to S.14, however, confers discretion on the court to entertain a petition for divorce prior to the completion of one year of marriage.

The obligation of the husband to provide for his wife's maintenance and support does not end with the passing of a decree for divorce. S. 25 of the HMA confers power upon the court to grant a right to either spouse to claim permanent alimony and maintenance under it. This right is statutory and cannot be contracted away, for example, through prenuptial agreements.

Hindu Succession Act, 1956

The Hindu Succession Act, 1956 ("**the HSA**"), lays down a uniform and comprehensive system of intestate succession and applies, *inter alia,* to persons governed by the *Mitakshara* and *Dayabhaga* schools, as also to those previously governed by the *Marumakkattayam, Alyasantana*, and *Nambudri* systems of Hindu law.

S.4 of the HSA gives overriding effect to the provisions of the Act. It abrogates all the rules of the law of succession applicable to Hindus, whether by virtue of any text or custom, in respect of all matters governed by the HSA. The HSA also supersedes any other law contained in any legislation in force immediately before it came into force.

Succession to a Hindu's property is governed by the provisions in Chapter II of the HSA. On the death of a Hindu, the people who are her nearest heirs succeed and become entitled at once to her property and may succeed simultaneously to it.

S.5 declares that the HSA cannot be applied to parties married under the Special Marriage Act, 1954. Succession, in such cases, is regulated by the Indian Succession Act, 1925. As *per* S.6 of the HSA, a daughter of a coparcener in a joint Hindu family governed by *Mitakshara* law is a coparcener in her own right and enjoys rights equal to the son of such coparcener. Thus, a woman can now be

karta of her joint Hindu family. She may dispose of any property that she is entitled to in this manner by testamentary disposition. S. 6(3) stipulates that on the death of a coparcener, there shall be a deemed division (notional partition) of the property to which such coparcener is entitled, as if a partition had taken place. As *per* S.6(4), the *doctrine of pious obligation* is abrogated to the extent that the specified heirs are not liable to satisfy debts solely on that ground.

S.8 of the HSA lays down the general rules of succession in the case of males. Legal heirs of deceased males, under the Act, are divided into four categories:

- Heirs in Class I of the Schedule or 'simultaneous heirs';
- Heirs in Class II of the Schedule;
- Agnates defined in S. 2(a); and
- Cognates defined in S. 2(c).

Property first devolves on the 12 preferential heirs mentioned in Class I of the Schedule to the Act, and failing such heirs, upon the second set of heirs, and failing such heirs, upon agnates and then cognates. The expression 'property' in this section includes self-acquired property, interest in a *Mitakshara* coparcenary property, ancestral property, and agricultural land.

The distribution of property among the first set of preferential heirs is to be in accordance with the rules laid down in S.10 of the HSA. Male and female heirs are treated as equal.

Illustration: A dies leaving his widow W, a daughter D, a son S1, and the two sons (SS1 and SS2) and daughter (SD) of a predeceased son. W, D, and S1 will each take one share, that is, one-fourth each; and SS1, SS2, and SD will together take one-fourth. The portion for each of them will be one-twelfth the property left by A.

Failing all heirs of the intestate specified in Class I of the Schedule, property devolves upon the heirs specified in the nine Entries in Class II of the Schedule. Class II heirs do not succeed simultaneously, but rather, they succeed in order of the nine entries in which they are grouped and in accordance with the rule laid down in S.11 of the Act. No question of computation of the shares of the heirs so listed can arise when there is only one heir who is entitled to take the property by virtue of her belonging to a prior Entry than any heir specified in a subsequent Entry. But, where there is more than one heir of the intestate (all listed in the same Entry) entitled to take the property, the computation of their shares is in accordance with the simple rule of equal distribution of the property among them.

Illustration: A dies, leaving a brother's son and a sister's sons and daughters. They are all heirs in Entry IV of Class II and will take A's property simultaneously and in equal shares.

Illustration: A dies, leaving three daughter's daughter's daughters and a daughter's son's son, the former being the granddaughters of his predeceased daughter D, and the latter being the grandson of another predeceased daughter, D1. The distribution will not be according to the branches of the daughters D and D1 but all four heirs will share equally, that is, each of them will take one-fourth of the property of the intestate.

S.8(c) of the HSA explicitly declares that failing all Class I and II heirs of the intestate, her property devolves upon agnates and cognates. The order of succession is to be worked out in accordance with the rules laid down in Ss.12 and 13. S.12 of the HSA lays down three rules of preference, which govern the order of succession among agnates and cognates. S.13 states the rules in accordance with which degrees of relationship between the intestate and her agnates or cognates are to be computed. The degree of relationship may be of ascent or descent or both.

Illustration: The competing heirs are two agnates, for example, brother's son's daughter and paternal uncle's son. The former, who only has two degrees of ascent, is preferred to the latter, who has three degrees of ascent.

Illustration: The competing heirs are two collateral cognates, for example, brother's

daughter's daughter; and mother's sister's son. The former, who has only two degrees of ascent, is preferred to the latter that has three degrees of ascent, regardless of the fact that she is female.

Any property possessed by a female Hindu, howsoever acquired, is now held by her as her absolute property and she has full power to deal with it or dispose of it by will as she likes. (S.14, HSA).

S.15 provides a definite and uniform scheme of succession to the property of a female Hindu who dies intestate. This section groups heirs of a female intestate into five categories:

- Sons, daughters, children of any predeceased son or predeceased daughter and her husband. They take simultaneously. Failing all heirs in this category, her property devolves upon the heirs of her husband.
- Heirs of her husband.
- Mother and father of the intestate.
- Heirs of the intestate's father
- Heirs of the intestate's mother

The basis of inheritance of a female Hindu's property who dies intestate is the source from which she came into possession of the property. This informs the manner of inheritance and devolution of that property. (*Bhagat Ram* v. *Teja Singh*, AIR 2002 SC 1)

In the case of a female dying intestate and without issue, the property inherited by her from her father or mother will revert to the heirs of the father in existence at the time of her death and not upon the husband or the heirs of the husband as per the general order of succession. Similarly, property inherited from her husband or father-in-law will revert to the heirs of the husband in existence at the time of her death and not upon the heirs of the father or mother.

If, however, the female dies leaving a son or a daughter or a child, male or female, of a predeceased son or daughter, then all her property, howsoever acquired, devolves upon such issue, and such issue takes the property simultaneously with the intestate's husband, if alive.

Illustration: A dies leaving her husband H; her sons S1 and S2; her grandson SS (son of predeceased son S); WS3, the widow of S3, a predeceased son; two daughters D1 and D2; DD, the daughter of D, a predeceased daughter; and B her brother. All of them, except WS3 and B will succeed to A's property, howsoever acquired as heirs included in Entry (a) of S.15(1). They will take simultaneously and to the exclusion of WS3 and B. WS3, who is an heir under Entry (b), and B, an heir under Entry (d), are not entitled to succeed as there are Entry(a) heirs.

Thus, S1, S2, SS, D1, D2, DD, and H who succeed simultaneously, will each take one-seventh share. If S had more children, they would have only taken one share between themselves and could not have claimed an equal share with S1 and the others. In their case, the distribution would have been *per stirpes* and not *per capita.* (S.19)

Illustration: A dies leaving her son S by her first husband and property that she inherited from her second husband B. The property will devolve upon S under Entry (a) and not upon the heirs of B. (*Rama Ananda* v. *Bhima*, AIR 1969 Bom 205)

Illustration: A dies leaving SSS, the son of a predeceased son of a predeceased son and SDS, the son of a predeceased daughter of a predeceased son, and HB the brother of her husband H. A's property will devolve on SSS alone as the heir of her husband under Entry (b) of S.15(1). SSS is the heir of H as specified in Class I of the Schedule to S.8, and SDS and HB are H's heirs specified in Class II of the Schedule. Thus, SSS will exclude SDS and HB.

S.18 provides that full blood heirs are preferred to those related by half-blood. S.19 goes on to provide that if two or more heirs succeed together to the property of an intestate, they take the property *per capita*. And S.20 states that a child who is born after the death of its mother has the same right to inherit property as if it had been born before

the death of the intestate.

The Hindu Inheritance (Removal of Disabilities) Act, 1928, provides that no person, other than a person who is and has been from birth, a lunatic or idiot, shall be excluded from inheritance or any share of joint family property by reason of any disease, deformity, or physical or mental defect.

Any Hindu, male or female, may dispose off, by will or other testamentary disposition, any property in accordance with the provisions of the Indian Succession Act, 1925. This power of testamentary disposition is, however, subject to the rights of maintenance of persons who are entitled to claim maintenance as dependants of the testator or testatrix. (S.30)

*Hindu Minority and Guardianship Act, 1956 ("**the HMGA**")*

The HMGA defines a minor as a person under the age of 18. (S.4(a)) A guardian is the caretaker of a minor, her property, or both. Categories of guardians include a natural guardian, a guardian appointed by way of a will by the mother or father, a guardian appointed by the court, and a person who qualifies as a guardian according to the Court of Wards. (S.4(b), HMGA)

If the father is alive, he is the natural guardian of his minor son and unmarried daughter. It is only after his death that the mother becomes the natural guardian. If, however, the minor is below the age of five, the mother will be the natural guardian in her lifetime, followed by the father after her death. In the case of illegitimate children, the mother is the natural guardian in her lifetime, followed by the father. (S.6, HMGA)

The powers of a natural guardian are listed in S.8 of the HMGA. A natural guardian can acquire property for the benefit of the minor. The natural guardian can take actions that will benefit and protect the minor and the minor's property. However, the guardian cannot sign a personal covenant for the minor. The guardian cannot sell, mortgage, or give away any part of the minor's immovable property, lease the property for more than five years, or lease the property for more than one year after the child turns 18.

*Hindu Adoption and Maintenance Act, 1956 ("**the HAMA**")*

The HAMA applies to Hindus, including Buddhists, Jains, and Sikhs. It amends and codifies the law relating to adoptions and maintenance. It also gives an overriding application to the provisions on the two subjects.

The requirements of a valid adoption under the HAMA are:

- The person adopting must have the right to take and be lawfully capable of taking a son or daughter in adoption. (Ss.7 and 8, HAMA);
- The person giving in adoption must be lawfully capable of doing so. (S.9, HAMA);
- The person adopted must be lawfully capable of being taken in adoption. (S.10, HAMA); and
- The conditions relating to adoption including actual giving and taking of a child with the intention of transferring the child from the family of its birth must be complied with. (S.11, HAMA)

Failure to comply with S.11 will render the adoption null and void.

Every male Hindu who is of sound mind, and has attained majority may lawfully take a son or daughter in adoption provided he has no Hindu son or daughter, grandson or granddaughter, or great-grandson or great-granddaughter, natural or adopted living at the time of adoption; and if he has a wife living, he can adopt only with her consent. (S. 7 read with S.11)

A female Hindu who is of sound mind, and has attained the age of majority may take a son or daughter in adoption to herself and in her own right. If she is married, she cannot adopt a son or daughter during the lifetime of her husband, unless the husband is of unsound mind or has renounced the world. A

female Hindu who is unmarried or a widow or a divorcee also has the capacity to adopt a son to herself, provided that she has no Hindu daughter or son's daughter living at the time of adoption. (S.8 read with S.11)

The capacity to give a child in adoption is confined to the biological parents of that child. When either biological parent wishes to give their child up for adoption, the consent of the other parent must be obtained. Where both parents are dead, have completely and finally renounced the world, have abandoned the child, or have been declared by a court of competent jurisdiction to be of unsound mind, or where the parentage of the child is not known, the testamentary guardian or a court-appointed guardian may give the ward in adoption if such adoption is for the welfare of the child, with the previous sanction of the court. (S.9, HAMA)

The person to be adopted may be male or female, must be Hindu, and not previously adopted. The adoptee must be unmarried and below the age of fifteen. The last requirements are subject to applicable custom or usage. (S. 10, HAMA)

The physical act of giving and receiving the adoptee is necessary to the validity of an adoption. (*Jai Singh* v. *Shakuntala*, (2002) 3 SCC 634) Mere expression of consent or the execution of a deed of adoption, though registered, but not accompanied by actual delivery of the child, does not operate as a valid adoption. (S.11(iv), HAMA)

An adopted child is deemed to be the child of her adoptive parents for all purposes with effect from the date of adoption. Thus, the adoptee can no longer claim any right to succeed in the property of her natural father or mother or any of the relations in the family of birth. From the date of adoption, all the ties of the child in her birth family become severed, and are replaced by the ties created in the adoptive family. (S.12, HAMA) There are, however, three qualifications to this rule:

- The adopted child is not divested of any property already vested in her before the adoption;
- The adoptee cannot marry any person whom the adoptee could not have married, if she had continued in the birth family;
- The adopted child does not divest any person of any property vested in him/her before the adoption.

Illustration: A has two sons, B and C. A gives C in adoption to X. C is not entitled to inherit from A as his son. On the death of D, B's and C's mother, which had taken place prior to the adoption, C had become entitled to a share (along with A and B) in the property left by her. That share, which has already vested in C, will continue to vest in him.

Illustration: A, a widow of a deceased coparcener, adopts a son, B. The adopted son can claim his share in the joint family property. If A makes a gift of coparcenary property after the adoption, to a third party, C, then B may challenge the same. (*Mukund Singh* v. *Wazir Singh*, (1972) 4 SCC 178)
No adoption which has been validly made can be cancelled by the adoptive parents or any other person, nor can the adopted child renounce its status and return to the family of birth. (S.15, HAMA)

Where there is a registered document placing on record the *factum* of adoption, the presumption is that the adoption was made in compliance with all the requirements of law. The onus of proving invalidity of the adoption lies with those who challenge the adoption. (S. 16, HAMA)

Chapter III of the HAMA codifies the law of maintenance applicable to Hindus. A wife is entitled to live separately from her husband and claim maintenance from him:

- If he is guilty of desertion (as under the HMA);
- If he has treated her with cruelty (as under the HMA);
- If he is suffering from a virulent form of leprosy;
- If he has any other wife living;
- If he keeps a concubine in the same house in which his wife is living or habitually

resides with a concubine elsewhere;
- If he has ceased to be a Hindu by conversion to another religion; and
- If there is any other cause justifying her living separately. (S.18(2), HAMA)

Maintenance includes provisions for food, clothing, residence, education, and medical attention and treatment. (S.3(b)(i), HAMA)

S.19 of the HAMA states the circumstances in which a daughter-in-law can seek maintenance from her father-in-law if she is unable to obtain maintenance from her own resources, out of the estate of her husband or her parents, or from her children. The right to claim maintenance from the father-in-law is further conditional upon him having possession of coparcenary property, out of which the widowed daughter-in-law had not obtained any share. However, she may claim maintenance from her father-in-law's self-acquired property. (*Jal Kaur* v. *Pal Singh*, AIR 1961 P&H 391)

A Hindu male or female is bound, during his/her lifetime, to maintain his/her legitimate children and his/her aged or infirm parents. Further, the duty to maintain the infirm parent or daughter extends when the parent or daughter is unable to maintain himself/herself out of his/her own property. (S.20, HAMA)

A dependant of a deceased Hindu male or female, who has not obtained any share in the estate of the deceased, is entitled to claim maintenance from those who take the estate. (S.22(2), HAMA)

The HAMA lays down that it shall be in the discretion of the court to determine whether any, and if so, how much maintenance shall be awarded under the Act. (S. 23(1))

S.23(2) provides that in determining the amount of maintenance to be awarded to a wife, child, or parent, the court will look at the following:

- The position of the parties;
- The reasonable wants of the claimant;
- If the claimant is living separately, whether the claimant is justified in doing so;
- The value of the claimant's property and any income derived from such property or from the claimant's own earnings;
- The number of persons entitled to maintenance from the husband or father or mother or son or daughter, as the case may be.

S.23(3) provides that in determining the amount of maintenance to be awarded to a dependent, the court will regard:

- The net value of the estate of the deceased after providing for the payment of her debts;
- The provisions, if any, made under the deceased's will in respect of the dependant;
- The degree of relationship between the two;
- The reasonable wants of the dependant;
- The past relations between the dependants and the deceased;
- The value of the property of the dependant and any income source; and
- The number of dependants entitled to claim maintenance under the Act.

A dependant's claim for maintenance is not a charge on the deceased's estate, unless one has been created by the deceased's will, by court decree, or, by agreement between the dependant and the owner of the estate. (S.27, HAMA)

Debts contracted or payable by the deceased take precedence over the right of maintenance of any dependant, unless there is a valid charge created in respect of the same. (S.26, HAMA)

The amount of maintenance, whether fixed by court or by agreement, may be altered if there is a material change in the circumstances justifying such alteration. (S.25, HAMA)

Muslim Law

The personal law of Muslims in India is based on the *Sharia*, which is only partially applied in India. Despite being largely uncodified, Mohammadan law or Muslim law has the

same legal status as other codified statutes. The development of the law is largely on the basis of judicial precedent, which in recent times has been subject to review by the courts.

S.2 of the Muslim Personal Law (Shariat) Application Act, 1937, provides that all questions regarding intestate succession, personal property inherited or obtained under contract or gift, or any other provision of personal law, marriage, dissolution of marriage, maintenance, dower, guardianship, gifts, trusts and trust properties and *wakfs*, applicable to Muslims in India, shall be governed by the Muslim Personal Law, or *Sharia*. This Act, therefore, provided statutory recognition to certain Islamic laws and makes it applicable to all Muslims in India.

A person is a Muslim either by birth or conversion. A person who is born a Muslim remains so until she renounces the religion by an unequivocal renunciation of Islam. It is not necessary for such a person to observe any particular rites or ceremonies. On conversion to Islam, converts, regardless of what their previous religion was, are presumed to have, from the moment of conversion, renounced their earlier religion and substituted Islam in its place. However, conversion must be *bona fide*, and not a conversion with the purpose of evading any unfavourable personal law that would have been applicable otherwise.

Conversion from Islam

Conversion or apostasy from Islam may be express, by the utterance of the phrase 'I hereby renounce Islam' or by conduct, for example, using grossly disrespectful language against the Prophet Mohammad or joining enemies that are at war with Muslims.

According to traditional Muslim law, if a Muslim converts to another religion, she is barred from inheriting from her Muslim relatives. By application of the Freedom of Religion Act, 1850, however, and subsequently, the Constitution, a convert from Islam does not lose the right of inheritance. Further, a Hindu cannot succeed to the estate of a Muslim.

Illustration: A and B, both Hindus, were married as *per* Hindu customs. Subsequently A converted to Islam and married C, a Muslim. On A's death, property will only pass to C and not to B. (*Chedabaram* v. *Ma Nyien*, ILR (1928) 6 Ran 243)

If a Muslim husband renounces Islam, his marriage with his Muslim wife is dissolved *ipso facto.* This is not the case if a Muslim wife renounces Islam. The Muslim wife's marriage is dissolved by apostasy only if the wife had been converted to Islam from some other faith and then subsequently she renounces Islam.

Schools of Muslim Law

There are two schools of Muslim law, that is, *Sunni* and *Shia*. The four sub-schools of *Sunni* law are: the *Hanafi* school; the *Maliki* school; the *Shafei* school; and the *Hanbali* school, each named after the *imams* that founded them. Though these schools differ in detail, their basic doctrines are essentially the same. In India, there is a presumption that parties are *Sunni* belonging to the *Hanafi* school, since this is the case with most Indian Muslims. (*Bafatun* v. *Bilaiti Khanum*, 1903 30 Cal. 683)

The three sub-schools of *Shia* law are: the *Ithna-Ashari* school; the *Ismaili* school; and the *Zaidy* school. As most *Shias* are *Ithna-Asharis,* the presumption is that a *Shia* is governed by the *Ithna-Ashari* exposition of the law. (*Akbarally* v. *Mahomedally*, (1932) 34 Bom LR 655)

Applicability of the law of the different schools is decided as follows:

- When the parties to a suit are Muslims of the same school, the law of that school will apply;
- If they do not belong to the same school, the law of the defendant will apply;
- If a Muslim changes her school of law in Islam, in good faith, the law of the new school will apply with immediate effect; and
- When a person, who has changed her school of law in Islam dies, the law of the school which she professed at the time of her death will be applicable as regards succession.

For the sake of brevity, only the law of *Sunnis* of the *Hanafi* school will be discussed in this section on Muslim Law.

Marriage

Marriage under Muslim law is a civil contract which has for its object the procreation and legalisation of children.

Essentials of a Muslim Marriage

Capacity to contract marriage: Every Muslim of sound mind, who has attained puberty, may enter into a contract of marriage. Lunatics and minors, who have not attained puberty, may be validly contracted in marriage by their respective guardians. Under Muslim law, in such matters, puberty and majority are the same, and is presumed to be at the age of fifteen. As an indirect result of the Child Marriage Restraint Act, 1929, underage marriages are criminalised, but such marriages are not void.

Proposal and acceptance: It is essential to the validity of a marriage that there be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other in the presence and hearing of two male or one male and two female witnesses who must be sane, adult Muslims. Both proposal and acceptance must be made at the same meeting. In *Shia* law, the presence of witnesses is dispensed with.

Illustration: A utters in the presence of D and E, "I have married myself to B," who is absent. On this information being conveyed by D and E to B, she says in their presence, "I have accepted." This does not constitute a lawful marriage as proposal and acceptance were made at two different meetings.

Illustration: A, writes a letter to B, offering her marriage. B receives the letter and then reads the letter in the presence of two male witnesses and declares her acceptance of the offer, in their presence. This constitutes a lawful marriage.

If consent to a contract of marriage is obtained by force or fraud, such marriage is invalid unless ratified.

Illustration: F, a Muslim father, contracted to give his daughter D in marriage to E. D and her mother M were opposed to the marriage. However, the marriage was still performed against D's wishes. This marriage is invalid as it was without the consent of D.

Absence of any impediment: The third essential requirement of a Muslim marriage is that there should be no impediments or prohibitions to the marriage of the parties. Impediments are of two kinds: absolute, those which prohibit a marriage and render it null and void (*batil*); and relative, those which do not impose an absolute impediment and are irregular (*fasid*) but not void.

Absolute prohibitions to a marriage:

- *Polyandry*: While a Muslim man may have as many as four wives at a time, a Muslim woman may only be married to one Muslim man.
- *Consanguinity*: No valid marriage can be contracted with the ascendants (mother, grandmother, howsoever high), descendants (daughter, granddaughter, howsoever low), relations of the second rank (brothers, sisters and their descendants), and paternal and maternal uncles and aunts, howsoever high.
- *Affinity*: A man cannot contract a marriage with his wife's mother or grandmother howsoever high, his wife's daughter or granddaughter howsoever low (only if he has consummated his marriage with that wife), his father's wife or any other ascendant's wife, and his son's wife or any other lineal descendant's wife.
- *Fosterage*: This is as much a prohibition to marriage as consanguinity since the act of suckling is considered equal to the act of procreation. Thus, whoever is prohibited by consanguinity or affinity is also prohibited by reason of fosterage.

Children born in such unions are considered illegitimate.

Relative prohibitions to a Muslim marriage:

- *Marrying a fifth wife*: A Muslim man may have as many as four wives at a time but not more. If he marries a fifth wife when he already has four, the marriage is not void, but merely irregular. This may be remedied by divorcing one of the wives.
- *Absence of proper witnesses*: This can be remedied by subsequent confirmation in the presence of witnesses.
- *Difference of religion*: A Muslim man may validly marry women of *kitabia* faiths, for example, Muslims, Christians, and Jews. If, however, he marries a Hindu, the marriage is irregular and must be regularised by the Hindu converting to Islam or to any of the Kitabia religions. A Muslim woman, however, can only validly marry a Muslim man. *Sunnis* and *Shias* can validly contract marriage with each other.
- *Unlawful conjunction*: A Muslim is forbidden from having two wives at the same time, so related to each other that if either of them had been a male, they would have been prohibited from marrying each other, for example, sisters. These marriages may be regularised on the death of one wife.
- *Woman undergoing* iddat: Marriage with a woman undergoing *iddat (*period of waiting that a woman must observe after the death of her husband, or after divorce) is not void but irregular, and may be regularised on expiration of the *iddat* period.

Presumption of marriage may be assumed:

- When there is prolonged and continuous cohabitation between the parties as husband and wife.
- When a man acknowledges the paternity of a child born to the woman.
- When a man acknowledges the woman as his wife.

A Muslim wife's rights on valid marriage are:

- Suitable matrimonial residence;
- Equal affection and impartiality, if a co-wife;
- *Dower*: It is the sum of money or other property which the wife is entitled to receive from the husband, in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, Muslim law confers this right upon the wife. (*Abdul Kadir* v. *Salima*, (1866) 8 All. 149) Dower is of four kinds:
  - *Specified dower*: This is fixed by agreement between the parties, either before or at the time of or after the marriage.
  - *Proper dower*: If nothing is said about dower at the time of marriage, the wife may claim to have a reasonable amount of dower settled for her even if the marriage was contracted on the express condition that she should not claim any dower.
  - *Prompt dower*: This is that part of the dower that is payable on demand of the wife.
  - *Deferred dower*: That part of the dower that is payable on dissolution of marriage by death or divorce.

  The dower ranks as an unsecured debt and the widow is entitled to have it satisfied on the death of her husband out of his estate before the legacies are paid and inheritance is distributed.

- *Maintenance*: The following five classes of persons are entitled to claim maintenance:
  - *Infant children and unmarried daughters*: A Muslim father is bound to maintain his sons until they attain the age of puberty and his daughters until they are married. If the father is poor or infirm, the liability to maintain the children falls upon the mother and if she is incapable then, upon the father's father.
  - *Adult children*: They are not entitled to maintenance unless they are infirm or weak.
  - *Parents*: Children are bound to maintain their poor parents.
  - *Grandparents*: Grandchildren are bound to maintain their poor grandparents
  - *Wife*: The husband is bound to maintain his wife as long as she is faithful to him.

A Muslim wife is entitled to maintenance during the *iddat* period of her divorce. During her *iddat* period after the death of her husband, she is not entitled to maintenance as she becomes entitled to inheritance. The right of a wife to maintenance exists even if she is able to maintain herself out of her own property.

Note that maintenance can also be claimed under S.125 of the Code of Criminal Procedure, 1973. (*Mohammad Ahmed Khan* v. *Shah Bano Begum*, (1985) 2 SCC 316)

Divorce

Forms of Divorce

- *Talak*: This form of divorce may be effectuated by the husband at any time by pronouncing the necessary words of divorce to his wife three times, if he is of sound mind and has attained puberty. It is not necessary that the divorce be pronounced in the presence of the wife or even addressed to her. (*Saleha* v. *Sheikh*, AIR 1973 MP 207)
- *Ila,* or vow of continence: Where a husband, who has attained puberty and is of sound mind, swears by god that he will not have sexual intercourse with his wife for a period of four months or more. On completion of this period, the marriage is dissolved. *Ila* may be cancelled by resuming intercourse with his wife within the *ila* period.
- *Khula*: This is divorce by mutual arrangement. It is effectuated by an offer from the wife to compensate the husband if he releases her from his marital rights and the husband accepts this offer. Once the offer is accepted, it operates as a single irrevocable divorce.
- *Mubara'at*: This is divorce by mutual consent. This may be effectuated by either the husband or the wife, and the wife is not required to compensate her husband for divorce.
- *Li'an*: When a Muslim husband charges his wife with adultery, and the charge is false, the wife has a right to sue for dissolution of the marriage.
- Judicial divorce: Divorce under the Dissolution of Muslim Marriages Act, 1939, on the grounds specified in S.2 of that Act.

Consequences of Divorce

- *Right to contract another marriage*: If the marriage was not consummated, the wife is not bound to observe *iddat* and may marry again immediately. If, however, the marriage was consummated, the wife is bound to observe the relevant *iddat.*
- *Maintenance*: As mentioned earlier, the husband is bound to maintain the wife during the *iddat* period.
- *Dower*: If the marriage was consummated, the wife is entitled to the whole of the unpaid dower. If not, she is entitled to half the specified dower.
- *Mutual rights of inheritance*: When the divorce becomes irrevocable, the mutual rights of inheritance cease to exist except in the case of a divorce given by a husband on his deathbed, in which case, the wife's right to inherit continues till the period of *iddat* is over.
- *Remarriage with divorced wife*: After *iddat*, the parties may remarry each other except when divorce is given by a triple pronouncement of *talak,* in which case, before they may remarry, the wife must observe the *iddat,* be married to another person, consummate that marriage, get divorced by that man, and then she may remarry her ex-husband. (*Rashid Ahmed* v. *Anisa Khatun*, (1932) 34 Bom. LR 475)

Rights and Obligations of Parties on Divorce

- Until the divorce becomes irrevocable, the husband may revoke it and both parties are entitled to inherit from the other. After it becomes irrevocable, the wife may marry another man.
- If the husband had four wives, including the divorced wife, at the date of the divorce, he can marry another wife immediately if his marriage was not consummated. Otherwise, he must wait for the completion of his ex-wife's *iddat* period.
- Sexual intercourse with the divorced wife is unlawful and the issues of such

intercourse are illegitimate even if the father establishes paternity.

Muslim Women (Protection of Rights on Divorce) Act, 1986

This enactment protects the rights of Muslim women who have been divorced by, or have obtained divorce from, their husbands. It provides for the return of a Muslim woman's dower and other properties to her at the time of the divorce.

It also provides for courts to make provision for the payment of maintenance to her. Further, it allows her the option of being governed by S.125 of the Code of Criminal Procedure, 1973.

Guardianship

There is no concept of adoption under Muslim law. It does, however, recognise four kinds of guardianship, which are especially relevant, *inter alia*, to determine custody upon divorce:

- *Guardianship in marriage*: This is discussed in the section on 'Marriage'.
- *Guardianship of minor for education*: The right to the custody of a male child until he completes the age of seven years and of a female child until she attains puberty, belong to the mother. This holds true even after the mother is divorced. (*Enamul Haque* v. *Bibi Taimunnisa*, (1967) AP 344) Failing the mother, it goes to the following female relatives: mother's mother howsoever high; father's mother howsoever high; full sister; uterine sister; consanguine sister; full sister's daughter; uterine sister's daughter; and consanguine sister's daughter.
- *Guardianship of minor's property*: A minor's property may be taken care of by three types of guardians:
  - *Legal guardian*: These guardians may alienate the movable property of a minor in cases of urgent necessity. They may also alienate the minor's immovable property in the following situations:
    - Where double the value is obtained;
    - Where the minor has no other property and its sale is absolutely necessary for her maintenance;
    - Where the debts of the deceased owner cannot otherwise be liquidated;
    - Where there are legacies to be paid and no other means of paying them;
    - Where the produce of the property is not sufficient to defray the expenses of keeping it;
    - Where the property is in danger of being destroyed; and
    - Where the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

Illustration: A, a Muslim, raises a loan from B. A mortgages the house belonging to C, her minor ward. In case of a default, B cannot proceed against the mortgaged house.

  - *Court-appointed guardian*: The court may appoint a guardian of the person or property of a Muslim minor, if it is for the minor's welfare. Such a guardian may alienate the movable and immovable property of her ward with the prior permission of the court. However, she may lease the property without the Court's permission.
  - De facto *guardian*: A person is the *de facto* guardian when she is neither the *de jure* guardian nor a court-appointed guardian and yet she voluntarily places she in charge of the minor's person and property. All relations, except the father and the paternal grandfather, and unrelated strangers can be *de facto* guardians. Such guardians may alienate only the minor's movable property. Any alienation of the minor's immovable property, without the Court's consent, is void.

Illustration: A, a Muslim, was a member of a partnership firm. A died, leaving behind B, his widow, and C, his minor

son. B contracted with the surviving partners of the firm on behalf of her minor son. This agreement is void as B, being C's *de facto* guardian, is barred from entering into such agreements.

- *Testamentary guardianship*: The only persons entitled to appoint a guardian to the property of a minor by will are the child's father and the paternal grandfather. A Muslim father can appoint one person as the executor of his will and a different person as the guardian of the minor's property.

Testamentary Succession

Every adult Muslim of sound mind can make a will in respect of the property owned by him in favour of any person capable of holding the property. She can make a will giving away only one-third of her property while the remaining two thirds of the property goes in inheritance.

A will under Muslim law may be made either orally or in writing. No particular form is prescribed. It need not be signed or attested. The person making the will may revoke it at any time either orally or in writing.

But, if the marriage of a Muslim has been held under the Special Marriages Act, 1954, then such a Muslim cannot execute a will under the Muslim law as the provisions of the Indian Succession Act, 1925, shall be applicable in such cases.

There are, however, certain restrictions laid down in making the will. A Muslim cannot bequeath her property in favour of someone who is an heir at the time of the death of the testator, unless the other heirs consent to the bequest after the death of the testator.

If the heirs do not question the will for a very long time and the legatees take and enjoy the property, the conduct of such heirs will amount to consent. Once an heir gives her consent to the bequest, she cannot rescind it later on.

Non-Testamentary Succession (Inheritance)

The property of a deceased Muslim is to be distributed as per the law of the school to which she belonged at the time of her death. All of her estate that remains after the payment of charges is heritable property and includes both movable and immovable property. Under Muslim law, no heir acquires any interest in property merely by *factum* of birth.

