DIRECTORATE OF LEGAL STUDIES
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3 Year B.L., Course
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IV - Semester

COURSE MATERIALS

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1. LAW OF EVIDENCE

The Indian Evidence Act, 1872 comprises of 167 sections divided in to 11 chapters under 3 parts.

Part-I deals with relevancy of facts [Ss.1-55]

Part-II deals with on proof [Ss.56-100]

Part-III deals with production and effect of evidence [Ss.101-167].

Preliminary:

Law of Evidence is a procedural code which determines what sort of facts have to be proved to establish a matter in dispute and what sort of proof is to be given and by whom and in what manner such proof is to be given. Law of Evidence regulates both civil as well as criminal trial.

The fundamental rules of evidence are:

1. Evidence should be confined to the facts in issue,
2. Hearsay evidence should not be admitted i.e., hearsay evidence is not an evidence, and
3. Best evidence rule or best evidence must be given in all cases.

RELEVANCY

Facts in issue [Sec.51]	**Relevant facts which may be**
It means matter in controversy.	- facts connected with the facts in issue [Ss.6-16] - Admissions and confessions[Ss.17-31] - Statements by persons who cannot be called as witnesses [Ss.32-33] - Statements made under special circumstances [Ss.34-39] - Judgments in other cases [Ss.40-44] - Opinions [Ss.45-51] - Character [Ss.52-55]

Doctrine of Res-Gestae:

It means “the thing done, a subject matter, a transaction or essential circumstances surrounding the subject”. It is things done including words spoken, forming a part of the same transaction.

R v Foster, [1941] SC 363

The accused was charged with manslaughter for killing a person by driving over him. A witness saw the vehicle at a high speed, but did not see the accident. On hearing cries of the victim, he reached the spot. The victim died after making statement as to cause of the accident. The statement was held to be admissible.

Identification parade [Sec.9]:

Identification is an important process in the administration of justice. Identification parades are held for the purpose of identifying the properties, which are subject matter of an offence or persons concerned in an offence.

Conspiracy [Sec.10]:

Where there is reasonable ground to believe that two or more persons have inspired together to commit an offence or an actionable wrong, then anything that is said, done or written by any one of the conspirators with reference to a common design, can be used as an evidence against all other conspirators.

L.K.Advani v. C.B.I. [1997] Cr.L.J 2559.

C.B.I. seized certain diaries from the residence of one S.K.Jain. The entries in the diary showed that a payment of Rs. 60 lakhs has been made as an illegal gratification to Mr.L.K.Advani for pursuing the award of Govt. contract to foreign bidders. The court refused to accept the diary as a piece of evidence against Advani, on the ground that, the prosecution had failed to prove prima facie case of conspiracy and there is no evidence to show that the entries were made only in reference to a common design.

Alibi [sec.11]:

Facts not otherwise relevant are made relevant-

- if they are inconsistent with any fact in issue or relevant fact
- if by themselves or in connection with other facts they make the existence or non- existence of any fact in issue or relevant fact highly probable or improbable.

Admissions and confessions [Ss.17-31]:

Admission:

Admission means acknowledgement of existence or truth of a particular fact. The statements made by the parties during judicial proceedings are 'self regarding statements'. It is of two types:

1. Self-serving statements; and
2. Self-harming statements.

Sections 18-20 of the Act lay down the provisions relating to persons competent to make admissions.

1. Parties to the suit,
2. Authorized agents of the parties expressly or impliedly assigned,
3. Persons having proprietary or pecuniary interest in the subject matter of the suit, and
4. Persons from whom the party to the suit has derived his interest.

Confession [Sec 22]:

If a person accused of an offence makes a statement against himself, it is called confession. The confession made to a police officer cannot be proved against the accused person. "all confessions are admissions, but all admissions are not confessions".

A person may be convicted on the basis of his confession enshrined in two latin maxims such as:

1. Confession in Judicio Omini Probatione Major Est:

It means 'confession in judicial proceedings is greater than any other proof'.

2. Confession Facta in Judicio Est Plena Probatio:

Confession is the absolute proof'.

Sitaram v. State [1996] Supp. S.C.R. 265

The accused after committing murder left a confessional letter on the dead body. The letter was addressed to police officer. The court treated the letter, not addressed to police, since police officer was not nearby. The confession was admitted and the accused was convicted.

Dying declaration: [Ss.32 and 33]

A dying declaration is a declaration written or verbal made by a person, as to the cause of his death or as to any of the circumstances of the transaction, which resulted in his death.

Sec 32 makes relevant statements made by person.

1. Who is dead,
2. Who cannot be found,
3. Who has become incapable of giving evidence, or
4. Whose attendance cannot be procured without unreasonable delay or expenses.

Dying declaration is of the utmost importance and the evidence as to it should be exact and full. The general Ie is that hearsay evidence is no evidence and is not admissible in evidence. But Ss.32 and 33 are exceptions to it.

Moti Singh v. State of U.P, [A.I.R. 1964 SC 900]

It was held in this case that, if the person survives, his statement cannot said to be the statement as to cause of his death.

Pakala Narayana Swamy v. Emperor [A.I.R. 1939 PC 47]

The accused Pakala has borrowed a sum of Rs. 3000/- from the deceased. The deceased received a letter from the accused's wife asking him to come down to Berhampur to collect the money. After 2 days, his dead body, cut in to seven pieces, was found in a trunk in a railway compartment. After investigation the accused was arrested and he was tried for murder. At the trial the statement made by the deceased to his wife, while showing the letter, that he is proceeding to Berhampur to collect money was held to be admissible as dying declaration.

The Privy Council was of the opinion that this statements related to the circumstances that he was proceeding to the spot where he was killed, that he was invited by a particular person and all those constituted circumstances that brought about his death and are therefore admissible as dying declarations.

Judgments: [Ss. 40-44]

Ss. 40-44 lays down the provisions relating to judgments of court of justice, when relevant judgments are categorized it to 2 types:

1. Judgment in rem; and
2. Judgments in personam.

For the application of sec.41 , the following conditions are to be satisfied:

1. It should be final judgment and not an interlocutory one,
2. The court must be competent,
3. The judgment must be in exercise of any of following jurisdictions namely; probate, admiralty, matrimonial and insolvency,
4. Such judgment must confer upon or take away from any person any legal character or declare that any person is entitled to any specific thing absolutely.

Opinion of experts: [Ss. 45-51]

An expert is a skillful professional in particular field viz., art or trade, foreign law, identity of hand writing and finger expressions etc. the expert opinion is only a piece of evidence and cannot be taken as substantive evidence since it is to be judged along with the other evidence.

Mubarak Ali v. State of Bombay [A.I.R. 1957 SC 857]

The Supreme Court laid down that a witness must confine himself to the facts and not to the state of his opinion.

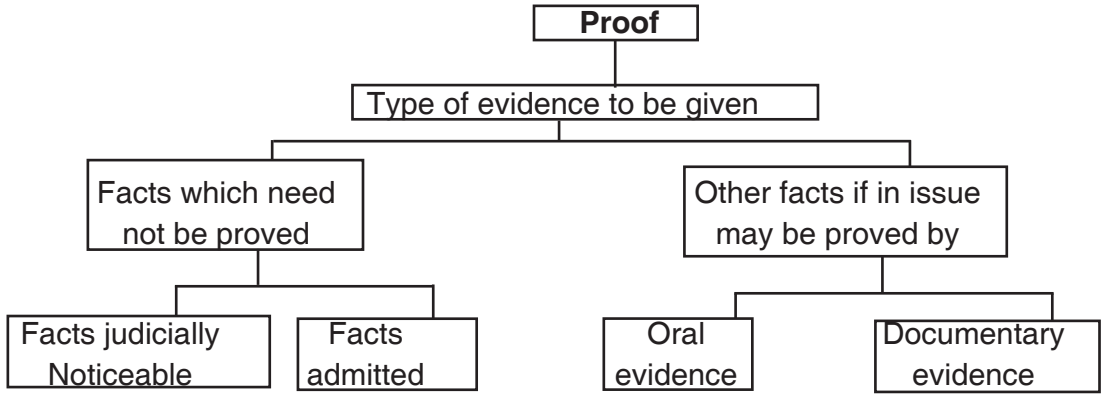
Relevancy of character: [Ss.52-55]

In civil proceedings, the evidence of good character or bad character is not relevant except in cases where such a bad conduct is itself a fact in issue in that particular case. In civil cases whenever damages are claimed, if evidence of character is likely to affect or mitigate such damages, the evidence of character becomes provable and not otherwise.

In criminal proceedings, the previous bad character of the accused is not relevant except under the following circumstances.

1. Where the accused himself comes forward and gives evidence of his good character and challenges the prosecution to prove his bad character, then as a reply to his challenge, the prosecution can let in evidence to prove the bad character of the accused.
2. Where the character of the accused itself is in dispute then evidence regarding bad character may be placed.
3. If the accused person has already been convicted for some other cases, the previous conviction can be used as an evidence for enhancement of punishment under section 75 of I.P.C.

Burden of Proof:



Whenever a party approaches the court for redressal for any injustice done to him, he release upon certain facts to claim his legal; right. Then, a question arises before the court is, who has to prove these facts, whether the plaintiff or the defendant?

In other words on whom the burden of proof shall lie. The burden of proof signifies on obligation imposed on a party to prove a fact. The general rule is who ever approaches the court to get a judgment in his favour, relying upon certain facts, he has to prove those facts. Whenever some facts which are within the special knowledge of a party and places as evidence, then the party who has such special knowledge should prove it.

Whenever an accused person pleads that his action does not constitute an offence, and his activities squarely fall within the general exceptions, that it is for the accused to prove that he comes within the general exceptions.

Where there is a question whether a man is alive or dead and if it shown that he was alive with in a period of 30 years, the burden of proving that he is dead is on the person who affirms it. On the other hand, if it is proved that he has not been heard for 7 years by those who would naturally have heard of him if he had been alive, the burden 0 proving that he is alive is shifted to the person who affirms it.

Estoppel:

When a person tells us something we generally hear him. If he says something different or contradicting, we would not hear any more and contradict such statement. This principle is enshrined in the maxim:

" **Aligans Contraria Non Est Audiendus**" which means "a man alleging contradictory facts ought not to be heard".

The principle of estoppels was laid down in the case of -

Pickard v. Seers [1832 A and E 469]

A was the owner of machinery. A allowed his friend, B to be in possession of the machinery. C obtained a decree against B and seized the machinery for which A did not raise any objection immediately. Later, C sold the machinery to other persons. Then, A raised an objection and sued C for getting up his title. The suit was dismissed on the ground that C cannot be stopped from sale. The doctrine is based upon 3 moral principles namely;

1. No one can blow hot and cold in the same breath.
2. No one can take the advantage of one's wrong.
3. No one can accept and reject at the same time.

M.P.Sugar Mills v. State of U.P [A.I.R. 1979 SC 621]

The Government through the Chief Secretary announced categorical assurance for the total exemption from the sales tax. Basing on this promise, the defendant setup a hydro generation's plant by raising huge loan. Later, the Government challenged its policy and announced the exemption of sales tax at 3, 2.1/2 and 2 for the 1 and 3rd years respectively. The tax exemption was completely withdrawn latter, when the defendant's factory started its production. The Supreme Court held that the Government is bound by its promise and directed to give exemption to the defendant's company.

Privileged communication: [Ss. 122-132]

The expression 'privilege' means 'a peculiar advantage or some special benefit conferred by virtue of sex or one's position'. Such persons are immune from liability or privileged. Any statements made by such persons is said to be privileged communication. Following are the instances of privileged communication.

1. Communication during marriage [Sec.122]
2. Evidence as to affairs of state [Sec.123]
3. Official communication [Sec.124]
4. Information as to commission of offences [Sec.125]
5. Professional communications [Sec.126]

T. J. Ponnen v. M. C. Verghese [AIR 1970 SC 1876]

The defendant i.e., husband of the plaintiff's daughter addressed a letter containing defamatory matter to his wife about the father i.e., plaintiff. Plaintiff noted the defamatory contents through his daughter i.e., wife of the defendant. In an action by the plaintiff against the son-in-law i.e., defendant the Kerala High Court held that suit was not actionable. But the Supreme Court reversed the above decision on the ground that if the communications between husband and wife have fallen into the hands of third person, they can be proved in any other way.

Examination of witness: [Ss.135-166]

Examination of witness consists of the following stages:

1. Examination-in-chief
2. Cross examination
3. Re-examination

Leading questions: [Ss.141-143]

Leading question means "a question, which by itself suggests the answer as expected by the person asked the same". The court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

Leading questions can be asked in cross-examination. They cannot be asked during chief examination or re-examination if they objected to by the adverse party except with the permission of the court. Indecent, scandalous questions intended to insult or annoy the witnesses shall not be asked.

Hostile witness: [Sec.154]

The word 'hostile' literally means "unfriendly". A witness is generally expected to give evidence in favour of the party by whom he is called. But in certain cases such witness may unexpectedly turn hostile and gives evidence against the interest of the party, who has called him. He is known as "adverse witness" or "unfavorable witness".

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2. ADMINISTRATIVE LAW

Origin and development of Administrative Law

Administrative Law is described as the outstanding legal development of the twentieth century. The role and the functions of the state have transformed a lot from that of a mere police state to welfare state. With the increase in number of disputes between government and individual, the state struggled to tackle the problem of just balance between individual liberty and public welfare. Subsequently, most of the cases required the judicial review of the administrative decisions. Thus all these developments have amplified the scope and influence of the administrative law.

Definition of Administrative Law

Administrative Law simply deals with the following aspects namely 1. Powers and composition of the administrative authorities 2. Fixing the limits of powers 3.The procedure which is to be followed by these authorities while they are exercising those powers and finally the judicial and other means to control these authorities.

Ivory Jennings:- "Administrative Law is the law relating to the administration. It determines the organisation, powers and duties of the administrative authorities."

K.C.Davis:- "Administrative Law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action."

Garner:- "Those rules which are recognized by the courts as law and which relate to and regulate the administration of government."

Powers and functions of Administrative Law:-

To ensure that the exercise of any category of administrative power is in accordance with the constitution, the law and rights and liberties of the citizens.

Distinction between the Constitutional Law and the Administrative Law:-

According to Hood Phillips "Constitutional Law is concerned with the organization and functions of government at rest whilst administrative law is concerned with that organization and those functions in motion.

Droit Administratif:-

French Administrative Law is known as Droit Administrative. It means a body of rules, which determine the organization, powers and duties of Public Administration and regulate the relation of the administration with the citizens of the country. Main features of Droit Administrative are as follows:-

1. Dual System of courts - separate administrative courts,
2. Conseil d'Etat,
3. Tribunal des conflicts and
4. Application of special rules.

Conseil d'Etat

In France, the Council of State (Conseil d'Etat) is a body of the French national government that provides the executive branch with legal advice and acts as the administrative court of last resort. The Council is primarily made up of high-ranking legal officers.

A General Session of the Council of State is presided over by the Prime Minister or, in his absence, the Minister of Justice. However, since the real presidency of the Council is held by the Vice-President, he usually presides all but the most ceremonial assemblies. This is also done for obvious reasons pertaining to the separation of powers. The Council's Vice-Chairman is ceremonially considered to be France's top functionary.

BASIC CONSTITUTIONAL PRINCIPLES

Doctrine of Rule of Law

One of the basic principles of English constitution is Rule of Law which is derived from the French phrase "Ia principle de legalite" which means a government based on the principles of law. The administrative law is purely based on the doctrine of rule of law which was originated by Sir Edward Coke, the then CJ of James I reign. Dicey developed this doctrine in his book called "The Law of Constitution". In the above mentioned book he advocated the following three meaning to the doctrine namely 1. Supremacy of Law, 2. Equality before law, 3. Predominance of legal spirit.

U.S.A.

All government officers of the United States, including the President, the Justices of the Supreme Court, and all members of Congress, pledge first and foremost to uphold the Constitution. These oaths affirm that the rule of law is superior to the rule of any human leader. I At the same time, the federal government has considerable discretion: the legislative branch is free to decide what statutes it will write, as long as it stays within its enumerated powers and respects the constitutionally protected rights of individuals. Likewise, the judicial branch has a degree of judicial discretion, and the executive branch also has various discretionary powers including prosecutorial discretion.

Scholars continue to debate whether the U.S. Constitution adopted a particular interpretation of the "rule of law," and if so, which one. For example, Law Professor John Harrison asserts that the word "law" in the Constitution is simply defined as that which is legally binding, rather than being "defined by formal or substantive criteria," and therefore judges do not have discretion to decide that laws fail to satisfy such unwritten and vague criteria. Law Professor Frederick Mark Gedicks disagrees, writing that Cicero, Augustine, Thomas Aquinas, and the framers of the U.S. Constitution believed that an unjust law was not really a law at all.

James Wilson said during the Philadelphia Convention in 1787 that, "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect." George Mason agreed that judges "could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as judges to give it a free course." Chief Justice John Marshall (joined by Justice Joseph Story) took a similar position in 1827: "When its existence as law is denied, that existence cannot be proved by showing what are the qualities of a law."

India

Dicey's rule of law has been adopted and incorporated in the Indian Constitution. The aforesaid principles are enriched in Part III of the Indian Constitution. India has a written constitution; a body of laws, subordinate to the constitution, dealing with various subjects; rules and regulations, executive instructions & Conventions. All these may be broadly termed as 'law' and their operation to subject population is the 'Rule of Law.' India is, in many senses, a typical example of a modern nation state. It contains within itself most of that which commends a state to the universal body politic. It has managed to stay within the definition of democratic. It has an elaborate, written constitution clearly delineating the three pillars of the modern nation state viz. the legislature, the executive and the judiciary, and demarcating their respective roles.