Exclusion from inheritance: The following are the disabilities affecting a Muslim in inheriting property:

- *Homicide*: A person who causes the death of another, intentionally or otherwise, cannot succeed to the property of the deceased.
- *Illegitimacy*: An illegitimate child may inherit from the mother and her relatives but not from the father and his relatives.

Classes of heirs: The three classes of heirs are:

- *Sharers (Quranic heirs)*: They are entitled to a prescribed share of the inheritance.
- *Residuaries (Agantic heirs)*: They take no prescribed share but succeed to the residue after the claims of the Sharers are satisfied. If there are no Sharers, the entire inheritance devolves upon this class of heirs. Note that *Sunni* laws and *Shia* laws differ in this regard.
- *Distant kindred (Uterine heirs)*: They are blood relatives who are neither Sharers nor Residuaries. They include the ascendants and descendants of the deceased; descendants of parents; and descendants of grandparents.

Illustration: A Muslim man dies leaving behind his father F, mother M, father's father FF, mother's mother MM, two daughters D1 and D2, and son's daughter SD. Thus, F gets 1/6 as sharer since the deceased has children surviving him. FF does not get anything as he is excluded by F. M also gets 1/6 as the deceased has children. MM is excluded by M. Both D1 and D2 get 2/3 as sharers while SD is excluded by D1 and D2.

Illustration: A Muslim woman dies leaving behind her mother, father, and husband. The husband is entitled to ½ as sharer whereas the father gets 1/3 and the mother gets 1/6.

Illustration: A *Sunni* man dies leaving behind his widow W, a daughter D, and his mother. W gets 1/8, the mother would get 1/6 but this is increased to 7/32 (as residuary), and the daughter's share ½ is increased to 21/32 (as residuary).

Illustration: A *Sunni* woman dies leaving husband, H, and daughter, D. H gets ¼ as sharer while D gets ¾ (1/2 as sharer and ¼ by return).

Note that step-children do not inherit from step-parents, and *vice-versa*.

Christian Law

The Indian Christian Marriage Act, 1872 ("**the CMA**"), defines the term 'Christian' as a person professing the Christian religion. The term 'Indian Christian' includes Christian descendants of native Indians converted to Christianity, as well as ordinary converts. (S. 3, CMA)

Illustration: A, born to Hindu parents was baptised at birth and attended a Christian school but did not profess the Christian faith. He got married as *per* Hindu ceremonies and rites. He is not a Christian because baptism by itself does not amount to conversion.

Illustration: A, a person born to Christian parents, is Christian regardless of whether she professes the Christian faith. She continues to be Christian until she converts to another religion by following that religion's procedures for conversion.

Marriage

The Christian law of marriage in India is governed by the CMA. Certain conditions have been laid down for a marriage to be valid under the CMA. The parties to the marriage should be Christian or at least one of them must be a Christian and the marriage should have been solemnised in accordance with the provisions of S.5 of the CMA by a person duly authorised to do so.

The State Government concerned has the authority to grant and revoke licences granted in favour of certain persons for the solemnisation of marriages under the CMA. (S.5(5), CMA) As *per* the provisions contained in the CMA, the marriage must be performed in a particular form duly entered in the Marriage Register, maintained for this purpose. The *factum* of marriage can be proved by producing the entries from this register. Other evidence can also be produced for this purpose and may include eye-witness accounts, subsequent conduct of the couple living as husband and wife, and admission of either spouse to marriage.

Conditions for marriage: For marriages among Indian Christians, it must be proved that the age of the bridegroom is not below 18 years and that of the bride is not below 15 years. Neither party should have a wife or husband living. The parties to the marriage have to take oath in the name of "Almighty God" and in the name of "Lord Jesus Christ" before the Marriage Officer and at least two witnesses. (S. 60, CMA)

Time and place of marriage: As a general rule, every Christian marriage must be solemnised between 6:00 A.M. and 7:00 P.M. at a Church (Ss. 10 and 11, CMA). S.69 of the CMA punishes any person, who is not licensed and who solemnises a marriage beyond these hours, outside the Church in the absence of the witnesses, with up to three years imprisonment. There are, however, special licences granted by each State Government that may permit a clergyman of the Church to solemnise a Christian marriage in contravention of these sections. (S. 11, CMA)

Marriages solemnised by licensed Ministers of Religion: Under Part III, one of the persons intending marriage must give notice in writing to the Minister of Religion who she desires to solemnise the marriage. (S. 12, CMA)

If the marriage is intended to be in a particular Church and the Minister of Religion, who has received the notice, has no jurisdiction to officiate as a Minister in that Church, she must either return the notice back or send it to the concerned Minister of Religion who shall affix the same in some conspicuous part of such Church. (S.13, CMA) If the marriage is intended to be in a private dwelling, the Minister of Religion shall forward the notice to the Marriage Registrar of the district, who shall affix the same at some conspicuous place in her own office. (S.14, CMA)

Before the solemnisation of marriage, a certificate by the Minister of Religion is essential. Such certificate shall not be issued before the expiry of four days from the date of the receipt of the notice. It should also be shown that there is no impediment in the issuance of the certificate and the issue of the same has not been forbidden. If the marriage is not solemnised within two months from the date of the issue of the certificate, the certificate becomes void and fresh notice is to be served. (S.17 read with S.26, CMA)

If a party to a marriage is a minor, the consent of the father if living, or if the father is dead, the consent of the guardian of the person of such minor, or if there is no guardian, then that of the mother, is essential before marriage. A marriage of a minor without such consent is not valid. (S.19, CMA)

Registration of Marriages: Part IV of the CMA deals with the registration of the marriages solemnised under the CMA. Ministers of Religion are required to keep, with them, registers of marriage. The entries of such marriages are to be signed by both the parties and the persons solemnising the marriages and shall be attested by two credible witnesses. (S. 33, CMA)

Illustration: A and B were married in accordance with the provisions of Ss.4 and 5 of the CMA. Subsequently, it was discovered that the marriage took place at 7:30 PM, in contravention of S.10 of the Act. This marriage is not void. (S. 77, CMA)

Illustration: A and B were married in accordance with Christian laws. Subsequently, it was discovered that there were errors in the registration of the marriage. This does not render the marriage void. On discovery of such error, the irregularity may be corrected by making the necessary changes in the Marriage Register.

Dissolution of Marriage

S.10 of the Indian Divorce Act, 1869 ("**the Divorce Act**"), allows either the husband or the wife, on the presentation of a petition before the District Court, to dissolve the marriage on the following grounds:

- *Adultery*: S.11 of the Divorce Act allows the petitioner to make the spouse's partner in adultery a co-respondent to the petition for divorce;
- Conversion to another religion;
- Incurably unsound mind for a continuous period of two years;
- Suffering from a virulent and incurable form of leprosy for a period of two years;
- Suffering from communicable venereal disease for two years;
- Has not been seen or heard from for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive;
- Wilful refusal to consummate the marriage and therefore the marriage remains unconsummated;
- Failure to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent;
- Desertion for at least two years; and
- Treatment with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

Illustration: A and B were married in accordance with Christian laws. After their marriage, they quarrelled constantly and on one occasion B slapped A. This by itself does not amount to cruelty. (*Agnel Valentine*

D'Souza v. *Blanche Agnela Piedade*, (1999) DMC 22)

Illustration: A and B were married in accordance with Christian laws. Subsequently, B converted to Islam and invited A to convert with him. A can file for divorce.

- A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy, or bestiality.
- S.10A inserted by the Indian Divorce (Amendment) Act, 2001, allows for divorce by mutual consent.
- A husband or a wife may present a petition to the court to declare their marriage null and void on the following grounds (S.19, Divorce Act):
  - Impotence;
  - That the parties are within the prohibited degrees of consanguinity or affinity (Chapter IV of the Indian Succession Act, 1925);
  - That either party was a lunatic or idiot at the time of marriage; or
  - That there was a valid marriage in existence with a previous spouse who was living at the time of marriage.

Children of such annulled marriages are treated as legitimate children for the purposes of succession.

In any suit for divorce or nullity, the wife may apply to the court for alimony pending the decree of the suit (S.36, Divorce Act). On such decree, the Court has the power to order permanent alimony (S.37, Divorce Act). Courts are also granted the power under Chapter XI to make provision regarding the custody of the children of divorcees.

Adoption

There is no specific statute enabling or regulating adoption among Christians in India. In the past, persons who wished to adopt a minor child usually approached the Court under the provisions of the Guardians and Wards Act, 1890, to obtain an order of guardianship for the minor child. Orders under that Act, however, would not apply once the child became a major, thereby disentitling the child from the benefits enjoyed by an adopted son or daughter.

Thus, Christians in India can now adopt children by resort to S.41 of the Juvenile Justice (Care and Protection of Children) Act, 2006, read with the Guidelines and Rules issued by various State Governments.

Succession

The Indian Succession Act, 1925 ("**the Succession Act**"), is the law relating to succession applicable to the great majority of Christians in India.

By virtue of the provisions of the Goa, Daman and Diu (Administration) Act, 1962, the Portuguese Civil Code is applicable in Goa. In Pondicherry, the French Civil Code still survives as per the provisions of the *Treaty of Cession*. Further, the Garos of Meghalaya are also not subject to the provisions of the Indian Succession Act and they follow their customary matrilineal system of inheritance. This protection is granted by the Constitution and also by S.29(2) of the Succession Act.
If a person has not made a testamentary disposition of her property which is capable of taking effect, she is deemed to have died intestate in respect of her entire estate. (S.30, Succession Act)

Ss.31 to 49 of the Succession Act lay down the rules for distribution of property belonging to Christians and Jews.

The property of an intestate primarily devolves upon the spouse, or upon those who are kindred of the deceased, in accordance with Chapter II of the Succession Act.

Illustration: A left no children, but left eight grandchildren and two children of a deceased grandchild. The property is divided into nine parts, one of which is allotted to each grandchild and the remaining one-ninth is

divided equally between the two great-grandchildren.

Illustration: A dies intestate leaving his mother and two brothers of full blood and a half-sister. The mother takes one-fourth, each brother takes one-fourth and the half-sister (uterine) takes one-fourth.

Illustration: A dies intestate leaving his great-grandfather, uncles and aunts, and no other relatives. They all take equal shares.

Other Personal Laws

Parsi Zoroastrians

The word 'Parsi' has been defined to mean Parsi Zoroastrian. The children of a Parsi father and a non-Parsi mother are Parsi provided they are admitted to the Parsi religion and profess the Zoroastrian faith. The children of a Parsi mother and non-Parsi father, however, would not be Parsi. (*Sir Dinshaw Maneckji* v. *Sir Jamshedji*, 33 ILR Bom 509)

Indian Parsis are governed by the Parsi Marriage and Divorce Act, 1937 ("**the PMDA**"), in matters relating to marriage and divorce.

A Parsi marriage is invalid if:

- The contracting parties are related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I of the PMDA;
- The marriage is not solemnised according to the Parsi ceremony of 'Ashirvad' by a priest in the presence of two Parsi witnesses; or
- If the contracting parties are underage, that is, the male has not completed 21 years of age, and the female has not completed 18 years of age.

The children of an invalid marriage are legitimate.

A Parsi priest who solemnises an invalid marriage is liable to imprisonment up to six months or fine up to Rs.200/-, or both.

Illustration: A married C, the mother of his son's wife, as *per* Parsi law. This marriage is invalid as A and C are within the prohibited degrees of relationship set forth in Schedule I of the PMDA. The priest who solemnised this marriage is also liable to punishment under the PMDa.

Every marriage must be certified and registered in accordance with S.6.
The following are some of the grounds for divorce available to married Parsis (S.32, PMDA):

- Adultery;
- Bigamy, rape or any unnatural offence under S.377 of the Indian Penal Code, 1860;
- Causing grievous hurt to the plaintiff;
- Cruelty;
- Defendant has been imprisoned for a period of seven years or more;
- Desertion for at least two years;
- Incurable unsound mind for at least two years;
- Infecting the plaintiff with a venereal disease;
- The bride was pregnant by some other person at the time of marriage;
- Unsound mind that the petitioner was unaware of at the time of marriage;
- Wilful non-consummation of marriage within one year of marriage; or
- Conversion to another religion.

Illustration: A and B were married in accordance with Parsi law. After their marriage, A alleged that B was neglecting her and spending all of his money on unnecessary luxury and vices. They also quarrelled a lot. There is no ground for divorce that is satisfied. (*Pestonji Kekobad Bharucha* v. *Aloo*, AIR 1983 Bom 117)

If consummation of the marriage is impossible due to natural causes, the marriage may be declared null and void at the instance of either party. If a husband or wife has been continually absent from the other for seven years and no one has seen or heard from the missing spouse in that period, the marriage

shall, at the instance of either party, be dissolved. Under Parsi law, both the husband and the wife are entitled to alimony *pendent lite* if unable to support himself/herself.

There is no provision for adoption under Parsi law. Therefore, Parsi couples wishing to adopt must do so under S.41 of the Juvenile Justice (Care and Protection of Children) Act, 2000.

Intestate succession is governed by Chapter III of the Succession Act:

- For the purposes of succession, there is no distinction between those who are actually born in the lifetime of the deceased and those who, at the date of her death were *in utero.* (S.50(a), Succession Act)
- A lineal descendant of an intestate who has died in the lifetime of the intestate, without leaving a widow or widower or any lineal descendants, is not to be taken into account when determining succession to the property of the intestate. (S.50(b), Succession Act)
- Where a widow or widower of any relative of an intestate has remarried in the lifetime of that intestate, she/he is not entitled to receive the intestate's property. (S.50(c), Succession Act)
- If a Parsi dies intestate leaving behind:
    - *Widow and children*: They share equally.
    - *No widow, only children*: Each child gets an equal share.
    - *Parents, Widow, and Children*: Widow and children share equally while each parent gets a share that is equal to half the child's share.

Illustration: A, a Parsi, dies intestate leaving his wife W, two sons S1 and S2, one daughter D, and both his parents M and F. As per the rules contained in Chapter III of the Indian Succession Act, 1925, W, S1, S2, and D get 2/10 or 1/5 and F and M get 1/10 each.

Jews

Unlike Christians, Hindus, and Parsis, there is no statutory law which governs marriages amongst the Jews. Unlike in the case of these three communities, as also in the case of Muslim women, there is also no statute providing for any matrimonial relief to an aggrieved party to a Jewish marriage. The nature and the incidence of a Jewish marriage and the matrimonial relief to which a Jewish husband or wife would be entitled, must therefore be ascertained from their personal law. (*Mozelle Robin Solomon* v. *Lt. Col. R. J. Solomon*, (1979) 81 Bom LR 578)

Courts have jurisdiction to entertain suits for divorce between Jews. The law to be applied in such cases is the Jewish law with such adaptation to the circumstances of the case as justice may require. In the event of any dispute, the custom of the Jewish community will be considered before any ruling on the matter may be pronounced. *(Bachel Benjamin* v. *Benjamin Solomon Benjamin*, AIR 1926 Bom 169)

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All India Bar Examination
Preparatory Materials

Subject 16: Human Rights Law

Introduction to the Development of International Human Rights Law

Human rights are rights that are inherent in all persons and are also inalienable and universal in nature. States are under an obligation to ensure that these rights are capable of enjoyment by all without any distinction. These rights are well-entrenched in international covenants and recognised under most constitutions. Thus, international human rights law refers to the body of international law that seeks to promote and protect human rights at the international, regional, and domestic levels through international treaties and customary international law.

International Human Rights Instruments

The United Nations Charter

The United Nations Charter, 1945, in its preamble, declares that the United Nations is determined to "*reaffirm its faith in fundamental rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small*". The Charter also provided for a Commission of Human Rights, which undertook the task of framing the International Bill of Human Rights.

The International Bill of Rights

The International Bill of Rights comprises the Universal Declaration of Human Rights, 1948 ("**the UDHR**"), the International Covenant on Civil and Political Rights, 1966 ("**the ICCPR**") with its two optional protocols, and the International Covenant on Economic, Social, and Cultural Rights, 1966 ("**the ICESCR**").

The Universal Declaration of Human Rights

The UDHR, a persuasive instrument, was drafted in consultation with representatives of several countries, including developing nations, so as to ensure that the rights enumerated were indeed 'universal'. The UDHR contains both civil and political rights and economic, social, and cultural rights. The foundational principles of equality and non-discrimination are enshrined in A.1 of the UDHR.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights

The ICCPR and ICESCR were formulated to impose binding human rights obligations on States. The differences between the West and the Soviet bloc over the nature of the rights and their enforcement and the implementation mechanism lead to the creation of two different treaties. As opposed to the rights contained in the ICCPR, which were immediately enforceable, those contained in the ICESCR were to be progressively realised by the State Party by taking steps "*to the maximum of its available resources*". The obligation of the State to ensure that the rights under the ICESCR are exercised without discrimination, however, is an immediate obligation.

Both covenants require State parties (States that are signatories to the covenants) to respect, protect, and fulfil human rights. The obligation of respecting human rights imposes a duty on the State to refrain from interfering with the enjoyment of the rights. In order to 'protect' human rights, States must prevent violation of the rights by third parties and in order to 'fulfil' the rights, the State must take initiatives and measures to facilitate the realisation of the rights.

Classification of Human Rights

Human rights have been classified as first, second, and third generation rights. Civil and political rights, such as the right to life and liberty, freedom of religion, freedom of movement, freedom of speech and expression, and the right against torture, are first generation rights. Economic, social, and cultural rights, such as the right to education, healthy food, work, housing, and social security are second generation rights. The

right to development, the right to a healthy environment, and collective rights are bracketed as third generation rights. While civil and political rights are mostly negative rights, in that they require the State to refrain from curtailing rights, economic, social, and cultural rights are positive rights as they require the State to take active steps to implement the rights.

Such a classification of human rights militates against the indivisibility and interdependence of human rights. The Vienna Declaration and Programme of Action, 1993, urged the international community to "*treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis*." The right to education, which is regarded as both a civil and political right, and as an economic, social, and cultural right, illustrates the indivisibility of rights.

Implementation of International Human Rights Law under the Constitution of India

As of June 2010, India has ratified the following six international human rights law covenants:

- The Convention on the Elimination of All Forms of Racial Discrimination ("**the CERD**");
- The ICCPR;
- The ICESCR;
- The Convention on the Elimination of All forms of Discrimination against Women, 1979 ("**the CEDAW**");
- The Convention on the Rights of the Child, 1989 ("**the CRC**"); and
- The Convention on the Rights of Persons with Disabilities ("**the CPRD**").

India has also ratified the two optional protocols to the CRC, and is a signatory to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 and the International Convention for the Protection of All Persons from Enforced Disappearance, 1992.

A.51(c) of the Constitution of India ("**the Constitution**") requires the State to "*foster respect for international law and treaty obligations…* " Further, A.253 vests Parliament with the power to make laws to implement international treaties or conventions. International law can be incorporated within domestic law through automatic incorporation or transformation. If there is no conflict between the domestic law and obligations under a treaty, the latter automatically becomes a part of domestic law. In the case of transformation, domestic legislation must be enacted to give effect to the obligations.

These constitutional provisions indicate that international law can be incorporated into Indian law by transformation, and the Supreme Court of India ("**the Supreme Court**") has ruled that the "*making of law…is necessary when the treaty or agreement operates to restrict the rights of citizens or others or modifies the laws of the State. If the rights of the citizen and others which are justiciable are not affected, no legislative measure is needed to give effect to the agreement or treaty.*" (*Maganbhai Ishwarbhai Patel* v. *Union of India*, (1970) 3 SCC 400)

In the event of a conflict between domestic law and international conventions, the former shall prevail. (*Gramophone Company of India Ltd.* v. *Birendra Bahadur Pandey*, AIR 1984 SC 667*)* Courts should interpret domestic legislation in light of international obligations. (*Jolly George Verghese* v. *Bank of Cochin*, AIR 1980 SC 470)

In *Vishaka* v. *State of Rajasthan,* AIR 1997 SC 3011, the Supreme Court held that if there is a void in domestic law, international conventions can be relied on to fill the gap, provided that they are not inconsistent with the Indian Constitution or with domestic law. The Supreme Court placed reliance on the CEDAW and proceeded to lay down guidelines to prevent the sexual harassment of women at the workplace.

Illustration: A young man who was picked up by the police for questioning in connection with a theft was later found dead near a railway track. The victim's mother approached the courts claiming compensation

for the violation of the right to life under A.21 of the Constitution. A.9(5) of the ICCPR entitles victims of unlawful arrest or detention to an enforceable right to compensation. Relying on this provision, the court arrived at the position that monetary compensation can be ordered under Aa.32 and 226 of the Constitution for contravention of a fundamental right. (*Nilabati Behera* v. *State of Orissa*, AIR 1993 SC 1960)

Human Rights and the Constitution

The fundamental rights enshrined in Part III of the Constitution have been described as the basic human rights by the Supreme Court of India. The rights have been categorised as right to equality, right to fundamental freedoms, right against exploitation, right to freedom of religion, cultural and educational rights, and right to constitutional remedies. Fundamental rights, which, with some exceptions, are primarily enforceable against the State, however, are not merely confined to the rights expressly stipulated in Part III of the Constitution. (*Unni Krishnan, J. P.* v. *State of Andhra Pradesh*, 1993 AIR SC 217) The Supreme Court has creatively interpreted several rights, such as the right to education (prior to the 86th Amendment to the Constitution), the right to health, the right to information, the right to food, privacy, and others, within the paradigm of fundamental rights.

A.13 of the Constitution ensures the justiciability and enforceability of the fundamental rights. The Article declares all pre-Constitutional laws that are inconsistent with fundamental rights to be void. A.13(2) further enumerates that the State will "not make any law which takes away or abridges the rights conferred" by Part III. It further adds that any such law, which is in contravention of the Constitution, will be declared void.

Fundamental rights, which are enforceable against the State and its instrumentalities, are understood as vertical in nature. These are as opposed to horizontal rights, such as the prohibition against child labour, exploitation, and untouchability, which are enforceable against private individuals and the State.

The violation of fundamental rights can be remedied by filing a writ petition before the Supreme Court and High Courts under Aa.32 and 226, respectively. Remedies for the enforcement of fundamental rights and judicial review form an essential component of the Indian Constitution.

Fundamental rights are not, however, absolute in nature, and are subject to well-defined 'reasonable restrictions'. With the exception of the right to life and the protection with respect to conviction for offences, all other rights may be suspended when a proclmation of emergency is in effect. (A.359 of the Constitution of India)

Right to Equality

The right to equality and non-discrimination is contained in Aa.14, 15, and 16 of the Constitution. These provisions are supplementary to each other. A.14, which guarantees equality before the law and the equal protection of the law to all persons within India, is also available to non-citizens. The principle of equality, however, does not imply that every law must have a universal application for all, despite the different situations, positions, and needs of persons. The law acknowledges that certain classes of persons require separate treatment. The State is permitted to make reasonable classifications of persons provided that the classification is "*…based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis.*" (*State of Bombay* v. *F. N. Balsara*, AIR 1951 SC 318)

Formal and Substantive Equality

The Constitution of India recognises both formal and substantive equality. Formal equality is based on the Aristotelian concept that likes must be treated alike. Equal treatment of persons not similarly placed results in greater discrimination and

inequality. For instance, a racially neutral law could have an unequal impact on a certain class of persons. Substantive equality thus focuses on the equality of results, which takes into perspective the differing social and economic status of persons. Protective discrimination, like the prohibition on women working at night or in bars, though it appears to be a positive or a protective step, invariably causes greater hardship and discrimination against women by denying them their right to livelihood.

Illustration: The Punjab Excise Act, 1914, prohibited women from being employed in any part of the premises in which liquor or an intoxicating drug was being consumed by the public. Although the objective of the law was to ensure the safety of women in public spaces, it reflected gender stereotyping and resulted in "invidious discrimination perpetrating sexual differences." The court struck down the impugned section of the Act as being violative of Aa.19(1)(g), 14, and 15 of the Constitution. The Court observed, "*Instead of prohibiting women's employment in the bars altogether the state should focus on factoring in ways through which unequal consequences of sex differences can be eliminated. It is the State's duty to ensure circumstances of safety which inspire confidence in women to discharge the duty freely in accordance to the requirements of the profession they choose to follow*."(*Anuj Garg* v. *Hotel Association of India*, AIR 2008 SC 663)

Non-Discrimination

A.15(1) of the Constitution prohibits the State from discriminating against any citizen on the grounds of religion, race, caste, sex, place of birth, or any of them. A.15(2) further prohibits individuals and the State from discriminating on the grounds only of religion, race, caste, sex, place of birth, or any of them, with regard to access to shops, hotels, and places of public entertainment, use of wells, tanks, bathing ghats, roads, and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

The Constitution provides that any law which violates any fundamental right can be struck down by the Supreme Court or the High Courts. Despite this stipulation, courts have refrained from striking down or declaring any provision of personal law unconstitutional. Instead, the Courts have read down and interpreted the provision allegedly in conflict with fundamental rights, in a manner that it ceases to be in conflict with the fundamental rights. In *John Vallamattom* v. *Union of India*, AIR 2003 SC 2902, however, the court declared S.118 of the Indian Succession Act, 1925, which restricted Indian Christians from bequeathing property for charitable or religious purposes, as being arbitrary, unreasonable, discriminatory, and therefore unconstitutional and violative of A.14 of the Constitution.

Illustration: AYZ filed a petition to strike down S.6(a) of the Hindu Minority and Guardianship Act, 1956, and S.19(b) of the Guardian and Wards Act, 1890, as violative of Aa.14 and 15 of the Constitution. Under Ss.6 (a) and 19(b), only the father of a Hindu minor could be the natural guardian. The mother could become the natural guardian only 'after' the lifetime of the father. The petitioner argued that the provision was discriminatory towards women and deprived mothers' guardianship rights, responsibilities, and authority in relation to her own children during the lifetime of the father. The court agreed that "*…gender equality is one of the basic principles of the Constitution and in the event the word 'after' is to be read to mean a disqualification of a mother to act as a guardian during the lifetime of the father, the same would definitely run counter to the basic requirement of the constitutional mandate and would lead to a differentiation between male and female*." The court interpreted the word 'after' to mean not after the death of the father, but in his absence, temporary or otherwise, or total apathy of the father towards the child, or inability of the father by reason of ailment to act as a natural guardian. (*Githa Hariharan* v. *Reserve Bank of India*, AIR 1999 SC 1149)

Constitutional Safeguards for Women, Children, Scheduled Castes, Scheduled Tribes, and Socially and Educationally Backward Classes

Whereas the right to equality prohibits discrimination on the basis of sex or caste, Aa. 15(3), 15(4), and 15(5) empower the State to make special provisions for women and children, socially and educationally backward classes of citizens, and the Scheduled Castes and the Scheduled Tribes. These provisions seek to eliminate the socio-economic backwardness of these classes and are a form of positive discrimination. A.16 ensures equality of opportunity for all citizens in employment or appointment to any office under the State. The Article enables the State to make employment reservations in government jobs in favour of any backward classes which have not been adequately represented by the State. In *Indra Sawhney* v. *Union of India,* AIR 1993 SC 477 (*Mandal Commission case*), the court addressed the constitutional validity of 27% reservation for socially and educationally backward classes in civil posts and services in the Government of India. The court laid down essential rules and limitations on reservations, such as:

- Reservation measures can be made by the Legislature by law or by the executive;
- A.16(4) is not an exception to A.16(1), and reservation of posts for a certain class is in the nature of a reasonable classification for ensuring equality of opportunity;
- Backwardness under A.16(4) is mainly social and need not be both social and educational;
- The socially advanced members of backward classes, identified as the creamy layer, should be excluded from the reservations and reservations should not exceed 50% in any one year; and
- Reservations cannot be applied to promotions and merit alone would be considered for certain posts and services.

Illustration: Rule 13A of the Kerala State Subordinate Services Rules, 1958, made it obligatory for an employee to pass departmental tests for promotion. On request, the State introduced Rule 13AA, which further exempted the Scheduled Castes and the Scheduled Tribes from passing the tests for a period of two years. XYZ was not promoted despite passing the said test, as opposed to the Scheduled Castes and the Scheduled Tribes who were promoted, though they had not passed the prescribed tests. XYZ filed a petition challenging the constitutionality of Rule 13AA on the ground that it was violative of A.16 of the Constitution. The apex court held that Aa.14 and 16 permit reasonable classification having a nexus to the objects to be achieved. The court remarked, "[t]he guarantee of equality before the law or the equal opportunity in matters of employment is a guarantee of something more than what is required by formal equality. It implies differential treatment of persons who are unequal." The Supreme Court upheld the validity of Rule 13AA justified under A.16(1) of the Constitution and within the purview of A.16(4). The Court reiterated the necessity of substantive equality as opposed to formal equality. It observed that equality of opportunity implies fair opportunity to all sections of society by eradicating the handicaps of a particular section of the society. What A.14 or A.16 forbids is hostile discrimination and not reasonable classification. Classification is implicit in the concept of equality because equality means equality to all and not merely to the advanced and educated sections of the society. (*State of Kerala & Another* v. *N. M. Thomas*, AIR 1976 SC 490)

Right to Fundamental Freedoms

A.19 guarantees Indian citizens six rights: the right to freedom of speech and expression; the right to peaceful assembly; the right to form associations or unions; the right to move freely thoroughout the country; the right to reside and settle in any part of the country; and the right to practise any profession and carry on any occupation or business. These freedoms that are a testament to the democratic values of India are subject to certain limitations. For instance, the Parliament or the State legislatures can impose restrictions on the right to freedom of speech and expression, on account of security of the State, the sovereignty and integrity of India, friendly relations within foreign states, public order, decency, or morality, or in relation to contempt of court, defamation or

incitement to an offence. The restrictions imposed, however, should be reasonable in nature.

Illustration: AP, a film-maker, made a documentary about the violence and terrorism in Punjab and efforts made by a group to restore communal harmony. This award-winning documentary, which was submitted to *Doordarshan*, was not screened on television as it was found unsuitable. The court held that this violated AP's right to freedom of expression and the people's right to know about the situation in Punjab. The court also emphasised that the right under A.19(1)(a) could be restricted only on the basis of grounds listed in A.19(2). (*Anand Patwardhan* v. *Union of India,* AIR 1997 Bom 25)

To determine the reasonableness of restriction, factors such as the duration and the extent of the restrictions, the circumstances under which and the manner in which their imposition has been authorised, the nature of the right infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, and the prevailing conditions at the time, must be taken into account. (*State of Madras* v. *V. G. Row*, AIR 1952 SC 196)

Freedom of Speech and Expression

A.19(1)(a) guarantees the right to free speech and expression to all citizens. The right to freedom of speech and expression comprises the right to express one's views and opinions, and to communicate, including through words, action, writing, print, pictures, films, and movies. The right to free speech and expression forms an inalienable component of a democratic and free State.

Illustration: The executive passed an order restricting the import of newsprint. Further, a newsprint policy placed restrictions on page limits. ABC Ltd., a media house, challenged the constitutionality of the order on the ground that it infringed the right to freedom of speech and expression and the right to equality. The Court held that the State was controlling newspapers and interfering with the freedom of press through the newsprint policy. The direct effect of such a law is the violation of the freedom of speech and expression. (*Bennett Coleman & Co*. v. *Union of India*, AIR 1973 SC 106)

In recent years, the right to information has been recognised as a right inherent in A.19(1)(a). The Supreme Court has held that the freedom of speech and expression also includes the right to know, receive, and disseminate information. (*The Secretary, Ministry of Information & Broadcasting* v. *Cricket Association of Bengal & Another*, (1995) 2 SCC 161)

Practising any Profession and Carrying on Business

A.19(1)(g) guarantees all citizens the right to practise any profession or to carry on any occupation, trade or business. The State can, however, impose reasonable restrictions on the right in the public interest.

Illustration: The State of Maharashtra banned women from dancing in beer bars because the performances were vulgar, led to sexual exploitation of women, and were likely to corrupt public morals. The ban, however, exempted three starred and above establishments, drama theatres, cinema theatres, auditoriums, gymkhanas, and clubs in order to promote tourism and culture. The ban was challenged as being violative of Aa.19(1)(a) and 19(1)(g) and also of the right to livelihood flowing from A.21. The court struck down the ban on the ground that it was unconstitutional and violative of the fundamental rights of the bar dancers and bar owners to practice an occupation. The court further held that the exemption granted to a class of establishments was arbitrary and violative of the right to equality guaranteed under A.14 of the Constitution. It observed that there was no nexus between the classification and restriction imposed and the object sought to be achieved by the Act. (*Indian Hotels and Restaurants Association and others* v. *State of Maharashtra*, 2006(3) BomCR 705)

Rights Available to Persons Accused of a Crime

A.20 guarantees protection of three different types to persons convicted or accused of a crime. First, a person can only be convicted of an act which is an offence under a law in force at the time of commission, and cannot be subjected to a penalty greater than that prescribed under the law in force at the time of the commission of the offence.

Second, no person can be "prosecuted and punished for the same offence more than once". This is also known as the rule of protection against double jeopardy.

Finally, A.20 provides protection against self-incrimination such that a person accused of a crime cannot be compelled to be a witness against she. S.161(2) of the Code of Criminal Procedure, 1973, provides similar protection against self-incrimination.
Nevertheless, the forceful acquiring of the thumb impression or writing specimen of the accused does not constitute a violation of the right against self-incrimination. "*Self-incrimination means conveying information based upon the personal knowledge of the giver and does not include the mere mechanical process of producing documents in court which do not contain' any statement of the accused based on his personal knowledge.*" (*Kathi Kalu Oghad* v. *State of Bombay*, AIR 1961 SC 1808)

The compulsory administration of a polygraph test, narcoanalysis, or brain mapping violates the right against self-incrimination and the right to privacy, and amounts to cruel, inhuman or degrading treatment. The coercive use of such techniques violates the right to personal liberty as they fail to meet the 'substantive due process' standard. (*Selvi and Others* v. *State of Karnataka*, AIR 2010 SC 1974)

The Constitution also extends protection to persons who are arrested and/or detained. No arrested person can be detained in custody unless that person is informed of the grounds of arrest, the right to consultation, and the right to be defended by a lawyer of her choice. Further, the detained person must be produced before a Magistrate within 24 hours of arrest.

With a view to check rising incidences of custodial violence, the Supreme Court in *D. K. Basu* v. *State of West Bengal*, AIR 1997 SC 610, laid down guidelines to be followed in all cases of arrest and detention. The guidelines required the police to bear accurate, visible and clear signs of identification, to prepare a memo of arrest attested by a witness indicating the time and date of arrest, to inform a friend or relative of the detainee of the place of detention, to inform the arrested person of the right to inform someone about the arrest, to maintain records of the arrest, and to ensure that the detainee is subjected to medical examination every forty-eight hours by an approved doctor. S.50A, introduced by the Code of Criminal Procedure (Amendment) Act, 2005, incorporates the guidelines requiring intimation of arrest to a friend, maintaining records of arrest, and informing the arrested person of the rights available.

The right to free legal aid, which flows from A.21, is a critical right available to accused persons. The State is under a duty to provide a lawyer to accused persons who are unable to afford legal services. (*Hussainara Khatoon* v. *Home Secretary, State of Bihar*, AIR 1979 SC 1369)

Illustration: A was accused of committing the offence of criminal intimidation under S.506 of the Indian Penal Code, 1860. Owing to A's poor financial condition, A could not afford the services of a lawyer and remained unrepresented during the trial. A was convicted of the offence by the trial court. In appeal, the court held that the trial had been vitiated owing to the denial of free legal assistance to the accused. The court, while setting aside the conviction, observed that the appellant was not informed of the right to free legal aid. Thus, the appellant was unrepresented by a lawyer during the trial. (*Suk* Das v. *Union Territory of Arunachal Pradesh*, AIR 1986 SC 991)

Right to Life

The right to life, enshrined in A.21 of the Constitution, a protection available to citizens and non-citizens, is the most precious of all human rights. The right to life guarantees that "no person shall be deprived of his life or personal liberty except according to procedure established by law." Although the right is subject to limitations established by law, the court in *Maneka Gandhi* v. *Union of India*, AIR 1978 SC 597, has held that the 'procedure established by law' should be 'fair, just and reasonable, not fanciful, oppressive or arbitrary.' The Court stipulated that the test of reasonableness of such a law, which deprives a person of personal liberty, would have to be determined by testing it against Aa.14 and 19. The Court therefore concluded that Aa.14, 19, and 21 are not mutually exclusive, but interrelated.

The imaginative interpretation of the expression 'life' by Courts further validates that the right to life, as Bhagwati, J., has observed is 'the ark of all other rights.' In *Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180, and *Francis Coralie Mullin* v. *Union Territory of Delhi*, AIR 1981 SC 746, the court has reiterated, that A.21 is not restricted to mere animal existence but includes the right to live life with dignity. Similarly, in *P. Rathinam* v. *Union of India*, (1994) 3 SCC 394, the Court, while referring to various decisions, reiterated that A.21 means the "*…right to live with human dignity and the same does not merely connote continued drudgery. It takes within its fold some of the finer graces of human civilisation, which makes life worth living, and that the expanded concept of life would mean the tradition, culture and heritage of the person concerned.*"

A.21 is thus placed at the centre of the fundamental rights. It includes within its fold various rights, including the right to dignity, environment, health, education, privacy, and livelihood. In *People's Union for Civil Liberties* v. *Union of India*, (1997) 1 SCC 301, the court has ruled that though the right to privacy is not expressly indicated in the Constitution, "*the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as the right to privacy*." It further ruled, that telephone conversations are a significant element of a person's life and at the time of talking on the telephone, a person is exercising her right to freedom of speech and expression. The court made a reference to India's obligation under A.17 of the ICCPR and A.12 of the UDHR.

A.21 has been invoked to safeguard the dignity and rights of prisoners, and persons accused of crimes. The court has held handcuffing of undertrials accused of a non-bailable offence punishable with more than three years' imprisonment, to be inhuman and arbitrary, and a violation of Aa.14, 19, and 21. A person can be handcuffed only if there is a clear and present danger of escape. (*Prem Shankar* v. *Delhi Administration*, AIR 1980 SC 1535) Further, the right against torture or cruel, inhuman or degrading treatment has also been carved out of A.21.

Illustration: M, who was arrested and detained under S.3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 ("**the COFEPOSA**") filed a petition challenging the constitutional validity of the provision of a Detention Order which prevented her from meeting her family more than once a month. Further, the said Detention Order made it impossible for her to meet her lawyer. The petitioner contended that the said clause of the Detention Order was arbitrary, unreasonable, and violative of Aa.14 and 21. The court held that the law of preventive detention has to pass the test not only of A.22, but also of A.21, to ensure that the law is reasonable, fair, and just. The court held "*the prisoner or detenu has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration*." The court remarked that the right to life is not restricted to a physical existence. "*We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling*

with fellow human beings." The court upheld the right of the detainee to meet her family and friends. It held the said clauses to be violative of Aa.14 and 21 and unconstitutional and void as they permitted only one interview in a month to a detainee and regulated the right of a detainee to have an interview with a legal adviser of her choice. (*Francis Coralie Mullin* v. *Union Territory of Delhi*, AIR 1981 SC 746)

Illustration: Right to Health

D suffered serious injuries after falling off a train. D was denied treatment in six hospitals on account of either non-availability of a vacant bed or lack of medical facilities required for the treatment. D contended that the non-availability of medical facilities had resulted in the denial of D's fundamental right guaranteed under A.21. The court declared that A.21 imposes an obligation on the State to safeguard the right to life of every person. The hospitals run by the State and the medical staff are duty bound to provide medical treatment to preserve life. The failure to provide timely medical treatment to a person in need of such treatment results in violation of the right to life guaranteed under A.21. The court ordered the State to compensate the petitioner for the breach of the right guaranteed under A.21 of the Constitution. It further directed the State to formulate a plan for providing services to ensure availability of medical care, and the implementation of the plan. (*Paschim Banga Khet Mazdoor Samity & Others* v. *State of West Bengal & Another*, AIR 1996 SC 2426)

Right Against Exploitation

Aa.23 and 24 protect the vulnerable from exploitation by the State and by private individuals. A.23 prohibits trafficking of human beings and other forms of forced labour. A.24 prohibits employment of children below 14 years of age in factories, mines or any other hazardous employment.

In furtherance of the above prohibitions, Parliament enacted laws such as the Immoral Traffic (Prevention) Act, 1956 (replaced the Suppression of Immoral Traffic in Women and Girls Act, 1956), to suppress trafficking of women for the purpose of prostitution, the Bonded Labour System (Abolition) Act, 1976, to prevent the economic exploitation of the vulnerable, and the Child Labour (Prohibition and Regulation Act), 1986, to prohibit the employment of children in specified occupations.

Illustration: M was working as a construction labourer and was being paid remuneration below the minimum wage. This amounts to 'forced labour' under A.23, and M has the right to approach the court under A.32 or A. 226. (*People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1473 (*Asiad case*))

Freedom of Religion

Aa.25 - 28 of the Constitution govern the right to freedom of religion. A.25 guarantees to every person the freedom of conscience and the right to profess, practise, and propagate religion freely. This right is subject to public order, morality, and health. This right does not prevent the State from enacting laws to regulate or restrict any economic, financial, political, or secular activity associated with religious practice or laws to provide for social welfare and reform.

The right to propagate religion does not include the right to convert and forceful conversion interferes with an individual's 'freedom of conscience'. (*Rev. Stainislaus* v. *State of Madhya Pradesh*, AIR 1977 SC 908)

Illustration: P, Q, and R, who belonged to the sect of Jehovah's Witnesses, were expelled from school because they refused to sing the National Anthem at school. They, however, would stand respectfully when the Anthem was being sung. The court held that compelling students to sing the National Anthem would contravene their right to freedom of religion and the right to freedom of speech and expression. (*Bijoe Emmanuel* v. *State of Kerala*, AIR 1987 SC 748)

Cultural and Educational Rights

A.29(1) recognises the right of a section of

citizens to conserve their distinct language, script, or culture. A.29(2) prohibits the denial of admission to citizens in educational institutions maintained or aided by the State on the basis of religion, race, caste, language, or any of them. This will not, however, prevent the State from making special provisions for the advancement of socially and educationally backward or the Scheduled Castes, or the Scheduled Tribes. A.30 recognises the rights of religion-based or language-based minorities to establish and administer educational institutions.

These provisions were included in the Constitution with a view to inspire confidence and security among minorities and to "*bring about equality by ensuring the preservation of the minority institutions and by guaranteeing to the minorities autonomy in the matter of the administration of these institutions.*" (*Ahmedabad St. Xaviers' College Society* v. *State of Gujarat*, AIR 1974 SC 1389)

Directive Principles of State Policy

The Directive Principles are contained in Aa. 36 - 51 of the Constitution. These principles bear resemblance to the economic, social, and cultural rights contained in the ICESCR, and require the State to undertake positive measures to promote social justice and economic welfare.

A.37 states that directive principles are not "enforceable in court" but are "fundamental in…governance" and that the State is duty-bound to "apply these principles in making laws." The courts have, however, observed that Fundamental Rights and Directive Principles are supplementary to each other, and have proceeded to read the latter into fundamental rights. For instance, in *Mohini Jain* v. *State of Karnataka*, AIR 1992 SC 1858, the Supreme Court elevated the State's duty to provide free education to children (till 14 years of age) contained in A.45 to a Fundamental Right, stating that it flows from the right to life and dignity. A.21A, introduced by the 86th Amendment to the Constitution in 2002, expressly recognises the right to education.

When interpreting fundamental rights, directive principles must be considered, and they must be harmoniously construed. (*In re: Kerala Education Bill*, AIR 1958 SC 956) Emphasising the interrelationship, the court has observed that "*the directive principles prescribe the goal or end that is to be attained, and fundamental rights are the means to achieve such end.*" (*Minerva Mills* v. *Union of India*, AIR 1980 SC 1789)

Illustration: XYZ Municipal Corporation decided to forcibly evict all slum dwellers and to deport them to their places of origin. This decision was challenged as being violative of the right to livelihood, freedom of occupation, and due process. The court relied on Aa.39(a) and 41 which required the State to secure adequate means of livelihood and the right to work in case of unemployment and held that "*…any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by A.21.*" (*Olga Tellis* v. *Bombay Municipal Corporation*, AIR 1986 SC 180)

Rights and Safeguards for Women

The CEDAW, which was adopted in 1979 by the United Nations General Assembly, was ratified by India in 1993 with two declarations regarding Aa.5(a) and 16(1) of the Convention. A.5(a) requires State parties to take steps to eliminate prejudices and customary practices steeped in gender bias and stereotyping. A.16 (1) relates to the elimination of discrimination against women in matters relating to marriage and family relations.

The CEDAW, which comprises of 30 articles, was drafted with the intention of ending all forms of discrimination against women in the private and public sphere. The ratification of the Convention makes it obligatory for States to take appropriate measures to end discrimination against women and to protect women's human rights. The CEDAW also puts in place a common definition of equality and of what constitutes discrimination against women.

The UNCRPD is another convention which protects the rights of women. The Convention recognises that girls and women with disabilities face greater risk and discrimination, as opposed to other women and disabled persons. The Convention adopts a two-track approach to promoting gender equality and the empowerment of women with disabilities, thus appreciating and acknowledging the intersections between gender and disability.

In view of the constitutional guarantees and the duty under the CEDAW, India has enacted several laws for the protection of women. Some of the rights and safeguards that have been incorporated in domestic laws, in order to ensure equality and non-discrimination, include laws on domestic violence, equal remuneration, maternity benefit, and medical termination of pregnancy. Likewise, in several landmark cases, courts have taken a gender-sensitive view on cases before them, thus recognising the gender bias and vulnerability faced by women and ensuring that the special measures required to ensure their rights and interests are safeguarded. These measures have proved equally essential in promoting, respecting, and fulfilling the human rights of women.

Violence Against Women

Violence against women ("**VAW**") is the most common and prevalent form of human rights violations. VAW includes, but is not limited to, physical, sexual, mental, reproductive, and economic abuse. Violence can take place within the private sphere or in the public sphere. Ss.375 - 376 of the Indian Penal Code, 1860 ("**the IPC**") cover sexual violence against women. The IPC defines rape as sexual intercourse with a woman without her consent. Valid consent forms an essential ingredient for sexual intercourse to not qualify as rape. The IPC covers rape in situations of custody and care and also instances of gang rape. S.114-A of the Indian Evidence Act, 1872, presumes lack of consent in cases where sexual intercourse by the accused is proved and the woman denies giving consent. Such situations include rape in custody and care, such as in jails, hospitals, and care institutions, rape by public servants, and even instances of gang rape.

The Protection of Women from Domestic Violence Act, 2005 ("**the PWDVA**"), was passed in 2006. The PWDVA protects women against violence in the private sphere, and has been one of the most significant victories in women's human rights in India. The PWDVA provides women suffering from domestic violence with civil reliefs like a maintenance order, protection order, residence order, custody order, compensation order, and interim and *ex parte* orders.

Illustration: M and her mother worked in a coffee estate. M was raped by the accused in the estate. The trial court convicted the accused under S.376 of the Indian Penal Code and sentenced him to seven years of imprisonment. The High Court confirmed the sentence on reappraisal and re-appreciation of the entire evidence on record. In an appeal to the Supreme Court, the accused contended that the prosecution had not examined any independent witnesses to prove the guilt of the accused beyond reasonable doubt and that the medical examination did not find physical injury on M. The court declared the mere lack of injuries on the body of the accused or of M could not lead to the inference that the accused did not commit forcible sexual intercourse. The court ruled that though the medical report does not disclose any evidence of sexual intercourse, the sole testimony of the prosecutrix, "*…which is found to be cogent, reliable, convincing and trustworthy has to be accepted*." The Supreme Court dismissed the appeal and upheld the conviction and sentence awarded by the trial court and confirmed by the High Court. (*B. C. Deva* v. *State of Karnataka*, (2007) 12 SCC 122) The Supreme Court in *Bharwada Bhoginbhai Hirjibhai* v. *State of Gujarat*, AIR 1983 SC 753, similarly observed that, "*Corroboration is not the* sine qua non *for a conviction in a rape case. In the Indian setting, refusal to act on the testimony of a victim of sexual assault, in the absence of corroboration as a rule, is adding insult to injury*."

Illustration: AYZ filed a writ petition challenging the constitutionality of the PWDVA, on the grounds that it is *ultra vires* the Constitution, as it accords protection solely to women and not men, in violation of A.14 of the Constitution. The court observed that the classification of persons for the purpose of bringing them under a well-defined class is not denial of equal treatment merely because the law does not apply to other persons. The Court held that the challenge to the Domestic Violence law was misconceived and devoid of any merit. (*Aruna Parmod Shah* v. *Union of India*, OI, WP, (Crl.) 425/2008, High Court of Delhi*)*

Some of the other laws protecting the rights of women in public and private spheres, in addition to the above, are the Maternity Benefit Act, 1961, the Equal Remuneration Act, 1976, the Dowry Prohibition Act, 1961, and the Preconception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994.

Rights and Safeguards for Children

A.15(3) of the Constitution allows the State to frame special provisions for women and children. The proviso to S.160(1) of the Code of Criminal Procedure, 1973, requiring children below 15 years of age to be questioned only in their homes and not in police stations, is in keeping with A.15(3). Further, the Directive Principles require the State to frame policies to safeguard the health of children, protect them from abuse, and to secure the right to education for them.

Right to Education

The 86th Amendment to the Constitution led to the introduction of the right to free and compulsory education for children between the ages of six to fourteen years. The Right of Children to Free and Compulsory Education Act, 2009, which came into force on April 1, 2010, gives effect to this constitutional guarantee. This right is also available to children with disabilities. Substantial obligations have been placed on the Central and state governments to ensure that children belonging to weaker sections or disadvantaged groups are not discriminated against or prevented from pursuing elementary education. Schools have been expressly prohibited from charging a capitation fee or subjecting children to a screening process.

Protection against Child Labour

In furtherance of A.24, the Child Labour (Prohibition and Regulation) Act, 1986, prohibits the employment of children in specified occupations such as those concerned with automobiles, workshops and garages, mines, handling of toxic or explosive substances, or workshops wherein processes such as *beedi*-making, carpet weaving, cement manufacture, cloth printing, building and construction, are carried out. This prohibition does not, however, apply to household enterprises and government schools. The Act also prescribes the hours and period of work, weekly holidays, health, and safety measures that must be observed in non-prohibited occupations. Similarly, provisions contained in laws including the Factories Act, 1948, the Mines Act, 1952, and the Beedi and Cigar Workers (Conditions of Employment) Act, 1966, prohibit the employment of children.

The Juvenile Justice (Care and Protection of Children) Act, 2000, criminalises the exploitation of a juvenile or child employee.

Juvenile Justice System

India's obligations under the CRC led to the revision of the law relating to juvenile justice. The Juvenile Justice Act, 2000 ("**the JJ Act**"), which replaced the Juvenile Justice Act, 1986, consolidated the law relating to juveniles in conflict with the law, and children in need of care and protection. It provides for care, protection, treatment, and rehabilitation measures to promote the well-being of children. The Act has incorporated one of the core principles contained in the CRC, which is that "*the best interests of the child shall be a primary consideration*".

The JJ Act sets out a "child-friendly" procedure to be followed while dealing with juveniles in conflict with the law and children in need of care and protection. The former has been defined to mean, "*A juvenile who is alleged to have committed an offence and has not completed the eighteenth year of age as on the date of commission of such offence*".

The JJ Act stipulates the orders that can be passed by the Juvenile Justice Board ("**the JJB**"). No order sentencing the juvenile to death or imprisonment can be passed.

It is notable that the claim of juvenility can be raised "at any stage, even after final disposal of the case" (S.7A, JJ Act). Furthermore, in cases pending before the JJ Act, 2000, came into effect, courts can continue with the proceedings and upon arriving at the conclusion that the offence has been committed, should forward the juvenile to the JJB for orders (S.20, JJ Act).

Illustration: D was 16 years, 10 months, and 20 days old when he allegedly kidnapped and murdered a person. The offence was committed in 1995 when the Juvenile Justice Act, 1986, was in force. This Act defined "juvenile" to mean "a boy who has not attained the age of sixteen years…" In 2003, D was convicted and sentenced to life imprisonment. In his appeal, D claimed that since he was a "juvenile in conflict with law", the sentencing would have to be in accordance with the 2000 Act (the JJ Act). The court held that on a combined reading of Ss. 7 and 20 of the JJ Act, it was clear that if a person was below the age of 18 years on the date of the commission of the offence, the JJ Act, would apply. (*Imtiyaz Hussain* v. *State of Maharashtra*, (2008) 110 BomLR 1645)

"Child in need of care and protection" has been broadly defined to include orphaned, abandoned, or surrendered child; child who is or is likely to be subjected to abuse, neglect, sexual abuse, or trafficking; a child who is terminally ill or child with disabilities and no caregiver; or a child who is a victim of armed conflict, civil commotion or natural disaster. Such a child can be brought before the Child Welfare Committee, which can pass orders to place the child in a children's home or shelter home to secure her safety and well-being.

The JJ Act is a secular legislation, and provides for adoption, foster care, sponsorship, or placement at an after-care organisation with the aim of securing the rehabilitation and social integration of children residing in children's or special homes.

Illustration: Mr. and Mrs. V, a Hindu couple wished to adopt S, a girl child who had been surrendered to a nursing home by her parents at birth. They also had a daughter of their own. The adoption was challenged as being in contravention of the Hindu Adoption and Maintenance Act, 1956 ("**the HAMA**"), which prohibits a person having a living daughter from adopting a daughter. Unlike the HAMA, under S.41(6)(b) of the JJ Act, a person having a biological son or daughter can adopt a child of the same sex. The court adopted a harmonious construction of these two laws and held that where a child falls within the description of "orphaned, abandoned or surrendered child," the provisions of the JJ Act would apply. (*In re: Adoption of Payal*, 2009 (111) BomLR 3816)

The Juvenile Justice (Care and Protection) Rules, 2007, ("**the Rules**") set out 14 principles, which the Child Welfare Committee and Juvenile Justice Board must abide by while implementing the Rules. Some of the key principles are the presumption of innocence, right to be heard, best interest, safety, family responsibility, equality and non-discrimination, right to privacy and confidentiality, institutionalisation to be a step of last resort, repatriation and restoration, and a fresh start.

Principle of Best Interest of the Child

The key principles entrenched in the CRC are the principles of non-discrimination, best interest, child participation, and the right to life. The principle of best interest of the child is also contained in the Hindu Minority and Guardianship Act, 1956, and the Guardians

and Wards Act, 1890, and has been regularly relied on by courts while deciding on custody matters.

Illustration: A filed a *habeas corpus* petition before the court seeking custody of his daughter, claiming that she had been abducted by B, his wife, and her parents. A also alleged that B was suffering from a mental ailment which rendered her unsuitable for custody. The court observed that "*in case of dispute between the mother and father regarding the custody of their child, the paramount consideration is welfare of the child and not the legal right of either of the parties*." Applying this principle, the court allowed B to retain the custody of the child. (*Rajesh K. Gupta* v. *Ram Gopal Agarwala*, AIR 2005 SC 2426)

Protection Against Violence

The provisions of the CRC require India to enact laws and take other appropriate measures to protect children from "*all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse…"* Further, the CRC expressly prohibits a child from being subjected to torture or inhuman treatment. The dignity of the child must be respected and secured.

Illustration: S, an eleven-year-old girl, was made to crouch in an uncomfortable position under the hot sun for two consecutive days in school as punishment for failure to recite alphabets. She later slipped into a coma and passed away. Corporal punishment in schools is an affront to the dignity of a child and interferes with the right to education flowing from the right to life. (*Parent's Forums for Meaningful Education* v. *Union of India*, AIR 2001 Del 212)

The Indian legal framework does not provide for child sexual abuse as a distinct offence. It is dealt with under provisions relating to rape, hurt, and outraging the modesty of a woman. Taking into account the unease and discomfort faced by a child victim of sexual abuse, the apex court has laid down that along with rape trials, the trial of the offences of outraging the modesty of a woman (S. 345, IPC) and unnatural sexual offences (S.377, IPC) shall be held in-camera. Further, while holding the trial of child sexual abuse or rape, a screen should be placed so that the victim cannot see the accused and the victim should be allowed sufficient breaks while giving testimony. Questions relating to the incident must be given in writing to the Presiding Officer who must then put it to the victim, "*in a language which is clear and is not embarrassing*." (*Sakshi* v. *Union of India*, AIR 2004 SC 3566)

Applicability and Enforcement of Human Rights

Right to Constitutional Remedies

A.32 of the Constitution encompasses the critical right to a remedy for violation of fundamental rights. A.32(1) guarantees the right to approach the Supreme Court directly and A.32(2) empowers the court to issue directions or orders or writs such as *habeas corpus*, *mandamus*, *certiorari*, *quo warranto*, and prohibition. The High Court can also be approached under A.226. This right may, however, be suspended by way of a presidential order when a proclamation of emergency under A.352 of the Constitution is in effect.

A petition may be filed by the person whose rights have been violated or any public spirited individual. The court may also exercise its *suo motu* powers and take cognizance of a violation.

Public Interest Litigation

In cases where the enforcement of a fundamental right is involved, a public interest litigation ("**a PIL**") can be filed in the Supreme Court under A.32. A writ petition can be filed in the High Court under A.226 on many grounds, aside from the violation of a Fundamental Right.

PILs, which have been used to protect the rights of the disadvantaged and to ensure access to justice, relax the traditional concept of *locus standi*, which permits only persons

whose rights have been affected to approach the Court. Following the Emergency of 1975-1977, non-adversarial litigation has emerged as a custodian of the basic human rights of the people. From upholding the personal liberty of undertrials (*Hussainara Khatoon & Others* v. *Home Secretary, State of Bihar*, 1979 AIR 1819), rehabilitation of child prostitutes (*Gaurav Jain* v. *Union of India*, AIR 1997 SC 3019), to the release of bonded labour (*Bandhua Mukti Morcha* v. *Union of India*, (1984) 2 SCR 67), the PIL has served as a "strategic arm of the legal aid movement." (*People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1473) The Supreme Court further relaxed rules of procedure by treating letters reporting the violation of fundamental rights as writ petitions.

Right to Compensation for Violation of Fundamental Rights

While the Constitution does not expressly provide for the right to compensation for violation of fundamental rights, the Supreme Court has, in pursuance of its powers under A.32, ordered compensation to redress violations, especially civil and political rights violations.

Illustration: R was detained for more than 14 years in jail after he had been acquitted. R filed a *habeas corpus* petition seeking his release and claimed compensation for the illegal detention. Ordering compensation, the court observed, "the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. A.21 which guarantees the right to life and liberty will be denuded of its significant content if the power of this Court were limited to passing orders to release from illegal detention." (*Rudul Sah* v. *State of Bihar*, AIR 1983 SC 1086)

Illustration: Ms. C, a citizen of Bangladesh, was gang-raped by employees of the Indian Railways. A petition was filed under A.226 claiming compensation. The court held that A. 21, which is available to non-citizens as well, had been violated and that "*[w]here public functionaries are involved and the matter relates to the violation of the fundamental rights or the enforcement of public duties, the remedy would still be available under the Public Law notwithstanding that a suit could be filed for damages under Private Law*." (*Chairman, Railway Board* v. *Chandrima Das*, AIR 2000 SC 988)

Compensation is not, however, ordered in every case of violation of fundamental rights. For instance, in cases involving custodial violence or death, compensation can be ordered if the violation of A.21 is "*patent and incontrovertible*", is "*gross and of a magnitude to shock the conscience of the court*", and has resulted in death or is supported by medical report, disability, or scars." (*Sube Singh* v. *State of Haryana*, (2006) 3 SCC 178)

Quasi-Judicial Bodies And Remedies

India established the National Human Rights Commission ("**the NHRC**") in 1993 under the Protection of Human Rights Act, 1993. The establishment of an impartial and autonomous body for protection and fulfilment of human rights was a consequence of growing human rights violence and domestic and international pressure. The NHRC has been vested with the power to investigate cases of human rights violations, to inspect existing mechanisms to protect human rights, to sensitise the government to its domestic and international obligations, to spread human rights awareness, and to work with civil society organisations and intervene in court proceedings. In the Gujarat *Best Bakery case*, the NHRC proactively filed a petition before the Supreme Court to transfer riot cases outside Gujarat for a fair and impartial trial and to ensure safety of witnesses. It further prayed for the setting aside of the trial court order in the Best Bakery case, which had wrongly acquitted all the accused in the case, and sought directions for further investigation by an independent agency and also retrial of the case in a court located outside Gujarat. The NHRC can take *suo motu* action and is vested with the power to intervene in court proceedings.

Complaints can be registered with the NHRC by or on behalf of any person whose human rights have been violated. The complaint can be filed free of cost, thus eradicating any economic barriers to access to justice.

In addition to the NHRC, States are under a duty to set up State Human Rights Commissions, which would work in conjunction with the NHRC and provide relief in different States with regard to human rights violations.

In addition to the NHRC, there is the National Commission for Women ("**the NCW**"), the National Minorities Commissions ("**the NCM**"), the National Commission for Protection of Child Rights ("**the NCPCR**"), the National Commission for Scheduled Castes ("**the NCSC**"), the National Commission for Scheduled Tribes ("**the NCST**"), and the National Commission for Backward Classes ("**the NCBC**"). There are similar bodies at the state level.

International Monitoring System

International human rights law covenants include provisions for scrutiny of a State's compliance under the instrument. For instance, State Parties are required to submit periodic reports to the treaty body constituted under the respective conventions on the measures taken to implement the rights contained in the relevant convention including the ICCPR, the ICESCR, the CEDAW, and the CPRD. Civil society organisations can also submit alternate or shadow reports to shed light on a State's compliance with a particular treaty. The treaty body then scrutinises the report submitted, and offers its recommendations in the form of "concluding observations". While this is not of any binding value, it creates a moral obligation on the state to address the concerns.

Select treaty bodies such as the Human Rights Committee, the Committee on CEDAW, and the Committee against Torture, can also receive complaints of human rights violations from individuals. India has, however, not ratified the relevant instruments that make it permissible for individuals to access the complaints' mechanisms of treaty bodies.

In 2006, the United Nations General Assembly adopted a resolution under which the Human Rights Council was constituted as a subsidiary organ of the General Assembly. The Council has been vested with the responsibility of promoting and protecting human rights and fundamental freedoms. The Council has been empowered to examine gross and systematic violations and make recommendations thereon. Significantly, through the Universal Periodic Review mechanism, the Council can undertake a review of the human rights record of all countries that are members of the United Nations.

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Notes:

All India Bar Examination
Preparatory Materials

Subject 17: Labour and Industrial Law

Matters pertaining to labour law and industrial relations find mention in the Concurrent List in the Seventh Schedule to the Constitution, and therefore, both Parliament and the State Legislatures have enacted statutes on this subject.

Industrial Relations

Industrial relations are primarily governed by the Industrial Disputes Act, 1947, the Trade Unions Act, 1926, and the Industrial Employment (Standing Orders) Act, 1946.

Industrial Relations: The Industrial Disputes Act

The Industrial Disputes Act, 1947 ("**the Industrial Disputes Act**") establishes the machinery and procedure for the investigation and settlement of industrial disputes, and generally attempts the regulation of industrial relations. The Industrial Disputes Act applies to every industry in India.

Industry

The term "industry" has been defined to mean "any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen." (S.2(j), Industrial Disputes Act) Regardless of whether there is any profit motive or a desire to generate income, any systematic activity organised by cooperation between an employer and employees for the production and/or distribution of goods and services calculated to satisfy human wants and wishes is an "industry". (*Bangalore Water Supply and Sewerage Board* v. *A. Rajappa*, AIR 1978 SC 548)

There are certain exceptions to this general rule. For instance, sovereign functions of the State do not qualify as "industry". If an establishment undertakes several activities, the dominant activity of that establishment will determine whether that establishment is an industry.

Illustration: A group of lawyers volunteer at a legal services clinic for free or at nominal cost. Since the lawyers are not engaged for remuneration or on the basis of master and servant relationship, the clinic is not an industry even if some servants are hired to support the dominant activity. (*Bangalore Water Supply and Sewerage Board* v. *A. Rajappa*, AIR 1978 SC 548)

Workman

"Workman" means any person (including apprentice) employed in any industry to do any manual, clerical or supervisory work for hire or reward. (S.2(s), Industrial Disputes Act) This definition does not, however, not include (i) persons employed in the Armed Forces, (ii) police officers and employees of prisons, (iii) persons employed in mainly managerial or administrative capacity, or (iv) persons in supervisory capacity drawing wages exceeding Rs.1,600/- *per* month.

Illustration: A is hired by a bank as an accountant. A is also authorised to sign the salary bills of staff. Since the main work that A is hired to do is clerical in nature, the mere authority to sign salary bills does not exclude her from the definition of "workman". (*Punjab Co-operative Bank Limited* v. *R. S. Bhatia*, AIR 1957 SC 1898)

Industrial Dispute

"Industrial dispute" means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment, or the terms and conditions of employment, or with the conditions of labour, of any person. (S.2(k), Industrial Disputes Act) S.2A clarifies that the dismissal, discharge, or retrenchment of even a single workman would be an 'industrial dispute' even if no other workman or any union is a party to the dispute.