The fundamental rights embodied in the Indian constitution in terms virtually identical term to the universal declaration of human rights act as guarantee that all Indian citizens can and will lead their lives in peace as long as they obey the law. These civil liberties take precedence over any other law of the land. They include individual rights common to most liberal democracies, such as equality before the law, freedom of speech and expression, freedom of association and peaceful assembly, freedom of religion, and right to constitutional remedies, such as Habeas Corpus, for the protection of civil rights. These rights are fundamental rights because they are certain basic human rights which every human being

has the right to enjoy for a balanced and harmonious growth of his or her personality. These rights are guaranteed in the constitution of India and help in the growth and development of responsible citizens. The constitution provides for safeguards against any violation of these rights. These safeguards can be enforced in a court of law, hence they are justiciable rights. They check the government from making laws that go against fundamental rights. Furthermore, they act as bulwark against various forms of exploitation which take place against women, children and minority communities.

Doctrine of Separation of Power

There are three distinct activities in every government through which the will of the people are expressed. These are the legislative, executive and judicial functions of the government. Corresponding to these three activities are three organs of the government, namely the legislature, the executive and the judiciary. The legislative organ of the state makes laws, the executive enforces them and the judiciary applies them to the specific cases arising out of the breach of law. Each organ while performing its activities tends to interfere in the sphere of working of another functionary because a strict demarcation of functions is not possible in their dealings with the general public. Thus, even when acting in ambit of their own power, overlapping functions tend to appear amongst these organs.

It is widely accepted that for a political system to be stable, the holders of power need to be balanced off against each other. The principle of separation of powers deals with the mutual relations among the three organs of the government, namely legislature, executive and judiciary. This doctrine tries to bring exclusiveness in the functioning of the three organs and hence a strict demarcation of power is the aim sought to be achieved by this principle. This doctrine signifies the fact that one person or body of persons should not exercise all the three powers of the government.

Montesquieu, a French scholar, found that concentration of power in one person or a group of persons results in tyranny. And therefore for decentralization of power to check arbitrariness, he felt the need for vesting the governmental power in three different organs, the legislature, the executive, and the judiciary. The principle implies that each organ should be independent of the other and that no organ should perform functions that belong to the other.

Montesquieu in the following words stated the Doctrine of Separation of Powers

There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

Through his doctrine Montesquieu tried to explain that the union of the executive and the legislative power would lead to the despotism of the executive, for it could get whatever laws it wanted to have, whenever it wanted them. Similarly the union of the legislative power and the judiciary would provide no defence for the individual against the state. The importance of the doctrine lies in the fact that it seeks to preserve the human liberty by avoiding concentration of powers in one person or body of persons.

Separation Of Powers Under Different Constitutions:-

Despite the safeguards it gives against tyranny, the modern day societies find it very difficult to apply it rigidly. In principle they go for separation of powers and dilution of powers simultaneously.

U.S.A.

The doctrine of separation finds its home in U.S. It forms the basis of the American constitutional structure. Art. I vests the legislative power in the Congress; Art. II vests executive power in the President and Art. III vests judicial power in the Supreme Court. The framers of the American constitution believed that the principle of separation of powers would help to prevent the rise of tyrannical government by making it impossible for a single group of persons to exercise too much power. Accordingly they intended that the balance of power should be attained by checks and balances between separate organs of the government. This alternative system existing with the separation doctrine prevents any organ to become supreme.

Despite of the express mention of this doctrine in the Constitution, U.S. incorporates certain exceptions to the principle of separation with a view to introduce system of checks and balances. For example, a bill passed by the Congress may be vetoed by the President in the exercise of his legislative power. Also treaty making power is with the President but it's not effective till approved by the Senate. It was the exercise of executive power of the senate due to which U.S. couldn't become a member to League of Nations. The Supreme Court has the power to declare the acts passed by the congress as unconstitutional. There are other functions of an organ also which are exercised by the other. India, too, followed U.S. in adoption of the checks and balances which make sure that the individual organs doesn't behold the powers absolutely.

This means that functioning of one organ is checked by the other to an extent so that no organ may misuse the power. Therefore the constitution which gives a good mention of the doctrine in its provisions also does not follow it in its rigidity and hence has opted for dilution of powers just like India.

U.K.

Before we go to India, it's important to know the constitutional setup of the country to which India was a colony and ultimately owes the existence of the form of government it has. U.K. follows a parliamentary form of government where the Crown is the nominal head and the real legislative functions are performed by the Parliament. The existence of a cabinet system refutes the doctrine of separation of powers completely. It is the Cabinet which is the real head of the executive, instead of the Crown. It initiates legislations, controls the legislature, it even holds the power to dissolve the assembly. The resting of two powers in a single body, therefore denies the fact that there is any kind of separation of powers in England.

India

Though, just like American constitution, in Indian constitution also, there is express mention that the executive power of the Union and of a State is vested by the constitution in the President and the Governor, respectively, by Articles 53(1) and 154(1), but there is no corresponding provision vesting the legislative and judicial powers in any particular organ. It has accordingly been held that there is no rigid separation of powers.

Although prima facie it appears that our constitution has based itself upon doctrine of separation of powers. Judiciary is independent in its field and there can be no interference with its judicial functions either by the executive or the legislature. Constitution restricts the discussion of the conduct of any judge in the Parliament. The High Courts and the Supreme Court has been given the power of judicial review and they can declare any law passed by parliament as unconstitutional. The judges of the S.C. are appointed by the President in consultation with the CJI and judges of the S.C. The S.C. has power to make Rules for efficient conduction of business

It is noteworthy that A. 50 of the constitution puts an obligation over state to take steps to separate the judiciary from the executive. But, since it is a DPSP, therefore it's unenforceable.

In a similar fashion certain constitutional provisions also provide for Powers, Privileges and Immunities to the MPs, Immunity from judicial scrutiny into the proceedings of the house, etc. Such provisions are thereby making legislature independent, in a way. The Constitution provides for conferment of executive power on the President. His powers and functions are enumerated in the constitution itself. The President and the Governor enjoy immunity from civil and criminal liabilities.

But, if studied carefully, it is clear that doctrine of separation of powers has not been accepted in India in its strict sense. The executive is a part of the legislature. It is responsible to the legislature for its actions and also it derives its authority from legislature. India, since it is a parliamentary form of government, therefore it is based upon intimate contact and close co- ordination among the legislative and executive wings. However, the executive power vests in the President but, in reality he is only a

formal head and that, the Real head is the Prime minister along with his Council of Ministers. The reading of Art. 74(1) makes it clear that the executive head has to act in accordance with the aid and advice given by the cabinet.

Generally the legislature is the repository of the legislative power but, under some specified circumstances President is also empowered to exercise legislative functions. Like while issuing an ordinance, framing rules and regulations relating to Public service matters, formulating law while proclamation of emergency is in force. These were some instances of the executive head becoming the repository of legislative functioning. President performs judicial functions also.

On the other side, in certain matters Parliament exercises judicial functions too. It can decide the question of breach of its privilege, and in case of impeaching the President; both the houses take active participation and decide the charges

Judiciary, in India, too can be seen exercising administrative functions when it supervises all the subordinate courts below. It has legislative power also which is reflected in formulation of rules regulating their own procedure for the conduct and disposal of cases

So, it's quite evident from the constitutional provisions themselves that India, being a parliamentary democracy, does not follow an absolute separation and is, rather based upon fusion of powers, where a close co-ordination amongst the principal organs is unavoidable and the constitutional scheme itself mentions it. The doctrine has, thus, not been awarded a Constitutional status. Thus, every organ of the government is required to perform all the three types of functions. Also, each organ is, in some form or the other, dependant on the other organ which checks and balances it. The reason for the interdependence can be accorded to the parliamentary form of governance followed in our country. But, this doesn't mean that this doctrine is not followed in India at all.

Except where the constitution has vested power in a body, the principle that one organ should not perform functions which essentially belong to others is followed. This observation was made by the Supreme Court in the Re: Delhi Laws Act case, wherein, it was held by a majority of 5:2, that, the theory of separation of powers is not part and parcel of our Constitution. But, it was also held that except for exceptional circumstances like in Art. 123, Art. 357, it is evident that constitution intends that the powers of legislation shall be exercised exclusively by the Legislature. As Kania, C.J., observed- "Although in the constitution of India there is no express separation of powers, it is clear that a legislature is created by the constitution and detailed provisions are made for making that legislature pass laws. Does it not imply that unless it can be gathered from other provisions of the constitution, other bodies-executive or judicial-are not intended to discharge legislative functions?"

In essence they imported the modern doctrine of separation of powers. While dealing with the application of this doctrine, it is quintessential to mention the relevant cases which clarify the situation further.

Natural Justice - Rule Of Fair Hearing

In India, there is no particular statute, laying down the minimum standard, which the administrative bodies must follow while exercising their decision making powers. There is, therefore, a confusing variety of administrative procedure. In some cases, the administrative procedure is controlled by the statute under which they exercise their powers. But in some cases, the administrative agencies are left free to device their own procedure. But the courts have several times reiterated that the administrative agencies must follow a minimum of fair procedure, while exercising their powers. This fair procedure is called the principles of natural justice.

The principles of natural justice have been developed by the courts, in order to secure fairness in the exercise of the powers by the administrative agencies. The principles of natural justice are the Common Law counterpart of the 'due process of law' in the Constitution of the United States. However wide the powers of the state and however extensive discretion they confer, the administrative agencies are always under the obligation to follow a manner that is procedurally fair.

The doctrine of natural justice seeks not only to secure justice but also to prevent miscarriage of justice. The norms of natural justice are based on two ideas:

1. *audi alteram partem*,- no man can be condemned unheard
2. *nema judex in causa sua potest* - no man can judge in his own cause

However the applicability of the principles of natural justice depends upon the facts and circumstances of each case

In India, the Supreme Court has reiterated that the principles of natural justice are neither rigid nor they can be put in a straight jacket but are flexible. In the case of R. S. Dass v. Union of India, the Supreme Court observed that:

> "It is well established that rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and background of statutory provisions, nature of the right which may be affected and the consequences which may entail, its application depends upon the facts and circumstances of each case".

The reason for the flexibility of natural justice is that the concept is applied to a wide spectrum of the decision-making bodies.

The project focuses on the rule of fair hearing, which is one of the essential rules of the Natural Justice.

Position in India: Article 14, 19, 21 of the Indian Constitution lay down the cornerstone of natural justice in India. In the case of E P Royappa v. State of Tamilnadu, the apex court held that a properly expressed and authenticated order can be challenged on the ground that condition precedent to the making of order has not been fulfilled or the principles of natural justice have not been observed. In another landmark case of Maneka Gandhi v. Union of India, the apex court held that law which allows any administrative authority to take a decision affecting the rights of the people, without assigning the reason for such action, cannot be accepted as a procedure, which is just, fair and reasonable, hence violative of Articles 14 and 21.

Rule against bias:- The term bias literally means "deciding a case otherwise than on the principles of evidence. This principle is based on the following three principles; the maxim nemo judex in Causa sua potest which means no man can judge in his own cause, justice should not only be done, but manifestly and undoubtedly be seen to be done, judges, like Caesar's wife should be above suspicion.

Types of Bias:- Bias can be classified under the following heads

1. **Pecuniary Bias:-** When the judge has some monetary interest in the subject matter of dispute, it gives rise to pecuniary bias.
   a) Dimes v. Grant Junction Canal (1852) 3 HL 759 : 17 Jur 79,
   b) Jeejeeboy v. Asstt. Collector of Thana AI R 1965 SC 1096,
   c) J. Mahapatra& Co. v. State of Orissa AIR 1984 SC 1572 (1576).
2. **Personal Bias:-** A judge may be a relative, friend or business associate of a party. He may have personal grudge, enmity against such party. In such circumstances there is every likelihood that the judge may be biased towards one party and prejudicial towards the other.
   a) Manaklal v. Premchand (AIR 1957 SC 425),
   b) A.K.Kraipak v. Union of India (1969) 2 SCC 262; AIR 1970 SC 150,
   c) State of UP v. Mohd. Nooh AIR 1958 SC 86,
   d) Pratap Singh v. State of Punjab AI R 1964 SC 72.
3. **Official Bias/Bias as to Subject matter/Policy/Departmental Bias:-** This may arise when the judge has a general interest in the subject-matter.
   a) Gullampally Nageswara Rao v. A.P.S.R.T.C. AIR 1959 SC 308,
   b) Krishna Bus Service (P) Ltd v. State of Haryana AI R 1985 SC 1651,
   c) K.Chelliah v. Chairman, Industrial Finance Corporation, AIR 1973 Mad. 122.

Judicial Obstinacy:- Apart from the above three types of bias there may also be a judicial bias. Judicial bias arises on account of judicial inflexibility.

a) State of W. B v. Shivananda Pathak AIR 1995 SC 2050.

Test of Real likelihood of bias

A pecuniary interest, however small it may be, disqualifies a person from acting as a judge. Other interests, however, do not stand on the same footing. Here the test is whether there is a real likelihood of bias in the judge. In India the same principle is accepted in Manaklal v. Premchand (AIR 1957 SC 425).

RULE OF FAIR HEARING

The maxim audi alteram partem brings out the rule of fair hearing. It lays down that no one should be condemned unheard. It is the first principle of the civilised jurisprudence that a person facing the charges must be given an opportunity to be heard, before any decision is taken against him. Hearing means 'fair hearing'.

The norms of reasonableness of opportunity of hearing vary from body to body and even case to case relating to the same body. The courts, in order to look into the reasonableness of the opportunity, must keep in mind the nature of the functions imposed by the statute in context of the right affected. The civil courts, in India, are governed in the matter of proceedings, through the Civil Procedure Code and the criminal courts, by the Criminal Procedure Code as well as the Evidence Act. But the adjudicator bodies functioning outside the purview of the regular court hierarchy are not subject to a uniform statute governing their proceedings.

The components of fair hearing are not fixed but are variable and flexible. Their scope and applicability differ from case to case and situation to situation. In Mineral Development v. State of Bihar, the apex court observed that the concept of fair hearing is elastic and not susceptible of a precise and easy definition. The hearing procedures vary from the tribunal, authority to authority and situation to situation. It is not necessary that the procedures of hearing must be like that of the proceedings followed by the regular courts.

The objective of the giving the accused an opportunity of fair hearing is that an illegal action or decision may not take place. Any wrong order may adversely affect a person. The maxim implies that the person must be given an opportunity to defend himself. LORD HEWART rightly observed that" it is merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seem to be done". In this regard the Dr. Bentley case needs to be elaborately discussed. In this case the Court of King's Bench condemned the decision of the Cambridge University, of canceling the degree of the scholar, without giving him the opportunity to be reasonably heard.

In another landmark case of Olga Tellis v. Bombay Municipal Corpn. , the court held that even if the legislature authorizes the administrative action, without any hearing, the law would be violative of the principles of fair hearing and thus violative of Articles 14 and 21 of the Indian Constitution. In Cooper v. Wands worth Board of Works, BYLES J. observed that the laws of God and man both give the party an opportunity to defend himself. Even God did not pass a sentence upon Adam before he was called upon to make his defence.

Law envisages that in the cases classified as 'quasi-judicial', the duty to follow completely the principles of natural law exists. But the cases which are classified as the 'administrative', the duty on the administrative authority is to act justly and fairly and not arbitrarily. In the 1970 case of A. K. Kraipak v. Union of India, the Supreme Court made a statement that the fine distinction between the quasi-judicial and administrative function needs to be discarded for giving a hearing to the affected party. Before the Kraipak's case, the court applied the natural justice to the quasi-judicial functions only. But after the case, the natural justice could be applied to the administrative functions as well.

COMPONENTS OF RIGHT TO FAIR HEARING

Right to notice:-

The term 'Notice' originated from the Latin word 'Notitia' which means 'being known'. Thus it connotes the sense of information, intelligence or knowledge. Notice embodies the rule of fairness and must precede an adverse order. It should be clear enough to give the party enough information of the case he has to meet. There should be adequate time for the party, so that he can prepare for his defence. It is the sine qua non of the right of hearing. If the notice is a statutory requirement, then it must be given in a manner provided by law. Thus notice is the starting point in the hearing. Unless a person knows about the subjects and issues involved in the case, he cannot be in the position to defend himself.

The notice must be adequate also. Its adequacy depends upon the case. But generally, a notice, in order to be adequate must contain following elements:

- Time, place and nature of hearing.
- Legal authority under which hearing is to be held.
- Statements of specific charges which the person has to meet.

The test of the adequacy of the notice will be whether it gives the sufficient information and material so as to enable the person concerned to prepare for his defense. There should also be sufficient time to comply with the requirements of a notice. Where a notice contains only one charge, the person cannot be punished for the charges which were not mentioned in the notice

The requirement of notice can be dispensed with, where the party concerned clearly knows the case against it and thus avails the opportunity of his defence. Thus in the case of Keshav mills Co. Ltd. v. Union of India, the court upheld the government order of taking over the mill for a period of 5 years. It quashed the argument of the appellants that they were not issued notice before this action was taken, as there was the opportunity of full-scale hearing and the appellant did not want to know anything more.

Right to know the evidence against him:-

Every person before an administrative authority, exercising ad judicatory powers has right to know the evidence to be used against him. The court in case of Dhakeshwari Cotton Mills Ltd. v. CIT, held that the assessee was not given a fair hearing as the Appellate Income Tax tribunal did not disclose the information supplied to it by the department. A person may be allowed to inspect the file and take notes.