Illustration: Company A, an industry, utilises the services of a contractor's employees as contract labour. Disputes raised by the contractor's employees against Company A would qualify as an "industrial dispute". As long as the party raising the dispute has a direct interest in the subject matter of the dispute, the fact that the workmen are employees of a contractor will not alter the nature of the dispute. (*Standard Vacuum Refining Company of India Limited* v. *Their Workmen and Another*, 1960 AIR 948 SC)

Appropriate Government

"Appropriate Government" for all purposes under the Industrial Disputes Act means: (i) the Central Government in case of railways, docks, I.F.C.I., E.S.I.C., L.I.C., O.N.G.C., U.T.I., Airports Authority of India, industry carried on by or under authority of the Central Government, and (ii) the State Governments in case of any other industrial disputes. (S.2, Industrial Disputes Act)

Strikes

"Strike" is defined as "a cessation of work by a body of persons employed in any industry acting in combination, or a concerted refusal, or a refusal, under a common understanding of any number of persons who are or have been so employed to continue to work or accept employment." (S.2(q), Industrial Disputes Act)

The right to strike is not a fundamental right of workmen, but rather a legal right provided by the Industrial Disputes Act. (*All India Bank Employees' Association* v. *National Industrial Tribunal*, 1962 AIR SC 171)

S.22(1) of the Industrial Disputes Act provides that no person employed in a public utility service shall go on strike in breach of contract:

- Without giving the employer notice of strike within six weeks before striking; or
- Within fourteen days of giving such notice; or
- Before the expiry of the date of strike specified in any such notice as aforesaid; or
- During the pendency of any conciliation proceedings before a ~~c~~Conciliation ~~o~~Officer and seven days after the conclusion of such proceedings.

Illustration: The workmen of a public utility service serve notice on their employer of their decision to strike work if certain demands are not met. The workmen and employer enter into negotiations, and during these negotiations, a period of six weeks expires. The negotiations fail, and the workers immediately strike work. This strike is illegal, as the workers were required to give fresh notice of a strike when the previously notified date lapsed. (*Mineral Miner's Union* v. *Kudremukh Iron Ore Company Limited*, (1989) I Lab LJ 277 (Karnataka))

While S.22(1) of the Industrial Disputes Act imposes restrictions on strikes in breach of contract in public utility services, S.23 prohibits strikes in any industrial establishment in the following circumstances:

- During the pendency of conciliation proceedings before a Board of Conciliation and till the expiry of 7 days after the conclusion of such proceedings;
- During the pendency and 2 months after the conclusion of proceedings before a Labour court, Tribunal, or National Tribunal;
- During the pendency and 2 months after the conclusion of arbitral proceedings, when a notification has been issued by the Appropriate Government under S.10A; or
- During any period in which a settlement or award is in operation in respect of any of the matter covered by the settlement or award.

Illustration: The workmen of an industrial establishment and their employer enter into conciliation proceedings before a ~~c~~Conciliation ~~o~~Officer, and during these proceedings, the workmen strike work. This strike is not illegal, as the conciliation proceedings are before a ~~c~~Conciliation ~~o~~Officer and not a Board of Conciliation.

S.24 of the Industrial Disputes Act provides that a strike in contravention of Ss.22 or 23, or in contravention of an order made under Ss.10 or 10-A is illegal. S.26 provides for imprisonment up to one month and the levy of fines up to Rs.50/- on workmen guilty of involvement in illegal strikes.

Illustration: The workmen of an industrial establishment strike work illegally, and the employer seeks damages as compensation from the workmen. A suit for damages will not lie, as the remedies for illegal strikes are found exclusively in S.26 of the Industrial Disputes Act. (*Rothas Industries Limited* v. *Rothas Industries Staff Union*, (1976) 1 LLN 165)

Lockouts

S.2(l) of the Industrial Disputes Act defines the term "lock-out" as "the temporary closing of a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him"

S.22(2) of the Industrial Disputes Act provides that no employer carrying on any public utility service shall lock out any workmen:

- Without giving the workmen notice of lock-out within six weeks before locking out; or
- Within fourteen days of giving such notice; or
- Before the expiry of the date of lock-out specified in any such notice; or
- When any conciliation proceedings are pending before a ~~conciliation officer~~Conciliation Officer, and seven days after the conclusion of such proceedings.

While S.22(2) of the Industrial Disputes Act imposes restrictions on lock-outs in public utility services, S.23 prohibits lock-out in any industrial establishment in the following circumstances:

- When conciliation proceedings are pending before a Board of Conciliation and till the expiry of 7 days after the conclusion of such proceedings;
- During the pendency and 2 months after the conclusion of proceedings before a Labour Court, Tribunal, or National Tribunal;
- During the pendency and 2 months after the conclusion of arbitral proceedings, when a notification has been issued by the Appropriate Government under S.10-A; or
- During any period in which a settlement or award is in operation in respect of any of the matter covered by the settlement or award.

S.24 of the Industrial Disputes Act provides that a lock-out in contravention of Ss.22 or 23, or in contravention of an order made under Ss.10 or 10-A is illegal. S.26 provides for imprisonment up to one month and the levy of fines up to Rs.1,000/- on employers guilty of involvement in illegal lock-outs.

Lay-offs, Retrenchment, and Closure

There are conditions and restrictions imposed by the Industrial Disputes Act on industrial establishments with respect to lay-offs, retrenchment and closure.

Lay-Offs

"Lay-off" is defined under S.2(kkk) of the Industrial Disputes Act as the failure, refusal or inability of an employer on account of shortage of power, raw materials, accumulation of stocks or breakdown of machinery, to give employment to a workman whose name is borne on the muster rolls of the employer's industrial establishment, and who has not been retrenched. A lay-off is a temporary act (as opposed to permanent acts such as retrenchment and closure) arising out of situations out of the control of the employer. Employees must be restored to their full position as employees as soon as the reasons for the emergency have ended.

Illustration: A is employed by industry B as a workman. Industry B faces a shortage of supplies and lays off some workmen (but not A) for a week. A meets with an accident during that week and does not report to work. A cannot be said to have been laid off, as a lay-off implies unemployment on account of a

cause which is independent of any action or inaction on the part of the workmen. (*Central India Spinning, Weaving and Manufacturing Company Limited* v. *State Industrial Court at Nagpur and Another*, (1959) I LLJ 468 (Bom))

Chapter V-A of the Industrial Disputes Act applies to industrial establishments employing more than 50 but less than 100 workmen on an average *per* working day in the previous calendar year, and to industrial establishments which are of seasonal character or where work is performed intermittently.

S.25C of the Industrial Disputes Act provides that such employers can lay off workmen who have completed one year of continuous service only upon payment of compensation equal to 50% of basic wages and dearness allowance. S.25E of the Industrial Disputes Act, provides, however, that lay off compensation will not be payable if such a workman refuses to accept alternate employment offered by the employer, or if the workman does not report to the establishment at the appointed time, or if the laying-off is due to a strike or slowing down of production by workmen in another part of the establishment.

Illustration: A has been employed as a shipyard worker by an industrial establishment for the last twelve months. For seven weeks in that period, however, due to stormy weather, no shipyard work was possible, and therefore, A did not perform any work. A must be considered to have been in continuous service for those twelve months, as regardless of whether any work is physically done, A is deemed to have actually worked on all those days during which A was in the employment of the employer and for which A has been paid wages either under contract or by compulsion of law. (*Workmen* v. *Management of American Express*, AIR 1986 SC 548)

Chapter V-B of the Industrial Disputes Act provides that industrial establishments employing 100 workmen or more on an average *per* working day in the previous calendar year (not being work of seasonal or intermittent nature) are required to seek prior permission of the appropriate Government before effecting any lay-offs.

The powers of the appropriate Government to give prior permission are *quasi*-judicial in nature, and hence the principles of natural justice must be applied. (*Workmen* v. *Meenakshi Mills Limited*, AIR 1994 SC 2696)

Retrenchment

S.2(oo) of the Industrial Disputes Act defines"retrenchment" as termination by the employer of service of a workman for any reason other than:

- Termination as a punishment inflicted by a disciplinary action;
- Voluntary retirement or retirement on reaching age of superannuation;
- Termination on account of non-renewal of contract upon expiry;
- Termination on grounds stipulated in the contract of employment; or
- Termination on account of the continued ill health of a workman.

Thus, the term ordinarily implies discharge of surplus labour or staff, and therefore, retrenchment is mandated by S.25G of the Industrial Disputes Act to be on the principle of 'last in first out' in respect of each category of workman. Furthermore, if the employer wishes to re-employ persons post any act of retrenchment, S.25H mandates that first preference must be given to retrenched workmen.

S.25F of the Industrial Disputes Act provides that in any industrial establishment, no workman in continuous service for at least a year may be retrenched until: (a) the workman has been given one month's notice in writing or has been paid wages in lieu of such notice; (b) the workman has been paid, at the time of retrenchment, compensation which must be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months; and (c) notice is served on the appropriate Government. S.25B excludes from the term

"continuous service", any interruptions on account of sickness, authorised leave, accident or strike which is not illegal, or lock-out or cessation of work which is not due to the fault of the workman.

Illustration: A is granted leave by employer B, but overstays the leave period. B terminates A's employment without following the procedure stipulated by law. This would not qualify as punishment inflicted by disciplinary action, and would therefore amount to retrenchment, since due process must be followed for a termination to qualify as disciplinary action. (*Uptron India Limited* v. *Shammi Bhan*, AIR 1998 SC 1681)

Additionally, under Chapter V-B of the Industrial Disputes Act, industrial establishments employing 100 workmen or more on an average *per* working day in the previous calendar year (not being work of seasonal or intermittent nature) are required to seek prior permission of the appropriate Government before effecting any retrenchment.

Closure

"Closure"is defined under S.2(cc) of the Industrial Disputes Act as the permanent closing down of a place of employment or part thereof.

Industrial establishments employing 50 or more workmen must serve a minimum of 60 days' notice to the appropriate Government.

Additionally, under Chapter V-B of the Industrial Disputes Act, industrial establishments employing 100 workmen or more on an average *per* working day in the previous calendar year (not being work of seasonal or intermittent nature) are required to seek prior permission of the appropriate Government before effecting any closure.

S.25FFF of the Industrial Disputes Act mandates that compensation must be paid to all workmen who have completed one year of continuous service, equal to what would have been payable upon retrenchment.

Dispute Redressal Mechanism

Labour Courts are constituted by state governments under S.7 of the Industrial Disputes Act, and have jurisdiction over:

- Interpretation of Standing Orders;
- Violation of Standing Orders;
- Discharge or dismissal of a workman;
- Withdrawal of any customary concession or privilege;
- Illegality or otherwise of a strike or lock-out; and
- Other matters which are not under the jurisdiction of the Industrial Tribunal.

Industrial Tribunals are constituted by State Governments under S.7A of the Industrial Disputes Act, and have jurisdiction over:

- Wages, including period and mode of payment;
- Compensatory and other allowances;
- Hours of work and rest intervals;
- Leave with wages and holidays;
- Bonus, profit sharing, provident fund, and gratuity;
- Shift working changes;
- Classification by grades;
- Rules of discipline; and
- Rationalisation and retrenchment of workmen.

The National Tribunal has been constituted by the Central Government under S.7B of the Industrial Disputes Act for the adjudication of industrial disputes of national importance or where industrial establishments situated in more than one state are involved.

Furthermore, under S.10 of the Industrial Disputes Act, the appropriate Government may refer any industrial dispute to the Board of Conciliation, Court of Enquiry, Labour Court, or Industrial Tribunal.

Settlements arrived at in the course of conciliation proceedings, or an arbitration award or award of Labour Court or Tribunal bind all parties to an industrial dispute, including present and future workmen and all

parties who were summoned to appear in the proceedings.
Settlements arrived at by mutual agreement bind only those who were actually party to the agreement.

The jurisdiction of civil courts is impliedly barred for industrial disputes. (*Chandrakant Tukaram Nikam* v. *Municipal Corporation,* 2002 AIR SCW 710)

In actual practice, 22 Central Government Industrial Tribunals ("**C. G. I. T.s**")/Labour Courts are presently functioning at Dhanbad, Mumbai, New Delhi, Chandigarh Kolkata, Jabalpur, Kanpur, Nagpur, Lucknow, Bangalore, Jaipur, Chennai, Hyderabad, Bhubaneshwar, Ahmedabad, Ernakulam, Asansol, and Guwahati. In order to reduce the pendency of cases, Lok Adalats have also been organised by the C. G. I. T. / Labour Courts.

Industrial Relations: The Trade Unions Act, 1926

The Trade Unions Act, 1926 ("**the Trade Unions Act**") was enacted to provide for:

- Registration of trade unions of employers and workers;
- Recognition of registered trade unions as juristic persons, with all attendant benefits such as perpetual succession and the ability to sue in its own name; and
- Under certain conditions, immunities to the registered trade unions, their members and office bearers against civil and criminal action for restraint of trade and conspiracy.

Trade Union

A "Trade Union" is defined by the Trade Unions Act as a "combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive condition on the conduct of any trade or business, and includes any federation of two or more trade unions."

Registration of a trade union is not compulsory, but is desirable, since a registered trade union enjoys certain rights and privileges under the Trade Unions Act. Trade Unions may be registered with the Registrar of Trade Unions under whose jurisdiction the registered office of the Trade Union falls. A union of workers, not so registered, is not afforded the various benefits under the Trade Unions Act.

Illustration: A federation of registered trade unions seek to raise a trade dispute on behalf of the workmen of an industry. Despite the constituent trade unions being registered trade unions, if the federation itself is not a registered body under the Trade Unions Act, it will not be recognised as a "trade union" within the meaning of S.2(h) of the Trade Unions Act, and will therefore not be considered a juristic person. It cannot therefore sue on behalf of the workmen. (*National Organisation of Bank Workers' Federation of Trade Unions* v. *Union of India and Others*, 1992 (65) FLR 164)

In order to register, the proposed trade union must:

- Have a minimum of seven workmen as its members; and
- Represent either (i) 10 per cent of the workmen engaged or employed in that industry or establishment or (ii) at least one hundred workmen engaged or employed in that industry.

Trade unions are also required to prescribe written rules in conformity with the provision of the Central Trade Unions Regulation, 1938.

S.15 of the Trade Unions Act specifies the objects for which the general funds of a registered trade union may be spent. These objects seek to ensure that the trade union looks after the welfare of its members.

Workmen

The term "workmen" has been defined in the Trade Unions Act as "all persons employed in

trade or industry whether or not in the employment of the employer with whom the trade dispute arises." The expression "trade or industry" is not defined in the Trade Unions Act. In the absence of any definition of "industry" in the Trade Unions Act, the same considerations which have been held to be relevant for the purpose of holding whether an institution is an industry or not under the Industrial Disputes Act, would be equally relevant for the purposes of the Trade Unions Act.

Accordingly, an activity can be regarded as an industry, if there is a relationship of employer and employees, and the employer is engaged in any business, trade, undertaking, manufacture or calling, and the employees, in any calling, service, employment, handicraft, or industrial occupation or avocation. In order that an activity may be regarded as an undertaking analogous to trade or business, it must be organised or arranged in a manner in which trade or business is generally organised or arranged. It must rest on co-operation between employer and employees who associate together with a view to production, sale or distribution of material goods or material services. It is entirely irrelevant whether or not there is a profit motive or investment of capital in such activity. It is also immaterial whether its objects are charitable or that it does not make profits. (*Workmen of Indian Standards Institution* v. *Management of Indian Standards Institution*, AIR 1976 SC 145)

Illustration: A is a religious institution whose main function is to manage the affairs of a few places of worship, and to enable pilgrims to visit places of worship and offer their prayers. Although A derives enormous income from its activities, which it utilises for various educational and religious purposes, the essential character of A is that of a religious institution. It is not an institution where material human needs are met. It is primarily a spiritual institution. Therefore, A cannot be regarded as a trade or industry within the meaning of the Trade Unions Act, 1926. Therefore, the persons employed by it are not workmen and cannot consequently register themselves into a trade union. However, A also operates electricity and water departments. Since these departments would be an industry or analogous to an industry, the employees in those departments would be workmen within the meaning of the Trade Unions Act and they will be entitled to register themselves as a trade union. (*Tirumala Tirupati Devasthanam* v. *Commissioner Of Labour*, (1979) ILLJ 448 AP)

Trade Dispute

The definition of the term "trade dispute" closely mirrors the definition of the term "industrial dispute" under the Industrial Disputes Act. Therefore, as in the case of industrial disputes, any party seeking to raise a trade dispute must have a direct interest in the subject matter of the dispute.

Immunity

Under certain conditions, the Trade Unions Act confers immunity to the registered trade unions, their members and office-bearers against certain civil and criminal actions.

Immunity: Criminal Conspiracy in Trade Disputes

Under S.17 of the Trade Unions Act, no office-bearer or member of a registered trade union is liable to punishment under S.120B (2) of the Indian Penal Code, 1860 in respect of any agreement made between the members for the purpose of furthering any object of the trade union as set out in S.15 of the Trade Unions Act. If, however, such an agreement is in itself an agreement to commit an offence, no immunity is available.

Illustration: Company A, an industry, retrenches a number of its workmen, who allege that the retrenchment was illegal. As a result, the retrenched workmen and members of the trade union representing them blockaded Company A's premises, wrongfully confining certain persons therein for an extended period of time. No immunity would be available to the workmen and the trade union members for the offence of wrongful confinement under S.340 of the Indian Penal

Code, 1860, as the act itself is illegal. S.17 of the Trade Unions Act grants limited immunity to members of a trade union, but there is no immunity against prosecution for either an agreement to commit an offence or intimidation, molestation or violence, where they amount to an offence. (*Jay Engineering Works Limited and Others* v. *State Of West Bengal and Others*, AIR 1968 Cal 407)

Immunity: Immunity from Civil Suit in Certain Cases

Registered trade unions and their office-bearers and members enjoy immunity from suits and other legal proceeding in Civil Courts in respect of any act done in contemplation or furtherance of a trade dispute to which a member of the Trade Union is a party on the ground only that such act induces some other person to break a contract of employment, or that it is in interference with the trade, business or employment of some other person or with the right of some other person to dispose of her capital or of his labour as she wills.

Registered trade unions are also immune from tortious liability for any acts of their agents if it is proved that such agents acted without the knowledge of, or contrary to express instructions given by, the executive of the trade unions. Any body that is entrusted with the management of the affairs of a trade union is the "executive", and all members of such a body are termed "office bearers".

Illustration: A workman, even if she is a trade union leader, inside the factory, is bound to obey the reasonable instructions given to her by the superiors and to carry out her duties duly assigned to her. Thus, a trade union leader is not immune from civil or criminal liability when she is duly discharged after holding an enquiry into her misconduct. (*West India Steel Company Limited* v. *Azeez*, 1990 LLR 142 (Ker))

Immunity: Special immunity

S.19 of the Trade Unions Act provides another sort of immunity. Agreements between members of a trade union are immune from the application of S.27 of the Indian Contract Act, 1872, which otherwise renders all agreements in restraint of trade void.

Appropriate Government

"Appropriate Government" for all purposes under the Trade Unions Act means: (i) the Central Government in case of trade unions whose objects are not confined to one state, and (ii) the State Governments in case of all other trade unions. The Appropriate Government is empowered to make regulations in respect of certain prescribed matters.

Industrial Relations: The Industrial Employment (Standing Orders) Act, 1946

The Industrial Employment (Standing Orders) Act, 1946 ("**the Standing Orders Act**") was enacted to require employers in industrial establishments to precisely define and make known to workmen the conditions of employment.

Applicability

S.2(e) of the Standing Orders Act applies to industrial establishments employing more than 100 workmen in the preceding twelve months. The term "industrial establishment"has been defined in S.2(e) of the Standing Orders Act as (i) an industrial establishment as defined in the Payment of Wages Act, 1936; (ii) a factory as defined in the Factories Act, 1948; (iii) the railways; and (iv) the establishment of a contractor who employs workmen to fulfil a contract with the owner of an industrial establishment.

Standing Orders

Standing orders are published documents that define with sufficient precision the conditions of employment and prevail over the terms of individual contracts of employment. (*Western India Match Company* v. *Workmen*, AIR 1973 SC 2650)

S.2(g) provides that certain matters must

compulsorily be specified in standing orders, such as the classification of workmen, working hours, holidays, wages, attendance and leave rules, retirement age, and termination.

Workman

The Standing Orders Act adopts the definition of the term "workman" in the Industrial Disputes Act.

Submission of Draft Standing Orders

Every employer must, within six months from the date on which the Standing Orders Act becomes applicable to its industrial establishment, submit to the Certifying Officer (a Labour Commissioner or a Regional Labour Commissioner, or any other officer appointed by the appropriate Government) the draft standing orders proposed for adoption in the industrial establishment. If the draft standing orders satisfy the requirements set out in the Standing Orders Act, the Certifying Officer may certify the draft standing orders, upon which they become the certified standing orders of that establishment. The Certifying Officer may invite comments from the workmen and trade unions of the establishment prior to certification. The Certifying Officer is also empowered to make amendments to the draft standing orders before certification.

Industrial Relations: The Factories Act, 1948

The Factories Act, 1948 ("**the Factories Act**") applies to all industrial establishments employing 10 or more persons and carrying on manufacturing activities with the aid of power. The Factories Act makes provisions for the health, safety, welfare, working hours, and leave of workers in factories, and provides, *inter alia*, for statutory health surveys, appointment of safety officers, establishment of canteens, crèches, and welfare committees in factories. The Factories Act empowers the State Governments to prescribe additional rules to provide for special conditions within each state.

Industrial Relations: Shops and Establishment Acts

Many states have also enacted Shops and Establishments Acts, providing for compulsory registration of shops and commercial establishments, and to regulate the conditions of work of the employees of such establishments. These enactments typically apply to shops and commercial establishments that employ at least 20 employees, and usually prescribe a wage limit for applicability to such employees.

Wages

Wages are regulated largely by the Minimum Wages Act, 1948, the Payment of Wages Act, 1936, and the Payment of Bonus Act, 1965.

Wages: The Minimum Wages Act, 1948

The Minimum Wages Act, 1948 was enacted to fix minimum rates of wages in "certain employments". The Ministry of Labour and Employment of the Government of India has interpreted this Act to have been intended to safeguard the interests of workers in the unorganised sector.

Applicability

Unlike many other labour and industrial enactments, the applicability of the Minimum Wages Act is not based upon the nature of the employer, but rather, on the nature of the employment. Under the provisions of the Minimum Wages Act, both the Central Government and the state governments are the appropriate governments to fix, revise, review, and enforce the payment of minimum wages to workers in respect of scheduled employments under their respective jurisdictions. There are 45 scheduled employments in the jurisdiction of the Central Government and over 1,600 scheduled employments in the jurisdiction of the state governments.

In some states, however, the Shops and Establishment Act extends the applicability of

the Minimum Wages Act to all shops and establishments that are covered by such Shops and Establishment Acts.

Upon applicability, the employer is generally bound to ensure that the minimum prescribed wages are paid, overtime is provided for, that the prescribed registers are maintained, and that the prescribed notices are displayed at the premises.

Wages

S.2(h) of Minimum Wages Act defines "wages" as all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable to a person employed in respect of her employment or of work done in such employment, and includes house rent allowance, but does not include:

- The value of:
  - Any house-accommodation, supply of light, water, medical attendance, or
  - Any other amenity or any service excluded by general or special order of the appropriate Government;
- Any contribution paid by the employer to any Pension Fund or Provident Fund or under any scheme of social insurance;
- Any travelling allowance or the value of any travelling concession;
- Any sum paid to the person employed to defray special expenses entailed on her by the nature of her employment; or
- Any gratuity payable on discharge.

Wage Rates

The Minimum Wages Act provides for the fixing by the appropriate Government of:

- A minimum rate of wages for time work;
- A minimum rate of wages for piece work;
- A minimum rate of remuneration to apply in the case of employees employed on piece work for the purpose of securing to such employees a minimum rate of wages on a time work basis; and / or
- A minimum rate (whether a time rate or a piece rate) to apply in substitution for the minimum rate which would otherwise be applicable, in respect of overtime work done by employees.

Wages: The Payment of Wages Act, 1936

The Payment of Wages Act, 1936 was enacted to regulate the payment of wages to workers and to protect them against illegal deductions or delays in the payment of wages. It is applicable to all industrial establishments, factories, and other establishments, but does not apply to persons earning in excess of Rs. 10,000/- per month. Upon applicability, the employer is bound to ensure that the wages are paid to employees, overtime is provided for, the prescribed registers are maintained and that the prescribed notices are displayed at the premises.

Wages: The Payment of Bonus Act, 1965

The Payment of Bonus Act, 1965 ("**the Bonus Act**") provides for the payment of bonus to persons employed in certain establishments, employing 20 or more persons, on the basis of profits or on the basis of production or productivity and for matters connected therewith. Once the Bonus Act is applicable, it continues to apply even if the number of employees falls below 20. The Bonus Act does not apply to any institution established not for purposes of profit. A minimum bonus of 8.33% is payable by every industry and establishment under S.10 of the Payment of Bonus Act, 1965. Persons drawing salary or wages not exceeding Rs.10,000/- per month in any industry to do any skilled or unskilled, manual, supervisory, managerial, administrative, technical or clerical work for hire or reward are eligible for payment of bonus.

Social Security

Social security legislation in India is generally said to stem from the Directive Principles of the State Policy in Part IV of the Constitution. These provide for mandatory social security

benefits either solely at the cost of employers, or on the basis of joint contribution of employers and the employees. While protective entitlements accrue to the employees, the responsibilities for compliance largely rest with the employers.

Social Security: The Payment of Gratuity Act, 1972

The Payment of Gratuity Act, 1972 ("**the Gratuity Act**") provides for a scheme of compulsory payment of gratuity to employees with at least 5 years of continuous service working in factories, mines, oil-fields, plantations, ports, railway companies, motor transport undertakings, shops and establishments in which ten or more persons are employed or were employed on any day of the preceding twelve months.

The employer would be required to pay gratuity, at the rate of 15 days' wages for every completed year of service in excess of 6 months, to every employee (other than an apprentice) with 5 years continuous service, subject to a maximum amount of Rs. 3,50,000/-. Gratuity is payable at the time of termination of the employee's service (including retrenchment) either (i) on superannuation; or (ii) on retirement or resignation; or (iii) on death or disablement due to accident or disease.

The employer is also required to obtain insurance from the Life Insurance Corporation of India and to notify an abstract of the Gratuity Act in its premises.

The Gratuity Act is administered by the Central Government in establishments under its control, establishments having branches in more than one State, major ports, mines, oil-fields and railway companies and by the state governments and Union Territory administrations in all other cases.

Social Security: The Employees' State Insurance Act, 1948

The Employees' State Insurance Act, 1948 ("**the ESI Act**") was enacted to provide medical care and cash benefits in the case of sickness, maternity and employment injuries.

Applicability

The ESI Act is applicable to all factories (including factories belonging to the government) other than seasonal factories, where:

- Ten or more persons are or were employed for wages on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- Wherein 20 or more persons are or were employed for wages, on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on.

The ESI Act does not apply to mines which are subject to the operation of the Mines Act, 1952, or railway running sheds, or to factories or establishments belonging to or under the control of the government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under the ESI Act.

The ESI Act authorises the appropriate government to extend the application of the ESI Act to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.S.2(1) of the ESI Act defines "Appropriate Government" to mean, in respect of establishments under the control of the Central Government or a railway administration, or a major port or a mine or oilfield, the Central Government, and in all other cases, the state government.

Accordingly, several States have so extended the application of the ESI Act, in most cases to shops, hotels, restaurants, cinemas including preview theatres, road motor transport undertakings, and newspaper establishments employing 20 or more persons.

Implementation

Cash benefits under the ESI Act are administered by the Central Government through the Employees' State Insurance Corporation, whereas the State Governments and Union Territory Administrations administer medical care.

Contribution

The contribution payable to the Employees' State Insurance Corporation in respect of an employee shall comprise of employer's contribution and employee's contribution at a specified rate. The rates are revised from time to time, and presently, the employee's contribution rate is 1.75% of the wages and the employer's is 4.75% of the wages paid/ payable in respect of the employees in every wage period. Employees in receipt of a daily average wage up to Rs.50/- are exempt from payment of contribution, although their employers must contribute their own share in respect of these employees.

Under S.39 of the ESI Act, an employer is liable to pay her contribution in respect of every employee, deduct employees' contributions from wages and pay these contributions at the specified rates to the Employees' State Insurance Corporation within 21 days of the last day of the calendar month in which the contributions fall due.

It is essential for an employer to make the contributions in order for the employees to obtain benefits from the Employees' State Insurance Corporation. Merely because a factory or an establishment is registered with the Employees' State Insurance Corporation would not *ipso facto* impose a duty on the Corporation to grant medical benefits to the employee. Unless the employer fulfils its part of the legal duties imposed by the ESI Act, the Employees' State Insurance Corporation cannot be held liable to pay the benefits under the ESI Act. (*Allied Industries* v. *Mool Chand and Another*, RLW 2007 (4) Raj 2937)

Insured Benefits

S.38 of the ESI Act provides that all employees in factories or establishments to which the ESI Act applies shall be insured in the manner provided in the ESI Act.

S.46 of the ESI Act provides for the benefits which the insured persons, their dependants and the persons mentioned therein shall be entitled to get on happening of the events mentioned therein, and envisages the following social security benefits to affected employees:

- Medical Benefit
- Sickness Benefit
- Maternity Benefit
- Disablement Benefit
- Dependants' Benefit
- Funeral Expenses

"Insured person" is defined by S.2(14) of the ESI Act to mean a person who is or was an employee in respect of whom contributions are or were payable under the ESI Act and who is by reason thereof, entitled to any of the benefits provided by the Employees' State Insurance Act, 1948.

Employment Injury Benefits

Employment injury, including occupational disease, is compensated according to a schedule of rates proportionate to the extent of injury and loss of earning capacity.

Employment injury is defined under S.2(8) of the ESI Act to mean a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of her employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India.

The important condition for constituting an employment injury for claiming compensation under the ESI Act, in respect of the injury caused, is that it should arise out of and in the course of employment, and the

injury must be personal to the employee and it must be caused by an accident resulting in her disablement, whether temporarily or permanently, or fully or partially to attend her work. (*General Manager, B. E. S. T. Undertaking, Bombay* v. *Mrs. Agnes*, AIR 1964 SC 193)

Courts have considered the term "in the course of employment", and the "doctrine of notional extension of employer's premises" has developed so as to include in those premises, an area which the workman passes and repasses in going to and in leaving the actual place of work. Thus, there may be some reasonable extension in both time and place and a workman may be regarded as in the course of her employment, even though she had not reached or had left her employer's premises. (*S. S. Manufacturing Co.* v. *B. V. Raja*, 1958 II LLJ 249) It is also well settled, however, that when a workman is on a public road or public place or using public transport, she is there as any other member of the public and is not there in the course of her employment, unless the very nature of her employment makes it necessary for her to be there.

Thus, under the doctrine of notional extension, where an obligation is present on a worker to discharge her duty, and she meets with an accident, it is an accident in the course of employment.

Illustration: A is obliged by her employers to travel by a particular means of transport to reach and to leave her place of work. A meets with an accident while so travelling. If the presence of the workman concerned at the particular point was so related to the employment, so as to come to the conclusion that she was acting within the scope of the employment that would be sufficient to deem the accident as having occurred in the course of employment. (*Chairman, Cochin Dock Labour Board* v. *P. J. George*, 1976 II LLJ 65)

Illustration: A works as a helper in a factory covered by the Employees' State Insurance Act, 1948. One day, while returning home directly from the factory, A is attacked by assailants over a land dispute, which leaves A permanently disabled. A may not make a valid claim to the Employees State Insurance Corporation for disablement benefits, as A's injuries are not "employment" injuries, because they were not sustained in the course of employment. (*Rajappa* v. *Employees State Insurance Corporation*, ILR 1992 KAR 284)

The Second Schedule to the ESI Act specifies the injuries deemed to result in permanent total disablement or permanent partial disablement. Rule 54 of the Employees' State Insurance (Central) Rules, 1950 provides the daily rate of benefit which an employee would get if she suffers an employment injury. Rule 57 provides for disablement benefits. Rule 58 provides for dependant's benefits in case the injured person dies as a result of an employment injury. Rule 60 provides for the medical benefits to an insured person who ceases to be in an insured employment on account of permanent disablement.

Employee

S.2(9) defines "employee" to mean:

- Any person employed for wages in or in connection with the work of a factory or establishment to which the ESI Act applies and:
    - Who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment, whether such work is done by the employee in the factory or establishment or elsewhere; or
    - Who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or her agent on work which is ordinarily part of the work of the factory or establishment, or which is preliminary to the work carried on in, or incidental to, the purpose of the factory or establishment; or
    - Whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire

has entered into a contract of service; and

- Any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment

This definition does not, however, include:

- Any member of the Indian naval, military or air forces; or
- Any person so employed whose wages (excluding remuneration for overtime work) exceed such wages as may be prescribed by the Central Government. This limit is presently Rs.10,000/- *per* month.

The definition is very wide, and courts have construed the term very liberally. All that is required for a person to qualify as an employee is that the work undertaken by the employee should not be irrelevant to the purpose of the establishment and it is sufficient if it is incidental to it. (*Royal Talkies Hyderabad and Others* v. *Employees' State Insurance Corporation,* AIR 1978 SC 1478*)*

Even casual employees come within the purview of the ESI Act. (*Regional Director, Employees' State Insurance Corporation, Madras* v. *South India Flour Mills (P.) Limited,* AIR 1986 SC 1686)

Insured Person

Insured person is defined by S.2(14) to mean a person who is or was an employee in respect of whom contributions are or were payable under the ESI Act and who is by reason thereof, entitled to any of the benefits provided by the ESI Act.

Wages

"Wages" is defined under S.2 of the ESI Act as all remuneration paid or payable, in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes any payment to an employee in respect of any period of authorised leave, lock- out, strike which is not illegal or lay-off and other additional remuneration, if any, paid at intervals not exceeding two months, but does not include:

- Any contribution paid by the employer to any pension fund or provident fund, or under the ESI Act;
- Any travelling allowance or the value of any travelling concession;
- Any sum paid to the person employed to defray special expenses entailed on her by the nature of her employment; or
- Any gratuity payable on discharge.

Records to be Maintained by the Employer

- Attendance Register/Muster Roll;
- Salary/Wage Register/Payroll;
- Employees' and Employer's Contribution Statement;
- Employees' Register;
- Accident Register;
- All Returns of Contribution;
- All Returns of Declaration Forms;
- Copies of Challans; and
- Books of Account with supporting bills and vouchers.

Bar on Dual Recovery

S.53 of the ESI Act creates a bar against receiving or recovery of compensation or damages under any other law, and states that an insured person or her dependants are not entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 1923 or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act.

Illustration: A, who is an employee of B, received injuries on her face while she is

carrying out repairs of a television in the course of employment. As a result of the injury, A lost vision in the left eye. After receiving benefits from the Employees' State Insurance Corporation under the Employees' State Insurance Act, 1948, A served a notice on B demanding damages under tort law. B is not liable to pay damages under tort law, as S.53 of the Employees' State Insurance Act, 1948 clearly bars A from claiming benefits under "any other law in force". (*A. Trehan* v. *Associated Electrical Agencies and Another*, (1996) 4 SCC 255)

Social Security: The Employees' Provident Funds and Miscellaneous Provisions Act, 1952

The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("**the EPF Act**") provides for social security and monetary assistance to employees and their families when they are in distress and to protect them in old age, disablement and in some other contingencies.

Applicability

The EPF Act provides for compulsory provident fund, pension and deposit-linked insurance in all factories employing more than 20 or more persons, and in all establishments employing 20 or more employees in 186 specified industries/classes of establishments.

Any employee earning wages up to Rs.6,500/- *per* month in an establishment covered by the EPF Act is required to become a member of the fund. Establishments that are not covered by the EPF Act may also voluntarily implement its provisions to provide social security benefits to its employees.

Once the EPF Act becomes applicable to a factory or establishment, it will continue to apply in perpetuity, even if the number of employees falls below 20 at any time. (*Ramesh Metal Works* v. *State*, AIR 1962 All 227)

Contributions

Upon applicability of the EPF Act, the employer would be required to make in respect of each covered employee:

- A contribution to the Employee Provident Fund of 12% of the basic salary every month;
- A contribution of 8.33% of the basic salary towards the Employee Pension Fund every month; and
- A contribution of 1% of the aggregate of the basic wages, dearness allowance and retaining allowance towards the Employees' Deposit-linked Insurance Fund every month.

The employees' contribution shall be equal to the contribution payable by the employer in respect of her and may, if any employee so desires, be an amount exceeding 12% of her basic wages, dearness allowance and retaining allowance (if any), subject to the condition that the employer shall not be under an obligation to pay any contribution over and above her contribution payable.

Implementation

The Government of India, through the Employees' Provident Fund Organisation, administers the EPF Act and the three Schemes framed thereunder:

- Employees' Provident Funds Scheme, 1952;
- Employees' Pension Scheme, 1995; and
- Employees' Deposit-Linked Insurance Scheme, 1976.

Employee

The term "employee" is defined in S.2 of the EPF Act to mean any person who is employed for wages in any kind of work, manual or otherwise, in, or in connection with, the work of an establishment, and who gets her wages directly or indirectly from the employer, and includes any person:

- Employed by or through a contractor in or in connection with the work of the establishment; and
- Engaged as an apprentice, not being an apprentice engaged under the Apprentices

Act, 1961 (52 of 1961), or under the Standing Orders of the establishment.

The term "employee" must be construed liberally, as the EPF Act is intended for social welfare. For instance, employees of a company that have retired, and then re-engaged on contract, have been held to be employees for the purposes of the EPF Act. (*Central Provident Fund Commissioner and Another* v. *Modern Transportation Consultancy Service Private Limited and Others*, AIR 1998 Cal) However, temporary workers would not be counted to ascertain the applicability of the EPF Act. (*Regional Provident Fund Commissioner* v. *T S Hariharan*, 1971 Lab IC 951 (SC))

Dispute Resolution

Dispute Resolution: Determination of Moneys due from Employees

In cases where a dispute arises as to the applicability of the EPF Act to an establishment, or where the amount due from any employer under any provision of the EPF Act is in dispute, the Central Provident Fund Commissioner, any Additional Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner, any Regional Provident Fund Commissioner or any Assistant Provident Fund Commissioner may, by order decide the dispute, and shall, for the purposes of such inquiry, have the same powers as are vested in a court under the Code of Civil Procedure, 1908, for trying a suit in respect of certain matters. Applications for review of such orders shall also lie to the same officer to passed the order.

Dispute Resolution: Employees' Provident Funds Appellate Tribunal

Appeals against any notifications or orders under the EPF Act lie to one-person tribunals termed "The Employees' Provident Funds Appellate Tribunal".

Basic Wages

"Basic wages" have been defined in S.2 of the EPF Act to mean all emoluments earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to her, but do not include:

- The cash value of any food concession;
- Any dearness allowance, house-rent allowance, overtime allowance, bonus, commission or any other similar allowance payable to the employee in respect of her employment or of work done in such employment; or
- Any presents made by the employer.

Social Security: The Workmen's Compensation Act, 1923

The main objective of the Workmen's Compensation Act, 1923 ("**the Workmen's Compensation Act**") is to impose an obligation upon the employers to pay compensation to workers for diseases and accidents arising out of and in the course of employment. The injured person or the dependent (in case of death) can claim the compensation.

Applicability

The Workmen's Compensation Act applies to any person who is employed otherwise than in a clerical capacity, in hazardous occupations, and other employments specified in Schedule II to the Workmen's Compensation Act. This includes factories, mines, plantations, mechanically propelled vehicles, construction work and certain other hazardous occupations and specified categories of railway servants. S.2(3) of the Workmen's Compensation Act, however, empowers State Governments to extend the scope of the Workmen's Compensation Act to any class of persons whose occupations are considered hazardous after giving three months' notice in the Official Gazette. The Workmen's Compensation Act, does not, however, apply to persons serving in the Armed Forces, and employees covered under the provisions of the Employees' State Insurance Act, 1948.

Implementation

Under the Workmen's Compensation Act, the State Governments are empowered to appoint Commissioners for Workmen's Compensation for (i) settlement of disputed claims, (ii) disposal of cases of injuries involving death, and (iii) revision of periodical payments. The Workmen's Compensation Act also empowers state governments to extend the scope of the Workmen's Compensation Act to any class of persons whose occupations are considered hazardous after giving three months notice to be published in the Official Gazette. Similarly, under S.3(3) of the Workmen's Compensation Act, the state governments are also empowered to add any other disease to the list mentioned in Parts A and B of Schedule – II, and the Central Government may do the same in case of employment specified in Part C of Schedule III of the Workmen's Compensation Act.

Employer's Liability

An employer is liable to pay compensation if:

- Personal injury is caused to a workman by accident arising out of and in the course of her employment; or
- A workman employed in any employment contracts any disease, specified in the Workmen's Compensation Act as an occupational disease peculiar to that employment.

Statutory Exclusions of Employer's Liability

The employer is not liable:

- In respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;
- In respect of any injury, not resulting in death or permanent total disablement, caused by an accident which is directly attributable to:

  - The workman having been at the time thereof under the influence of drink or drugs; or
  - The wilful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen; or
  - The wilful removal or disregard by the workman of any safety guard or other device which she knew to have been provided for the purpose of securing the safety of workmen.

Compensation

The rate of compensation to be is determined by a schedule proportionate to the extent of injury and the loss of earning capacity. In case of death, the minimum amount of compensation payable is Rs.80,000/- and the maximum amount of compensation payable is Rs.4,57,580/- (including funeral costs). In case of permanent disablement, the minimum amount of compensation is Rs.90,000/- and the maximum compensation is Rs.5,48,496/- in case of permanent total disablement. The existing wage ceiling for computation of maximum amount of compensation is Rs. 4,000/-.

Accident

The word "accident" is not defined in the Workmen's Compensation Act. The term has, however, come to acquire a settled meaning through case law: some unexpected event happening without design even though there may be negligence on the part of the workman.

Illustration: A is a workman who works at a furnace in a factory. A's eyes are continuously exposed to the glare of a furnace over a period of time, with the effect of completely blinding her. A will be held to have suffered from injury arising out of an accident. Although an accident must be a particular occurrence which happens at a particular time, in order that it may constitute an accident within the meaning of S.3, it is not necessary that the workman should be able to locate it in order to succeed in the claim. There would be cases where a series of tiny accidents, each producing some unidentifiable result and

operating cumulatively to produce the final condition of injury, would constitute together an accident for the purposes of the Workmen's Compensation Act. (*Bai Shakri w/o Naraindas Maganlal* v. *New Manekchowk Mills Company Limited,* (1961) ILLJ 585 Guj)

Illustration: A is a workman who works at a furnace in a factory. A has a history of previous eye disorders, but despite knowing that, continues to work in an employment, which by the very nature of work might cause further strain on her eyes and might thereby suffer a permanent injury to A's eyes. A will be held to have suffered from injury arising out of an accident. The fact that A continued in employment against the advice of a doctor and also knowing that her work would cause strain on her eyes, and precipitated the permanent injury is irrelevant. Once it is found that the work which A has been doing is to be within the scope of A's employment, the question of negligence, great or small on A's part is irrelevant. (*Harris* v. *Associated Portland Cement Manufacturers, Limited*, (1939 A.C. 71))

"arising out of and in the course of employment"

Since S.3 of the Workmen's Compensation Act provides that the accident must arise out of and in the course of the workman's employment, the accident, in order to give rise to a claim for compensation, must have some causal relation to the workman's employment and must be due to a risk incidental to that employment. The principles that courts generally adopt in ascertaining this are:

- There must be a causal connection between the injury and the accident and the accident and the work done in the course of employment.
- The onus is upon the workman to show that it was the work and the resulting strain which contributed to or aggravated the injury.
- It is not necessary that the workman must be actually working at the time of her death or that death must occur while she is working or had just ceased work.
- Where the evidence is balanced, if the evidence shows a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed. (*Bai Shakri w/o Naraindas Maganlal* v. *New Manekchowk Mills Company Limited,* (1961) ILLJ 585 Guj)

Illustration: A is employed as a night watchman at a pumping station where a process was carried on for pumping water by more than ten persons. One night when A is on duty, A complains of pain in the chest. A's condition deteriorates and A dies after a few hours. The medical evidence showed that A was suffering from heart disease and that death was brought about by the strain caused upon A's heart by the particular work that A was doing, that is, having to stand and move about as a watchman. A will be held to have died of an injury by an accident falling within the scope of S.3 of the Workmen's Compensation Act. If a workman suffers from a particular disease and as a result of wear and tear of her employment, she dies of that disease, no liability would be fixed upon the employers. If, however, the employment is a contributory cause, or if the employment has accelerated her death, or if it would be said that death was due not only to the disease but the disease coupled with the employment, then the employer would be liable and it could then be said that death arose out of the employment of the deceased. (*Laxmibai* v. *Chairman and Trustees, Bombay Port Trust* (1954) ILLJ 614)

Social Security: The Maternity Benefit Act, 1961

The Maternity Benefit Act, 1961 was enacted to promote the welfare of working women, and prohibits the working of pregnant women for a specified period before and after delivery. It also provides for maternity leave and payment of certain monetary benefits to female employees / workers subject to fulfilment of certain conditions during the period when they are out of employment on account of their pregnancy. The services of a woman worker cannot be terminated during the period of her absence on account of

pregnancy except for gross misconduct. The maximum period for which a woman can get maternity benefit is twelve weeks. Of this, six weeks must be taken prior to the date of delivery of the child and six weeks immediately following that date.

The provisions of the Maternity Benefit Act are administered by the Central Government in mines and the circus industry through the Chief Labour Commissioner (Central), and in factories, plantations and other establishments by the state governments.

Social Security: The Plantations Labour Act, 1951

The Plantations Labour Act, 1951 provides for the welfare of labour and regulates the conditions of work in plantations.

Unorganised Workers

The term 'unorganised worker' has been defined under the Unorganised Workers Social Security Act, 2008 ("**the Unorganised Workers Social Security Act**") as a home-based worker, self-employed worker, or a wage worker in the organised sector, and includes a worker in the organised sector who is not covered by any of the following Acts:

- The Workmen's Compensation Act;
- The Industrial Disputes Act;
- The Employees' State Insurance Act, 1948;
- The Employees' Provident Funds and Miscellaneous Provision Act, 1952;
- The Maternity Benefit Act, 1961; or
- The Payment of Gratuity Act, 1972.

The Unorganised Workers Social Security Act provides for the constitution of a National Social Security Board, which must recommend the formulation of social security schemes, such as life and disability cover, health and maternity benefits, old age protection, and any other benefit as may be determined by the Government for unorganised workers. The Unorganised Workers Social Security Act provides for the Government to administer schemes to promote the welfare of, and extend social security benefits to, unorganised workers.

In addition, special labour legislation exists for special categories of unorganised workers. For instance, Parliament has enacted legislation for welfare of construction workers (for example, (i) The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, and (ii) The Building and Other Construction Workers' Welfare Cess, Act, 1996), and migrant workers (The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979)).

Contract Labour

Contract labour generally refers to workers engaged by a contractor for the use of other establishments and industries. The Contract Labour (Prohibition and Regulation) Act, 1970 ("**the Contract Labour Act**") provides a mechanism for regulating, and in some cases, abolishing contract labour. The Contract Labour Act applies to every establishment / contractor where 20 or more workmen are employed as contract labour. It, however, does not apply to any establishment where the work is intermittent or casual in nature.

The Central Government and state governments, in their capacity as "Appropriate" Governments, are required to set up Central and State Advisory Contract Labour Boards to advise respective Governments on matters arising out of the administration of the Contract Labour Act as are referred to them. The Central Advisory Contract Labour Board is a statutory body, tripartite in constitution and *quasi*-judicial in nature. This Board investigates particular forms of contract labour, which if found to be engaged in areas requiring perennial work connected with the production process, may be recommend for abolition under S.10 of the Contract Labour Act.

When the appropriate Government issues a notification under S.10 of the Contract Labour Act abolishing contract labour, the employees with a contractor will not be automatically

absorbed in the employment of the company, if the contract was genuine. If, however, the contract was not genuine but a mere camouflage, the so-called contract labourers would be deemed to be employees of the principal employer. (*Steel Authority of India* v. *National Union Water Front*, AIR 2001 3574 SC)

Every establishment and contractor, to whom the Contract Labour Act applies, has to register or obtain a license for execution of the contract work. The interests of contract workers are protected in terms of wages, hours of work, welfare, health and social security. The amenities to be provided to contract labour include canteens, rest rooms, first aid facilities, and other basic necessities at the work place, such as the availability of drinking water. The responsibility to ensure payment of wages and other benefits is primarily that of the contractor, and, in case of default, that of the principal employer.

Women, Children, and Work

The Supreme Court of India, in *Vishaka and Others* v. *State of Rajasthan and Others*, (AIR 1997 SC 3011), laid down certain guidelines for the prevention of sexual harassment of women employees in their work places. All Central Ministries/Departments, State Governments /Union Territories, and Central Public-Sector Undertakings have been asked to implement the guidelines laid down in the Judgment. The Standing Orders Act has also been amended to make the guidelines applicable to the private sector.

The Government of India ratified the ILO Convention No.100 of 1951 in 1958. This Convention relates to equal remuneration for men and women, and the President promulgated the Equal Remuneration Ordinance, which was subsequently replaced by the Equal Remuneration Act, 1976. The Convention also prohibits discrimination on recruitment, promotion, training or transfer, except where the employment of women is restricted by law.

In addition, several other legislation (such as the Beedi and Cigar Workers (Conditions of Employment) Act, 1966, the Plantation Labour Act, 1951, and the Contract Labour Act) make specific provisions for the welfare of female employees / workers, such as provisions mandating the availability of crèches, and regulating working hours for female employees / workers.

The Child Labour (Prohibition and Regulation) Act, 1986, is applicable to all establishments and workshops, and prohibits the employment of children below the age of 14 years in notified hazardous occupations and processes. It also regulates the employment of children in nonhazardous occupations and processes.

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Notes:

All India Bar Examination Preparatory Materials

Subject 18: Law of Torts, Including Motor Vehicle Accidents and Consumer Protection

Law of Torts, including Motor Vehicles Accidents, and Consumer Protection

Chapter 1: Nature of a Tort

A tort is a legal wrong. Tort law is a branch of the civil law (as distinguished from criminal law or public law). In civil law, the dispute is typically between private parties (though the government can also sue and be sued in a civil action in court). The person who commits a tortious act is called a *tortfeasor* while the victim of a tortious act is the plaintiff in a tort case.

~~While tort law does involve the idea of obligation, t~~The duties and obligations imposed by the law of torts apply to everyone subject to the law of the relevant jurisdiction, unlike other ~~and are not~~ voluntarily assumed obligations, ~~(~~such as those under a ~~of~~ contract. ~~or trust).~~

It is critical to note that while India's tort law traces its historical origin to the writ system and common law decisions of the English courts, the sources of modern tort law in India can be found both in judicial decisions and in statutes. In doctrinal contrast, the tort (*délit*) law of France, for example, is entirely codified, and Article 1382 of the Civil Code of France simply states that "[a]ny act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it."

Illustration: The tort of negligence has become a part of the applicable tort law in India through judicial decisions that endorsed the principles of negligence laid down by the English courts. Negligence, therefore, is a common law tort in India. In contrast, remedies for statutory torts have been established in Indian law through provisions in various laws, including in the Consumer Protection Act, 1986, the Motor Vehicles Act, 1988, the Workmen's Compensation Act, 1923, and the Public Liability Insurance Act, 1992. Therefore, the sources of tort law in India are both common law and statute.

A major part of the tort law in India originated from the Indian judiciary's acceptance and explicit endorsement of relevant decisions of the English courts on similar issues. However, the Supreme Court of India has stated that "*[w]e have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for that matter in any other foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own jurisprudence…..[w]e in India cannot hold our hands back and I venture to evolve a new principle of liability which English Courts have not done.*" (Chief Justice Bhagwati in *M. C. Mehta* v. *Union of India*, AIR 1987 SC 1086 (*Oleum Gas Leak Case*))

Tort law only provides an avenue of redress for the injured person - it does not provide a guarantee of recovery. Several commentators have pointed out that most injured persons in India just bear the loss suffered and move on with their lives rather than investing the time, effort, and cost involved in pursuing an uncertain remedy through tort law and the courts.

Etymologically, the word tort derives from the Latin words '*torquere*', '*tortum*' and '*tortus*' that convey a meaning of 'twisted', and thereby linguistically connote a sense of a wrong or deviation from what is right.

Examples of torts include trespass to land, trespass to chattels, conversion, detinue, false imprisonment and wrongful confinement, assault, battery, fraud and deceit, defamation, negligent misstatement, nuisance, invasion of privacy, intentional infliction of emotional distress, nervous shock, and of course, negligence.

Legal scholars have attempted to provide a

satisfactory definition of the term tort, and it is apposite here to briefly re-state a few such attempts made at defining a tort:

"An act which causes harm to a determinate person, whether intentionally or not, not being the breach of a duty arising out of a personal relation or contract, and which is either contrary to law, or an omission of a specific legal duty, or a violation of an absolute right." (*Pollock*)

"A civil wrong independent of contract for which the appropriate remedy is an action for unliquidated damages." (*Ratanlal and Dhirajlal*)

"A term applied to a miscellaneous and more or less unconnected group of civil wrongs other than breach of contract for which a court of law will afford a remedy in the form of an action for damages." (*William Prosser*)

It is important here to elaborate the major differences between tort law and criminal law, and between tort and contract, which the above definitions directly or indirectly reference.

Tort and Crime

The law of delict (the forerunner to the modern idea of tort), protects the interests of injured individuals and determines whether and when redress may be claimed. In contrast, criminal law subjects the wrongdoer to a sanction (as punishment) in order to prevent the repetition of the act and to deter others from committing the same act.

Illustration: The Indian Penal Code, 1860, criminalises public nuisance and provides for a punishment for anyone found guilty of committing a public nuisance (S.268 read with S.290). Therefore, public nuisance is a crime in India, and those responsible for a public nuisance can be punished under the criminal law. By contrast, the tort of private nuisance (which is a violation of a person's enjoyment of her property) gives the affected person the standing to pursue a civil action for damages and/or injunctive relief.

This fundamental distinction allows us to appreciate some primary differences between tort and crime:

- *First*, the plaintiff is usually a private party in tort cases, whereas it is the state (on behalf of society in general) that initiates action against the accused in criminal cases.
- *Second*, intention is not necessarily a requirement for all torts (for example, negligence does not require intention to be established) while intention or motive are necessary elements for any crime to be established.
- *Third*, criminal law in India always manifests in the form of statutes, whereas tort law in India usually manifests in the form of case law or common law. Therefore, the primary lawmaker in criminal cases is usually the legislature, whereas the primary lawmaker in tort cases is usually the court.
- *Fourth*, the standard of proof in criminal cases is 'beyond a reasonable doubt' whereas the standard of proof in tort cases is 'by a preponderance of probabilities / evidence'.
- *Finally*, damages (as compensation) are usually awarded to the successful plaintiff in tort cases whereas the appropriate response towards the guilty person under criminal law is usually punishment.

Illustration: First, A unintentionally but negligently injures B, and second, C intentionally shoots at and injures D. In the first case involving a tort, plaintiff-victim B proceeds against injurer-defendant A in court through a tortious claim for unliquidated damages where the standard of proof is by a preponderance of evidence in support of B's claim. In the second case, the prosecutor-state (on behalf of society in general) presses criminal charges against accused-defendant C (for attempted murder, for example) so as to punish C (through imprisonment and/or a monetary penalty). The standard of proof required to establish that C did indeed commit the crime is that of beyond reasonable doubt.

Tort and Contract

Historically, Roman law and the civilian tradition have always maintained a delicate distinction between delict and contract as two separate branches of the law of obligations. Correspondingly, a similar conceptual distinction between tort and contract has become firmly enshrined in common law (including English law and Indian law).

While the exact boundaries of this distinction have become blurry as a result of modern developments including insurance and the social security system, it may be said that the essence of the difference boils down to the centrality of the idea of mutuality or a joint venture in contract as distinguished from tort law's fixation with delimiting and coordinating the freedom of individuals irrespective of any prior relationship between the parties.

Illustration: Tort law imposes a duty of care on every person to ensure that they do not unreasonably harm others (including strangers). When such a duty of care is breached, tort law requires that the duty-bound owner compensate the victim for any losses they suffer. (*Donoghue* v. *Stevenson* (1932) AC 562) A contract for the sale of a car however only imposes duties on the parties to the contract (that is on the seller of the car and the purchaser of the car.)

Three major differences between tort and contract are worth highlighting here:

- *First*, the rights, obligations, and duties under tort law do not depend on a mutual agreement, which is unlike in contract law where the contractual rights, duties, and obligations originate from "an agreement enforceable by law." (S.2(h) of the Indian Contract Act, 1872) In other words, you choose to be bound under a contract but you cannot choose whether or not to be bound by tort law.
- *Second*, rights under tort law are enforceable against anyone who commits the civil wrong in question, whereas contractual rights are enforceable only against the other party or parties to the contract.
- *Finally*, the damages under tort are always unliquidated, whereas contractual damages could be liquidated. Unliquidated damages refer to damages where the amount or the quantum of the damages is not determined in advance or mathematically knowable through a fixed formula, but rather, is left to the court to decide upon. Liquidated damages (also referred to as ascertained damages) are damages whose amount the parties designate during the formation of a contract for the injured party to collect as compensation upon a specific breach of the contract, for example, late performance.

Illustration: If A negligently causes an injury to B, such a tortious wrong does not entitle B to a fixed compensation (of say one lakh rupees) from A. Rather, A's tortious action towards B only entitles B to a claim for unliquidated damages against A where the court decides exactly how much A should pay B to compensate for the injury to B. An example of liquidated damages in contract law would be a specific clause in the lease agreement between C and D for an office space in Nariman Point, Mumbai, that states that if C breaches the contract by not leasing the office space to D on the appointed day of December 25, 2010, then C must pay D Rs. 1 lakh as liquidated damages for the breach.

Chapter 2: Historical Origins of Tort Law

The history of tort law is exceedingly complex and represents an as yet under-researched area in legal scholarship. Roman law, early Anglo-Saxon law, medieval actions of trespass and trespass on the case, 19th century developments of the theory of negligence, and modern 21st century theories that accommodate for constitutional, scientific, and technological advances have contributed to the corpus of material that constitutes tort law today.

The philosophical analysis of problems raised by tort law is conventionally traced back more than 2,500 years to Aristotle's discussion of

corrective justice in the *Nicomachean Ethics*. The publication, in 1881, of Oliver Wendell Holmes, Jr.'s *The Common Law* represents, arguably, one of the first relatively modern efforts to analyse the fundamental problems of the common law, including tort law, in broad historic-philosophical terms.

For our purposes here, it is useful to briefly highlight the connection between modern tort law and the history of the action of trespass, and then comment briefly on the origins of tort law in India.

Early English law did not distinguish between torts and crimes, and the early remedies for supposed wrongs included waging private wars known as feuds. The early history of the law of torts, after its separation from the ideas of crime and criminal law, is intricately connected with the history of the action of early trespass (that originated as a personal remedy in the English courts during the 13th century).

It is pertinent to note that trespass originated as a remedy for those wrongs that had been committed with force and with arms and that constituted a breach of the king's peace ("*vi et armis, et contra pacem Domini Regis*").

In actions involving trespass to the person, the violence (through force and arms) is directed against the person of the injured party. The action of *trespass quare clausum fregit* focused on the remedy for situations where the defendant had wrongfully and unlawfully entered (intruded) upon the plaintiff's property (real estate). The action of *trespass de bonis asportatis* enabled the recovery of damages from the defendant who had unlawfully taken and carried away the goods of the plaintiff.

In all other cases of indirect damages and damages unaccompanied by violence to a person's body, land, or personal property, and for damages such as those to a person's reputation, early English law on the action of trespass provided no relief until near the close of the thirteenth century. This lacuna was filled with the creation of the action of trespass on the case (most probably owing its origin to the well known *in consimili casu* clause of Edward I's Statute of 1285, Westminster II, Chapter 24) that enabled a remedy for all other cases not involving violence (by force or arms) but nonetheless causing injury or loss to the plaintiff.

Together, the actions (or writs) of trespass and trespass on the case covered the whole field of tortious liability.

Illustration: The difference between trespass and trespass on the case is illustrated by the classic example provided by the English case of *Leame v. Bray,* (1803) 3 East 593. A throws a heavy wooden log onto the road. If B is struck by the rolling log, B could seek remedy through a trespass action against A since the injury was direct and immediate. If, however, B comes along later and is hurt by stumbling over the stationary log on the road, B could only maintain an action of trespass on the case.

Tort Law in India

The early history of tort law in India is quite distinctive and warrants a few additional comments. While the British brought the common law system to India in the 18th century, the Indian legal system was systematised only in the years following the 1857 revolt. A unified hierarchy of courts was established in each region, and a series of legal codes in the fields of criminal, commercial, and procedural law (based on English law) were made applicable throughout British India by 1883.

Tort law was perhaps the only major field of law left uncodified, though the need for a tort code was urged by Sir Henry Maine, Sir James Stephen, and the Fourth Law Commission Report of 1879. It is well documented that Sir Frederick Pollock even drafted an Indian Civil Wrongs Bill in 1886, but this was never legislatively enacted.

Commentators have pointed out that the tort law in India was largely under-developed until as recently as the 1980's, and it is

pertinent to note that the total number of tort cases adjudicated in independent India is surprisingly low. Over the last three decades, however, the Indian judiciary has steadily developed the jurisprudence of tort law in India.

It is also important to reiterate that it is entirely up to the Indian courts to decide whether to apply an English tort principle if justice demands it in a certain situation, either entirely, or with appropriate modifications.

Illustration: The Indian Supreme Court devised the absolute liability standard by modifying the strict liability standard as laid down by the English courts. Another example pertains to the tort of slander, which is not always actionable *per se* (without proof of damage) under English law, but is actionable *per se* under Indian law. Slander is the transitory form of the tort of defamation. Defamation is a tortious act of communication that causes someone to be shamed, ridiculed, held in contempt, lowered in the estimation of the community, or to lose employment status or earnings, or to otherwise suffer a damaged reputation.

Chapter 3: Aims of Tort Law

Commentators have suggested, and ~~argued~~debated about, ~~a number of~~the aims of tort law. These aims include corrective justice, distributive justice, economic efficiency, avoidance of future costs, fairness and equity, a rationalised system for treatment of bad luck, and so on. While a detailed discussion of these accounts is not necessary for our present purposes, it is useful to note the learned observations of Winfield in this regard when she states that it is not possible to assign any one aim to the law of tort, especially when one considers that the subject comprehends situations as disparate as A carelessly running B down in the street (negligence), C calling D a thief (defamation), E giving bad investment advice to F (negligent misstatement), and G selling H's car when she has no authority to do so (conversion).

Winfield asserts that at a very general level, however, it is possible to say that tort is concerned with the allocation or prevention of losses, which are bound to occur in society. In most tort actions coming before courts, the plaintiff is seeking monetary compensation (damages) for the injury she has suffered, and this fact strongly emphasises the function and aim of tort law in allocating or redistributing loss.

Illustration: A suffers serious physical injury due to the negligent driving of B. As a result of this injury, A will be unable to work until she recovers. A will also have to spend money on medical treatment of the injury. In the absence of tort law, these monetary losses would belong entirely to A. A's tort claim against B for damages allows A to transfer, allocate, or redistribute these losses to B who was responsible for the injury in the first place.

In cases where the plaintiff is seeking an injunction to prevent the occurrence of harm in the future, the "preventive" function and aim of tort law predominates.

Illustration: A files a suit for private nuisance against B who operates a highly polluting chemical factory with extremely noisy machinery right next to A's house in a residential area. The remedy that A seeks through her tort claim is an injunction that forbids or prevents B from continuing with B's chemical factory at its current location.

Chapter 4: Concept~~ion~~s of Tortious Liability

Elements of a Tort that Create Liability

Analytically, a tort is constituted of three basic elements: wrong, harm, and an appropriate relationship between the injurer's wrong and the harm to the victim. Once these conditions are met in any specific case, tort law enables the victim-plaintiff to shift her losses to the injurer-defendant. The conditions for shifting losses from victim-plaintiffs to injurer-defendants are expressed through "liability rules" that vary from one tort to another and also from one legal jurisdiction to another.

Illustration: A hits and badly injures B with her car while driving negligently. The wrong here is A's driving negligently. The harm is the serious injury to B. The appropriate relationship between the injurer's wrong and the harm to the victim is borne out by the fact that it was A's negligent driving that caused or resulted in the injury to B. The law of negligence enables victim-plaintiff B to recover compensatory damages from injurer-defendant A on account of A being liable for the tort of negligence.

Winfield's definition of tortious liability is useful here: "*tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressible by an action or unliquidated damages.*"

It is important to note that the liability rules (for each of the torts) constitute the main substantive content of tort law.

Distinguishing Fault Liability and Strict Liability

Tort law distinguishes between two basic kinds of liability: fault liability and strict liability. Conventionally, under fault liability, the plaintiff establishes fault by showing that she was wronged by the defendant and that in doing so the defendant acted wrongfully, that is, without justification or excuse.

Illustration: A punches B in the face and badly injures her. A is liable to B for her fault in committing the tort of battery. For the intentional tort of battery to be established, it is necessary that the defendant has the intent to cause a harmful or offensive touching of the plaintiff's person, and that the defendant does cause a harmful or offensive touching of the plaintiff's person.

Conversely, under strict liability, the person does not have to establish the fault of the defendant, though a judgment of strict liability does not necessarily mean that the defendant has acted innocently or justifiably.

Illustration: A's dangerous dog somehow breaks its leash and bites her neighbour, B, despite A taking the necessary precautions of buying the strongest available leash and constructing a high wall around her house, and therefore not acting negligently. A is strictly liable to B for the injury B suffers.

We will return to the crucial ideas of fault liability and strict liability in greater detail in the final section of this module.

Vicarious Liability

A unique form of liability that deserves mention here is the concept of vicarious liability wherein a person can be held liable for the conduct of another person. Vicarious liability may be defined as the liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties.

Vicarious liability is a form of strict (and secondary) liability originating from the common law doctrine of agency that broadly states that the superior is responsible for the acts of the subordinate. This type of liability can also be traced to the old Latin doctrine of '*respondeat superior*', which roughly translates to 'let the master / superior answer'.

Illustration: A's servant B negligently injures visitor C while cleaning A's house. A is vicariously liable to C for the tortious act of her servant B.