Right to present case and evidence:-

The ad judicatory authority must provide the party a reasonable opportunity to present his case. This can be done either orally or in written. The requirement of natural justice is not met if the party is not given the opportunity to represent in view of the proposed action.

Courts have unanimously held that the oral hearing is not an integral part of the fair hearing, unless the circumstances call for the oral hearing. In Union of India v. J P Mitter, the court refused to quash the order of the President of India in respect of the dispute relating to the age of a High Court judge. It was held that where the written submission is allowed, there is no violation of natural justice, if the oral hearing is not granted.

Right to cross-examination:-

The right to rebut adverse evidence presupposes that the person has been informed about the evidence against him. Rebuttal can be done either orally or in written, provided that the statute does not provide otherwise. Cross examination is a very important weapon to bring out the truth. Section 33 of the Indian Evidence Act, 1972, provides for the rights of the parties to cross-examine. The cross-examination of the witnesses is not regarded as an obligatory part of natural justice. Whether the opportunity of cross examination is to be give or not depends upon the circumstances of the case and statute under which hearing is held. State of Jammu and Kashmir v. Bakshii Ghulam Mohd., the Government of Jammu and Kashmir appointed a Commissioner of Inquiry to inquire into the charges of corruption and maladministration against the ex-Chief Minister of the state. He claimed the right to cross-examine the

witnesses on the ground of natural justice. The Court interpreted the statute and held that only those witnesses who deposed orally against the Chief Minister can be cross-examined and not of those who merely filed affidavits.

Similarly, in Hira nath mishra v. Rajendra Medical College, Ranchi, some male students of medical college entered the girls hostel and misbehaved with the girls. An enquiry committee was set up against whom the complaints were made. The complainants were examined but not in presence of the boys. On the report of the committee, four students were expelled from the college. They challenged the decision of the committee on the ground of violation of the natural justice. The court rejected the plea and held that in presence of the boys, the girls cannot be cross-examined that that may expose them to the harassment.

Right to counsel:-

For some time the thinking had been that the lawyers should be kept away from the administrative adjudication, as it saves time and expense. But the right to be heard would be of little avail if the counsel were not allowed to appear, as everyone is not articulate enough to present his case. In India few statutes like the Industrial Disputes Act, 1947, specifically bar the legal practitioners from appearing before the administrative bodies. Till recently the view was that the right to counsel was not inevitable part of the natural justice.

Reasons must be given for the decisions:-

Union of India v. M.L.Capoor (AIR 1974 SC 87) The Apex held that in case of an administrative order also even in the absence of any statutory provisions imposing a duty to give reasons, "a minimal requirement of just and fair treatment" required that the person affected ought to be informed of the reasons for the action.

Judicial review of Administrative adjudication

General Grounds

1. Doctrine of Ultra vires.
2. Jurisdictional Grounds.
    a) Lack of absence of jurisdiction due to nature of subject matter.J.K.Chowdhury v. Dutta Gupta (AIR 1958 SC 722) News Papers Ltd. v. Industrial Tribunal (AIR 1957 SC 532), United Commercial Bank v. Workmen AIR 1951 SC 230.
    b) Declining Jurisdiction or refusal to exercise jurisdiction.
        i. Rajagopala Naidu v. State Transport Appellate Tribunal (AIR 1964 SC1573),
        ii. Union of India v. Goel (AIR 1964 SC 364),
        iii. State of Madras v. Sundaram (AIR 1965 SC 1103),
        iv. Syed Yakoob v. K.S. Radhakrishna (AIR 1964 SC 417),
        v. Sumithra Devi v. Sheo Shankar Yadav (1973 SCJ 334),
        vi. Premchand v. State of Punjab (AIR 1971 P & H 50).
3. Error of law apparent on the face of the record Harikrishna Kamath v. Syed Ahmed (AIR 1955 SC 233), Shanmugam v. S.R.V.S. (AIR 1963 SC 1636)
4. Violation of Principles of natural Justice,
5. Violation of the constitution.

DELEGATED LEGISLATION

Delegated legislation is law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation. It is law made by a person or body other than the legislature but with the legislature's authority.

In England

In the United Kingdom, delegated legislation is legislation or law that is passed otherwise than in an Act of Parliament (or an Act of the Scottish Parliament, Northern Ireland Assembly or National Assembly for Wales). Instead, an enabling Act (also known as the parent Act or empowering Act) confers a power to make delegated legislation on a Government Minister or another person or body. Several thousand pieces of delegated legislation are made each year, compared with only a few dozen Acts of Parliament. Delegated legislation can be used for a wide variety of purposes, ranging from relatively narrow, technical matters (such as fixing the date on which an Act of Parliament will come into force, or setting the level of fees payable for a public service, e.g. the issue of a passport), to filling in the detail of how an Act setting out broad principles will be implemented in practice.

Different forms of Delegated Legislation:

1. Central Act to Central Government:

Central Act empowered Central Government to come with delegated legislation. Basically this legislation based on particular Parent Act. For Example, S.3 of Defence Act, S.3 of All India Service Act.

2. Central Act to State Government:

Central Legislature to empower to state executive to comes with delegated legislation. For Example, S.8 of Opium Act, S.2 of Muslim Wakf Act.

3. Central Act to Central as well as State Government:

Parent Act empowered to central as well as state executive to come with delegated legislation. For Example, Administrative Tribunal Act, S.35 empower central Government and S.36 empower to state government come with delegated legislation.

4. Central Act to Statutory bodies:

Central Legislature empower to statutory bodies come with delegated legislation. For Example, Advocate Act 1961, S.49 empower to bar council of India to make a rule means Central Act through the statutory body to make a rule.

5. State Act to State Government:

State Legislature empower to State Executive come with delegated legislation. For Example, Municipality Act, Panchayat Act.

6. State Act to Statutory bodies:

For Example, GNLU Act, S.46, State Act empower to Statutory Body to make a law.

Classification of Delegated Legislation

Delegated legislation may take several forms. They may be normal or of exceptional type, they may be usual or unusual, positive or negative, skeleton or Henry VIII clause.

1. **Title based classification**

   Rules: For the definition see the General Clauses Act 1897

   Regulation: An instrument by which decisions, orders and acts of government are made known to the public.

   Order: in general order refers to Administrative Rule making.

   Bye-laws: Rules made by semi-governmental authorities established under the Acts of Legislature

   Directions: Expression of Administrative Rule making under the authority of law

Scheme: It is the situation where the law authorizes the administrative agency to lay down a framework.

In Sukhdev Singh v. Bhagatram Supreme Court held delegated legislation means rules, regulation, bye-laws.

2. Purpose based delegated legislation

Power to bring an act into force

Power to extended life of the Act

Power to extend laws from one area to another Power to include

Power to exempt

Power to adopt

Power to fill in detail

Power to prescribed punishment

Power to make modification

Power to remove difficulty

Judicial Control of delegated legislation

Delegation of powers means those powers, which are given by the higher authorities to the lower authorities to make certain laws, i.e., powers given by the legislature to administration to enact laws to perform administration functions.

A. General grounds

a) Delhi Laws Act Case (AIR 1951 SC 332),

The question of validity of delegated legislative powers under the Constitution came before the Supreme Court in the form of a Presidential reference under Article 143 in what is known as in Re: Delhi laws Act case, in this case president referred advisory opinion to three question. The question whether the above section, or any of its provision, and in what particulars, or to what extent, was ultra vires Parliament. The Apex court held that Delegation of Legislative Powers is valid but essential legislative functions should not be delegate. Furthermore general principles regarding delegation of legislative powers were discussed elaborately. The following principles were observed by the apex court:-

1. Basic Policy should be laid down in the Parent Act.
2. Essential Legislative function should not be delegated.
3. Executive can only implement the policy laid down in the enabling act.
4. Some standard guidelines or principles should be laid down in the parent act. Otherwise, such power is considered as arbitrary or excessive.

b) Raj Narain v. Chairman, Patna Admn. Committee (AIR 1954 SC 569), an attempt was made to define essential function

c) Harishankar Bagla v. State of M.P. (AIR 1954 SC 465),

d) Hamdard Dawakhana v. Union of India (AIR 1960 SC 554),

e) State of Maharashtra v. George (AIR 1963 SC 722), Publication of delegated legislation is necessary even when the parent act is silent.

f) V.Nagappa v. Iron Ore Mines Cess Commr. (AIR 1973 SC 1374).

B. Ground of Ultra Vires

1. Delegated legislation is void if it is ultra vires the parent Act.
   a) King Emperor v. Sibnath Bannerji (AIR 1945 P.C. 156),
   b) Mohd Hussain v. State of Bombay (AI R 1962 SC 97),
   c) Gadde Venkateswara Rao v. State of A.P. (AIR 1966 Sc 828),
   d) Yasin v. Town Area Committee (AIR 1952 SCR 572),

e) M.L.Bagga v. Murhan Rao (AIR 1956 Hyd 35),
f) Harish Chandra v. State of M. P. (AI R 1965 SC 932).

2. Delegated legislation ultra vires the constitution is void even though the parent Act is Intra vires.
   a) Narendra Kumar v. Union of India (AIR 1960 SC 430),
   b) Dwaraka Prasad v. State of U.P. (AIR 1954 SC 224),
   c) Kharak Singh v. State of U.P. (AIR 1963 SC 1295),
   d) Bar Council Delhi v. Swijcet Singh
3. Delegated Legislation is void if the parent Act itself is Ultra Vires the Constitution.
   a) Chintaman Rao v. State of M.P. (AIR 1954 SC 118)
4. Delegated legislation ultra vires the general law,
5. Unreasonableness,
6. Mala fide,
7. Sub - Delegation and
8. Excessive Delegation.

Sub - Delegation

When a statute confers some legislative powers on an executive authority and latter further delegates those powers to another subordinate authority or agency, it is called Sub - Delegation. In other words, in sub-delegation, a delegate further delegates. The enabling act is called as Parent Act and the delegated and sub-delegated legislations are called Children act.

Ganpati v. State of Ajmer (AIR 1955 SC 188),

Jackson v. Butterworth (1948) 2 All ER 558,

Central Talkies v. Dwaraka Prasad (AIR 1961 SC 606.

Conditional Legislation

A statute that provides controls but specifies that they are to go into effect only when a given administrative authority fulfils the existence or conditions defined in the statute. It is also called as Conditional Legislation.

Field v. Clark (1892) 143 US 649,

Emperor v. Benoari Lal (AI R 1945 PC 43),

State of Bombay v. Narottamdas (AIR 1951 SC 69),

Inder Singh v. State of Rajasthan (AIR 1957 SC 510).

ADMINISTRATIVE TRIBUNALS

The word tribunal literally means" seat or bench upon which a judge or judges sit in a court or court of justice. A tribunal is a body with judicial/quasi - judicial powers/functions set up by the statute outside the usual judicial hierarchy of SC and HC's.

Kinds of Tribunals

1. Statutory or Administrative Tribunals and
2. Domestic Tribunals.

Statutory or Administrative Tribunals

Administrative Tribunal is body constituted under a statute to perform adjudicatory functions of the management of affairs of an organization or executive branch of a Government. They are not courts, but they are set up to perform quasi - judicial functions.

Kinds of Administrative Tribunals in India

1. Income Tax Appellate Tribunals,
2. Industrial Tribunal,
3. Railway Rates Tribunal,
4. Administrative Tribunals under Administrative Tribunals Act, 1985. (CAT),
5. Consumer Commission.

The central government set up a "Central Administrative Tribunal from November I, 1985, under the Administrative Tribunals Act. which came into force on February 27, 1985. The main aims and objects of the Tribunal were to provide speedier justice to public servants regarding their service complaints or disputes. The Tribunals would also ease the burden of the judiciary. The Jurisdiction of all Courts dealing with the service matters was taken away from November" 1985 except the Jurisdiction of the Supreme Court under Article 136 of the constitution . Pending cases were transferred to the concerned bench of the Central Administrative Tribunal except appeals pending in High Courts which were to be dealt with by the respective High Courts. Besides the principal bench at Delhi, the benches of the tribunal were to be established at seven additional places, at Allahabad, Calcutta, Gauhati, Madras, Bombay, Nagpur and Bangalore.

Domestic Tribunals

Domestic Tribunals refers to an agency created to regulate the internal discipline among the members by exercising the adjudicatory and investing powers. These Tribunals are further sub - divided into following two types:-

i. Statutory Domestic Tribunals and

ii. Non - Statutory/Contractual Domestic Tribunals.

Statutory Domestic Tribunals

It refers to the domestic Tribunals created by or under a Law. Such Tribunals regulates professions and lay down standards and provide adjudicative machinery to enforce the same. Example:- Bar Council, Universities, Medical Council, ICA etc.

Non-Statutory/Contractual Domestic Tribunals

These types of tribunals are created under an agreement or contract among the parties. Example:- Clubs, Chamber of Commerce, Trade Unions, Private Arbitrators, etc.

PURELY ADMINISTRATIVE FUNCTIONS

DISCRETIONARY FUNCTIONS AND MINISTERIAL FUNCTIONS

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

The problem of administrative discretion is complex. It is true that in any intensive form of government, the government cannot function without the exercise of some discretion by the officials. It is necessary not only for the individualization of the administrative power but also because it is humanly impossible to lay down a rule for every conceivable eventually in the complex art of modern government.

But it is equally true that absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. Therefore, there has been a constant conflict between the claims of the administration to an absolute discretion and the claims of subjects to a reasonable exercise of it. Discretionary power by itself is not pure evil but gives much room for misuse. Therefore, remedy lies in tightening the procedure and not in abolishing the power itself.

Judicial behaviour and administrative discretion in India:-

Though courts in India have developed a few effective parameters for the proper exercise of discretion, the conspectus of judicial behaviour still remains halting, variegated and residual, and lacks the activism of the American courts. Judicial control mechanism of administrative discretion is exercised at two stages:

(1) Control at the stage of delegation of discretion;

(2) Control at the stage of the exercise of discretion.

(1) Control at the stage of delegation of discretion.-

The court exercises control over delegation of discretionary powers to the administration by adjudicating upon the constitutionality of the law under which such powers are delegated with reference to the fundamental rights enunciated in Part III of the Indian Constitution. Therefore, if the law confers vague and wide discretionary power on any administrative authority, it may be declared ultra vires Article 14, Article 19 and other provisions of the Constitution. In case of delegated legislation, courts have after been satisfied with vague or broad statements of policy, but usually it has not been so in cases of application of fundamental rights to statutes conferring administrative discretion. The reason is that delegated legislation being a power to make an order of general applicability presents less chance of administrative arbitrariness than administrative discretion which applies from case to case.

(2) Control at the stage of the exercise of discretion.-

In India, unlike the USA, there is no Administrative Procedure Act providing for judicial review on the exercise of administrative discretion. Therefore, the power of judicial review arises from the constitutional configuration of courts. Courts in India have always held the view that judge-proof discretion is a negation of the rule of law. Therefore, they have developed various formulations to control the exercise of administrative discretion. These formulations may be conveniently grouped into two broad generalizations:

(a) That the authority is deemed not to have exercised its discretion at all or failure to exercise discretion- non application of mind" ;

(b) That the authority has not exercised its discretion properly or excess or "abuse of discretion"

JUDICIAL REVIEW OF ADMINISTRATIVE DISCRETION

GENERAL GROUNDS

I. Abuse of Discretion.

(1) Mala fides:-

Mala fides or bad faith means dishonest intention or corrupt motive.

In **Jaichand v. State of West Bengal**, the Supreme Court observed that mala fide exercise of power does not necessarily imply any moral turpitude as a matter of law. It only means that the statutory power is exercised for purposes foreign to those for which it is in law intended. In this sense, mala fides is equated with any ultra vires exercise of administrative power. The term "mala fides" has not been used in the broad sense, but in the narrow sense of exercise of power with dishonest intent or corrupt motive. Mala fides, in this narrow sense, would include those cases where the motive force behind an

administrative action is personal animosity, spite, vengeance, personal benefit to the authority itself or its relations or friends. Mala fide exercise of discretionary power is bad as it amounts to abuse of power.

In **Pratap Singh v. State of Punjab,** (AIR 1964 SC 972) the Supreme Court used the phrase "mala fides" for initiating administrative action against an individual "for satisfying a private or personal grudge of the authority.

In **Rowjee v. Andhra Pradesh,** (Al R 1964 SC 962) under the schemes prepared by the State Road Transport Corporation, certain transport routes were proposed to be nationalized. The schemes owed their origin to the directions by the Chief Minister. It was alleged that the Chief Minister had acted mala fide in giving the directions. The charge against him was that the particular routes had been selected because he sought to take vengeance on the private operators on those routes, as they were his political opponents. From the course of events, and the absence of an affidavit from the Chief Minister denying the charge against him, the court concluded that mala fide on the part of the Chief Minister was established.

In **State of Punjab v. Gurdial Singh,** the court struck down the land acquisition proceedings for acquiring the land of the petitioners for a mandi on account of mala fides.

In **G. Sadanandan v. State of Kerala,** the petitioner, a businessman, dealing in wholesale kerosene oil was detained under Rule 30(1)(b) of the Defence of India Rules, 1962 with a view to preventing him from acting in a manner prejudicial to the maintenance of supplies and services essential to the life of the community. The petitioner challenged the validity of the impugned order of detention mainly on the ground that it is malafide and has been passed as a result of malicious and false reports, prepared at the instance of Deputy Superintendent of Police. The whole object of Deputy Superintendent in securing the preparation of these false reports was to eliminate the petitioner from the field of wholesale business in kerosene oil in Trivandrum so that his relatives may benefit and obtain the dealership. The Deputy Superintendent did not file the affidavit to controvert the allegations made against him and the affidavits filed by the Home Secretary were very defective in many respects. After considering all the materials the Supreme Court declared the order of detention to be clearly and plainly malafide.