A few terms that prominently feature in cases involving vicarious liability that require a brief explanation are:

- Principal or Employer: One who retains the services of others (Agents or Employees) to carry out her work.
- Agent: One retained to carry out the work of a Principal.
- Independent Contractor: A subordinate who is usually subject to less oversight or monitoring than an Agent.
- Employee: A subordinate who is usually subject to less oversight than an Agent and more oversight than an Independent Contractor.

To establish vicarious liability, the courts must find first that there exists a relationship of employee and employer. It is important to note that the torts of independent contractors generally do not impose vicarious liability on employers, with some exceptions in the case of non-delegable duties and also inherently dangerous activities. (*Honeywill and Stein Ltd* v. *Larkin Brothers Ltd*., (1934) 1 KB 191)

Illustration: A hires an independent contractor B to erect a fence around her property. B negligently injures C while erecting the fence. A is not vicariously liable to C for the tortious act of B.

While no one test can cover all types of employment, historically, the test for establishing a relationship of employer and employee has centred on identifying the existence of control between the supposed employer and the employee in a form of master and servant relationship. (*Yewens* v. *Noakes*, (1880) 6 QBD 530) The control test imposed liability on the employer when the employer ordered or dictated what work was to be done and how it was to be done.

Illustration: A hires B to get rid of all the monkeys that have begun to invade her large farm property without any further directions on how this is to be done. B is not A's employee but only an independent contractor since A does not have control over how the work is to be done.

An employer is normally held vicariously liable for the acts of the employee only when the tort is committed by the employee in the course of her employment. A preferred test of the courts for connecting torts to the course of employment (formulated by Salmond), states that an employer will be held liable for either a wrongful act that they have authorised, or for a wrongful and unauthorised mode of performing an act that was authorised. (*Limpus* v. *London General Omnibus Co*., (1862) 1 H & C 526; *Century Insurance Co* v. *Northern Ireland Road Transport Board*, (1942) AC 509)

Illustration: A is the conductor of a bus owned by B in Lucknow. One day, A drives the bus negligently and injures several people on the road. B will not be vicariously liable for A's negligence since the tortious act did not occur during the course of A's employment (which was that of a bus conductor and not that of a bus driver).

The vicarious liability of an employer for torts committed by employees should not be confused with the liability an employer has for her own torts. An employer whose employee commits a tort may be herself liable for negligence in hiring or supervising the employee. But, an employer, who was not negligent in hiring or supervising the employee, may still be held vicariously liable for the injury to a third party caused by her employee's negligence.

Some classic categories of vicarious liability include:

- *Liability of the principal for the tortious act of the agent*: When a principal authorises her agent to perform any act, the principal becomes liable for the tortious act of such agent, provided that such act occurs in the course of performance of the agent's duties.
- *Liability of firm partners for the tortious act of one partner*: Partners of a firm are responsible to the same extent as the defaulting partner when the tortious act occurs in the normal course of business of that partnership. The liability thus arising will be joint and several.
- *Liability of the master for the tortious act of the servant*: The master is liable for the tortious act of her servant provided that such wrongful act occurs within the course of the servant's performance of the master's business or orders.

While historically most actions alleging vicarious liability for intentional torts have failed, English law has relatively recently recognised (in a case involving vicarious liability for sexual abuse) that where an intentional tort committed by an employee is closely connected to her duties, her employer may be found vicariously liable. (*Lister* v. *Hesley Hall Ltd*, (2001) UKHL 22)

Illustration: A owns a nightclub where her servant, B, is in charge of the security arrangements. One day, B punches and kicks a guest C of the nightclub. A is vicariously liable to C for her employee B's intentional tort of battery.

It is important to note that in common law, a servant or employee will be liable to compensate the master or employer for the amount of damages paid by the master or employer. Under English law, the provisions of the Civil Liability (Contribution) Act, 1978, may enable the employer or principal, as the case may be, to recover some, or all, of the damages from her employee or agent.

Illustration: A is held to be vicariously liable for the tortious act of her servant B towards C and A pays damages amounting to Rs. 10,000/- to C. B will be liable to compensate A up to Rs.10,000/-.

Joint, and Several Liability

The terms joint liability, several liability, and joint and several liability are important to understand how the plaintiff obtains damages from two or more defendants in a tort case. We briefly describe these and related terms below.

Joint Liability

When two or more defendant parties have joint liability, they are called joint tortfeasors, and each is individually liable to the plaintiff for up to the full amount of the loss. Even if one defendant dies, disappears, or is declared bankrupt, the plaintiff can recover the full amount of the damages from the other defendant(s). The plaintiff must usually show indivisibility of harm to obtain joint liability of the defendants. Importantly, the plaintiff cannot recover her full damages more than once.

Illustration: A incites B to defame C. A and B are joint tortfeasors and will be jointly liable to C for the tort of defamation.

Several Liability

When two or more defendants have several or separate liability, they are called several or independent tortfeasors, and each is individually liable to the plaintiff only for their 'own' respective share of the loss or damage. Several liability can be determined by causal responsibility or fault of the defendants.

Illustration: A brandishes a large stick and threatens to smash B with it while moving threateningly towards her. C takes the stick from A and actually does hit B with it. A and C are severally liable for the torts of assault and battery, respectively. An assault is an attempt or a threat to do a corporal hurt to another, coupled with an apparent present ability and intention to do the act.

Joint and Several Liability

Under joint and several liability, a claimant may pursue an obligation against any one defendant, and it becomes the responsibility of the defendants to sort out their respective proportions of liability and payment. Therefore, in tort cases involving joint and several liability, the plaintiff may recover all the damages from any one of the defendants regardless of the individual shares of liability of the defendants.

Illustration: A technician, A, negligently installs a water heater in B's house. Years later, another technician C inspects the water heater installation and approves it. The water heater explodes causing injury to B. A and C are joint and severally liable to B for the tort of negligence.

Chapter 5: The Categorisation and Domain of Tort Law

Torts can be usefully divided into a number of different categories so as to provide greater analytical clarity on the exact domain of tort law.

The categories of torts could include intentional torts, unintentional torts, physical torts, abstract torts, property torts, constitutional torts, statutory torts, economic torts, mass torts, and torts in international human rights law. Please note that these are not strict legal categories but rather a convenient way of understanding the diverse kinds of torts that the law encounters.

Intentional Torts

Denote intentional acts that can reasonably be foreseen to cause harm to one or more individuals, and that indeed do so.

Intentional torts in India include torts against the person such as assault, battery, false imprisonment and wrongful confinement, intentional infliction of emotional distress, and fraud, and also torts against property such as trespass to land, trespass to chattels, and conversion.

Illustration: A intentionally punches B in the face and breaks her nose. A is liable for the intentional tort of battery.

Unintentional Torts

Denote all those torts that are not intentionally committed by the tortfeasor. Most unintentional torts are therefore accidents (usually cases of negligence), but this category also includes torts falling under the rubric of 'strict liability' or 'absolute liability'.

Illustration: On learning that she has passed the bar examination, A joyfully but carelessly swings her arms around and in the process accidentally hits B in the face and breaks B's nose. A is liable for the unintentional tort of negligence.

Illustration: A is the owner of a tiger rehabilitation centre near the outskirts of Trivandrum. If a particularly strong tiger escapes from the centre and attacks a passerby B, A will be absolutely liable to B under Indian tort law even if A was as careful as she could have been, and was not negligent in planning the safety measures and the strength of the cages. This absolute liability tort is also an example of an unintentional tort, since A had no intention to cause a tiger to escape from her centre and attack B.

Physical Torts

Denote all those torts that cause physical hurt to the body of one or more other persons. Physical torts can include both intentional torts and unintentional torts that involve physical hurt to one or more persons. Classic examples of physical torts would be battery, false imprisonment, and negligence involving physical hurt to another person.

Illustration: A intentionally punches B in the face and breaks her nose. A is liable for the physical tort of battery.

Illustration: A locks B in her room and refuses to open the door for several hours even when B pleads to be released. A is liable for the physical tort of false imprisonment. For the physical/intentional tort of false imprisonment to be established, it is necessary that the defendant intentionally causes the total restraint on the freedom of movement of the plaintiff without any lawful justification. (*See Davidson* v. *Chief Constable of North Wales & Another*, (1994) 2 All ER 597)

Abstract Torts

'Abstract Torts' denote torts that cause damage to the mind or to reputation.

Examples of abstract torts include defamation, copyright infringement, and restriction of competition. In most jurisdictions, abstract torts usually have a requirement of intention to commit the tortious act.

Illustration: A writes an article in a leading national newspaper that B has been constantly cheating on her husband and is also infected with several sexually transmitted diseases. These allegations are not true and A spreads this misinformation purely because she hates B for personal reasons. A is liable for the abstract tort of defamation (specifically libel).

Illustration: B has been running a restaurant in Bangalore for many years that has acquired fame for its delicious tandoori chicken. A opens a restaurant in another part of Bangalore and advertises her tandoori chicken preparation as "the original B's recipe tandoori chicken." A's tandoori chicken, however, is of very poor quality, and as a result of the confusion arising from the words "the original B's recipe tandoori chicken" printed in A's advertisements and menus, many people in Bangalore also stop visiting B's restaurant. This results in a significant loss of earning to B. A is liable for the abstract tortious act of copyright infringement.

Property Torts

Denote torts that involve a wrong interference with the lawful property rights of the plaintiff.

Examples of property torts include trespass to land, trespass to chattels (personal property), and conversion. In most jurisdictions, these property torts usually have a requirement of intention to commit the tortious act.

Illustration: A, intentionally and without permission or consent, enters B's farm. A is liable for the property tort of trespass to land. Trespass to land is committed when an individual intentionally enters the land of another without a lawful excuse.

Illustration: A, intentionally and without permission or consent, takes B's pencil box and plays with it before putting it back into B's bag. A is liable for the property tort of trespass to chattel. Trespass to chattel is the intentional interference with the right of possession of personal property.

Illustration: A and B are flat-mates in a house in Delhi. One day when B is watching a movie at the local cinema, A goes into B's room and takes out all the furniture from there and stores the same in her sister's house. B comes back from the movie and finding her room completely empty, asks A where all her furniture is. A refuses to disclose the location of the missing furniture. A is liable for the property tort of conversion. Conversion is a significant interference with an owner's immediate right to possession of personal property by denying possession, damaging the property, or destroying the property.

Constitutional Torts

Denote violations of the Constitution (or infringements of constitutionally guaranteed rights), where the plaintiff-victim is awarded compensatory damages from the State (most paradigmatically) in a civil action before a civil court.

In India, A.300 of the Constitution provides that the Government may sue or be sued.

Landmark cases including *Rudul Shah* v. *State of Bihar* AIR 1983 SC 1806; *Sebastian M. Hongray* v. *Union of India*, AIR 1984 SC 571, *Bhim Singh* v. *State of Jammu & Kashmir*, AIR 1986 SC 494, and *Nilabati Behera* v. *State of Orissa*, AIR 1993 SC 1960, represent the important place that constitutional torts have come to occupy in our tort and constitutional jurisprudence.

Constitutional torts could be intentional or unintentional.

Illustration: A, a prominent member of the Legislative Assembly of the State of Jammu and Kashmir, is wrongly arrested by the police to prevent her participation in an important session of the Legislative Assembly where her vote might have been crucial. A is kept in an undisclosed location and is not produced before a magistrate for four days. A is later released after the conclusion of the legislative session. The State of Jammu & Kashmir is liable to pay compensation to A for the constitutional torts of arbitrary detention, wrongful arrest, and confinement.

Statutory Torts

Denote civil wrongs that arise through the violation of a duty created by the Parliament (through legislation), and not by the courts.

While most statutory torts have their origin in the common law, they were usually expressly

put into statutes so as to clarify their content or to emphasise their importance.

Statutory torts can be found in legislation and regulations dealing with a variety of things including consumer protection and product liability, occupiers' liability, food safety, health and environmental protection, and railways accident liability.

One notable example from Indian law is the Consumer Protection Act, 1986 ("**the Consumer Protection Act**"), that creates a framework for remedies against deficiency in goods or services. S.14(1)(d) of the Consumer Protection Act enables the District Forum to issue an order to the product manufacturer or service provider "to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer."

Statutory torts could be intentional torts or unintentional torts depending on the statute in question.

Illustration: A buys a new pair of shoes from the manufacturer B's factory outlet in Jaipur. However, the shoes still have some harmful chemical on them and A's feet develop a painful rash that eventually results in A's left foot getting paralyzed. B is liable to A for the injury and loss under the statutory tort regime developed through the Consumer Protection Act.

Economic Torts

Denote civil wrongs that involve interference with a person's trade, business, or economic interests.

Economic torts feature in the doctrine of restraint of trade, and in competition law and anti-trust law.

Examples of economic torts include civil conspiracy (simple or unlawful) in an economic or business context, deceit, malicious falsehood, inducing breach of contract, intimidation (in an economic context), unlawful interference with trade (also referred to as causing loss by unlawful means), and negligent misstatement.

Certain torts of negligence in economic contexts are also sometimes included by commentators under the category of economic torts.

Following the House of Lords decision in *OBG Limited* v. *Allan*, (2007) UK HL 21, liability for economic torts (under English law) arises when a person intends to do a wrongful act.

Illustration: A tells B that a third party C is creditworthy and emphatically encourages B to lend money to C despite knowing very well that C is actually broke and already heavily in debt. Relying on A's statements, B loans a large sum of money to C and consequently loses it with no possibility of recovering the same from C. Here, A is liable for the economic torts of deceit and malicious falsehood.

Illustration: A knows that B owes a contractual obligation to C, and procures or induces B to breach the said obligation such that C incurs damage as a result. A is liable to C for the economic tort of inducing breach of contract.

Illustration: A and B have an agreement that B's truck company will transport freshly harvested vegetables from A's farm to the vegetable market in Gangtok every Sunday. A third party C threatens B that she will stop and burn B's trucks if any of them are found to be transporting A's goods. B is frightened and consequently refuses to transport any of A's vegetables, which results in huge losses to A. Here, C is liable to A for the economic tort of intimidation.

Illustration: A and B are rival airplane manufacturers. On the day before an important international air exhibition in which B's new airplane model is to be launched, A illegally enters B's factory and replaces the engine in B's new airplane model with an older and less efficient one. As a result, B's airplane under-performs at the exhibition, and many orders for the airplane

are consequently cancelled. A is liable for the economic tort of unlawful interference with trade or causing loss by unlawful means.

Mass Torts

Denote civil actions involving numerous victim-plaintiffs against one or more (usually corporate or state) defendants. Mass torts include mass disaster torts, mass toxic torts, and mass product liability torts.

Illustration: The Bhopal chemical plant of a multinational chemical company D develops a leak (due to negligent safety standards) that releases poisonous chemicals into the atmosphere, groundwater, and soil, and that consequently results in thousands of deaths and many more injuries to the residents (then and future) of Bhopal. D is absolutely liable in the mass tort litigations that follow.

Illustration: G is a major pharmaceutical company that develops a sedative drug that is sold on the marketplace for three years. It is soon discovered that G's sedative drug results in severe birth defects in newborn children whose mothers had consumed the drug during pregnancy. The tragic side-effects of the drug were not discovered during field trials because of G's negligent safety standards. G is liable in the mass tort litigations that follow.

Torts in International Human Rights

These denote those wrongs that international human rights instruments and policies provide civil redress for. Examples of these kinds of international tortious claims include demands for reparations for torture, war crimes, genocide, illegal renditions, and environmental pollution.

Another important instrument worth mentioning here is an American legislation – the Alien Tort Claims Act, 1789, which grants jurisdiction to US Federal Courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

Importantly, the domain of tort law is in no way clearly circumscribed or defined and continues to remain highly debated and in considerable flux. For example, the tort of trespass retains considerable antiquity going back several centuries while legislators, courts, and scholars continue to deliberate about relatively modern (and disputed) torts such as the invasion of privacy, torture, sexual harassment, and cyber-damage.

Modern developments in science and technology, changing perceptions of morality and culture, and complex advances in economic and social policy necessitate that tort law too constantly evolve and re-define itself to adequately deal with the full spectrum of losses and misfortunes arising from legal wrongs.

"*Truly speaking the entire law of torts is founded and structured on morality. Therefore, it would be primitive to close strictly or close finally the ever expanding and growing horizon of tortuous liability.*" (*Jay Laxmi Salt Works (P.) Ltd.* v. *State of Gujarat*, (1994) 4 SCC 1)

"*The categories of negligence are never closed.*" (Lord Macmillan in *Donoghue* v. *Stevenson*, [1932] AC 532)

Chapter 6: Strict / Absolute Liability

Strict Liability: The Rule in Rylands *v.* Fletcher

The landmark case of *Rylands* v. *Fletcher*, 1868 (19) LT 220, established the strict liability standard that continues to hold sway in Anglo-American tort law.

The rule in *Rylands* v. *Fletcher* provides that a person, who for her own purpose brings on to her land and collects and keeps there anything likely to do mischief, must keep it at her peril and, if she fails to do so and it escapes, is *prima facie* liable for the damage which is the natural consequence of its escape.

The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default, or neglect, or even that she had no knowledge of its existence.

This rule applies only to non-natural uses of the land and it does not apply to things naturally on the land, or where the escape is due to an act of God or an act of a stranger or the default of the person injured, or where the thing which escapes is present by the consent of the person injured, or, in certain cases, where there is statutory authority.

Illustration: A keeps a large dangerous dog inside a closed area on her property. B enters A's property and unlocks the gate to the closed area before leaving A's property. A few minutes later, the dog escapes and bites B right outside A's property. A is not liable to B under strict liability because it was B's default that led to the dog's escape from A's property.

Courts have interpreted *Rylands* v. *Fletcher* to impose strict liability if harm results from a miscarriage of an unusual, extraordinary, exceptional, or inappropriate activity in light of the place and manner in which the activity is conducted. Therefore, the primary basis of strict liability is the creation of extraordinary risk.

The American Restatement on the Law of Torts has accepted *Rylands* in limited form by limiting it to ultra-hazardous activities, defined as those "necessarily involving a risk of serious harm to the person, land, or chattels of another which cannot be eliminated by the exercise of the utmost care."

Absolute Liability: The Rule in M. C. Mehta *v.* Union of India

The decision of the Indian Supreme Court in *M. C. Mehta* v. *Union of India*, AIR 1987 SC 1086 (*Oleum Gas Leak case*), established the unique standard of absolute liability in India.
The essential difference between the absolute liability standard and the strict liability standard is that absolute liability is not subject to any of the exceptions expressly listed in *Rylands* v. *Fletcher*.

The rule in the *Oleum Gas Leak case* provides that where an enterprise is engaged in a hazardous or inherently dangerous activity, and harm results to anyone through the operation of such hazardous or inherently dangerous activity, the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate *vis-a-vis* the tortious principle of strict liability under the rule in *Ryland* v. *Fletcher*.

The Supreme Court further added that the measure of compensation in cases of absolute liability must be correlated to the magnitude and capacity of the enterprise involved.

Illustration: A is injured by the poisonous gas that leaks from B's chemical factory that manufactures pesticides and insecticides. B is absolutely liable to A for the loss suffered by A.

Illustration: B's chemical factory manufactures poisonous pesticides and insecticides. One day, lightning strikes a tank on B's property and this leads to a leakage of a poisonous gas that injures A. Under *Rylands* v. *Fletcher*, B would not be strictly liable to A since the escape of the poisonous gas is due to an act of God. However, under Indian law, B will be absolutely liable to A for the injury suffered by A.

Chapter 7: The Tort of Negligence

The tort of negligence occurs when the defendant's conduct imposes an unreasonable risk upon the plaintiff, which results in injury to the plaintiff. The negligent tortfeasor's mental state of intentionality is irrelevant as regards the tort of negligence. Therefore, while negligence is not an intentional tort, it does incur fault liability.

The components of a negligent action are:

- *Duty*: There is a legal duty for the defendant to behave according to a certain standard that will avoid unreasonable risk to others.
- *Failure to conform*: The defendant's behaviour / conduct does not conform to this standard.

- *Proximate cause*: There must be a sufficiently close causal link between the defendant's negligent act and the plaintiff's injury and resulting harm.
- *Actual damage*: The plaintiff must actually suffer a loss or damage of a legally recognised kind.

Illustration: A is driving her car but keeps looking at her mobile phone or the car stereo and does not pay adequate attention to the road. A's car hits and injures a pedestrian B. The requirements of the tort of negligence are satisfied because A (while driving) owes a duty of care to pedestrians on the road. A's failure to pay attention to the road is a failure to confirm to the duty of care, which is the proximate cause of a legally recognised injury to B. Finally, B has been injured and therefore there is actual damage.

Standard of Care in Negligence

In tort law, the standard of care is the degree of prudence and caution that a reasonable individual must display when discharging a duty of care under similar circumstances. It is important to note that the reasonable person standard is an objective standard that is different from the average person standard. The key question involved in determining the standard of care in tort cases is: "*What is it to be a reasonable person of ordinary prudence?*"

Illustration: A starts a fire at her campsite in the forest. She then packs and leaves her campsite without putting out the fire, which in turn leads to a major forest fire causing a lot of damage. A will be liable for her negligent action because a reasonable person under similar circumstances would have put out the fire before leaving the area.

Two important points to note while determining or analysing the requisite standard of care in a particular instance:

- The plaintiff must show that the defendant's conduct imposed an unreasonable risk of harm on the plaintiff.
- It is not enough for the plaintiff to merely show that the defendant's conduct resulted in the plaintiff's injury. The plaintiff must show that the defendant's conduct, viewed as of the time it occurred, imposed an unreasonable risk of harm.

The Doctrine of Res Ipsa Loquitur

The doctrine of *res ipsa loquitur* (translated as "the thing speaks for itself") creates a strong inference in favour of the plaintiff that negligence has indeed taken place. Once the doctrine of *res ipsa loquitur* applies, it requires no further showing of how exactly the defendant was responsible for the negligence because the elements of duty of care and breach can be inferred from the very nature of the accident.

Illustration: A goes to her doctor after an appendectomy (removal of appendix) complaining of a pain in her stomach and abdominal area. The X-ray shows that a metallic object of the size and shape of a medical scalpel is in her abdomen. The thing speaks for itself and it shows that the doctor who carried out the appendectomy was negligent.

Res ipsa loquitur does not usually fully reverse the burden of proof under English law or Indian law. For the doctrine to apply, three conditions are usually required to be met:

- The injury or accident in question is of a kind that ordinarily does not occur without negligence.

Illustration: Doctor B carries out a surgery on patient A's brain when the patient has complained of a pain in her right foot.

- The injury or loss is caused by an instrumentality within the exclusive control of the defendant.

Illustration: A, a railway guard posted at a train crossing, neglects to switch the signals or close the gate. As a result, two trains crash, causing considerable damage. *Res ipsa loquitur* applies as the injury was caused by an instrumentality within the exclusive control of the defendant railway.

- The injury is not due to any voluntary action or contribution from the injured party

Illustration: The elevator in A's building is maintained by B's company. B places a notice on the door of the elevator that the elevator is malfunctioning and residents should use the steps instead. A removes the notice from the door. Later that day, on returning home late at night, A steps into the elevator forgetting about the notice that she earlier removed. A is consequently injured due to the malfunction. The *res ipsa loquitur* doctrine will not apply because of A's contribution.

Chapter 8: Analysing a Tort Case

A simple three-step process in analysing any case involving tort law involves the consideration of:

- Whether a *prima facie* case for a tort exists or whether the facts are more properly suited for another branch of the law like contracts, crime, or insurance.

This step involves an analysis of the key elements of a tort in light of the facts available for consideration. A lawyer ought to ask and answer questions relating to:

- *The Implicated Duty*: Who owes a duty to whom? What is the content of this duty?
- *The Breach*: Was the duty breached? By whom? In what manner? Who has the burden of proving the breach?
- *The Harm*: Did the breach of the duty result in harm? To whom? In what manner?
- *Ownership of the Harm*: Who can be said to own the harm in question? Was the harm foreseeable? Was the harm avoidable? What was the cause-in-fact of the harm? What was the proximate cause of the harm?

- If a *prima facie* case for tort does exist, what are the defences available (to the injurer-defendant) for the tort in question? Defences that might be available for the tort in question include:

- *Consent of the victim-plaintiff (including both express consent and implied consent)*: The law usually does not provide redress to plaintiffs who expressly or impliedly consent or permit someone to injure them. This defence is also sometimes expressed as the plaintiff's assumption of risk or through the maxim "*volenti non fit injuria*" (translated as "to the willing, no injury is done").

Illustration: A is a regular spectator at cricket matches and is injured by the cricket ball in the spectators' area of the stadium when a batsman strikes the ball out of the ground and scores six runs. Since this is a foreseeable event, and regular spectators are assumed to accept that possible risk of injury when buying a ticket to watch a cricket match, A's claim will not succeed due to the defendant's defence of consent or *volenti non fit injuria*.

- *Self-defence*: The law may not attribute liability to the defendant who carries out the tortious act in furtherance of self-defence. It is important to note that the decision to resort to self-defence must be a reasonable one.

Illustration: A brandishes a large knife and rushes towards B while screaming that she will kill B. B strikes A to prevent her from stabbing her. B will be able to successfully use the defence of self-defence against A's tort claim for battery.

- *Defence of others*: The law may not attribute liability to the defendant who carries out the tortious act while defending some other third-person against a real threat. It is important to note that the decision to defend the other person must be a reasonable one.

Illustration: A brandishes a large knife and rushes towards B's infant son C while screaming that she will kill C. B strikes A to prevent her from stabbing C. B will be

able to successfully use the defence of 'defence of others' against A's tort claim for battery.

- *Defence of property*: The law may not attribute liability to the defendant who carries out the tortious act while defending her own (or someone else's) property. It is important to note that the decision to defend the property must be a reasonable one.

Illustration: A brandishes a burning torch and rushes towards B's wooden house while screaming that she is going to burn the house down. B strikes A to prevent her from burning the house. B will be able to successfully use the defence of 'defence of property' against A's tort claim for battery.

- *Capacity of the defendant*: If the defendant tortfeasor is not capable, legally, of being sued, this works as a successful defence to claims for tortious liability. This defence may be used by groups / individuals including foreign sovereigns, diplomats, bankrupts, convicted persons, the judiciary, minors, persons suffering from mental disorders, intoxicated persons, and unconscious persons, all of whom present special technical and procedural problems in relation to 'capacity'. It is important to note that much will depend upon the state of mind required by the tort in question.

Illustration: A is driving her car when she suffers from a stroke. This sudden stroke renders her paralysed, and she is no longer able to control her actions or even stop driving. The car continues to move and a few minutes later hits and injures B. The (lack of) capacity of A will be a successful defence to B's tort claim for negligence.

- *Reasonable mistake (including perceived threat of harm by the defendant)*: The law may not attribute liability to the defendant who carries out the tortious act when under the reasonably mistaken belief that the act is necessary and / or justified.

Illustration: A security guard monitoring the closed circuit cameras in a jewellery shop sees A stealing a valuable gold necklace during the busy evening shopping hours. She rushes into the main part of the store and detains B, who looks very similar to A and happens to be wearing a yellow dress that is identical to the one that A is wearing, for questioning by the police who arrive 20 minutes later. The jewellery shop will be able to successfully use the defence of reasonable mistake against B's tort claim for wrongful confinement.

- *Necessity (including both public necessity and private necessity)*: The law may not attribute liability to the defendant who carries out the tortious act so as to minimise the overall loss resulting from public necessity or private necessity.

Illustration: During the outbreak of a major fire in a city, A was urgently trying to save as many possessions from her home as she could. B, a senior government official, authorises the destruction of A's home to stop the progress of the fire and to prevent its spread to nearby buildings. B will be able to successfully use the defence of public necessity against A's tort claims.

- *Breaks in the causal chain (*novus actus interveniens*, translated as "new act intervening")*: The law may not attribute liability to the defendant when there is some new intervening act that breaks the chain of causation between the defendant's tortious act and the damage to the plaintiff.

Illustration: A negligently breaks a water main and some water enters B's house. On account of the water that has entered her house, B goes to stay at her friend's house for a few days. During this time, a group of homeless squatters break into B's house and cause major damage. B sues A for the damage to the house caused by the squatters. A will be successfully able to use

the defence that the squatters' actions amounted to a *novus actus interveniens* (between the negligent breaking of the water main and the final damage) to escape liability for the damage caused by the squatters.

If none of the available defences validly apply in the instant case, what factors determine the damages payable by the defendant and/or other remedies available to the plaintiff? The remedies available to the plaintiff could include:

- *Compensatory damages*: An award of money paid to the plaintiff as compensation for loss or injury suffered.

Illustration: A suffers serious physical injury due to the negligent driving of B. As a result of this injury, A will be unable to work until she recovers. A will also have to spend money on medical treatment of the injury. A's tort claim against B for compensatory damages allows A to transfer, allocate, or redistribute these losses to B.

- *Punitive damages (also known as exemplary damages)*: Awarded only in special egregious cases, over and above compensatory damages, in order to reform or deter the defendant and similar persons from pursuing a course of action such as that which injured the plaintiff. (*Rookes* v. *Barnard*, (1964) 1 All ER 367) The only three situations in which punitive damages are allowed involve: Oppressive, arbitrary, or unconstitutional actions by the servants of government; Where the defendant's conduct was 'calculated' to make a profit for she; and Where a statute expressly authorises the same.

Illustration: A is an employee of a government organisation and a member of a workers' union B. A resigns from the union on account of ideological differences. The union B threatens an indefinite strike unless A resigns from her job or is fired. B also uses unlawful means to force A's employer to suspend her from her job. A few days later, A is dismissed from her job with a week's salary in lieu of proper notice. B might be liable for punitive damages in A's claim for tortious intimidation involving unlawful means to terminate an employment contract.

- *Injunctive relief*: Usually an order by the court restraining the continuance or threat of harm.

Illustration: A files a suit for private nuisance against B who operates a highly polluting chemical factory with extremely noisy machinery right next to A's house in a residential area. The remedy that A seeks through her tort claim is injunctive relief that forbids or prevents B from continuing with B's chemical factory at its current location.

Criteria for Tort Claims

A useful checklist for a (plaintiff or defendant side) lawyer addressing tort claims would include taking note of the following criteria for tort claims:

- The burden of proof is usually on the plaintiff;
- The plaintiff must prove that the defendant owes the plaintiff a legal duty;
- The plaintiff must prove that the requisite standard of care has been breached;
- The plaintiff must establish the causation involved:
  - Causation in fact;
  - Proximate cause;
- The plaintiff must establish legally cognizable damage; and
- The plaintiff must counter the defences to tort liability that the defendant makes use of .

An Overview of the Causation Doctrine

Causation must be established for a successful tort claim. The two branches of the causation doctrine are:

- *The "but for" cause*: This is also known as causation-in-fact and represents the

indispensable condition without which the accident / harm would not have occurred. This is expressed by the statement "but for X no Y" where X represents the cause being analysed and Y represents the harm or injury to the plaintiff. For the defendant to be held liable, the plaintiff must establish that but for the defendant's conduct or activity, the plaintiff would not have been injured. (*Barnett v. Chelsea & Kensington Hospital*, (1969) 1 QB 428)

Illustration: A negligently forgets to replace the cover over a large drain on the pavement of the road. B falls into the drain and injures herself. A's action is the cause-in-fact of B's injury and satisfies the "but for" test.

- *The proximate cause*: This represents one of several but-for causes that is so proximate or closely responsible for the injury that the author(s) of such a proximate cause ought to be held responsible in tort. The proximate cause test is a useful way of establishing causation when several causes satisfy the but-for test.

Illustration: A, as a prank, pulls the chair from under B as B is about to sit down. When B hits the floor, a rare expensive painting falls from the wall and gets badly damaged. Both A's action and B's hitting the floor are but-for causes of the damage to the painting. The court must now examine whether A's action represents a proximate cause of the painting's damage or not. This will involve considerations of such things including foreseeability, possibility of prevention, and the natural course of events.

An Overview of when Fault Liability Applies

Fault liability in tort arises from the breach of a duty not to harm faultily. Fault liability under common law arises in the following three scenarios:

- Intentional torts (also called wilful torts in some jurisdictions) are torts committed with a general or specific intent.
- Recklessness in tort law involves those acts (of the defendant) that evidence a conscious disregard of a substantial risk of real harm to the plaintiff.
- Negligence involves conduct that creates liability because it falls short of what a reasonable person would do to protect another person from the foreseeable risks of harm.

Chapter 9: The Consumer Protection Act, 1986

The Consumer Protection Act is an example of legislation that creates a statutory regime for redress of legal injury caused to consumers of goods and services in India.

S.2(d) of the Consumer Protection Act defines a "consumer" as any person who:

- Buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- Hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who 'hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purposes.

Illustration: A buys a laptop from the manufacturer B for Rs.25,000/-. C avails of a home-cleaning service from D's company for Rs.7,000/- a month. A and C are 'consumers' within the meaning of S.2(d) of the Consumer

Protection Act.

The Consumer Protection Act provides a mechanism through which consumers can obtain a remedy for any defect in good, deficiency in services, or any other unfair trade practice that has resulted in a legal injury to them. S.2(f) defines a 'defect' as "any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods." S.2(g) defines 'deficiency' as "any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service." S.2(r) defines the term 'unfair trade practice'.

Illustration: A buys a kilogram of rice from B for Rs.20/-. The rice sold to A is rotten and full of insects. The rice sold by B to A is defective.

Illustration: A hires B to manage the information technology system in her company (including protecting the system from any unauthorised access and virus). B does not install any protective software and soon all computers in A's office crash. B's service to A is deficient.

The agencies established by the Consumer Protection Act include a Consumer Disputes Redressal Forum to be known as the "District Forum" established by the State Government in each district of the State, a Consumer Disputes Redressal Commission to be known as the "State Commission" established by the State Government in the State, and a National Consumer Disputes Redressal Commission to be known as the "National Commission" established by the Central Government. The jurisdiction of the District Forum, the State Commission, and the Nation Commission, is pecuniary jurisdiction as per the limits provided in Ss.11, 17, and 21 of the Consumer Protection Act, 1986.

Illustration: A buys a car from manufacturer B for Rs.15 lakh. Any consumer complaint relating to the car should be appropriately pursued in the District Forum that has a jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed does not exceed Rs.20 lakh.

Illustration: A buys a car from manufacturer B for Rs.25 lakh. Any consumer complaint relating to the car should be pursued in the State Forum that has a jurisdiction to entertain complaints where the value of the goods or services and the compensation claimed exceeds Rs.20 lakh but does not exceed Rupees 1 crore.

Illustration: A buys a customised car from manufacturer B for Rs.1 crore 5 lakh. Any consumer complaint relating to the car should be pursued in the National Forum that has a jurisdiction to entertain complaints where the value of the goods or services and the compensation exceeds Rupees 1 crore.

From the perspective of tort law, the most important provision is contained in S.14(1)(d) of the Consumer Protection Act, which enables the District Forum to issue an order to the product manufacturer or service provider "to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer."

Illustration: A buys a laptop from B for Rs. 40,000/-. A week later, the laptop explodes while A is using it and causes severe burns to A. B will be liable to A for the loss suffered by A.

S.15 of the Consumer Protection Act provides that any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date of the order. S.19 provides that any person aggrieved by an order made by the State Commission may prefer an appeal against such order to the National Commission within

a period of thirty days from the date of the order. S.23 provides that any person aggrieved by an order made by the National Commission may prefer an appeal against such order to the Supreme Court of India within a period of thirty days from the date of the order. Finally, S.24 provides that every order of a District Forum, the State Commission, or the National Commission shall, if no appeal has been preferred against such order under the provisions of the Consumer Protection Act be final.

Illustration: A buys a laptop from B for Rs. 40,000/- in Kolkata. A week later, the laptop explodes while A is using it and causes severe burns to A. A files a complaint in the relevant District Forum but the complaint is dismissed. A then appeals to the State Commission, which also dismisses the appeal. A then appeals to the National Commission, which once again dismisses the appeal. A can now appeal to the Supreme Court of India within 30 days of the order of the National Commission dismissing her appeal.

S.27 of the Consumer Protection Act, 1986, provides that where a trader or a person against whom a complaint is made or where the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, then such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees.

Illustration: A buys a laptop from B for Rs. 40,000/-. A week later, the laptop explodes while A is using it and causes severe burns to A. On hearing A's complaint, the District Forum directs B to pay Rs. 3 lakh compensation. B however does not comply with this order for over a year despite repeated requests and reminders from A. The District Forum can punish B with imprisonment or a fine.

Chapter 10: The Motor Vehicles Act, 1988

Chapter X (Liability without fault in certain cases), Chapter XI (Insurance of Motor Vehicles against Third Party Risks), and Chapter XII (Claims Tribunals) of the Motor Vehicles Act, 1988 ("**the Motor Vehicles Act**"), are particularly important from the perspective of tort law.

The 'no-fault liability' under S.140 of the Motor Vehicles Act is a statutory liability, which provides for a fixed compensation to be paid under certain circumstances for accidents (and injury) arising from the use of a motor vehicle.

The Motor Vehicles Act provides for different amounts of compensation for death and permanent disablement arising from the use of a motor vehicle.

The Motor Vehicles Act further provides that a claim for compensation under S.140 shall not be defeated by reason of any wrongful act, neglect, or default of the person in respect of whose death or permanent disablement the claim has been made, nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement.

Illustration: A pedestrian B crosses the street even though the traffic sign indicates that she is to wait until the traffic passes. B is hit and killed by A's car. The claim for compensation for B's death is not defeated on account of B's negligent act in crossing the road despite the traffic signal indication that she should wait.

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Notes:

All India Bar Examination Preparatory Materials

Subject 19: Principles of Taxation Law

Principles of Taxation Law

Chapter I: Introduction

Taxation, in its basic form, is a compulsory exaction from individuals and entities by the Government to raise finances. It is often used as a policy tool to influence manufacture, provision, and consumption of goods and services. Taxes are characterised by their mandatory nature and the lack of any need for correlation between the amount paid and the value of the public services financed by the tax.

Under the Constitution, taxes are levied by the Union or the States, depending on the entries in the Seventh Schedule. Further, A.265 states, "No tax shall be levied or collected except by authority of law." Here, 'law' means a law enacted by a legislature. (*Ghulam Hussain* v. *State of Rajasthan,* AIR 1963 SC 379) An executive order, a rule that goes beyond the powers under the statute, or a custom, are not 'law'.

Tax is imposed on the occurrence of a *"taxable event"*. The taxable event for income tax, for instance, is the earning of income; the taxable event for excise duty is manufacture; and the taxable event for service tax is the provision of service.

Taxing statutes typically have a *"charging provision"* that identifies the taxable event, and related provisions regarding computation. These provisions are to be interpreted strictly. If a person has not been brought within the ambit of the provision strictly, she cannot be taxed at all. (*I. R.* v. *Countess of Longford*, 13 T.C. 573 (HL)) There are also machinery provisions that provide for assessment, collection, adjudication, and appeals. These are to be interpreted so as to make the machinery workable. (*United Provinces* v. *C. I. T.*, 204 ITR 794)

Chapter 2: Classification of Taxes

Taxes may be broadly classified by two systems – either as direct and indirect taxes; or as proportional, progressive, and regressive taxes.

Direct and Indirect Taxes

Direct taxes are taxes that are imposed on persons, usually based on their ability to pay, and calculated on their income, expenditure or net wealth (for example, Income-tax, Wealth-tax, Gift-tax).

Indirect taxes, on the other hand, are taxes imposed on goods, services, transactions, or activities. They are usually collected by an intermediary, such as the seller or service provider, from the person on whom the tax burden finally falls. Examples of indirect taxes include sales tax, excise duty, and customs duty.

Proportional, Progressive, and Regressive Taxation

Proportional taxation is where the quantum of tax is a proportion of the sum sought to be taxed, where such proportion remains constant despite the sum.

Progressive taxation is where the tax rate increases with the sum taxed, so that as the sum taxed increases, a larger portion of each additional unit taxed is to be paid as tax.

Regressive taxation is where the tax rate decreases as the sum becomes larger.

In some cases, like professional tax, the tax rate is a fixed amount payable each year. Such a tax is not proportional, progressive, or regressive, but is known as a flat tax.

Chapter 3: Direct Taxes

Income Tax

Legislation

Income-tax is levied under the Income-Tax Act, 1961 ("**the IT Act**"), that replaced the

Indian Income-Tax Act, 1922. It has been passed under Entry 82 of List I of the Seventh Schedule to the Constitution, which provides for "Taxes on income other than agricultural income". This exemption for "agricultural income" is reflected in S.10(1) of the IT Act.

Charging Provision

Income-tax is charged under S.4 of the IT Act:

"(1) Where any *Central Act* enacts that income-tax shall be charged for any assessment year at any rate or rates, *income-tax at that rate or those rates shall be charged for that year* in accordance with, and subject to the provisions (including provisions for the levy of additional income-tax) of, this Act in respect of the *total income* of the *previous year* of *every person:*"

The key terms in this section are:

- "Central Act": This refers to the custom that it is the Finance Act, passed pursuant to the budget, that sets out the rate of income-tax payable that year.
- "Every person": includes persons that are defined in S.2(31) - "A person, an individual, a company, a firm, an association of persons, a local authority, and every artificial juridical person not falling within any of the above categories."
- The income taxed is the income of the "previous year" (defined in S.3) and not of the assessment year. The tax is 'assessed and paid in the next succeeding year upon the results of the year before'. (*Indian Iron* v. *C. I. T.*, 11 ITR 328). However, the law to be applied is the law in force during the assessment year. (*Reliance* v. *C. I. T.*, 120 ITR 921). Therefore, the liability to tax arises by virtue of the charging section, when the previous year closes, although the quantification of the amount is done later. (*Wallace Bros.* v. *C. W. T.*, 16 ITR 240)
- The "total income" (defined in S.5) of the person is brought to tax.

Income

Income is defined under S.2(24) of the IT Act, and has a wide definition under that provision. The classic definition of "income" is:

"Income… connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources… excluding anything in the nature of a mere windfall… Thus income has been linked pictorially to the fruit of a tree, or the crop of a field. It is the produce of something which is loosely spoken of as 'capital'." (*C. I. T.* v. *Shaw Wallace*, 59 I.A. 206)

This dictum, however, has been whittled down in a variety of judgments, and it is accepted today that anything which can be properly described as income and taxed under the IT Act, unless expressly exempted, is "income". (*Emil Webber* v. *C. I. T.*, 200 ITR 483 (SC)). The term is wide enough to include income from unlawful businesses also. (*Minister of Finance* v. *Smith*, 1927 A.C. 193)

The Court has held in many judgments that only "real income" of a person can be taxed under the IT Act. If it is not income of the assessee at all, no income-tax liability arises. (*Godhra Electric Company* v. *C. I. T.*, (1997) 4 SCC 530)

Illustration: An electricity company, P Ltd., receives amounts from its customers and makes profits. Under a particular legislation, there is an obligation to refund ⅓ rd of excess profit to the consumers. The liability to refund ⅓ rd was set apart to a "Consumer Benefit Reserve Account". Even though it was part of such a reserve account, it was liable to be returned to the consumers and therefore did not form part of P Ltd.'s real profits, and cannot be brought to tax. (*Poona Electric Supply* v. *C. I. T.*, 57 ITR 521)

Capital and Revenue Receipts

Receipts that arise out of the normal course of an assessee's business are called "revenue receipts" and the receipts that are not from the assessee's regular course of business are "capital receipts". Under the IT Act, broadly, only revenue receipts are taxed as income,

unless the capital receipts are chargeable as "capital gains".

Illustration: A, a teacher in a school, receives a salary each month. It is a revenue receipt. A receives a large sum of money under a will from her uncle. That is a capital receipt.

Illustration: B Co. engages in the stationery business. It receives money for the sale of property. That is a capital receipt.

If B Co. was in the real estate business, the sale of land would amount to a revenue receipt. If B Co. sold its office premises and made a gain, it would be a capital receipt, since the land was held and dealt with as a capital investment outside its trade.

Illustration: C Co., which engaged in the business of being a selling agent for a colliery, had to, in the course of its business, purchase wagons on behalf of its clients. Anticipating a rise in prices due to war, it purchased a large number of wagons and sold them at a great profit. This profit is revenue, since it is in the ordinary course of business. (*Benyon and Co.* v. *Ogg*, 7 T.C. 125)

As a broad rule, a receipt that is in the nature of a fixed capital is not taxable, but when it refers to circulating capital or stock-in-trade, it is taxable. (*John Smith* v. *Moore*, 12 T.C. 266 (HL))

Illustration: A company manufactured fireclay goods, and was a lessee of certain fireclay fields. This field was acquired by a railway company under a statute, and compensation was paid. The receipt was held to be a capital receipt since it was made for the loss of a fireclay field, which was a capital asset. The fact that such payment was calculated on the profits that could have been earned did not make it a revenue receipt. (*Glenboig Fireclay Co.* v. *I. R.*, 12 T.C. 427)

The nature of the receipt depends only on its character in the hands of the recipient and not on its character in the hands of the payee.

Illustration: W Co. is a dealer in machinery. Z Co., an automobile manufacturer, buys machinery from W Co. For Z Co., the expenditure is a capital expenditure, while for W Co., the receipt is a revenue receipt.

Profits and gains that arise from transactions that are incidental to, or closely associated with the business of an assessee, are revenue receipts.

Illustration: The sale and purchase of shares by a stock-broker on her own account, profits from foreign exchange transactions of a bank, and income to a company from letting out its houses to its employees, are all revenue receipts.

The recurring or lump-sum nature of the receipt is irrelevant to determining the nature of receipt. Advances against royalties received by authors, for instance, would be a revenue receipt in their hands. If a payment is measured by the estimated annual profit or yield, then it is revenue. Similarly, what is relevant is the nature of the transaction, and not the name given to it by the parties.

Illustration: ABC Co. is the sole selling agent for XYZ Co. Any compensation it receives for the termination of the agency is a capital receipt. (Under S.28 of the IT Act, however, it is made taxable.) If ABC Co. had many agencies and one of them were terminated, the compensation received would be a revenue receipt.

Illustration: A doctor, under her contract with a hospital, is restrained from practising in that locality for five years and receives a compensation for this restraint. It is a capital receipt. Under the doctor's employment agreement, however, the doctor is entitled to a "non-practising allowance" for agreeing to practice only in the hospital. That is a revenue receipt.

"Previous Year", "Assessment Year", "Financial Year"

S.3 of the IT Act provides:

"For the purposes of this act, "previous year"

means the financial year immediately preceding the assessment year:"

S.2(9) defines assessment year as the period of twelve months beginning every April 1.

Finally, while the IT Act does not define "financial year", the Companies Act, 1956, defines it as the period in respect of which the profit and loss account is laid by the company before the annual general meeting. Such period need not be exactly one year. The General Clauses Act, 1897 defines it as the period starting from April 1 and ending with March 31. However it does define assessment and previous year. "assessment year" means the period of twelve months commencing on the 1st day of April every year while previous year is defined as the financial year immediately preceding the assessment year.

In the case of businesses or professions that are newly set up, the assessment year or [previous year is taken as between the date on which the business is set up, up to the date on which the financial year ends.

Illustration: Y joins the Bar on December 4, 2009. Her previous year, for the assessment year 2010-11, will be between December 4, 2009 and March 31, 2010.

Illustration: Z Co. commences business on December 26, 2008, and closes its account book for the financial year 2008-09 on December 31, 2009. .In the present case the previous year will include period up to March 31, 2010 and the assessment year will start from April 1, 2010 for a period of twelve months thereafter.

Resident, Not Ordinarily Resident and Non-Resident (S.6)

A person is resident in India if she is in India for a period or periods aggregating to more than 182 days during the previous year, or she has been in India for more than 365 days in the four years preceding the previous year, and at least sixty days in the previous year.

A person is not-ordinarily-resident in India if she fulfils one of the "resident" criterion, and she has been a non-resident for nine out of the last ten years preceding the relevant previous year, or she has been in India for less than 729 days in the seven years preceding the relevant previous year.

If she does not fall within either of the above categories, she is classified as a non-resident.

In the case of a company, an "Indian company", as defined by S.2(26) of the IT Act, is always resident in India. In the case of a foreign company, according to S.6(3), if the *whole* of the control and management of the company is exercised from India during that previous year, it is resident in India.

Total Income

The "total income" of a "resident" under S.5 (1) of the IT Act includes income that is:

- Received or deemed to be received in India; or
- Accrues or arises to her in India; or
- Accrued or arises to her outside India.

A person who is not ordinarily resident in India would be taxed only on the first two points above.

A non-resident is taxed only on income that is either received, deemed to be received, or accrues or is deemed to accrue *in India*.

Receipt, Accrual

"Receipt" refers to the physical receipt of the income in the hands of the assessee, or by someone on behalf of the assessee. Two pieces of information need to be understood in the case of receipt – the place of receipt, and the time of receipt. The amount is received by the assessee when it is put in her control. Therefore, the place of receipt of a cheque by post would be the place where the cheque is received by the assessee, and the time of receipt of such amount would be the time of receipt of the cheque and not the time of encashment.

Amounts deemed to be received by the assessee are amounts such as taxes deducted at source, incomes of other persons included in the assessee's income (Ss.60 - 64), unexplained incomes, investments (Ss.69A, 69), contributions to Provident Funds (S.7(i)), and any dividend or deemed dividend (S.2 (22)) paid by a company.

An income is said to "accrue" to a person when a debt is created in her favour. A person 'earns' an income when she contributes to production by the rendering of goods or services, but for an income to "accrue", when the right to receive such income becomes vested in the assessee.

Illustration: W sells goods to Y, for which W receives part-payment from Y. Unless there is an agreement to the contrary, the entire amount has accrued to W, even though W has not received it, since W has a right to receive such income.

Illustration: A company, EDS Co., was a managing agent of four companies. According to the contract, the managing agency commission was calculated at the end of each financial year and paid to EDS by the four companies. A few months into a financial year, EDS transferred its managing agency to four other agencies. The managing agency commission was calculated by the companies at the end of the year and paid to the four new companies. No amount has accrued to EDS during that year, even though it had performed services for a part of that year, because EDS had no right to receive any money under the contract until the end of the year.

Incomes that are deemed to accrue or arise in India to a non-resident are listed in S.9 and include:

- Income from a business connection in India: "Business connection" means a business activity carried out by a non-resident through a person acting on her behalf (see Explanation to S.9(1)(i));
- Income from a property in India: This income is deemed to arise in India, irrespective of where the income is received;
- Income from any asset or source of income in India;
- Income through the transfer of a capital asset situated in India;
- Salaries earned in India: Any amount paid for the rendering of services in India. This is to be read with S.10(6), which exempts certain income of foreign individuals;
- Salaries paid by the Government of India for services outside India;
- Dividend paid by an Indian company;
- Certain interest incomes;
- Royalty incomes: defined in the Explanation to S.9(1)(vi); and
- Fees for technical services: defined in the Explanation to S.9(1).

Illustration: J, a citizen of India is employed in the Indian Embassy in Tokyo. J's status for the year 2009-10 is non-resident. J's salary, since it is paid by the Indian government, is liable to tax in India. J rents a property in Patna to K for six months, after which J sells it to L. Both incomes, the rent, and the sale proceeds, are deemed to arise in India.

Incomes Exempt from Tax

Ss.10 - 13A of the IT Act list out various incomes that do not form a part of the "total income". In other words, they are exempt from tax in India. Prominently, S.10(1) exempts agricultural income, since the Constitution does not allow it. The other sub-sections in S.10 list a variety of other exceptions. Ss.10A, 10AA, 10B, and 10BA grant exemptions to certain entities including those in free trade zones, special economic zones, export-oriented undertakings, and software technology parks.

Under S.11, income derived from property held under trust wholly for charitable or religious purposes is exempt from tax. S.12 exempts any voluntary contributions received by a trust or an institution. "Charitable purpose" is defined under S.2(15) of the IT Act as including relief to the poor and to education, medical relief, and the advancement of any other object of general

public utility. The expression 'general public utility' has been interpreted to mean even a segment of society and not necessarily the whole of mankind. As long as the object is not to benefit specified individuals, but a class of persons, it would come under this definition. Accordingly, a chamber of commerce (*C. I. T.* v. *Andhra Chamber of Commerce*, 55 ITR 722) and State Bar Councils (*C. I. T.* v. *Bar Council of Maharashtra*, 130 ITR 28) have been held to come within the definition of a "charitable purpose". Where some objects of a trust are charitable, and some are not, the dominant purpose of the trust is to be considered.

Chapters VI-A and VII of the IT Act list out various incomes that are to be deducted from the total income. These are, in effect, incomes that are not liable to tax. There is a distinction between exemptions and deductions, though the effect of both is to relieve a sum of tax. A sum exempt from tax does not form part of the total income at all, and is exempted from the charge of tax. A deductible sum is allowed to be deducted when computing taxable income, but is not exempted from the charge of income tax.

This is important for two reasons – first, the rate of tax payable is determined by the total income, and second, in several cases, calculations are to be made on the total income. The "deductions" are used in computing the "total income" brought to tax, but the "exemptions" are completely excluded.

Heads of Income

Under S.14, all incomes are classified into five heads:

- Salaries (Ss.15 – 17)
- Income from House property (Ss.22 – 27)
- Profits and Gains of Business or Profession (Ss.28 - 44DA)
- Capital gains (Ss.45 – 55A)
- Income from other sources (Ss.56 – 59)

Salaries

"Salaries" are defined under S.17 to include wages, annuity or pension, gratuity, and fees, commissions, perquisites or profits, in lieu of salary in addition to salary or wages, amongst other sums. For an income under this head, there must be an employer-employee relationship between the payer and the assessee. Therefore, a contract of service leads to a salary, but a contract for services does not lead to a salary.

Illustration: F is a Director in G Ltd. and receives remuneration for her services. If G is a full-time director and works under the control of the organisation, G's remuneration is a "salary". (*C. I. T.* v. *Navnitlal Sakarlal*, 247 ITR 70) However, if F is a Chartered Accountant acting as an independent director on the Board, the remuneration received by her is only "profits and gains of business or profession".

Illustration: GS is the Advocate-General of Tamil Nadu. GS is not an employee of the Government, but merely performing professional services for it. GS' remuneration as Advocate-General is not salary. (*C. I. T.* v. *Govind Swaminathan*, 233 ITR 264)

Salaries are chargeable to tax at the time when they are due or when they are received, whichever is earlier.

Illustration: A Co. is unable to pay salaries to its employees in 2009-10. B Co. pays salaries in advance for six months in January 2010. Both sums will be brought to tax in Assessment Year 2010-11.

"Perquisites" defined under S.17(2) are taxed under "salaries", and so are "profits in lieu of salary".

Income from House Property

Even though the head uses the term "house property", the tax is levied on the "annual value" of a property consisting of a "building" and "land appurtenant thereto" owned by the assessee that is not occupied by her for the purposes of a business or profession.

"Building" is a term that signifies some

measure of permanence. Therefore, even huts may be buildings, but circus tents or exhibition structures are not buildings. Lawns, gardens, and parking lots attached to the buildings are covered within the meaning of "land appurtenant thereto". A person is the "owner" of a property as long as that person is entitled to receive income from it. There is no need for a registered deed in that person's favour. (*C. I. T.* v. *Podar Cement Ltd.*, 266 ITR 625) S.27 lists some special cases in which persons are deemed to be owners of the property.

The "annual value" of the property is defined in S.23 as the sum for which the property might reasonably be expected to let from year to year. Whether the sum is actually earned from the property is irrelevant to this section. Therefore, even a vacant property is subjected to "income from house property".

However, the annual value of property that is occupied by the assessee herself, or which is not occupied by her due to her employment in another place, is considered as zero, in accordance with S.23, unless the assessee is deriving some benefit from the property.

The taxes levied by a local authority are deducted from the annual value. Under S.24 (a), a flat 30% is deducted. Subject to certain conditions, the interest payable on capital borrowed to buy or construct the property, make repairs, or reconstructions on the property is also deducted. These deductions are also available when the annual value is zero under S.23, in which case the income from house property is taken as a loss.

Profits and Gains of Business or Profession

Under S.28 of the IT Act, the profits and gains of a business or profession are brought to tax. The other sub-sections of the provision list out other incomes charged under this provision, such as the compensation received upon termination and modification of certain contracts, and other sums.

"Business", defined in S.2(13), can be understood as an activity that is carried out by devoting time, attention, and labour of a person either on her own, or by employing other persons with a motive to make profits. The provision defines "business" as any trade, commerce, or manufacture, or any adventure in the nature of a trade.

"Profession" is defined in S.2(36) to include a vocation. Therefore, not only activities carried out by knowledge acquired through a professed study, but also on account of inborn talent or skill, would qualify as a "profession". For example, philosopher and musician would be included within the definition of profession.

Income under this head, according to S.145, is computed using the method of accounting employed regularly by the assessee. Further, the guidelines given in the detailed provisions of Ss.30 to 43D are followed.

Current Repairs and Capital Expenditure

Subject to the conditions in S.30 and S.31, rents, insurance, and repairs of the premises of business or profession, or machinery, plant, and furniture are allowable deductions.

Only "current repairs", however, and not "capital expenditure" is allowed as a deduction under this provision. If an asset is restored to its normal or original condition by incurring certain expenditure that does not enhance the efficiency beyond the normal efficiency, then such expenditure is "current repairs". On the other hand, if a new and enduring advantage ensues from an expenditure with respect to a building or machinery, it would amount to a capital expenditure.

Illustration: V is a restaurant that is partially destroyed in a fire. Furniture and other equipment, including air-conditioning are replaced. This is within the definition of "current repairs", since the object of the expenditure is to regain the original efficiency. (*C. I. T.* v. *Volga Restaurant*, 253 ITR 405)

Illustration: The spare parts of a power loom in a textile mill are faulty. The engineer suggests

their replacement with a much more powerful part. This expenditure would be capital expenditure and not "current repairs".

Depreciation (S.32)

In respect of tangible assets including buildings, machinery, plant, and furniture, and in respect of certain intangible assets, such as know-how, patents, copyrights, and licences, a depreciation at rates specified in the Income Tax Rules, 1962, is allowed as a deduction. For this, however, there are three conditions to be fulfilled:

- The assessee must own the asset;
- The asset must be used for the purpose of business or profession; and
- The asset must be used during the relevant previous year.

Illustration: H Co. is in possession of a land on part-payment of sale consideration. It constructs a factory on such premises and a temple for its employees inside the factory. H Co. will be considered an "owner" for the purposes of S.32 (*See Universal Radiators* v. *C. I. T.*, 281 ITR 261), since a wide meaning must be given to the term. Therefore, H Co. can claim depreciation on the building. H Co. can also claim depreciation on the temple, since the asset has to be used for the purpose of business or profession, and not necessarily to generate profits on its own. (*See Atlas Cycles* v. *C. I. T.*, 134 ITR 458)

Other Deductions

The IT Act provides for various other deductions listed in the succeeding provisions including various insurance premiums, bonus, or commission paid to employees, interest on borrowed capital, contributions to provident and gratuity funds, and bad debts. It must be noted that all these expenses are deductible only if they are incurred for the purposes of business.

Illustration: A company borrows money to lend the same to its sister concern for no interest. To claim a deduction, the assessee must show that such lending is a part of its business purpose. (*See C. I. T.* v. *Prem Engineering*, 285 ITR 554 and *C. I. T.* v. *Abhishek Industries*, 286 ITR 1)

All capital expenditures are not allowed as deductions under "Profits and Gains of Business or Profession". The test of whether an expenditure is capital or revenue is whether it gives a benefit of an enduring nature. If so, it is a capital expenditure. (*Empire Jute Co.* v. *C. I. T.*, 124 ITR 1)

Illustration: X Co. constructs a new textile mill. It is a capital expenditure, since the mill provides an enduring benefit. If X Co. constructs the same mill on leased property, and the lease deed has no clause to transfer the building to X Co. after the completion of the lease, the expenditure incurred is revenue expenditure, since it only grants X a business advantage and not an enduring benefit. (*C. I. T.* v. *Madras Auto Service*, 233 ITR 468; *C. I. T.* v. *Hari Vignesh Motors*, 282 ITR 338)

Illustration: S Co. shifts its place of business and incurs expenditure for the same. It is treated as a revenue expenditure, since the new place of business is only for convenience and for increasing the efficiency in operation, and not for an enduring benefit. (*C. I. T.* v. *Madura Coats*, 253 ITR 62) The amount spent to purchase such premises, however, would be capital expenditure. Similarly, the expenses relating to the shifting of machinery would be capital expenditure, while the expenses relating to the transportation would be revenue expenditure. (*C. I. T.* v. *Bimetal Bearings*, 210 ITR 945)

Illustration: CV Co. paid money to the local authorities of an area for the construction of a bridge leading to its office. Such expenditure is revenue in nature, as no tangible or intangible asset was acquired by the assessee, nor was there any addition to, or expansion of the profit-making apparatus of the assessee. (*C. I. T.* v. *Coats Viyella*, 253 ITR 667). If CV Co. had laid a private bridge on its own, it would be capital expenditure.

Illustration: A firm sent one of its partners, Mr. V, overseas, for a two-year course in Business

Management. This expenditure is not of a revenue nature since it has nothing to do with the business of the firm. (*C. I. T.* v. *Hindustan Hosiery*, 209 ITR 383)

Under the explanation to S.37(1), an expenditure incurred by the assessee for any purpose which is an offence, or which is prohibited by law, is not deductible. It follows that interest for delayed payment of tax, which is not penal, is deductible, whereas penalty for non-payment of tax is not deductible, since that is a penal payment. (*Lakshmandas* v. *C. I. T.*, 254 ITR 799)

Capital Gains

S.45 imposes capital gains tax on any "profits or gains" that arise from the "transfer" of a "capital asset" during the relevant previous year.

"Capital asset" is defined in S.2(14) as property of any kind held by the assessee, whether or not connected with her profession or business. Examples include certain kinds of property, including stock-in-trade, consumables, and raw materials used in the business or profession, personal effects of movable nature held for personal use, agricultural land in India (except that mentioned in S.2(1A)), and certain Government Bonds.

Illustration: AR owns a car and uses it for purely personal purposes. She buys it for Rs. 20 lakhs, and sells it for Rs.35 lakhs. This would not be subject to capital gains tax since it is a movable personal effect.

Transfer

The capital asset must be transferred for there to be capital gains tax imposed. "Transfer" is defined under S.2(47) of the IT Act, and includes a sale, an extinguishment, exchange, relinquishment, or compulsory acquisition of any asset. Some transactions, including the distribution of capital assets or the partition of a Hindu undivided family ("**HUF**"), or a transfer under a gift or irrevocable gift, and certain transfers from a parent to a subsidiary company and so on, are not "transfers" under Ss.46 and 47.

Computation of Capital Gains

Computation of Capital Gains is done under S.48 of the IT Act, which holds that the gains from the transfer of the capital asset shall be the full value derived from the transfer minus:

- The expenditure incurred for such transfer;
- The cost of acquisition of the transfer; and
- The cost of improvements to the capital asset.

Short-Term and Long-Term Capital Gains

If the capital asset is sold more than thirty-six months after its acquisition, such a transfer results in a long-term capital gain. Else, the gain is a short-term capital gain. These two gains are taxed at different rates, and certain procedural rules vary for the two classes of gains.

Income from Other Sources

The incomes that are not covered under any of the other heads, such as incomes from dividends, from keyman insurance policies, winnings from lotteries, interest on securities, hiring out of a building with machinery, and so on, are covered under this head.

Chapter 4: Indirect Taxes

Central Excise

Legislation

Excise is a duty on goods indigenously manufactured. The taxable event for Central Excise is 'manufacture'. It is an indirect tax because even though it is levied on the manufacturer, the manufacturer passes the burden of taxation on to the consumer of the goods by including the tax in the price of the goods. Central Excise is levied in India through the Central Excise Act, 1944 ("**the CE Act**"). Central Excise is levied by the Union under Entry 84 of List I of the Seventh Schedule.

Charging Provision

The charging provision for Central Excise is S. 3(1) of the CE Act, according to which, a duty called "CENVAT" is leviable on all excisable goods, which are produced or manufactured in India at the rates set forth in the Schedules to the Central Excise Tariff Act, 1985 ("**the CET Act**"). While excise is levied on 'goods', the term is not defined in the Act. In *Union of India* v. *Delhi Cloth and General Mills*, 1 ELT 199, the Supreme Court held that a 'good' is an article, which can ordinarily come to the market to be bought and sold. The crucial element for a 'good', therefore, is saleability.

Taxable Event

As stated above, the taxable event for excise duty is manufacture. Tax is levied on the manufacture, and not on the goods themselves. While the excise duty is imposed at the time of the removal of goods from the factory, the taxable event is not removal, but manufacture. Therefore, if there is no excise leviable on a good at the time of manufacture, no liability arises on the good at the time of removal even if excise duty is imposed on the good by that time.

Illustration: In *Empire Industries* v. *Union of India*, 20 ELT 179, the petitioners were job workers and they carried out the processes on a work-order basis. They argued that since they were not the owners of the manufactured goods, no liability to pay excise duty arose on them. The Supreme Court held that the taxable event was manufacture and not ownership. Therefore, the liability to pay excise duty was on the manufacturer.

Manufacture

The term 'manufacture' implies the bringing into existence of a new substance. It does not merely mean a change in the substance, however small the change may be, but entails an element of marketability. The Supreme Court in *Union of India* v. *Delhi Cloth and General Mills*, 1 ELT 199, quoted with approval the following definition:

"'Manufacture' implies a change, but every change is not manufacture and yet every change of an article is the result of treatment, labour and manipulation. But something more is necessary and there must be transformation; a new and different article must emerge having a distinctive name, character or use."