In **P.B. Samant v. State of Maharashtra,** the court held the distribution of cement against the law and the circulars or guidelines issued by the Government on that behalf as bad. The distribution of cement was in favour of certain builders in return for the donations given by them to certain foundations of which the Chief Minister was a trustee. It was a clear case of malafide exercise of power. The power to control the distribution of an essential commodity like cement is given to the Government with a view to ensuring its equitable distribution. When this power is used for obtaining donations for a trust, it is a clear case of abuse of power.

In **Express Newspapers (Pvt.) Ltd v. Union of India,** a notice of re-entry upon the failure of lease of lease granted by the central government and of threatened demolition of the Appellant's officer buildings was held to be mala fide and politically motivated by the party in power against the Express Group of Newspapers in general.

In **State of Punjab v. V.K Khanna,** the Court held that the expression 'malafide' has a definite significance and there must be existing definite evidence of bias. The action would not be malafide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the Act.

The Supreme Court in **E.P. Royappa v. Tamil Nadu**, brought out difficulties inherent in proving malafides. The factors which are important in proof of malafides: (i) Direct evidence (e.g. documents, tape recordings etc.), (ii) Course of events, (iii) Public utterance of the authority, (iv) Deliberate ignoring of facts by the authority and (v) Failure to file affidavits denying the allegations of malafides. However, if the allegations are of wild nature, there is no need of controverting allegations. Malafides may also be inferred from the authority ignoring apparent facts either deliberately or sheer avoidance.

(2) Improper purpose:-

If a statute confers power for one purpose, its use for a different purpose will not be regarded as a valid exercise of the powers and the same may be quashed. The cases of exercise of discretionary power from improper purposes have increased in modern times because conferment of broad discretionary power has become usual tendency. The orders based on improper purpose were quashed first in the cases concerning the exercise of powers of compulsory acquisition in England. "Improper purpose" is broader than malafides, for whereas the latter denotes a personal spite or malice, the former may have no such element.

In a few cases on preventive detention the Supreme Court has held that the power of preventive detention cannot be used as a convenient substitute for prosecuting a person in a Criminal Court. In **Srilal Shah v. State of West Bengal**, a preventive detention order was issued against a person mainly on the ground that he had stolen railway property. He had documents in his possession to prove his bona fide and to prove that he had purchased the goods in the open market. A criminal case filed against him was dropped and the mentioned preventive detention was passed in its place. The order was held to be bad by the court.

In **L.K. Dass v. State of West Bengal,** the court held that the power of detention could not be used on simple solitary incident of theft of railway property and the proper course to prosecute the person was in a criminal court.

(3) Irrelevant considerations:-

A discretionary power must be exercised on relevant and not on irrelevant or extraneous considerations. It means that power must be exercised taking into account the considerations mentioned in the statute. If the statute mentions no such considerations, then the power is to be exercised on considerations relevant to the purpose for which it is conferred.

In **Ram Manohar Lohia v. Bihar,** (AIR 1966 SC 740) the petitioner was detained under the Defence of India Rules, 1962 to prevent him from acting in a manner prejudicial to the maintenance of "law and order", whereas the rules permitted detention to prevent subversion of "public order". The court struck down the order as, in its opinion, the two concepts were not the same, "law and order" being wider than "public order".

In Barium Chemicals Ltd. v. Company Law Board, (AIR 1967 SC 95) this case shows a definite orientation in the judicial behaviour for an effective control of administrative discretion in India. In this case Company Law Board exercising its power under Section 237 of the Companies Act 1956 ordered an investigation into the affairs of Barium Chemicals Ltd. The basis of the exercise of discretion for ordering investigation was that due to faulty planning the company incurred a loss, as a result of which the value of the shares had fallen and many eminent persons had resigned from the Board of Directors. The court quashed the order of the Board on ground that the basis of the exercise of discretion is extraneous to the factors mentioned in Section 237.

(4) Mixed considerations:-

Sometimes, it so happens that the order is not wholly based on irrelevant or extraneous considerations. It is founded partly on relevant and existent considerations and partly on irrelevant or non-existent considerations. The judicial pronouncements do not depict a uniform approach on this point.

In **Shibbanlal v. State of U.P.,** (AIR 1954 SC 179)the petitioner was detained on two grounds: first, that his activities were prejudicial to the maintenance of supplies essential to the community, and second, that his activities were injurious to the maintenance of public order. Later the government revoked his detention on the first ground as either it was unsubstantial or non-existent but continued it on the second. The court quashed the original detention order.

In **Dwarka Das v. State of J & K,** (AIR 1957 SC 164) the Supreme Court has observed that if the power is conferred on a statutory authority to deprive the liberty of a subject on its subjective satisfaction

with reference to specified matters, if that satisfaction is stated to be based on a number of grounds or for a variety of reasons, all taken together, the exercise of the power will be bad if some of the grounds are found to be non-existent or irrelevant.

(5) Leaving out relevant considerations:-

If in exercising its discretionary power, an administrative authority ignores relevant considerations, its action will be invalid. An authority must take into account the considerations which a statute prescribes expressly or impliedly. In case the statute does not prescribe any considerations but confers power in a general way, the court may still imply some relevant considerations for the exercise of the power and quash an order because the concerned authority did not take these into account.

In **Shanmugam v. S.K. V.S. (P) Ltd.,** (AIR 1963 SC 1626) a regional transport authority called for applications for the grant of stage of carriage permit for a certain route. Under the statute, the authority had broad powers to grant the permits in public interest, but the government attempted to control the discretion of the authority by prescribing a marking system under which marks were allotted to different applicants on the basis of viable unit, workshop, residence (branch office) on the route, experience and special circumstances. In the instant case, the branch office on the route, which the petitioner had, was ignored on the ground that he had branches elsewhere. It was held that the authority had ignored a relevant consideration. It was an untenable position to take that even if the applicant had a well-equipped branch on the route concerned; it would be ignored if the applicant "has some other branch somewhere unconnected with that route".

In **Rampur Distillery Co. Ltd. v. Company Law Board,** (AIR 1970 SC 1789) the Company Law Board exercising wide discretionary power under Section 326 of the Companies Act, 1956 in the matter of renewal of a managing agency refused approval for the renewal to the managing agents of the Rampur Distillery. The reason given by the Board for its action related to the past conduct of the managing agent. The Vivian Bose Enquiry Commission had found these managing agents guilty of gross misconduct during the year 1946-47 in relation to other companies. The Supreme Court, though it did not find any fault in taking into consideration the past conduct, held the order bad, because the Board did not take into consideration the present acts which were very relevant factors in judging suitability.

(6) Colourable exercise of power:-

At times, the courts use the idiom "colorable exercise of power" to denounce an abuse of discretion. Colorable exercise means that under the "colour" or "guise" of power conferred for one purpose, the authority is seeking to achieve something else which it is not authorized to do under the law in question then the action of the authority shall be invalid and illegal. Viewed in this light, "colorable exercise of power" would not appear to be a distinct ground of judicial review of administrative action but would be covered by the grounds already noticed, improper purpose or irrelevant considerations. The same appears to be the conclusion when reference is made to cases where the ground of "colorable exercise of power" has been invoked.

In the Somawanti v. State of Punjab, (Al R 1963 SC 151) the Supreme Court stated as the follows with reference to acquisition of land under the Land Acquisition Act: "Now whether in a particular case the purpose for which land is needed is a public purpose or not is for the State Government to be satisfied about subject to one exception. The exception is that if there is a colorable exercise of power the declaration will be open to challenge at the instance of the aggrieved party. If it appears that what the Government is satisfied about is not a public but a private purpose or no purpose at all action on the Government would be colorable as not being relatable to the power conferred upon it by the Act and its declaration will be a nullity."

(7) Judicial discretion :-

At times, the courts have used a vague phrase "judicial discretion" to restrict the exercise of discretionary power by an authority.

(8) Unreasonableness:-

At times the statute may require the authority to act reasonably. The courts have also stated that the authority should consider the question fairly and reasonably before taking action. The term "unreasonable" means more than one thing. It may embody a host of grounds mentioned already, as that the authority has acted on irrelevant or extraneous consideration or for an improper purpose, or mala fide, etc. Viewed thus, unreasonableness does not furnish an independent ground of judicial control of administrative powers apart from the grounds already mentioned. The term may include even those cases where the authority has acted according to law but in wrong manner and where it has acted according to law and in a right manner but on wrong grounds. Sometimes statutes itself provides for reasonable exercise of the discretionary power. Under such conditions the authority concerned had to act reasonably. And, the court will interfere with the order where it has not been passed under reasonable belief.

In **Sheonath v. Appellate Assistant Commissioner**, (AIR 1971 SC 245) the Supreme Court has remarked that the words "reason to believe" (for initiating reassessment proceedings) used in the Income-tax Act suggest that "the belief must be that of an honest and reasonable person based upon reasonable grounds but not on mere suspicion."

There may be cases where the administrative authority might have exercised his power without any reason. In such cases the court would quash the order.

The Supreme Court observed in **K.L. Trading Co. Ltd. v. State of Meghalaya,** that to attract judicial review of administration action, the applicant must show that the administrative action suffers from vice of arbitrariness, unreasonableness and unfairness. Merely because the Court may feel that the administrative action is not justified on merit, can be no ground for interference. The Court can only interfere when the process of making such decision is wrong or suffers from the vice of arbitrariness, unfairness and unreasonableness.

It may be mentioned here that in France the reasonableness of the administrative acts or decisions is examined on a much broader scale than in common law countries. In France any act can be brought to the test of reason. Every administrative act or decision is thought to be proper and lawful only if it is reasonable.

(9) Non - Application of mind by Authority:-

State of Punjab v. Suraj Prakash (AIR 1963 SC 507),

Purtabpove Company Ltd v. Cane Commr (AIR 1963 SC 507),

Mahadayal Premchandra v. C.T.O.

(10) Acting mechanically and without due care - Negligent Action :-

Barium Chemicals v. Rana (AIR 1972 SC 591),

Sadanandan v. State of Kerala (AI R 1966 SC 1926).

II. Violation of Fundamental Rights

An Administrative authority must exercise its discretionary powers in consonance with those rights which are enriched under Part III of the Indian Constitution. West Bengal v. Anwar Ali, (AIR 1952 SC 75), Satwant Singh v.Asst. Passport Officer (AIR 1967 SC 1836).

III. Ultra Vires

The term "Ultra Vires" means beyond powers. If the administrative authority while exercising the discretionary power exceeds the limit, such act is said to be ultra Vires. Liversidge v. Anderson (1042 AC 206), Ridge v. Baldwin (1964 AC 40), Gurbachan v. Bombay (AIR 1952 SC 221), Ram Manohar Lohia v. State of Bihar (AIR 1966 SC 749).

ADMINISTRATIVE FINALITY

Exclusion of or Preclusion of Judicial Review

"OUSTER CLAUSES"

Nature, Scope or extent of "finality" or "Ouster" clauses in the relevant statute is determined by the court only after considering the following factors:-

a) Terms of Scheme of the statute concerned,

b) Object or Purpose of such clauses,

c) Adequacy of remedies provided under the statute for redressal of grievances of the aggrieved party and

d) Nature of the administrative action challenged.

Generally speaking ouster clauses do not prohibit challenge of any category of action which is Ultra Vires, Unconstitutional, illegal and mollified.

TYPICAL EXAMPLES OF "OUSTER" CLAUSES

a) Administrative action shall be final.

b) Any order or decision under the Act "shall not be questioned in any legal proceedings whatsoever" ,

c) "no suit shall lie for anything done or purported to be done in good faith under this statute".

Basappa v. Govt of Madras (AIR 1964 SC)

Srinivasa v. State of AP (AIR 1971 SC 71)

Barlow v. Collins (1970) US 159

Statutory Inquiries

Jagannath v. State of Orissa (AIR 1969 SC 215),

Krishna Ballabh v. Commn of Inquiry (AIR 1969 SC 258),

State of J&K v. Ghulam Mohammed (AIR 1967 SC 122),

Ramakrishna Dalmia v. Tendolkal (AIR 1958 SC 538).

OMBUDSMAN

Ombudsman is a person who acts as a trusted intermediary between either the state (or elements of it) or an organization, and some internal or external constituency, while representing not only but mostly the broad scope of constituent interests. The Government of India has designated several ombudsmen (sometimes called Chief Vigilance Officer or CVO) for the redress of grievances and complaints from individuals in the banking, insurance and other sectors being serviced by both private and public bodies and corporations. The CVC (Central Vigilance Commission) was set up on the recommendation of the Santhanam Committee (1962-64).

In India, the Ombudsman is known as the Lokpal or Lokayukta. An Administrative Reforms Commission (ARC) was set up on 5 January 1966 under the Chairmanship of Shri Morarji Desai. It recommended a two-tier machinery: Lokpal at the Centre (parliamentary commissioner, as in New Zealand) and one Lokayukta each at the State level for redress of people's grievances. However, the jurisdiction of the Lokpal did not extend to the judiciary (as in New Zealand). The central Government introduced the first Lokpal Bill, Lokpal and Lokayuktas Bill in 1968, and further legislation was introduced in 2005, but has so far not been enacted.

The state-level Lokayukta institution has developed gradually. Orissa was the first state to present a bill on establishment of Lokayukta in 1970, but Maharashtra was the first to establish the institution, in 1972. Other states followed: Bihar (1974), Uttar Pradesh (1977), Madhya Pradesh (1981), Andhra Pradesh (1983), Himachal Pradesh (1983), Karnataka (1984), Assam (1986), Gujarat (1988), Delhi

(1995), Punjab (1996), Kerala (1998), Chhattishgarh (2002), Uttaranchal (2002), West Bengal (2003) and Haryana (2004). The structure of the Lokayukta is not uniform across all the states. Some states have Up-Lokayukta under the Lokayukta and in some states, the Lokayukta does not have suo moto powers of instigating an enquiry.

Kerala State has an Ombudsman for Local Self Government institutions like Panchayats, Municipalities and Corporations. He or she can enquire/investigate into allegations of action, inaction, corruption and maladministration. A retired Judge of the High Court is appointed by the Governor for a term of three years, under the Kerala Panchayat Raj Act.

In the State of Rajasthan, the Lokayukta institution was established in 1973 after the Rajasthan Lokayukta and Up-Lokayuktas Act, 1973 was passed by the State Legislature.

REDRESSAL OF GRIEVANCES

REMEDIES AVAILABLE TO AN AGGRIEVED PARTY

Constitutional Remedies :- Arts. 32,226,227,136" 132, 133, 134

Remedies under Ordinary or General Law :- Suit, appeal, review, injunction, declaration.

Remedies under the relevant provisions of the concerned statute:- Appeal, reference, review, statement of case.

Scope and extent of a remedy depends upon the following factors:-

1. Action of the state in question,
2. Provisions of the relevant statute,
3. Provisions of ordinary or general law,
4. Provisions of constitutional law,
5. Inherent limitations of each remedy,
6. Self - imposed limitations by the judiciary.

Case Laws:- Art. 136

1. Kriloskar Electric Company v. Workman (AIR 1973 SC 2119)
2. M.S.I.Hussain v. State of Maharashtra (AIR 1976 SC 1992)

Art 226

1. S.Narayanan v. Union of India (AIR 1976 SC 1986)

Hebeas Corpus:-

1. K. Sanyal v.. Ot. Magistrate (AIR 1973 SC 2684)
2. Addl. Ot. Magistrate v. S.Shukla (AIR 1976 SC 1207)

Mandamus

1. Umakant Saran v. state of Bihar (AI R 1973 SC 965

Certiorari

1. C.Raza Textiles v. I.TO. Rampur (AIR 1973 SC 1362)

Writ of Prohibition and

Writ of Quo Warranto.

Locus Standi and Public Interest Litigation. S.P.Gupta v. Union of India

LIABILITY OF THE STATE OR GOVERNMENT

Articles 299 and 300 of the constitution deals with the state liability which are as follows:-

1. Tortious Liability of the state (Art 300) and
2. Contractual Liability of the state (Art 299).

Tortious Liability of the state (Art 300):-

It refers to the liability of the state/government for torts committed by its servants. It is based on the following two maxims namely **Qui facit per alium facit per se** and **Respondent Superior.**

Sovereign Immunity:-

It means exception from liability on the ground of being sovereign provided the following two conditions are satisfied:-

1. Tort committed in discharge of duty imposed on him by law
2. It must be in delegation of sovereign power.

Contractual Liability of the state (Art 299):-

A state when enters into variety of contracts with the parties, the government as a party to the contract is subject to the same contractual obligations, rights and liabilities.

Right to Information

Right to Information is added into the Human Rights ion of the following reaons. RTI stands Right to Information. Right to Information is a part of fundamental rights under Article 19(1) of the Constitution. Article 19(1) says that every citizen has freedom of speech and expression. As early as in 1976, the Supreme Court said in the caseof Raj Narain v. State of UP, that people cannot speak or express themselves unless they know. Therefore, right to information is embedded in article 19. In the same case, Supreme Court further said that India is a democracy. People are the masters. Therefore, the masters have a right to know how the governments, meant to serve them, are functioning. Further, every citizen pays taxes. Even a beggar on the street pays tax (in' the form of sales tax, excise duty etc) when he buys a piece of soap from the market. The citizens therefore, have a right to know how their money was being spent. These three principles were laid down by the Supreme Court while saying that RTI is a part of our fundamental rights. On the other hand in International Scenario Right to Information and its aspects find articulation as a human right in most important basic human rights documents, namely, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. At regional levels, there are numerous other human rights documents, which include this fundamental right for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the African Charter on Human and People's Rights, etc. The Commonwealth has also formulated principles on freedom of information.

Right to information is a key to the democratic governance of a nation. It is a powerful tool to fight against evils of society su ;h as corruption. Today a law student should be equipped with socio-legal factors . Law student must fully participate in public life - The information gained would allow him to participate in priority setting and decision making -

When a section of a public spirited citizen question the government - The authorities are cautious that their actions could be questioned.- It would make government efficient helps to exercise personal rights. Government are made accountable through RTI- It confers equal treatment and equal justice.

Any Public information belongs to people . Any Public document is a open document. Knowing right to Information Act,2005 makes a student to commit and act with social responsibility. The fact true is that there should not be lack of Knowledge on information as Knowledge is empowerment.

Access to information sooner would be a fundamental right in long run. Access to information is something every citizen of India can demand. So a law student studying law should definitely know the fundamentals of right to information act so as to question the human right violations and to promote transparency and accountability.

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3. LABOUR LAW - I

INDUSTRIAL RELATIONS AND WAGES

UNIT - I

ORIGIN AND DEVELOPMENT OF LABOUR LEGISLATION

1. Law of Master and Servant under Common Law.
2. State regulation through Labour Legislations.
3. Role of ILO in Setting Labour Standards.
4. History of Labour Legislations in India.
5. Object and Nature of Labour Legislation.

UNIT - II

THE INDUSTRIAL DISPUTES ACT, 1947

1. The main objective of the Act:

(a) The promotion of measures for securing and preserving amity and good relations between employer and workmen;

(b) An investigation and settlement of industrial disputes;

(c) Regulation of strikes and lock-outs; and

(d) Relief to workmen in cases of lay-off, retrenchment and closure of industrial establishment.

2. Definitions:

(a) Industry: Sec. 2 (j)

The applicability of the Act is mainly based on this concept. Though the provision is worded in a simple language, conflicting opinions emerged. Finally it was resolved by the Supreme Court in Bangalore Water Supply and Sewerage Board v.. A. Rajappa, AIR 1978 SC. The Court redefined the word industry and formulated two test to identify an industry.

(i) Triple Test and

(ii) Predominant Nature Test.

The following cases are to be studied in this connection:

1. D.N. Banerjee v. P.R. Mukherjee. AIR 1953 SC.
2. Nagpur Corporation v. Its Employees. AIR 1960 SC.
3. State of Bombay v. Hospital Mazdoor Sabha. AIR 1960 SC.
4. Safdarjung Hospital v. Kuldip Singh. AIR 1970 SC.
5. University of Delhi v. Ramnath. AIR 1963 SC.
6. Brahmo Samaj Education Society v. West Bengal College Employees Association. AIR 1960 Cal.
7. Madras Gymkhana Club Employees Union v. Management. AIR 1968 SC.
8. N.N.U.C. Employees v Industrial Tribunal. AI R 1962 SC.
9. Swaraj Ashram v. Industrial Tribunal, U.P. AIR 1979 SC.
10. Soundarajan v. Secretary to Govt. of India, Ministry of Labour (1994) 2 LLJ (Mad).
11. Union of India v. Kamlesh Kumar Bharti, (1998) SCC.
12. Coir Board v. Indira Devi P.S. (1998) SCC.

This provision has been amended by the Industrial Disputes Amendment Act 1982 which has not been enforced till now.

(b) Industrial Dispute: Sec. 2 (K)

This definition can be studied under three heads:

(1) Factum of Dispute: Dispute or Difference. Dispute is a controversy in which the parties are directly and substantially interested in maintaining their respective contention. It should not be mere ideological difference. Expression of grievance is not a demand.

(2) Parties to the Dispute: Dispute must be between employer and workmen; Workmen and Workmen arid employer and' employer. Individual dispute when becomes an industrial disputes (Sec. 2A)

(3) Subject matter of the Dispute: Employment, non-employment; Terms of employment or conditions of labour of any person.

1. Workmen v. Dharampal Premchand AI R 1960 SC.
2. Workman of Dimakuchi Tea Estate v. Mgt. of Dimakuchi Tea Estate AIR 1958 SC.
3. Workmen of Indian Express Newspaper Ltd. v. The Management AIR 1970 SC.

When does an Industrial dispute become and Industrial Dispute. Dispute between individual workmen and employeer does not constitute indusrial dispute but if there is involment by the trade union or considerable number of workmen.

INDUSTRIAL DISPUTES

Settlement Machinery 26-18 Industrial Relations And Industrial Disputes Conciliation:

The practice by which the services of a neutral third party are used in a dispute as a means of helping the disputing parties to reduce the extent of their differences and to arrive at an amicable settlement or agreed solution. Conciliation officer: an authority appointed by the government to mediate disputes between parties brought to his notice; enjoying the powers of a civil court. He is supposed to give judgement within 14 days of the commencement of the conciliation proceedings. Board of conciliation: The Board is an adhoc, tripartite body having the powers of a civil court created for a specific dispute (when the conciliation officer fails to resolve disputes within a time frame, the board is appointed) Court of enquiry: In case the conciliation proceedings fail to resolve a dispute, a court of enquiry is constituted by the government to investigate the dispute and submit the report within six months.

26 - 19 Industrial Relations And Industrial Disputes Voluntary arbitration:

It is he process in which the disputing parties show willingness to go to an arbitrator (a third party) and submit to his decision voluntarily. This is followed after failure of conciliation proceedings. Adjudication: It is the process of settling disputes compulsorily through the intervention of a third party appointed by the Government. The Industrial Disputes Act provides a three-tier adjudication machinery consisting of: Labour court Industrial tribunal National tribunal Machinery For The Settlement of Industrial Disputes In India

Case Law:

Central Provinces Transport Industrial Services Versus R.G. Patvardhan 1957 (1) LLJ.

Newspaper Ltd. Versus Industrial Tribunal U.P AIR 1957 SC

Bombay Union of Journalist Versus the Hindu 1961 (2) LLJ

(c) Workman: Sec. 2(S)

1. Statutory meaning of Workmen.
2. Persons who are included by the definition.
3. Excluded categories of Persons.

Excluded categories of persons

Also those who are employed mainly in managerial or administrative functions, Supervisory capacity. Those who are getting monthly wages Rs. 10,000/- and above as per the amendment made in the year 2000.

Cases:

1. Dharagadhara chemical works Ltd v. State of Saurashtra. Al R 1956 SC.
2. Punjab National Bank v. Qulam Dastagin. AIR 1978 SC.

(d) Approximate Government: Sec. 2(a)

The general principle is that in case of an industry carried on by or under the authority of the central govt or the industry being located in more than one state, the appropriate govt is the central govt. In all other cases the State Govt. is the appropriate govt.

Cases:

1. Bharat Glass Works (Private) Ltd., v. State of West Bengal. AIR 1957 Cal.
2. Hindustan Machine Tools Ltd., v. Industrial Tribunal Jaipur, (1993) LLJ. Raj.

(e) Public Utility Service: Sec. 2(n)

Cases:

1. D.N. Banerji v. P.R. Mukherjee AIR 1955 SC. ,
2. Johnson arid Johnson Employees Union v. Union of India (1994) LLJ. Bom.
3. Machineries for Settlement of Industrial disputes:

3. (a) Works Committee: Sec. 3.

Constitution, functions and duties of works committee.

Cases:

North Brook Jute Co. Ltd. v. Workmen AIR 1960 SC.

(b) Conciliation Officer: Sec. 4.

Conciliation is the persuasive process by which a third party mediates the disputants to come to an agreement among themselves by mutual negotiation.

Appointment of conciliation officer - Sec. 4.

Powers of Conciliation Officer - Sec. 11

Duties of Conciliation Officer - Sec. 12

(c) Board of Conciliation:

Constitution of Board of Conciliation - Sec. 5

Duties of the Board - Sec. 13

Commencement and Conclusion of Conciliation Proceeding - Sec. 20

Settlement in conciliation Proceeding - Sec. 2 (p)

Period of operation of settlement - Sec. 19

Binding nature of settlement - Sec. 18

Functioning and operation of conciliation machinery - A critical study is to be made.

Cases:

Ram Nagar Cane and Sugar Co. Ltd. v. Jatin Chakravarthy

Balmer Lawrie Worker's Union v. Balmer Lawre AIR 1960 SC. & Co. 1985 LLJ SC

(d) Court of Inquiry: Sec. 6

Constitution and duties of Court, of Inquiry. Sec. 14 arid Sec. 17.

(e) Labour Court:

Constitution of Labour Court - Sec. 7

Jurisdiction in respect of subject matter - Schedule II of the Act.

(f) Industrial Tribunal :

Constitution of Industrial Tribunal - Sec. 7 A.

Jurisdiction in respect of Subject matter - Schedule III of the Act.

(g) National Tribunal :

Constitution and Jurisdiction of National Tribunal - Sec. 7B.

Procedures and Powers of Labour Court etc. - Sec. 11, 11 A.

Duties of Labour Court etc., - Sec. 15.

Award in adjudicatory proceeding - Sec. 2(b)

Publication of the award - Sec. 17(1)

Sri Silk Ltd. v. State of A.P. AIR 1964 SC

Enforcement of the award - Sec. 17 A.

Governments power to modify or reject the award Sec. 17 A.

Binding nature of the award - Sec. 18

Grounds of Judicial review of the award.

Last Protected Workmen

Definition Sec 33 (3) office bearers of a registered trade union given by the employer.

Cases:

1) Bharat Bank Ltd., Delhi v. Their Employees AI R 1950 SC ..
2) Management of Ritz Theatre (Private) Ltd., Delhi v. Its Workmen. AIR 1953 SC.
3) G.M. Talang v. Shaw Wallace and Co. Ltd:, AIR 1964 SC.
4) British Paints (India) Ltd:, v. Its Workmen. AIR 1966 SC.
5) H.V. Kamath v. Syed Ahmed Ishaque AIR 1955 SC.
6) Bengal Chemical and Pharmaceutical Works Ltd., v. Their Workmen AIR 1959 SC.
7) Gujarat Steel Tubes Ltd., v. G.S.T. Mazdoor Sabha. (1980) 1 LLJ SC.
8) D.C. & Gen. Mills v. Thejvir, AIR 1972 SC.

(h) Grievance Settlement Authority: Sec. 9-C.

(i) Labour Arbitration: (Sec. (10A)

Conditions for Valid reference. Sec. 10A.

Duties and Powers of Labour Arbitrator. Sec. 11.

Commencement and Conclusion of arbitration Proceeding.

Binding nature of arbitration award Sec. 18(2) and 18(3).

Publication of arbitration Award Sec. 17(1).

Measures for Promotion of arbitration machinery.

An assessment of operation of the machinery.

4. Reference of Industrial Dispute (Sec. 10)

(a) Discretionary reference: Sec. 10(1)

Nature of Power

State of Madras v. C.P. Sarathy AIR 1953 SC. State of Bombay v. K.P. Krishnan. AIR 1960 SC.

Bombay Union of Journalists v. State of Bombay AI R 1964 SC.

Sindhu Resettlement Corporation v. Industrial Tribunal, Gujarat AIR 1968 SC. Veeraranjan v. State of Tamilnadu. AIR 1987 SC.

Shambhu Nath Goyal v. Bank of Baroda (1978) SC.

(b) Mandatory reference: Sec. 10(1) Proviso 2 and Sec. 10(2)

(c) Choice of dispute Settlement Process.

Neimla Textile Finishing Mills Ltd., v. Industrial Tribunal, Punjab AIR 1957 SC:

(d) Consequences of reference.

5. Regulation of Strike and Lock-Out.

Definition of Strike Sec. 2 (q)

Definition of lock-out Sec. 2 (L)

Prohibition of strikes and lock-outs in public utility service: Sec: 22

General Prohibition of strikes and lock-outs. Sec. 23.

Illegal Strikes and lock-outs. Sec. 24:

Prohibition of financial aid to illegal strike and lock-out. Sec. 25.

Penalty for illegal strike and lock-out. Sec. 26.

Cases:

1) India General Navigation and Railway Co .. v. Its Workmen. AIR 1960 SC.
2) Crompton Greaves Ltd:, v. Its Workmen. AIR 1978 SC.
3) Gujarat Steel Tubes Ltd., v. Gujarat Steel Tubes Mazdoor. Sabha AI R 1980 SC.
4) Bank of India v. TS. Kelawala AIR 1990 SC.
5) Rahtas Industries Staff Union v. State of Bihar AI R 1963 Patna:
6) The Buckingham Carnatic Mill Co. Ltd., v. Its Workmen. AIR 1953 SC.

6. Relief to Workmen in case of Lay-off :

Definition of Lay-off Sec. 2 (kkk)

Right of laid off workman to compensation - Sec. 25-C.

Circumstances when workmen not entitled to lay-off compensation - Sec. 25-E.

Cases:

1. M.A. Veiyra v. C.P. Fernandez AIR 1957 Bombay.
2. Fire Stone Tyre & Rubber Co. Ltd., v. Its Workmen AIR 1976 SC.
3. Tata Nagar Foundry Co. Ltd., v. Its Workmen. AIR 1962 SC.

7. Relief to Workman in Case of retrenchment.

Definition of retrenchment - Sec. 2 (00)

Conditions precedent of retrenchment - Sec. 25 F.

Procedure for retrenchment - Sec. 25 G.

Re-employment of retrenched workman - Sec. 25H.

Cases:

1. Parry & Co. Ltd. v. P.C. Pal AIR 1970 SC.
2. Barsi Light Railway Co. Ltd., v. K.N. Joglekar AIR 1957 SC.
3. State Bank of India v. N. Sundaramoney AIR 1976 SC.
4. Robert D'Souza v. Executive Engineer, Southern Railways AIR 1979 Kerala FB.
5. Santhosh Gupta v. State Bank of Patiala. AIR 1980 SC.
6. Punjab Land development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court 1990 SC.

8. Closure of Industrial establishment

Definition of Closure - Sec. 2 (cc)

Procedure for closure - Sec. 25 FFA.

Compensation payable to workmen in case of closure - Sec. 25 FFF.

Cases:

1. Management of Standard Motors Products of India Ltd. v. A. Parthasarathy (1986) LLJ SC.
2. Prakash Cotton Mills Pvt. Ltd. v. The Rashtriya Mill Mazdoor Sarigh (1987) LLJ SC.

9. Special. Provisions relating to Lay-off, Retrenchment and closure in certain establishments - Sec. 25K - Sec. 25(R).

10. Unfair Labour Practice - Sec. 25-T and Sec. 25-U including Schedule V of the Act.

Unfair Labour practices on the Part of employer and Trade Union of Employers.

Unfair Labour practices on the part of workmen and Trade union of workmen.

Cases:

1. Eveready Flash Light Company v. Labour Court, Bareilly 1962 LLJ.
2. L.H. Factories and Oil Mills, Pililehit v. State of U.P. 1961 LLJ.
3. Hind Construction and Engineering Co. Ltd. v. Their Workmen. 1965 LLJ SC.

11. Conditions of Service of Workmen to remain unchanged under certain circumstances - Sec. 33, 33A.

UNIT - III

THE TRADE UNION ACT, 1926.

1. History of Trade Union Movement in India.
2. Definition of Trade Union Sec. 2h
3. Registration of Trade Union. Sec. 3 - 14.
4. Trade Onion Funds - Constitution of General and Political Funds. Sec. 15 and 16.
5. Trade Union Immunities.
   a: Immunities from Criminal Liability - Sec. 17.
   b. Immunities from Civil Suits - Sec. 18.
   c. Enforceability of agreements in restraint of trade - Sec. 19.

   Cases:

   1. West India Steel Company Ltd. v. Azeez. 1990 LLJ Ker.

2. Rohtas Industries Staff Union v. State of Bihar. AIR 1963 Patna.
3. Reserve Bank of India v. Ashis Kusum AIR 1969 Cal.
4. Western India Cinema Employees Federation v. Filmalaya Pvt. Ltd:, AIR 1981 Mad.
5. Simpson and Group Companies Worker's and Staff Union v. Amco Batteries Ltd., 1992 LLJ.
6. Jaya engineering works v. state of West Bengal AIR 1968 Calcutta 407

6. Trade Union Recognition:
7. Recognition by agreement - Sec. 28C
8. Recognition by order of a Labour Court Sec. 280.
9. Rights of a recognised Trade Union. Sec: 28F.
10. Collective Bargaining:
11. Meaning of Collective bargaining.
12. Objectives of Collective bargaining.
13. Essentials of Collective bargaining.
14. Position of Collective bargaining in Industrial Dispute Act.

UNIT -IV

INDUSTRIAL EMPLOYMENT (STANDING ORDERS) ACT, 1946

1. Meaning of Standing Order.
2. Procedure for certification of Standing Order - Sec. 3 - 9.
3. Duration and Modification of Standing Order - Sec. 10.

Cases:

1. S.S. Light Railway Co. v. S.S. Railway Workers Union. AIR 1969 SC.
2. Western India Match Co. v. Workmen. AIR 1973 SC.
3. Associated Cement Co. Ltd., v. P.O. Vyas. AIR 1960 SC.
4. U.P.E: Supply Co. v. T.N. Chatterjee. AIR 1972 SC.
5. Barauni Refineries P.S.P. v. Indian Oil Corporation Ltd. (1991) 1. LL(SC).

UNIT - V

MINIMUM WAGES ACT 1948

1. Theories of wages and wage Policy.
2. Concept of wages - Minimum wage, Living wage and Fair Wage.
3. a) Fixation of minimum rates of wages - Sec. 3 and 4.
   b) Procedure for fixing and revising minimum wages. - Sec. 5.
   c) Composition of committees and Advisory Boards - Their powers and functions. Sec. 7-9.
4. Appointment of Inspectors - Powers and functions. Sec. 19.
5. Settlement of Claims arising under the Act - Sec. 20.

Express Newspaper Versus Union of India AIR 1958 SC 528

The authority can order payment of minum wagesif not paidand also impose ten times of wages as fine / or as compensation to worker.

Cases:

1. Hydro (Engineers) Private Ltd. v. The Workmen AI R 1969 SC.
2. Kamani Metals and Alloys v. Their Workmen. AIR 1967 SC.
3. S.A.F.L. Works v. State Industrial Tribunal, Nagpur. AIR 1978 SC.
4. Edward Mills Co. Ltd., v. State of Ajmer (1954) LLJ:
5. The crown aluminnium versus their workmen AIR 1958 SC 30

THE PAYMENT OF WAGES ACT, 1936

1. Employers responsibility for the payment of wages. Sec. 3. - Exception to this rule - Fixation of wage periods - Time of Payment of Wages - Wages to be paid in current coins and currency notes. Sec. 4, 5 and 8.
2. Deductions which may be made from wages - Sec., 7.
   a) What is deduction - Explanation 1 to Sec. 7.
   b) What are not deduction - Explanation 11 to Sec. 7.
   c) Authorised Deductions - Sec. 7(2).
      (i) Deductions by way of fine.
      (ii) Deductions for absence from duty.
      (iii) Deductions for house accommodation, Service etc.,
      (iv) Deductions for advances or loans etc.,
      (v) Deductions for damages to or loss of goods.
      (vi) Deductions for Income Tax Payable.
      (vii) Deductions pursuant to an order of a court.
      (viii) Deductions for PF or National Defence Fund.
      (ix) Deductions for Co-operative Societies.
      (x) Deductions for Insurance or Savings.
      (xi) Deductions by Railway Administration.
      (xii) Permissible Total deductions ..
3. Appointment of Inspectors - Their Powers and functions - Claims and their settlement.

The overall limit of deduction is made in respsect of Amount payable to cooperative societies not to exceed 75% and in other case 50 % of the total wages.

EqualRemunerationAct, 1976

- Duty of employer to pay equal remuneration to men and women (Sec 4)
- Prohibition of discrimination in recruitment or other condition of service (Sec 5)
- Advisory Committee (increasing employment opportunities for women) (Sec 6)
- Authorities for hearing and deciding claims and complaints (Sec 7)
- Maintenance of Registers (Sec 8)

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4. INTERNATIONAL LAW

Public international law concerns the structure and conduct of sovereign states and also holy see. it also some times concerns multinational corporations and individuals. Public international law has increased in use and importance vastly over the twentieth century, due to the increase in global trade environmental deterioration on a worldwide scale, awareness of human rights violations, rapid and vast increases in international transportation and a boom in global communications.

Public international law combines two main branches:

1. The law of nations (Jus gentium) and
2. The international agreements and conventions (Jus inter gentes)

Private international law is concerned with the resolution of conflict of laws international law "consists of rules and principles of general application dealing with the conduct of states and of intergovernmental organizations and with their relations with persons, whether natural or legal or juristic.

International legal theory

International legal theory comprises a variety of theoretical and methodological approaches used to explain and analyze the content, formation and effectiveness of public international law.

Some approaches center on the question of compliance:

Why states follow international norms in the absence of a coercive power that ensures compliance?

Other approaches focus on the problem of the formation of international rules:

Why states voluntarily adopt international law norms, that limit their freedom of action, in the absence of a world legislature?

While other perspectives are policy oriented: they elaborate theoretical frameworks and instruments to criticize the existing norms and to make suggestions on how to improve them.

Some of these approaches are based on domestic legal theory some are interdisciplinary, and others have been developed expressly to analyze international law.

Classical approaches to International legal theory are:

1. The natural law

The natural law approach argues that international norms should be based on axiomatic truths.

2. The Eclectic

In 1625 Hugo Grotius argued that nations as well as persons ought to be governed by universal principle based on morality and divine justice while the relations among polities ought to be governed by the law of peoples, the jus gentium, established by the consent of the community of nations on the basis of the principle of pacta sunt servanda, that is, on the basis of the observance of commitments.

3. The legal positivism schools of thought

- The early positivist school emphasized the importance of custom and treaties as sources of international law.
- The early positivist school emphasized the importance of custom and treaties as sources of international law.
- 16th century the historical examples showed the positive law (jus voluntarium) was determined by general consent.
- Bynkershoek asserted that the bases of international law were customs and treaties commonly consented to by various states,
- Moser emphasized the importance of state practice in international law.

- The positivism school narrowed the range of international practice that might qualify as law, favouring rationality over morality and ethics.
- The 1815 Congress of vienna marked the formal recognition of the political and international legal system based on the conditions of Europe.
- Modern legal positivists consider international law as a unified system of rules that emanates from the states' will. International law, as it is, is an "objective" reality that needs to be distinguished from law "as it should be." Classic positivism demands rigorous tests for legal validity and it deems irrelevant all extralegal arguments.

International law is the vanishing point of jurisprudence

According to Holland International law is the vanishing point of jurisprudence. By using the words "vanishing point" in relation to international law and jurisprudence, he meant that international law and jurisprudence are parallel to each other, and they there fore are distinct and separate though it might be appearing that they are one and the same at vanishing point.

Vanishing point is a point at which parallel lines in the same plane appears to meet. Thus international law cannot be kept in the category of law mainly because there is neither any sovereign authority nor exists sanctions if its rules are violated. In the light of above discussions the analytical jurist, Holland ,remarks that international law is the vanishing point of jurisprudence.

He has stated therefore that international law can be described as law only by courtesy, since the right with which it is concerned cannot properly be described as legal.

While his view was perhaps correct at his time but at present the same is subjected to severe criticism and therefore, it is not tenable in the changed character of International law, due to treaties the obligation of states and other social environmental and humanitarian characteristics of international law.

SOURCES OF INTERNATIONAL LAW

Formal sources: sources from which a law derives its authority or sanction. Material sources: sources from which the law derives its subject matter.

Art 38 of the ICJ Statute contains the sources of international law

1. International conventions or treaties
2. International customs
3. General principles of law recognized by civilized nations
4. Judicial decisions. Arbitral tribunals and juristic works
5. Decisions of international institutions (Resolutions)

1. International conventions or treaties

International convention and treaties are important sources of international law

Convention means meeting or conference when more number of countries meets to formulate certain rules of international law it is called general convention.

Treaty is an agreement whereby two or more states establish or seek to establish relationship between them governed by international law. They may be bilateral treaties, trilateral or multilateral treaties.

Treaties are of 2 kinds

1. Law making treaties
2. Treaty contracts

2. International customs

Customs are oldest sources of international law

Custom is a long practice of usage. It is a rule of conduct recognized by civilized states. Custom is valid only if it is satisfies the essential requirements vis long duration, uniformity and consistency, Generality of practice, opinio juris et necessitates.

3. General principles of law recognized by civilized nations.

General principles of laws are recognized and accepted by almost all the states principles of natural justice. Res judicata, estoppel, good faith, prescription are few examples.

The word civilized nations faced several criticism ..

4. Judicial decisions, Arbitral tribunals and juristic works

Judicial decisions, Arbitral tribunals and juristic works are most important and indirect sources on international law. Art 59 of ICJ Statute says the decisions of the court shall be binding only between the parties and in respect of that particular case.

5. Decisions of international institutions (Resolutions)

The resolutions of GA and the contribution of specialized agencies have influenced the formulation of rules of international law . Other slogan of international law, writing of jurists and commutators, judicial decisions of international and municipal county and Certain norms of international law achieve the binding force of peremptory norms (jus cogens) as to include all states with no permissible derogations.

RELATION BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

International law governs the relationship between states and other subjects international law whereas municipal law results the conduct of the individuals within the states.

Some times international law becomes part of municipal law. Transformation of international law into municipal law may take place as per the constitutional provisions of the state. International law cannot be applied without the cooperation of the national legal system. International law is not law above but between the states and is therefore weaker than municipal law.

Monism

Law is a unified branch of knowledge. Both municipal and international law are parts of one universal legal system.

There is only one legal system called domestic legal order serving the needs of human community in one way or the other. International law and municipal law are intimately connected with each other.

Dualism

Law is not a unified branch of knowledge. International law and municipal law are two distinct and separate laws.

International law result in common will of the sovereign states. Municipal law result of the will of the people of that particular states.

Specific adoption theory:

International law cannot be directly enforced in the field of municipal law the state must specifically adopt the rules of international law for the purpose of enforcing them in the field of municipal law. This theory is propounded by positivists.

Transformation theory

International law has to be transformed into municipal law, unless the rules of treaty are substantially transformed they cannot be enforced in the sphere of national law. International law cannot find place in the national or municipal law unless the latter allows its machinery to be used for the purpose.

Delegation theory

The rules of international law are applied in the field of state law in accordance with the procedure laid down in its constitution. It; is the state to decide for itself when the provisions of a treaty or convention are to come into effect and in what manner they are to be incorporated in the municipal law. There is no need of transformation of a treaty into national law.

SUBJECTS OF INTERNATIONAL LAW:

International law deals with the rights and duties of the state and also it apples to individuals and certain non state entities.

Theories regarding the subject of international law:

Realistic theory:

Only states are the subjects of international law- Oppenheim

Fictional theory:

Only individuals are the subjects of international law - Kelson, Westlake, the duties and rights of the states are only the duties and rights of men who compose them. There is no difference between international law and state law.

Funtinal theory:

States, individuals and certain non state entities are the subjects of international law. This theory is mixture of the above two theories. UN is treated as an international person under international law.

INDIVIDUALS AS THE SUBJECT OF INTERNATIONAL LAW

Gradually individuals are occupying place of importance under international law as a subject of international law in some occasions.

Some points to understand that international law recognized individual as subject -

1. The universal declaration of Human rights 1948 recognized a broad spectrum of human rights of an the individual and thus upholds human dignity.
2. Every state is entitled to apprehend and punish the pirates,
3. State can punish harmful individuals and criminals.
4. International law regulates the conduct of the foreigners,
5. Espionage is a crime and spies can be punished,
6. Aggrieved persons can claim damages against states
7. UN enables individuals to file petitions

STATE RESPONSIBILITY OR DUTIES

State responsibility means liability or accountability of the state. It is an obligation towards the nations and their citizens.

State responsibility means of various fields -

1. State responsibility for international delinquency
2. State responsibility for injury to aliens
3. State responsibility for the act of Govt organs
4. State responsibility for contracts with foreigners
5. State responsibility for breach of treaty or contracts
6. State responsibility in respect of expropriation of property
7. State responsibility for the acts of multinational corporations

STATE SUCCESSION

Succession means substitution or replacement. Succession means the substitution of one state by another state over a territory. It indicates transfer of rights and duties from one international person to another in consequence of a territorial exchange. The state which replaces is called successor state or new state. The state which has been replaced by another state is called predecessor state or parent state.

Methods of succession

1. Universal succession
2. Partial succession

Universal succession

When the personality of the predecessor state is completely destroyed and is absorbed by another state it is called as universal or total succession. State looses its legal identity here. Generally it takes place by annexation or conquest or subjugation or voluntary merger.

Partial succession

When a part of the territory is severed or detached from the parent state and personality is effected only to the extent by which the territory is transferred it is called a partial succession.

Here the parent state looses its legal identity. Partial succession takes place by succession or cession or conquest and annexation of a part or dismemberment.

TERRITORIAL SOVEREIGNTY MODES OF ACQUISITION AND LOSS OF TERRITORY

Acquisition of a territory by a state means acquisition of sovereignty over such territory.

Mode of acquisition

1. By occupation
2. By prescription
3. By accretion
4. By cession
5. By conquest
6. By award
7. By plebiscite

1. By Occupation

Occupation means the control of country by military force of a foreign power. This is an act of appropriation by a state over a territory which does not belong to any other state.

2. By Prescription

Prescription means using a property for a long period. It is the acquisition of territory by an adverse holding continued for a certain length of time peacefully. Three essentials are to be fulfilled for this method of acquisition

- possession of territory must be peaceful
- it must be continuous without interruption
- it must be held fairly for a long time

3. By accretion

Accretion means increase or growth of land by rivers naturally. It is an act of rivers or sea which modifies the existing state and the same is considered to be the part of geographical process.

4. By cession

Cession means give over or surrender to the physical control of another state. State transfers some portion of its territory to another sovereign state with or without compensation.

5. By conquest

Conquest means takeover or invasion through military force in times of war.

6. By award

Award mean decision or judgement. A territory may be acquired by a state through a judgement by international court of justice, ad hoc arbitral tribunals or conciliation commissions.

7. By plebiscite

Plebiscite means vote by the electorate determining public opinion on a question of national importance. The inhabitants of a given territory wish to merge it with another state.

Modes of Loss of Territory

1. By cession:

Cession is a formal separation from an alliance or federation. After separation the state acquires new and separate international personality. In this process the state which gives up the part losses its territory.

2. By operation of nature

A state may lose its territory by operation of nature, by earthquake a coast of the sea or an island may disappear.

3. By subjugation

Subjugation means forced submission to control by others. A state may acquire territory through annexation, the other state may loose it through subjugation, but is not recognized as valid mode.

4. By prescription

Prescription means using a property for a long period. A state may lose its territory by using it for a long period, on the contrary the state which had occupation over it earlier may lose it.

5. By revolt

A state may lose its territory by means of revolt. In the process revolt a state may lose its territory.

6. By dereliction

Dereliction means negligence or carelessness. When a state neglects a territory that may be acquired by a state through occupation.

7. By grant of independence

The newly emerged state acquires territorial sovereignty and international personality. Thus the state which grants freedom looses that territory.

EXTRADITION

Extradition means delivery of criminals or surrender of escapee. Sometime a person who commits crime in his own country runs away to another country, in such situation the country affected finds itself helpless to exercise jurisdiction to punish the fugitive. In order to punish such escapee international cooperation is necessary. Extradition is a legal process by which one government may obtain custody of individuals from another govt in order to put them on trial or imprison them.

Principles and rules of extradition

1. There must be a bilateral extradition treaty between states
2. The act should be crime in both states under extradition
3. There must be prima facie evidence against the criminal
4. The formalities prescribed should be fulfilled
5. The treaty terms and proper trial should be followed
6. The accused must be prosecuted only for the specific crime.
7. Generally persons charged with political crimes are not extradited.

Rule of speciality

The prosecution of the accused only for the crime for which he was extradited is known as rule of speciality. The requesting state in under a duty to try or punish the fugitive criminal only for the offence for which he has been extradited.

Double criminality

The crime for which extradition is claimed should be crime in both countries is known as double criminality. Generally a list of crimes are embodied in the treaty and extradition is limited to such listed crimes only.

ASYLUM

Asylum means a place offering protection and safety. In latin the word asylum means unbreakable place. Asylum is a protection given to an escapee by a state on its territory under its control. Asylum is therefore an extension of hospitality and protection to a fugitive and the place where such protection is offered.

Asylum has two elements

1. Shelter; and
2. Active protection

Types of asylum

1. Territorial asylum
2. Extra territorial asylum

1. Territorial asylum:

Asylum granted by a state in its own territory is known as territorial asylum. It is purely discretion of the state either to grant or not to grant.

2. Extra territorial asylum:

Asylum granted by a state outside its territory is known as extra territorial asylum. The state gives protection at legations, consular premises and war ships etc. extra territorial asylum is further classified in to the following categories. They are:

1. Asylum in legation
2. Asylum in consulates
3. Asylum in warships
4. Asylum in merchant vessels
5. Asylum in the premises of international institutions

LAW OF THE SEAS

The United Nations Convention on the Law of the Sea (UNCLOS), also called Law of the Sea treaty, The Law of the Sea Convention defines the rights and responsibilities of nations in their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine Natural resources. Unclos concluded in 1982 it replaced four 1958 treaties.

The UNCLOS replaces the older and weaker freedom of the seas' concept, dating from the 17th century: national rights were limited to a specified belt of water extending from a nation's coastlines, usually 3 nautical miles, according to the 'cannon shot' rule developed by Bynkershoek. All waters beyond national boundaries were considered international waters: free to all nations, but belonging to none of them (the mare liberum principle promulgated by Grotius).

The most significant issues covered were setting limits, navigation, archipelagic status and transit regimes, exclusive economic zones (EEZs), continental shelf jurisdiction, deep seabed mining, the exploitation regime, protection of the marine environment, scientific research, and settlement of disputes.

The convention set the limit of various areas, measured from a carefully defined baseline. (Normally, a sea baseline follows the low-water line, but when the coastline is deeply indented, has fringing islands or is highly unstable, straight baselines may be used.) The areas are as follows:

Internal waters: It Covers all water and waterways on the landward side of the baseline.

The coastal state is free to set laws, regulate use, and use any resource. Foreign vessels have no right of passage within internal waters.

Territorial waters: Out to 12 nautical miles (22 kilometres; 14 miles) from the baseline, the coastal state is free to set laws, regulate use, and use any resource. Vessels were given the right of innocent passage through any territorial waters, with strategic straits allowing the passage of military craft as transit passage, in that naval vessels are allowed to maintain postures that would be illegal in territorial waters. “Innocent passage” is defined by the convention as passing through waters in an expeditious and continuous manner, which is not “prejudicial to the peace, good order or the security” of the coastal state.

Fishing, polluting, weapons practice, and spying are not “innocent”, and submarines and other underwater vehicles are required to navigate on the surface and to show their flag. Nations can also temporarily suspend innocent passage in specific areas of their territorial seas, if doing so is essential for the protection of its security.

Archipelagic waters: The convention set the definition of Archipelagic States in Part IV, which also defines how the state can draw its territorial borders. A baseline is drawn between the outermost points of the outermost islands, subject to these points being sufficiently close to one another. All waters inside this baseline are designated Archipelagic Waters. The state has full sovereignty over these waters (like internal waters), but foreign vessels have right of innocent passage through archipelagic waters (like territorial waters).

Contiguous zone: Beyond the 12 nautical mile limit, there is a further 12 nautical miles from the territorial sea baseline limit, the contiguous zone, in which a state can continue to enforce laws in four specific areas: customs, taxation, immigration, and pollution, if the infringement started within the state’s territory or territorial waters, or if this infringement is about to occur within the state’s territory or territorial waters. This makes the contiguous zone a hot pursuit area.

Exclusive economic zones (EEZs): These extend from the edge of the territorial sea out to 200 nautical miles (370 kilo metres; 230 miles) from the baseline. Within this area, the coastal nation has sole exploitation rights over all natural resources. In casual use, the term may include the territorial sea and even the continental shelf. The EEZs were introduced to halt the increasingly heated clashes over fishing rights, although oil was also becoming important.

Continental shelf: The continental shelf is defined as the natural prolongation of the land territory to the continental margin’s outer edge, or 200 nautical miles from the coastal state’s baseline, whichever is greater. A state’s continental shelf may exceed 200 nautical miles until the natural prolongation ends. However, it may never exceed 350 nautical miles (650 kilometres; 400 miles) from the baseline; or it may never exceed 100 nautical miles (190 kilometres; 120 miles) beyond the 2,500 meter isobath (the line connecting the depth of 2,500 meters). Coastal states have the right to harvest mineral and non-living material in the subsoil of its continental shelf, to the exclusion of others. Coastal states also have exclusive control over living resources “attached” to the continental shelf, but not to creatures living in the water column beyond the exclusive economic zone. Aside from its provisions defining ocean boundaries, the convention establishes general obligations for safeguarding the marine environment and protecting freedom of scientific research on the high seas, and also creates an innovative legal regime for controlling mineral resource exploitation in deep seabed areas beyond national jurisdiction, through an International seabed Authority and the Common heritage of mankind principle. Land locked states are given a right of access to and from the sea, without taxation of traffic through transit states.

FREEDOMS OF THE AIR

The freedoms of the air are a set of commercial aviation rights granting a country's airlines the privilege to enter and land in another country's airspace it is formulated as a result of disagreements over the extent of aviation liberalization in the Convention on International civil aviation of 1944, known as the Chicago Convention.

The convention was successful in drawing up a multilateral agreement in which the first two freedoms, known as the International Air Services Transit Agreement or "Two Freedoms Agreement", were open to all signatories.

While it was agreed that the third to fifth freedoms shall be negotiated between states, the International Air Transport Agreement (or "Five Freedoms Agreement") was also opened for signatures, encompassing the first five freedoms.

Several other "freedoms" have since been added; although most are not officially recognized under international bilateral treaties, they have been agreed by a number of countries

1. the right to fly over a foreign country, without landing there.
2. the right to refuel or carry out maintenance in a foreign country on the way to another country
3. the right to fly from one's own country to another
4. the right to fly from another country to one's own
5. the right to fly between two foreign countries during flights while the flight originates or ends in one's own country
6. the right to fly from a foreign country to another one while stopping in one's own country for non-technical reasons
7. the right to fly from a foreign country to another one while stopping in one's own country for non-technical reasons
8. the right to fly between two or more airports in a foreign country while continuing service to one's own country
9. the right to fly inside a foreign country without continuing service to one's own country

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5. CLINICAL COURSE - II

THE ARBITRATION AND CONCILIATION ACT, 1996

HISTORY OF ARBITRATION

Arbitration has a long history in India. In ancient times, people often voluntarily submitted their disputes to a group of wise men of a community-called the panchayat - for a binding resolution.

Modern arbitration law in India was created by the Bengal Regulations in 1772, during the British rule. The Bengal Regulations provided for reference by a court to arbitration, with the consent of the parties, in lawsuits for accounts, partnership deeds, and breach of contract, amongst others.

Until 1996, the law governing arbitration in India consisted mainly of three statutes:

(i) Arbitration (Protocol and Convention) Act, 1937

(ii) Indian Arbitration Act, 1940

(iii) Foreign Awards (Recognition and Enforcement) Act, 1961.

General law governing arbitration in India along the lines of the English Arbitration Act of1934, and both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards (the 1961 Act implemented the New York Convention of 1958).

The government enacted the Arbitration and Conciliation Act, 1996 (the 1996 Act) in an effort to modernize the outdated 1940 Act. The 1996 Act is a comprehensive piece of legislation modeled on the lines of the UNCITRAL Model Law. This Act repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act). Its primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes. The 1996 Act covers both domestic arbitration and international commercial arbitration.

The Arbitration Act, 1940

The Arbitration Act, 1940, dealt with only domestic arbitration. Under the 1940 Act, intervention of the court was required in all the three stages of arbitration, i.e. Prior to the reference of the dispute to the arbitral tribunal, in the duration of the proceedings before the arbitral tribunal, and after the award was passed by the arbitral tribunal. Before an arbitral tribunal took cognizance of a dispute, court intervention was required to set the arbitration proceedings in motion. The existence of an agreement and of a dispute was required to be proved. During the course of the proceedings, the intervention of the court was necessary for the extension of time for making an award. Finally, before the award could be enforced, it was required to be made the rule of the court.

While the 1940 Act was perceived to be a good piece of legislation in its actual operation and implementation by all concerned - the parties, arbitrators, lawyers and the courts, it proved.

THE ARBITRATION AND CONCILIATION ACT, 1996

PRELIMINARY

The Arbitration and Conciliation Act, 1996 was enacted with a view to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

The Act is in four parts. Part I relates to arbitration, Part II deals with enforcement of certain foreign awards namely the New York and Geneva Convention awards, Part III provides for conciliation as an alternative dispute resolution mechanism and Part IV consists of supplementary provisions.

The Act extends to the whole of India. However, Parts I, III and IV of the Act shall extend to the State of Jammu and Kashmir only in so far as they relate to international commercial arbitration or, as the case may be, international commercial conciliation.

Arbitration is an alternative means of dispute resolution by a domestic tribunal who is chosen by the parties themselves or appointed with their consent.

It is a popular means of settling disputes in international, national and commercial spheres and an arbitration clause is usually incorporated in almost all business transactions and employment contracts. The Indian equivalent for arbitration is 'panchayat.'

Arbitration is the means by which parties to a dispute get the same settled through the intervention of a third person (who is called an arbitrator), so that the actual decision of the dispute rests with the arbitrator, who is considered to be the ultimate judge of the law and facts involved in the dispute.

The underlying principle of this branch of law is to encourage parties to settle their disputes amicably through a tribunal of their own choice instead of carrying it to the established courts of justice.

Salient Features of the Arbitration and Conciliation Act, 1996

1) In addition to arbitration, conciliation has also been recognized as a means of settling commercial disputes.
2) The arbitration award and the settlement arrived at during conciliating proceedings have been treated at par with the decree of the Court.
3) Powers of the Court have been considerably curtailed.
4) The Act contains a salutary provision making it mandatory for the arbitrator to give reasons for the award.
5) The Act no longer requires the parties to make an application to the Court to make the award and this provision helps in saving considerable time of the litigants in execution of arbitral award.
6) The Act contains the provision relating to the interim measures which empower the arbitrator or arbitral tribunal to pass interim orders in respect of the subject-matter of the dispute at the request of the party.
7) The Act is more exhaustive and it deals with arbitration, conciliation, enforcement of foreign Arbitral awards basing on the Model Law of Arbitration and Rules of Conciliation of the UNCITRAL and deals with both Geneva Convention awards and New York Convention Awards.
8) The Act specifically defines the term 'international commercial arbitration' as an arbitration relating to disputes arising out of legal relationship whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties whether an individual, body corporate or a company is having business or residing abroad and in case of Government, the Government is of a foreign country.
9) The Act has abolished the Umpire system.
10) The Act insists on the qualification of the arbitrators who are really competent and well versed in such matters.
11) The Act contains a provision that an arbitral award which Is in conflict with the public policy in India shall not be valid in law being null and void.
12) The Act provides for enforcement of certain foreign awards made under the New York Convention and the Geneva Convention respectively.
13) There is a standard arbitration clause in the Act which is more useful for the parties entering into international commercial transactions.
14) The Act is a comprehensive legislation on domestic as well as international or inter-State Arbitrations.

15) The Act provides detailed procedure for conduct of Arbitrations and awards.
16) Arbitrators have been given more powers and the arbitral tribunals have been assigned better competence to rule on their jurisdiction.
17) As the Act has provisions for applicability of Foreign Arbitral Tribunal's awards, it has international applicability.
18) The role of institutions in promoting and organizing arbitration has been recognized.
19) The power to nominate arbitrators has been give (failing agreement between the parties) to the Chief Justice or to an institution or person designated by him.
20) The time limit for making awards has been deleted. The Act after amendment provides Fast Track Arbitration for quick disposal of disputes.
21) The Provisions relating to arbitration through intervention of Court when there is no suit pending or by order of the Court where there is a suit pending, have been removed.
22) The importance of transnational commercial arbitration has been recognized and it has been specifically provide that even where the arbitration is held in India, the parties to the contract would be free to designate the law applicable to the substance of the dispute.

Permanent arbitral institution

The parties may themselves directly appoint arbitrators and arrange for the necessary facilities for conduct of the arbitration (whether it be commercial or non-commercial arbitration) in such cases there is no intermediary. However, it is a common practice in commercial arbitration to entrust arbitration to institutions which administer arbitrations but do not arbitrate on disputes. By use of the words 'whether or not administered by a permanent arbitral institution' the definition in sec. 2(1) (a) has given legal recognition to arbitrations administrated by an institution thus removing the risk of administered arbitrations being declared unlawful.

The expression 'permanent arbitral institution' has not been defined in the Act nor does the Model Law on which this Act is based define the term. It may be taken to mean an institution which has acquired legal permanency by way of registration under some Act or by incorporation under a statute.

The role or function of such an institution as defined by sec. 6 is to arrange for administrative assistance to facilitate the conduct of arbitration proceedings.

What matters may be referred to arbitration?

All matters of controversy or litigation, unless they are forbidden by a statute or public policy can be submitted to arbitration. It is generally held that the following matters can be referred to arbitration:

i. All matters of civil nature, which may form the subject of civil litigation affecting private rights, may be referred to arbitration. Sec. 9 of the Civil Procedure Code refers to matters of civil nature.
ii. Even disputes which are not of a civil nature may be referred to arbitration provided they are not disputes of criminal nature .
iii. It is open to the parties to refer a pure question of law or facts or questions of territorial jurisdiction involving questions of law and fact to arbitration.

Matters which cannot be referred to arbitration:

i. Criminal proceedings – If the criminal proceedings involve a dispute which is purely criminal and which cannot be the subject of a civil action, such matter cannot be referred to arbitration.
ii. Illegal transactions – Where the subject matter of a reference is illegal, no award can be binding.
iii. Matrimonial matters – A suit for divorce cannot be referred to arbitration.
iv. Testamentary matters – The question of genuineness or otherwise of a will cannot be referred to arbitration as the Probate Court is the only Court to determine whether a Probate of an alleged will shall be issued.

v. Insolvency Proceedings- Insolvency proceedings cannot be referred to arbitration.

vi. Lunacy proceedings – Lunacy proceedings are not the subjects of arbitration as it is the prerogative of Government to protect lunatics.

Difference between arbitration and judicial adjudication

1. Nature of the tribunal – In case of arbitration the private tribunal or arbitrators are generally chosen by the parties themselves. The arbitral tribunal is a quasi-judicial body in whom the parties have confidence. The decision of the arbitral tribunal is called arbitral award and it is final and binding and cannot be corrected by any appeal but may be set aside in certain exceptional circumstances. Whereas, in litigation the tribunal is a Court of compulsory and competent jurisdiction, a judicial body. The judgement of the Court is subject to correction by way of appeal, revision or review.
2. Procedure and evidence – An arbitrator is not bound by the technical and strict rules of evidence and procedure but he must conform to the rules of natural justice. The proceedings before him are of a quasi-judicial nature. He need not record separate findings to the various issues raised before him. All that he is required to do is to give an intelligent decision which determines the rights of the parties. The courts are bound by the technical and strict rules of procedure and evidence contained in the Code of Civil procedure and The Indian Evidence Act.
3. Basis of decision – An arbitrator is generally expected to determine a dispute according to law, but he may depart from the rules of law and decide equitably. But the Courts of law cannot depart from the mandatory provision of law when the law is clear and rules of law exist. The major advantages of arbitration are there is no publicity as it maintains privacy. It is speedier than litigation, it is less format and affords flexibility in procedure. But the parties have to bear the cost of arbitration which may at times be substantially heavy and be more expensive than litigation.

Secs. 2-43

SCOPE AND APPLICABILITY Secs. 2(2) to (5) & Sec. 1(2) proviso

Part I shall apply to all arbitrations and all proceedings relating thereto subject to the following. It shall –

1. apply where the place of arbitration is in India;
2. not affect any other law which prohibits submission of certain disputes to arbitration;
3. except for the provisions relating to non-discharge of arbitration agreement upon death of any party thereto [sec. 40(1)], provisions in case of insolvency [sec. 41], and limitations [sec. 43], Part I of the Act shall apply to statutory arbitrations to the extent it is not inconsistent with that other enactment or rules made the reunder;
4. apply to statutory arbitration and arbitrations under an international agreement only in so far as here is nothing otherwise provided in that particular statute, law or agreement;
5. apply to the state of Jammu and Kashmir only in so far as it relates to international commercial arbitration.

DEFINITIONS Sec. 2(1), sec. 2(7) and sec. 7

Sec. 2(1) In this part unless the context otherwise requires-

a) "arbitration" means any arbitration whether or not administered by permanent arbitral institution.

b) "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not.

The arbitration agreement is required to be in writing, it may be in the form of an arbitration clause in a contract or in the form of a separate agreement or may arise where parties by reference import the arbitration clause contained in an earlier document into a subsequent contract so as to incorporate it.

The arbitration agreement shall be deemed to be in writing if it is contained in –

i. a document signed by the parties;

ii. an exchange of leteres, telex, telegrams or other means of telecommunication which provide a record thereof; or

iii. an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other. Sec. 2(1) (b) read with sec. 7;

c) "arbitral award" includes an interim award;

d) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators.

e) "court" means a District Court and a High Court exercising original Jurisdiction but does not include any court inferior to the District Court or any Court of Small Causes

f) "international commercial arbitration" means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is –

i. if an individual, a national of, or habitually resident in any country other than India; or

ii. if a body corporate, is incorporated in any country other than India; or

iii. if a company or an association or a body of individuals, the central management and control thereof is exercised in any country other than India, or

iv. the Government of a foreign country,

"international commercial conciliation' shall have the same meaning as assigned to the expression "international commercial arbitration" subject to substitution of word conciliation in place of arbitration. Sec. 1(2) Expln.;

g) "Legal representative" means a person who in law represents the estate of the deceased, and includes any person who intermeddles with the estate person on whom the estate devolves on the death of the party so acting;

h) "party" means a party to an arbitration agreement.

Sec. 2 (7) "Domestic award" an arbitral award made under this Part shall be considered as domestic award.

ESSENTIAL INGREDIENTS OF ARBITRATION AGREEMENT

In order that an arbitration agreement be regarded as valid in law it must comply with the special statute on Arbitration and like all contracts it must be legally valid under the law of contract.

The essentials of a valid contract under the provisions of Chapter II of the Indian Contract Act briefly stated are :-

1. Contractual capacity – Parties must be legally competent to enter into a contract under secs. 11 and 12

2. Free mutual consent – Free consent not tainted by coercion, fraud etc., as provided by secs. 13 to 22. The parties to the agreement must be ad idem. There should be consensus between the parties they must agree upon the same thing in the same sense.

3. Lawful object and consideration – The subject or class of subjects to which the dispute relates must be lawful under secs. 23 to 27 and 30.

4. Certainty – There should be no uncertainly in the agreement. The meaning of the agreement must be certain or capable of being made certain as required by sec. 29. The rule is id certum est quod certum redid potest meaning that what is capable of being ascertained is certain, not uncertain.

The essential ingredients of an arbitration agreement as provided by sec. 2 (b) read with sec. 7 are –

1. Written agreement.
2. Intention to submit to arbitration.
3. Disputes present or future justiciable in civil action, in respect of defined legal relationship whether contractual or not.
4. Parties.

CONSTRUCTION OF REFERENCES Sec. 2(6) – 2(9)

Freedom of parties to determine a certain issue conferred by Part I, except in relation to rules applicable to substance of dispute under sec. 28 shall include the right of parties to delegate the determination of that issue to any person or institution. [Sec. 2(6)].

Where in any agreement a reference is made to any arbitration rules those rules shall be deemed to be incorporated in the agreement and the parties shall be deemed to have agreed to the contents of those rules. [Sec. 2(8)].

The expression claim shall also apply to a counter-claim and defence shall apply or include defence to claim and counter-claim except for the purposes of sec . 25(a) and 32(2) (a) where reference to claim means claim by claimant only. [Sec. 2(9)].

An arbitral award made under Part I of the Act shall be considered as a domestic award. [Sec. 2(7)].

RECEIPT OF WRITTEN COMMUNICATIONS Sec. 3.

Unless otherwise agreed by the parties, any written communication is deemed to have been received –

a) if it is delivered to the addressee personally, or at his place of business, habitual residence or mailing address; and
b) where none of the places referred to above can be found after making a reasonable inquiry, if it is sent to the addressee's last known place of business, habitual residence or mailing address by registered letter or by any other means which provides a record of the attempt to deliver it.

The communication is deemed to have been received on the day it is so delivered. The deeming provisions of this section apply to arbitral tribunal and not to written communication in respect of proceedings of any judicial authority.

WAIVER OF RIGHT TO OBJECT Sec. 4.

A party who knowingly fails to object the non-compliance of any non-mandatory provisions of Part I or any requirement under the arbitration agreement by the other party without undue delay or within the specified period of time limit, is deemed to have waived his right to so object.

EXTENT OF JUDICIAL INTERVENTION. Sec. 5.

Irrespective of anything contained in any other law, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

ADMINISTRATIVE ASSISTANCE Sec. 6.

To facilitate the conduct of arbitral proceedings administrative assistance by a suitable institution or person may be arranged by the parties or by the arbitral tribunal with the consent of the parties.

POWER TO REFER PARTIES TO ARBITRATION. Sec. 8.

A judicial authority before which an action is brought in respect of a matter which is the subject of an arbitration agreement shall refer the parties to arbitration if a party makes an application for this purpose, which must be accompanied by the original arbitration agreement or a duly certified copy thereof, not later than when submitting his first statement on the substance of the dispute.

Inspite of the fact, that an application as above has been made and the issue is pending before a judicial authority an arbitration may be commenced or continued and an arbitral award made.

POWER OF COURT TO GRANT INTERIM MEASURES. Sec. 9.

A party to the arbitration agreement may either before commencement of, or during arbitration proceedings or at any time after the making but before enforcement of the arbitral award apply to a court for-

i. the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

ii. an interim measure of protection in respect of any of the following matters, namely –

a) the preservation, interim custody or sale of any goods forming the subject-matter of the arbitration agreement;

b) securing the amount in dispute;

c) the detention, preservation or inspection of any property or thing and authorizing the taking of all necessary steps which are expedient for the purpose of obtaining full information or evidence in this behalf;

d) interim injunction or the appointment of a receiver;

e) such other interim measure of protection as appears just and convenient to the court.

While dealing with an application for and granting interim measures of protection the court shall have the same powers as it has for the purpose of or in relation to any proceedings before it.

COMPOSITION OF ARBITRAL TRIBUNAL Secs. 10-15

Number of arbitrators. –The parties are free to determine the number of arbitrators but such number shall not be an even number. Where they do not so determine, the arbitral tribunal shall consist of a sole arbitrator. [Sec. 10].

Appointment of arbitrators – may be made by the parties themselves or upon request of the parties by the Chief Justice or any person or institution designated by him. In case of international commercial arbitration the reference to Chief Justice shall be construed as a reference to the Chief Justice of India and in case of any other arbitration it shall be construed as a reference to the Chief Justice of High Court. The High Court which would have had jurisdiction if the questions forming the subject matter of arbitration had arisen in a suit.

A person of any nationality may be appointed as an arbitrator, unless otherwise agreed by the parties. However, in case the parties in an international commercial arbitration belong to different nationalities, the Chief Justice of India or the person or institution designated by him may appoint the sole or third arbitrator of a nationality other than the nationalities of the parties.

The parties are at liberty to mutually agree upon a procedure for appointment of arbitrators. If a procedure has been agreed upon appointment shall be made in accordance therewith.

Where the parties have agreed that the number of arbitrators shall be three but no procedure is laid down or agreed upon, the procedure laid down in sec.11(3) shall apply. Accordingly, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

Power of Chief Justice or person or institution designated by him to appoint arbitrators-In an arbitration with three arbitrators when the procedure prescribed by Sec. 11(3) fails –

i. either because one of the parties fails to appoint an arbitrator; or

ii. because the two arbitrators appointed by the parties –

a) fail to appoint, or

b) fail to agree upon, the third arbitrator within the specified period of thirty days, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

In an arbitration with a sole arbitrator, where there is a failure to agree on procedure or where the parties fail to agree on appointment of the sole arbitrator within thirty days of receipt of a request by one party from the other party to so agree, the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

Where despite there being an agreement on procedure to appoint there is failure in acting upon it on the part of either, a party or the parties or the two appointed arbitrators or a person or the institution to whom the Chief Justice delegated his power, unless the agreement on the appointment procedure provides other means for securing the appointment, a party may request the Chief Justice or any person or institution designated by him to take the necessary measures.

While appointing an arbitrator in exercise of powers vested under this section, the Chief Justice or the person or institution designated by him shall have due regard to the following considerations –

a) any qualifications required of the arbitrator by the agreement of the parties;

b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

Where more than one request has been made under this section to the Chief Justices of different High Courts or their designates, the Chief Justice or his designate to whom the request has been first made shall alone be competent to decide on the request.

A decision on a matter entrusted to the Chief Justice or the person or institution designated by him is final.

The Chief Justice may make such Scheme as he may deem appropriate for dealing with matters entrusted to him by his section. [Sec. 11].

Grounds for challenging the appointment of arbitrator

A duty is cast upon a prospective arbitrator (i.e., a person approached in connection with his possible appointment as an arbitrator) when approached and an arbitrator, from the time of his appointment and throughout the arbitral proceedings, to disclose, without delay to parties in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality, unless the parties have already been informed of them by him.

The appointment of a person as an arbitrator can be challenged by a party who has appointed him or participated in his appointment only on two grounds that is circumstances exist which raise justifiable doubts as to his independence or impartiality or he does not possess the qualifications agreed to by the parties and only for reasons of which the party becomes aware after the appointment has been made. [Sec. 12].

Procedure for challenging the appointment

The parties are free to agree on a procedure for challenging the arbitrator. However, if no procedure has been agreed the following procedure shall apply. The party intending to challenge an arbitrator shall send written statement of the reasons for the challenge to the arbitral tribunal within fifteen days after becoming aware of the constitution of the arbitral tribunal or of the existence of any circumstances giving rise to justifiable doubts as to the independence or impartiality of the arbitrator or the fact that the arbitrator does not possess the qualifications agreed to by the parties.

The arbitral tribunal shall decide on the challenge on merits except where the challenged arbitrator withdraws from office or the other party agrees to the challenge.

If the challenge is unsuccessful the arbitral tribunal shall continue the proceedings and make an arbitral award. However, the party who challenged the appointment of the arbitrator may apply for setting aside of the award under sec. 34. In case the award is set aside for wrongful rejection of the challenge the court may decide as to whether the arbitrator whose appointment was challenged is entitled to any fees. sec. 13.

Termination of mandate of arbitrator sec 13, 14 and 15.

Termination of mandate or authority of an arbitrator takes place in the following circumstances-

1) where the challenged arbitrator withdraws from office or the other party agrees to the challenge; [sec. 13(3)], or
2) upon failure or impossibility to act, that is if-
   a) the arbitrator becomes de jure or de facto unable to perform his functions; or
   b) for some other reasons fails to act without undue delay; or
   c) the arbitrator withdraws from his office; or
   d) the parties agree to the termination of his mandate.

   If there is any dispute between the parties as to whether either in law or factually the arbitrator is incapacitated from performing his functions or has for other reasons failed to act without undue delay a party may apply to the court to decide on the termination of the mandate, unless the parties have agreed otherwise.

   The withdrawal of the arbitrator from his office or an agreement between the parties to terminate his mandate shall not ipso facto imply acceptance of the validity of any of the grounds referred to in this sec. or sec. 12(3). [Sec. 14].
3) Where the arbitrator withdraws from office for any reason or the parties by mutual agreement terminate his mandate. [Sec 15(1)].

Substitution of arbitrator.

Where the mandate of an arbitrator terminates, the vacancy is to be filled by a substitute arbitrator who shall appointed by following the same procedure as was applicable to the appointment of the arbitrator being replaced.

Unless the parties to the arbitration otherwise agree, where an arbitrator is replaced –

a) any hearings previously held may be repeated at the discretion of the arbitral tribunal;
b) the change in composition of arbitral tribunal shall not render invalid any order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under sec. 15. [Sec. 15]

JURISDICTION OF ARBITRAL TRIBUNAL secs. 16-17.

Competence of arbitral tribunal to rule on its own jurisdiction.

The arbitral tribunal is competent to rule on its own jurisdiction. It can also decide ay objections with respect to the existence or validity of the arbitration agreement. While deciding these questions it shall take into account the following factors –

a) an arbitration clause shall be treated as an agreement independent of the other terms of the contract; and
b) a decision by the arbitral tribunal that the contract is null and void shall not ipso jure (by the mere operation of law) result in the automatic invalidity of the arbitration clause.

The plea of lack of jurisdiction of the arbitral tribunal shall be raised not later than the submission of the statement of defence. However, a party shall not be precluded from raising such a plea merely because he has appointed or participated in the appointment of an arbitrator.

Similarly, a plea that the arbitral tribunal is exceeding the scope of its authority may be raised during the course of arbitral proceedings.

The arbitral tribunal shall decide on any such plea and where it takes a decision rejecting the plea, it shall continue with the arbitral proceedings and make an arbitral award.

A party aggrieved by such an arbitral award may apply for having it set aside under sec. 34. [sec. 16].

Interim measures ordered by arbitral tribunal

In the absence of any agreement to the contrary the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection in respect of the subject-matter of the dispute. It may also require a party to provide appropriate security for carrying out the interim measures ordered by it. [sec. 17].

CONDUCT OF ARBITRAL PROCEEDINGS secs. 18-27.

Commencement of arbitral proceedings

In the absence of any agreement between the parties providing otherwise, the arbitral proceedings in respect of a particular dispute commence on the date on which the respondent receives a request for reference of the dispute to arbitration. [Sec. 21].

Place of arbitration

The parties are free to agree on the place of arbitration. If they fail to do so the arbitral tribunal shall determine the place of arbitration having regard to the circumstances of the case and the convenience of the parties.

Notwithstanding the above provisions, if there is no agreement to the contrary, the arbitral tribunal may meet at any place it considers appropriate for consultation among its members, hearing witnesses, experts or the parties, or inspection of documents, goods or other property. [Sec. 20].

Language to be used in arbitral proceedings

The parties are given the liberty to decide by mutual agreement what language or languages are to be used in the arbitral proceedings. In the event of there being no such agreement the arbitral tribunal shall determine the language or languages to be used. The language agreed or determined shall, unless otherwise specified, apply to any written statement, hearing, arbitral award, decision or other communication by the arbitral tribunal, and the arbitral tribunal may order that any documentary evidence shall be accompanied by the translation into such language. [Sec. 22].

Determination of rules of procedure

The arbitral tribunal shall not be bound by the code of Civil Procedure, 1908 or the Indian Evidence Act, 1872.

Subject to the provisions contained in Part I of this Act the parties are free to agree on the procedure to be followed in the conduct of arbitral proceedings, and in the absence of any such agreement the arbitral tribunal may follow the procedure it considers appropriate. This power of arbitral tribunal to determine the procedure includes the power to determine the admissibility, relevance, materiality and weight of any evidence. [Sec. 19].

Equal treatment of parties

The arbitral tribunal must mete out equal treatment to the parties and it must give each party a full opportunity to present his case. [Sec. 18].

Statements of claim and defence

Statements of claim and defence are required to be made within the period of time as agreed upon by the parties or determined by the arbitral tribunal. All documents considered relevant or a reference to the documents or other evidence they will submit should accompany such statements.

The claimant shall state the facts supporting his claim, the points at issue and the relief and remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of these statements.

Unless otherwise agreed by the parties, they may amend or supplement the statements of claim or defence and the arbitral tribunal has power at his discretion to allow amendment of pleadings and may refuse it on grounds of delay. [Sec. 23].

Hearings and written proceedings

Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or conduct the proceedings on the basis of documents or other materials. He shall hold oral hearings on request of a party except where the parties have agreed against it.

The arbitral tribunal shall give sufficient advance notice of any oral hearing and of any meeting for the purposes of inspection of documents, goods or other property. All statements, documents or other information supplied to or applications made and any expert report or evidentiary documents which the arbitral tribunal may rely on in making its decision shall be communicated to the parties. [Sec. 24].

Default of a party

Unless otherwise agreed by the parties, where, without showing sufficient cause-

a) the claimant fails to file his statement of claim as required by sec. 23(1), the arbitral tribunal shall terminate the proceedings;

b) however, where the respondent fails to submit his statement of defence as per sec. 23(1), the arbitral tribunal shall continue the proceedings ex parte without treating that failure as admission of claimant's allegations;

c) where after filing the statements one of the parties fails to appears at the oral hearing or produce any documentary evidence in support of his statement, the arbitral tribunal may continue the proceedings ex parte and make the award on the evidence before it. [Sec. 25].

Expert appointed by arbitral tribunal

In the absence of any agreement to the contrary between the parties –

a) the arbitral tribunal may appoint one or more experts to report on any specific issue and require a party to give the expert any relevant information or to produce, or to provide access to any relevant documents, goods or other property for his inspection;

b) if a party requests and the arbitral tribunal considers it necessary the expert shall participate in an oral hearing where he may be examined and cross examined;

c) upon request of a party the expert shall make available to him for examination all relevant documents, goods or property in possession of the expert on the basis of which he prepared his report. [Sec. 26].

Court assistance in taking evidence

An application may be made by the arbitral tribunal or by a party with the approval of the arbitral tribunal to the court for assistance in taking evidence. The following particulars must be specified in such application –

a) the names and addresses of the parties and the arbitrators;

b) the general nature of the claim and the reliefs sought;

c) the evidence to be obtained in particular –

   i. the name and address of any person to be heard as witness or expert witness and statement of the subject-matter of the testimony required;

   ii. the description of any document to be produced or property to be inspected.

The court on hearing the application may execute the request by ordering that the evidence be provided directly to the arbitral tribunal. While passing the necessary order the court may issue process or summons to witness as in suits tried before it. Where a witness fails to comply with the order and, or process, t will amount to contempt of arbitral tribunal and he will be subject to and incur the same disadvantages, penalties and punishments by order of the court on the request of the arbitral tribunal as he would incur for like offences in suits tried before the Court.

The expression processes used in this section includes summonses and commissions for the examination of witnesses and summonses to produce documents. [Sec. 27].

MAKING OF ARBITRAL AWARD & TERMINATION OF PROCEEDINGS

Rules applicable to substance of dispute Where the place of arbitration is situated in India –

a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute in accordance with the substantive law of India.

b) in international commercial arbitration –

   i. the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties. Any such designated law of a country shall, unless otherwise expressed, be construed as directly referring to the substantive law of that country and not to its conflict of laws rules.

   ii. failing any designation of the law by the parties the arbitral tribunal shall apply the rules of law it considers appropriate under the circumstances surrounding the dispute.

The arbitral tribunal shall decide ex aequo et bona or as amiable compositeur only if expressly authorized by the parties to do so.

In all cases the arbitral tribunal shall decide in accordance with the terms of the contract and by taking into account the usages of the trade applicable to the transaction. [Sec. 28].

Decision making by panel of arbitrators

In the absence of any agreement providing otherwise, where there is more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members. However, questions of procedure may be decided by the presiding arbitrator where the parties or all the members authorises him to do so. [Sec. 29].

Encouraging settlement not incompatible with arbitration agreement

It is not incompatible for an arbitral tribunal to encourage settlement of the dispute, and with the agreement of the parties he may use mediation, conciliation or other procedures at any time during arbitral proceedings to encourage settlement.

If parties settle the dispute during arbitral proceedings the arbitral tribunal shall terminate the proceedings and record the settlement in the form of an arbitral award on agreed terms made in accordance with sec. 31 and stating that it is an arbitral award. Such an award has the same status and effect as any other arbitral award on the merits of the dispute. [Sec. 30].

Form and contents of arbitral award

The requirements as to form and contents of an arbitral award are –

1. An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal. In proceedings with more than one arbitrator signatures of the majority shall suffice if the reasons for any omitted signature is stated.
2. Reasons upon which the award is based must be stated except where parties agree otherwise or it is an award on agreed terms under sec. 30.
3. The arbitral award shall state the date and place of arbitration.
4. A signed copy of the award shall be delivered to each party.
5. The arbitral tribunal may make an interim arbitral award.
6. Unless the parties otherwise agree, where an arbitral award is for payment of money, interest at a reasonable rate (on whole or part of the money for the whole or any part of the period between the date of arising of the cause of action and the date of making of the award) may be included in the sum for which the award is made.

   Interest at the rate of eighteen per centum per annum from the date of the award till date of payment is payable on the sum directed to be paid by an arbitral award unless the award otherwise directs.
7. The costs of an arbitration shall be fixed by the arbitral tribunal who shall specify the amount of costs or method for determining that amount, the manner of paying the costs, the party entitled to and the party who shall pay the costs.

The term costs for this purpose means reasonable costs relating to the fees and expenses of the arbitrators and witnesses, legal fees and expenses, any administration fees of supervising institution, any other expenses incurred in connection with the arbitral proceedings and the arbitral award. [Sec. 31].

Termination of Proceedings

The arbitral proceedings shall be terminated –

1. by the final arbitral award; or
2. by an order of the arbitral tribunal for termination of arbitral proceedings. Such an order can be passed in the following circumstances –
   a) where the claimant withdraws his claim, however, no order for termination of arbitral proceedings shall be passed where the respondent objects to such withdrawal and the arbitral tribunal recognizes that the respondent has a legitimate interest in obtaining a final settlement of the dispute;
   b) where the parties agree on the termination of the proceedings; or
   c) where the arbitral tribunal finds that the continuation of the proceedings has for any other reason become either unnecessary or impossible.

The mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