Illustration: G Co. manufactures vanaspati oil through a four-stage process. Although, chemically, vanaspati is produced in the second stage, the process of deodorising renders it commercially marketable. Therefore, vanaspati is only said to have been manufactured in the fourth stage, because only then is it known as vanaspati to the consumers and the commercial community. (*Union of India* v. *Delhi Cloth and General Mills*, 1 ELT 199)

Illustration: A company produces an article X, which is in the First Schedule to the CET Act, 1985, which is then converted to Y, and sold in the market. Unless such X is produced in its marketable form, no liability to excise arises under the CE Act. However, if X is produced in its marketable form, but not sold, it would still amount to 'manufacture'. (*Bhor Industries* v. *C. C. E.*, 40 ELT 280)

Illustration: D Co. processes commercial plywood to make slip-proof commercial plywood. Both articles fall under the same entry in the Schedule to the CET Act. Still, since slip-proof commercial plywood is a distinct product that is brought into existence by the process, it is excisable. (*Decorative Laminates* v. *C. C. E.*, 86 ELT 186)

Marketability implies mobility. If the goods cannot be brought to the market, they are not marketable.

Illustration: A company manufactured a turbo-alternator that was made of a turbine and an alternator. But, as a turbo-alternator, it could not be taken to the market as such, and therefore, did not amount to 'manufacture'. (*Triveni Engineering* v. *C. C. E.*, 120 ELT 273)

Deemed Manufacture

S.2(f) of the CE Act lists out many processes that might not amount to manufacture under the classic understanding, but are deemed to be manufacture under the CE Act.

Manufacturer

The term 'manufacturer' is not defined in the Act, but is crucial because excise duty is imposed on a manufacturer. In its barest sense, 'manufacturer' means a person who does the manufacturing on her own or a person who does it through hired labour. This implies that there should be a clear master-servant or principal-agent relationship between the hirer and the labour.

Apart from the control test listed above, the Courts have also used the profit test. Under this test, a manufacturer is the one who enjoys the profit or bears the loss of the process.

Illustration: K and Co. was in the business of selling agarbattis. It gave raw materials required for manufacturing agarbattis to different women, who made the battis in their own house. They were remunerated according to the number of packets they made. K and Co. sold these in the market. In this case, only the women were held to be liable to excise duty and not the company, since the women manufactured the goods without any supervision of the company, in their own houses. The transaction between the company and the women was on a principal-to-principal basis. (*C. C. E.* v. *Khambhatwala*, 84 ELT 161)

Central Excise Tariff

The First Schedule to the CET Act has a list of goods that are liable to excise, and are classified in an easy-to-use manner. The Schedules also list the rates at which excise duty is imposed on the various goods. S.2 of the CET Act sets out rules regarding how the classification is to be done:

- The titles of the sections, chapters, and sub-chapters are only for guidance, and have no bearing on the classification.
- If a heading refers to an article, it refers to the article, finished or unfinished, as long as it has the essential character of a finished article.
- If a heading refers to a substance or a material, it refers to mixtures involving that substance or material.
- If the goods are, *prima facie*, classifiable under more than one heading, the heading that is more specific will be preferred to the general.
- In the case of mixtures or composite goods that cannot be classified under (a), they shall be classified according to the component that gives its essential character.
- Goods that cannot be classified under any of the above rules are to be classified under the heading to which they are most akin.

Valuation of Excisable Goods

There are two modes of valuation under the CE Act.

Under S.4 of the Act, the assessment of the value of excisable goods is made on the 'transaction value' – the total sale consideration in the transaction of sale excluding taxes. Three conditions have to be fulfilled for the transaction value to be considered. First, the assessee must sell the goods for delivery at the time and place of removal. Second, the assessee and the buyer must not be related. Third, the price is the sole consideration for the sale. If any of these conditions are not fulfilled, then the valuation takes place under the Central Excise Valuation Rules, 2000.

Under S.4A of the CE Act, valuation is done on the maximum retail price of the goods. In the case of certain goods, under the Packaged Commodities Rules, 1977, and the Standards of Weights and Measures Act, 1958, the maximum retail price is required to be printed on the packaging of such goods. In such cases, the Central Government can issue a notification in the Gazette, requiring the valuation of the goods to be done under. S.4A. The value of such goods shall be the MRP of

the goods.

Service Tax

Service Tax is levied by the Union on services under its residuary powers under Entry 96 of List I of the Seventh Schedule of the Constitution of India. Although Entry 92-C of the List does mention "Taxes on services", the Entry has not been notified till date.

Legislation

Service Tax was introduced in India through the Finance Act, 1994 ("**the FA, 1994**"), and continues to be levied under that Act. No separate legislation exists, to this day, dealing with service tax.

Taxable Event, Charging Provision

The taxable event in service tax is the provision of a 'taxable service'. Under S.66, which is the charging provision, service tax is levied on any 'taxable service' as defined under S.65(105) of the FA, 1994. After the introduction of S.66A, services that are provided from outside India to a recipient in India are taxable under the Act. Tax is calculated on the consideration paid for the service.

Taxable Service

Only services that are listed in S.65(105) of the FA, 1994, are liable to service tax. The section stipulates that any services that are "provided, or to be provided" in relation to a variety of items are taxed in India.

The Supreme Court has held in *iMagic Creative* v. *C. C. T.*, (2008) 2 SCC 614, that payments of sales tax and service tax are mutually exclusive. If service tax is paid on a transaction, then no sales tax can be imposed on the same transaction. Many transactions, however, especially financial leasing, hire purchase, and certain software contracts, continue to be liable to both sales and service tax.

Customs Duty

Legislation

Customs duty is a tariff or tax imposed on the import of goods. As in the case of excise, the tax is not imposed on the goods, but on the activity of import. Customs duties are levied under the Customs Act, 1962, read with the Customs Tariff Act, 1975 ("**CTA**").

Types of Customs Duties

The types of customs duties imposed in India are:

- *Basic Customs Duty*: Basic customs duty is leviable under S.12 of the Customs Act. Normally, it is levied on an *ad-valorem* basis. In certain instances, the duty is prescribed on a "so many rupees per kilogram" measure.
- *Additional duty*: Any article imported into India, shall, in addition be subject to a countervailing duty ("**CVD**") equal to an excise duty for the time being under S.3(1) of the CTA.
- *Additional Duty to balance the excise duty on raw materials*: Under S.3(3) of the CTA, in addition to the CVD, on some special items, an additional duty is imposed to balance the excise duty paid on raw materials and certain inputs.
- *Additional duty in lieu of sales tax / VAT*: Under S.3(5) of the CTA, the Central Government can impose an additional duty to counter-balance sales tax, VAT, local taxes, or other similar taxes.
- *Protective Duty:* In the interests of certain industries, under S.6 of the CTA, the Government can impose a protective duty on the good.
- *Safeguard Duty:* If the Central Government, after enquiries, feels that certain articles are imported in quantities that are harmful to domestic industry, then a safeguard duty can be imposed on such articles under S.8B of the CTA.
- *Safeguard Duty on China:* On certain goods from China as above.
- *CVD on subsidised article:* If an article is subsidised in the country of its manufacture, then the Government can

impose, under S.9 of the CTA, a CVD on such article to balance such subsidy.

- *Anti-dumping duty*: Where the Government ascertains that articles are being imported into India at a rate lower than their normal value, that is, in other words, if they are being "dumped", it can impose a duty to normalise such "dumping" under S.9A of the Act.

Valuation of Goods

Goods are valued for the purpose of customs duty under S.14 of the CTA. The basic rule of valuation is that the price actually paid or that is payable ("transaction value") for the goods when sold for export to the country of importation is the basis for customs valuation. Rule 9 of the Valuation Rules, 1988, contains various other items that are to be included in the transaction value, if these are not already included in the value.

If, however, the sale is not made under normal competitive conditions, but is made to a related enterprise, or the data regarding the adjustments to be made under Rule 9 do not exist, then alternate methods are prescribed for the valuation of these goods.

Duty Drawback

"Duty drawback" means a refund or rebate of duties of customs and central excise paid on imported or indigenous inputs, allowed at the time of export. Duty drawback is allowed on the re-export of duty paid goods (S.74) and imported materials used in the manufacture of goods that are exported (S.75).

Sales Tax

Legislation

The Centre's power to impose sales tax on goods is regulated by A.286 of the Constitution. Only sales that are in the course of inter-state trade and commerce can be liable to central sales tax. All other sales are liable to State sales tax governed by local legislation. The Central Sales Tax Act, 1956 ("**the CST Act**"), levies central sales tax on inter-state sales.

Taxable Event

The taxable event, in all sales tax, is the sale of a good. In certain cases, the legislature may specify that the liability to pay tax is on the purchaser. In such cases, the tax is called a "purchase tax", although it is usually governed by the same legislation and is collected in the same manner.

Sale

The meaning of "sale" for the purposes of sales tax is similar to the understanding in the Sale of Goods Act, 1930. It is defined in S. 2(g), and includes certain special conditions as well. In some cases, enumerated under A. 366(29-A) of the Constitution, however, there is a "deemed sale". Deemed sales include compulsory sale, hire purchase, lease, transfer of right to use the goods, works contracts, and so on.

Inter-State Sale

S.3 of the CST Act formulates the principles for when a sale is considered a sale in the course of inter-state trade and commerce. It holds that when the sale "occasions the movement of goods" from one state to another, or when it is effected by a transfer of the documents of title to the goods during their movement from one state to another, it is an inter-state sale.

Illustration: A company with its head office in State A manufactures air-conditioners in state B. It receives orders at its head office in A, transports the goods from its factory in B, and sends it to its customers in A, B, or other states. All the sales are in the course of inter-state trade and commerce, since the movement of goods is occasioned from state A to state B as a result of the contract made in State A. (*Union of India* v. *K.G. Khosla*, 43 S.T.C. 437)

Value-added Tax

Value-added Tax is a system of taxation that

seeks to avoid the cascading effect of taxation. For instance, excise is imposed on the manufacture of goods, and such goods are used as raw materials in another industry, and excise is imposed again on the finished goods. In the second stage, excise duty is not only being imposed on the goods, but also on the excise duty used in manufacture of raw materials. In a value-added tax system, a manufacturer is given credit for the tax paid on the inputs for her industry, and avoids a tax on tax.

Illustration: V Co. is a pharmaceutical company that is engaged in producing drug F. F uses H, J, and T as raw materials. H costs Rs.100/-, J costs Rs.50/-, and T costs Rs.30/-. Excise duty at 10% is imposed on each input. Therefore, the duty paid on the inputs by V Co. is Rs.18/-.

Say, F is priced at Rs.250/- per unit, and excise duty of Rs.25/- is payable on it. If there is no VAT, the customer will have to pay Rs. 250/- plus Rs.25/- as excise. However, under the VAT system, V Co. can claim Rs.18/- as credit for taxes and will only pass Rs.7/- as tax on to its customer.

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Notes:

All India Bar Examination
Preparatory Materials

Subject 20: Public International Law

International law is that body of law composed of principles and rules of conduct which States recognise as binding, and therefore, commonly observe in their relations with each other. Note that 'State' in this module refers to a sovereign political entity, or, as it are commonly referred to, a 'country'. As such, international law may be referred to as 'public international law' and is in contrast to 'private international law.' Public international law refers to rules, laws, and principles of general application that deal with the conduct of States and international organisations among themselves, as well as the relationships between States and international organisations with persons, whether natural or juridical. Private international law, on the other hand, refers primarily to the resolution of conflict of laws in the international setting and involves determining the law of which State is applicable in specific situations.

Sources of International Law

A.38(1) of the 1946 Statute of the International Court of Justice ("**the Statute of the ICJ**") identifies the sources of international law as:

- International conventions (treaties);
- International custom, as evidence of a general practice accepted as law;
- The general principles of law recognised by civilised nations;
- Judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.

Conventions (also known as *treaties*): Those agreements whereby States establish their position in international law on a particular topic or establish new rules to guide them for the future in their international conduct. Such law-making treaties require the participation of a large number of States, and may produce rules that will bind all states that are parties to them. A number of contemporary treaties, such as the Geneva Conventions (1949) and the United Nations Convention on the Law of the Sea (1982), have more than 150 parties to them, reflecting both their importance and the evolution of the treaty as a method of general legislation in international law. Other significant treaties include the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the Vienna Convention on Diplomatic Relations (1961), the Antarctic Treaty (1959), and the Rome Statute establishing the International Criminal Court (1998).

Countries that do not sign and ratify a treaty are not bound by its provisions. Treaty provisions can, however be the basis of international custom in certain circumstances, provided that the provision is "*of a fundamentally norm-creating character.*" (*North Sea Continental Shelf case*, ICJ Reports, (1969), p. 3*)*

Customary International Law: In international law, a rule of custom evolves from the practice of States. There must be evidence of substantial uniformity of practice by a substantial number of States.

Illustration: The customary rule (now superseded), that States had the right to exclusive fishing within a twelve nautical mile zone, emerged from the practice of states. (*Fisheries Jurisdiction cases (United Kingdom* v. *Iceland; Germany* v. *Iceland)*, ICJ Reports (1974), p. 3)

For a custom to be accepted and recognised, the other major powers in that field must concur with it. Other countries may propose ideas and institute pressure, but without the concurrence of those most interested, it cannot amount to a rule of customary law.

Where a new rule is created, acquiescence is assumed from actual agreement or from lack of interest. But, if the new practice is not consistent with an established customary rule, and a State is a *persistent objector* to the new practice, the practice may either not be

regarded as evidence of a new custom or the persistent objector may be regarded as having established an exception to the new customary rule.

For the creation of a new rule of custom, in addition to practice, there must also be a general recognition by States that the practice is settled enough to amount to an obligation binding on States under international law. This is known as *opinio juris*. This is the factor that turns usage into custom and renders it a part of international law. (*Nicaragua* v. *United States of America*, ICJ Reports (1986), p. 14)

General Principles of Law: International courts and tribunals attempt to fill the gaps in international law by borrowing concepts from domestic law if they can be applied to relations between States. Such concepts are chiefly with regard to procedure and evidence, (*Corfu Channel case*, ICJ Reports (1949), p. 4), or based on analogies drawn from private law, such as good faith. (*Nuclear Tests case*, ICJ Reports (1974), p. 253), and estoppel (*Temple case*, ICJ Reports (1962) p. 6)

Judicial Decisions: A.38 of the ICJ Statute provides that the judgments of courts and tribunals are a subsidiary source of international law. However, they are only persuasive authority. Most cases involving points of international law are often first presented in domestic courts. The effect of such decisions of domestic courts on a particular legal point can be evidence of custom, although it is possible that domestic courts may interpret international law inaccurately.

Teachings of the Most Highly-Qualified ~~Writers~~Publicists: The role played by ~~writer~~publicists on international law is also subsidiary, though in the formative days of international law, their views may have been more influential than they are today. Treatises on international law are used as a method of discovering what the law is on any particular point. These textbooks are important as they help to arrange and put into focus the structure and form of international law. They also help to understand the nature, history, and practice of international law. Academic writings play a useful role in stimulating thought about the values and aims of international law as well as pointing out the defects that exist within the system, and making suggestions for the future.

Other Sources of International Law: General Assembly Resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence that is important for establishing the existence of a rule or the emergence of an *opinio juris.* To establish whether this is true of a General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. A series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule. (*Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996), p. 70)

Non-binding instruments or documents such as the Helsinki Accord of 1975, or non-binding provisions in treaties form a special category termed 'soft law'. While soft law may not have the ordinary force of law, it is still considered a source of international law.

Jurisdiction

A State may exercise jurisdiction and thereby override the interests of a competing state if there is a close connection between the subject matter and the State.

Territorial Principle: A State is free to legislate and enforce legislation within its territory, except when that freedom is restricted by treaty. It can enforce its legislation on any person within its territory, including foreign nationals. A State's laws apply to ships flying its flag or aircraft registered with it, and on persons on board these carriers. This is the primary basis for jurisdiction.

Illustration: Scottish courts exercised jurisdiction over the bombers of the airplane that exploded over the Scottish town of

Lockerbie. (*Lockerbie case*, ICJ Reports (1992) p. 12)

Nationality Principle: A State can make legislation regulating the activities of its nationals living or visiting outside its territory. An example of this would be tax laws. States may enact legislation that provides for the repatriation and prosecution of its nationals who commit offences abroad and for extradition for that purpose as well. Unless a treaty allows for it, legislation cannot be enforced within another State.

Passive Personality Principle: This principle refers to the assertion of jurisdiction by a State over acts committed abroad against its own nationals by foreign nations. The *Lotus case* (1927 PCIJ Ser. A, No. 10) is often cited as the basis for this principle and is now found in various counter-terrorism conventions.

Illustration: A Lebanese citizen was captured by United States' ("**the US**") agents in international waters. He was prosecuted in the US for his alleged involvement in the hijacking of a Jordanian airplane that had several American passengers. (*United States of America* v. *Yunis*, *(No. 2)*, 82 ILR p. 344)

Protective Principle: In certain circumstances, a State can establish its jurisdiction over a foreign national who commits an offence abroad that is prejudicial to the State's security, even if the act is not an offence under the State's domestic law. The scope of this principle is not well defined, but is seen in treaties that provide for *quasi*-universal jurisdiction.

Illustration: A was born in America but fraudulently acquired a British passport and subsequently claimed to have acquired German nationality. It was proved that he had been employed by a German radio company, and that he had delivered from enemy territory broadcast talks in English hostile to Great Britain. British courts would have jurisdiction over A as he is a British subject and therefore he owes a duty to the Crown and enjoys the protection of the Crown despite the fact that the treason occurred outside British territory. (*Joyce* v. *Director of Public Prosecutions*, 15 ILR p. 91)

Universal and Quasi-*Universal Jurisdiction*: It is exceptional for States to have jurisdiction based on the protective principle. But, certain crimes including piracy, slavery, torture, war crimes, genocide, and other crimes against humanity are so prejudicial to the interests of all states, that customary international law (in this case, often derived from treaty law) does not prohibit a State from exercising jurisdiction over them, wherever they take place and whatever the nationality of the alleged offender or victim. This is known as universal jurisdiction.

This principle has been embodied in universal treaties dealing with terrorism, drug trafficking, and corruption. In these cases, the principle only binds the treaty parties and is called *quasi*-universal jurisdiction.

Illustration: All states may both arrest and punish pirates apprehended on the high seas. (A.105 of the Convention on the Law of the Sea, 1982)

The Law of Treaties

The Vienna Convention on the Law of Treaties, 1969 ("**the Vienna Convention, 1969**"), codified the rules and procedure for making and applying treaties, including the law of treaties. A.2(1)(a) of the Vienna Convention, 1969 defines 'treaty' as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

The term 'treaty' includes treaties that are universal or regional, intergovernmental, inter-ministerial, or administrative. A treaty can be bilateral (between two parties) or multilateral (between three or more parties). Further, there must be an intention to create obligations under international law in the treaty. A treaty can be constituted by an exchange of third-person diplomatic notes,

which are initialled but not signed. A Memorandum of Understanding ("**MOU**") is distinguishable from a treaty based on the language used in it. MOUs are preferred because of confidentiality, especially in defence arrangements.

Credentials and Full Powers: Treaties are made between subjects of international law – between states; between states and international organisations; and between international organisations. Every state possesses the capacity to conclude treaties. (A. 6, Vienna Convention, 1969)

Credentials are issued by a State, usually by the foreign minister, to a delegate to a multilateral treaty conference, authorising her to represent that State. It is then presented to the host government or international organisation. These credentials grant the delegate the authority to negotiate and adopt the text of the treaty and to sign the final act only. A person is considered to be representing a State for the purpose of adopting the text of a treaty if she produces appropriate full powers. (A.7(1), Vienna Convention, 1969)

Adoption and Authentication: Once negotiations are complete, it is necessary for the negotiating States to adopt the text. The act of adoption does not amount to consent to be bound by the treaty. Adoption at an international conference requires two-thirds vote of the States 'present and voting'. (A.9(2), Vienna Convention, 1969)

Initialling the text of a bilateral treaty amounts to both adoption and authentication. Treaties adopted within an international organisation are authenticated by the adoption of a resolution by an organ of the organisation, such as the assembly, or by the act of authentication performed by the president of the assembly or the chief executive officer of the organisation.

Consent: There are a number of ways by which a State may express its consent to an international agreement. It may be signalled by signature, the exchange of instruments constituting a treaty, ratification, acceptance, approval, or accession. It may also be expressed by previously agreed means. (Aa.11 – 17, Vienna Convention, 1969)

Illustration: India has not signed the Comprehensive Nuclear Test Ban Treaty ("**the CTBT**"), although it was a party to the negotiations surrounding the CTBT. This indicates that India does not agree with the terms contained therein.

Illustration: India signed and ratified the United Nations Convention on the Rights of Persons with Disabilities ("**the UNCRPD**"). This indicates that India intends to amend domestic law to reflect the terms contained within the UNCRPD. The United Kingdom ("**the UK**") has signed but not ratified this treaty indicating agreement with the terms in the UNCRPD. The UK needs to make changes to domestic laws before ratifying the UNCRPD.

Illustration: India had signed and ratified the Convention on the Elimination of all forms of Discrimination against Women ("**the CEDAW**"). However, it was the Supreme Court of India in *Vishakha and Others* v. *State of Rajasthan,* AIR 1997 SC 3011, that utilised provisions in the CEDAW to create laws governing sexual harassment at the workplace in India.

Reservations: A.2(1)(d) defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State." A reservation cannot be made to a bilateral treaty. All terms of such treaties must be agreed to before it can bind the parties.

A State may seek to fine-tune or adjust the application of a multilateral treaty by using reservations. A State which has made and maintained a reservation which has been objected to by one or more parties to the Convention but not by others, can be regarded as being a party to the Convention, if the

reservation is compatible with the object and purpose of the Convention. (*Reservations to the Genocide Convention case*, ICJ Reports (1951) p. 15)

A.19 permits reservations to be made when signing, ratifying, accepting, approving, or acceding to a treaty, but not where prohibited by the treaty, or where only specified reservations may be made or where the reservation is not compatible with the object and purpose of the treaty.

A.21(1) speaks of the legal effects of a reservation which has been established with regard to another party. An effective reservation operates reciprocally between a party and any other party that has not objected to the reservation, thereby modifying the treaty to the extent of the reservation for them in their mutual relations. But, as between the other parties, the treaty remains unaffected. (A.21(2), Vienna Convention, 1969)

Entry into Force: In the absence of any provision or agreement regarding when a treaty will become operative, it will enter into force as soon as consent to be bound by the treaty has been established for all the negotiating States. (A.24, Vienna Convention, 1969)

Illustration: The Geneva Convention on the High Seas, 1958, provides for entry into force on the thirtieth day following the deposit of the twenty-second instrument of ratification with the United Nations Secretary-General.

Treaties and Domestic Law: A.26 of the Vienna Convention, 1969, contains the fundamental principle of the law of treaties: every treaty in force is binding upon the parties to it and must be performed in good faith (*pacta sunt servanda*). If new legislation or modifications to existing laws are necessary in order to comply with a new treaty, the State must ensure that this has been done by the time the treaty enters into force for it. (A.27, the Vienna Convention, 1969)

Interpretation: Aa.31 to 33 of the Vienna Convention, 1969, are concerned with interpretation. Aa.31 lays down the fundamental rules of interpretation and reflects customary international law.

The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to give effect to them in their natural and ordinary meaning in the context in which they occur. (*Competence of the General Assembly for the Admission of a State to the United Nations case*, 82 ILR, p. 590)

If, however, there remains confusion regarding the interpretation according to the provisions of A.31, the supplementary means of interpretation under A.32 may be relied upon. This includes the preparatory works (*traveaux préparatoires*) of the treaty and the circumstances of its conclusion.

A.33 of the Vienna Convention, 1969, deals with the interpretation of treaties authenticated in two or more languages.

Invalidity of Treaties: A.44 of the Vienna Convention, 1969, provides that a State may only withdraw from or suspend the operation of a treaty in respect of the treaty as a whole. A.45 provides that a ground for invalidity, termination, withdrawal, or suspension may no longer be invoked by the State where after becoming aware of the facts, it expressly agreed that the treaty is valid or remains in force, or where by reason of its conduct, it may be deemed to have acquiesced in the validity of the treaty or its continuance in force.

A State cannot plead a breach of its internal laws as to the making of treaties as a valid excuse for condemning a treaty. (Article 46, Vienna Convention, 1969)

A State may only invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and which formed an essential basis of its consent to be bound by the treaty (A.48, Vienna Convention, 1969)

Where a State's consent to be bound by a treaty has been caused by the fraudulent conduct of another negotiating State, that State may invoke the fraud as invalidating its consent to be bound. (A.49, Vienna Convention, 1969)

Where a negotiating State directly or indirectly corrupts the representative of another State in order to obtain the consent of the latter to the treaty, that corruption may be invoked as invalidating the consent to be bound. (A.50, Vienna Convention, 1969)

Where consent has been obtained by coercing the representative of a State, whether by acts or threats directed at her, it shall be without any legal effect. (A.51, Vienna Convention, 1969)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. (A.53, Vienna Convention, 1969) If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. (A.64, Vienna Convention, 1969)

An invalid treaty is void and without legal force. Acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason only of the invalidity of the treaty. (Article 69, Vienna Convention, 1969)

Termination of Treaties: A treaty may be terminated or suspended in accordance with a specific provision in that treaty, or at any time by consent of all the parties after consultation. (Aa.54 and 57) If a treaty contains no such provision, a State may only denounce (bilateral treaty) or withdraw (multilateral treaty) from that treaty. (A.56, Vienna Convention, 1969)

A material breach of a treaty consists of either a repudiation of the treaty not permitted by the Convention or the violation of a provision essential to the accomplishment of the object or purpose of the treaty. (A.60(3), Vienna Convention, 1969)

Where the carrying out of the terms of the agreement becomes impossible because of the permanent destruction or disappearance of an object indispensable for the execution of the treaty, a party may validly terminate or withdraw from it. (A.61, Vienna Convention, 1969)

Dispute Settlement: If a dispute has not been resolved within twelve months by the means specified in A.33 of the United Nations ("**UN**") Charter, then further procedures will be followed. If the dispute concerns Aa.53 or 64 (*jus cogens*), any one of the parties may, by a written application, submit it to the International Court of Justice ("**the ICJ**") for a decision unless the parties by common consent submit the dispute to arbitration. If the dispute concerns other issues in the Convention, any one of the parties may, by request to the UN Secretary-General, set in motion the conciliation procedure laid down in the Annex to the Convention. (A.66, Vienna Convention, 1969)

Topics in International Law

International law, being a body of law that has been in development over hundreds of years, has been categorised into various sub-topics. These include:

- International humanitarian law or the laws of war;
- The law of the sea;
- International civil aviation;
- International criminal law;
- International economic law; and
- International environmental law.

*International Humanitarian Law ("**IHL**")*

IHL consists of the following:

- The rules on how hostilities can be conducted in a lawful manner (Hague Law consisting of the Hague Conventions of 1899 and 1907); and
- The rules governing the treatment of non-combatants (The Geneva Law Conventions and three Additional Protocols).

Even when a State is not a party to an IHL treaty, it will be bound by those of its rules that are now considered a part of customary international law, such as the original Hague Law and Geneva Law Conventions (except for Additional Protocols I and II). (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004) p. 89)

IHL deals with international armed conflicts. The legal distinction between international and internal armed conflicts, however, is becoming smaller. (*Tadic*, 105 ILR 453 p. 489)

The central principle of IHL is that only those acts as are necessary to defeat the enemy are permissible, while the means and the objects against which they are used are restricted. The basic rules for land warfare apply also to warfare at sea or in the air.

A.35 of the Additional Protocol I prohibits the use of *arms, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering*.

IHL applies to the threat or use of nuclear weapons. (*The Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, ICJ Reports (1996) p. 226)

The Biological Weapons Convention, 1972, and the Chemical Weapons Convention, 1993, prohibit the possession of such weapons thereby banning their use in armed conflict.

A.4 of the Third Geneva Convention, which relates to the Treatment of Prisoners of War ("**POW**"), states that POW status is conferred on the members of the armed forces of a party to the conflict, including militias or volunteer corps that are a part of the forces. The POW categories were enlarged by Additional Protocol I, Aa.43 and 44, to cover irregular or resistance forces.

The treatment of civilians is the subject of the Fourth Geneva Convention. They are also the subject of Additional Protocol I, which adds significantly to the duty to protect civilians and civilian objects during active hostilities. The fundamental rule expressed in A.48 of Additional Protocol I is that armed forces must distinguish between civilians and militants, and between civilian and military objectives, and direct their operations only against military objectives.

All war crimes are crimes for which there is universal jurisdiction.

Law of the Sea

The first successful attempt to codify the law of the seas was the 1958 UN Convention on the Law of the Sea, but the most important aspects of the law are now set out in the UN Convention on the Law of the Sea, 1982 ("**the UNCLOS**"). The law is a mixture of treaty and established or emerging customary international law, that has developed over centuries. For those states that are parties to the 1958 Convention, the UNCLOS replaces it. As most of the UNCLOS represents customary international law, even non-parties, such as Iran and the United States of America, are bound by those provisions.

International Terrorism

International law relating to terrorism is presently still in the process of being crystallised. For instance, there are several UN, multilateral and regional Conventions that attempt to address various issues involving terrorism, and yet States and other players in international relations remain unable to even establish a universally agreed, legally binding definition of terrorism.

Two key conventions on terrorism adopted by the General Assembly are: International Convention for the Suppression of Terrorist Bombings (1997), and the International Convention for the Suppression of Acts of Nuclear Terrorism (2005).

International Civil Aviation

The Chicago Convention on International Civil Aviation, 1944 ("**the Civil Aviation Convention**"), provides the essential

framework for international civil aviation. It also established the International Civil Aviation Organization. The Civil Aviation Convention has 188 parties.

The purpose of the Warsaw Convention for the Unification of Certain Rules relating to Carriage by Air, 1929, was to create one liability regime, with the key elements being uniform documentation, liability without proof of negligence, limits on compensation, and specified jurisdictions at the choice of the claimant. The Montreal Convention for the Unification of Certain Rules for International Carriage by Air, 1999, is intended to replace the whole Warsaw regime. This Convention entered into force in 2003 and has sixty-five parties, including the European Community and the United States of America.

Bodies and Organisations of International Law

The United Nations

The United Nations ("**UN**") was established by the UN Charter, 1945 ("**the UN Charter**"). To be accepted as a Member (satisfying the conditions set out in A.4 of the UN Charter), the Security Council must first recommend membership and the General Assembly must then agree to admission by a two-thirds majority vote. (Aa.4(2) and 18(2), UN Charter)

The UN has six principal organs:

- The General Assembly;
- The Security Council ("**the SC**");
- The International Court of Justice ("**the ICJ**");
- The Economic and Social Council;
- The Trusteeship Council (now defunct); and
- The Secretariat.

Agencies such as the United Nations Environment Programme ("**the UNEP**"), the United Nations High Commissioner for Refugees ("**the UNHCR**"), and the United Nations Children's Fund ("**the UNICEF**") are not specialised agencies of the UN, but are bodies set up by the UN General Assembly, and lack separate international legal personality.

The General Assembly

The General Assembly consists of all Members of the United Nations, each having one vote. (A.18, UN Charter) Decisions on important questions like the budget and elections are taken by a two-thirds majority of those members present and voting. All other matters, including whether a question is important, are decided by a simple majority of those voting.

The General Assembly's resolutions are generally non-binding. Over time, however, the substance of certain resolutions may become accepted as customary international law.

The Security Council

The Security Council has fifteen members, of which five are permanent. The ten non-permanent members serve for two years, five of these members are elected each year by the General Assembly. These ten members cannot serve consecutive terms.

Each member of the Security Council has one vote, but, unlike the General Assembly, procedural matters are decided by the affirmative vote of nine or more members. (A. 27(2), UN Charter) No veto can be cast. Decisions on all other matters are also made by the affirmative vote of nine or more members, provided no permanent member has vetoed it. Contrary to A.27(3) of the UN Charter, the abstention or absence of a permanent member does not count as a veto. The practice of the Security Council from 1946 has been to interpret the term 'concurring' as 'not objecting' only.

A.24 of the UN Charter gives the Security Council the primary responsibility for the maintenance of international peace and security. The Security Council has the power to impose legally binding measures on all UN members. Most Council resolutions contain only recommendations and are informally referred to as 'Chapter VI resolutions' as

resolutions made under that chapter of the UN Charter are not binding. In contrast, resolutions made under Chapter VII or VIII authorise enforcement action by regional bodies and are binding. The combined effect of Aa.25 and 48 of the UN Charter is to place a legal obligation on all UN Members to carry out the measures.

International Court of Justice

The ICJ is the primary judicial organ of the United Nations. It was established in June 1945 by the Charter of the United Nations and began work in April 1946. The Court is composed of 15 judges, who are elected for terms of office of nine years by the United Nations General Assembly and the Security Council. (Aa.3 and 4 of the Statute of the ICJ)

The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorised United Nations organs and specialised agencies. The ICJ should not be confused with the International Criminal Court, which potentially also has global jurisdiction.

The ICJ has jurisdiction in two types of cases:

- Contentious issues between states in which the court produces binding rulings between states that agree, or have previously agreed, to submit to the ruling of the court; and
- Advisory opinions, which provide reasoned, but non-binding, rulings on properly submitted questions of international law, usually at the request of the United Nations General Assembly.

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Notes: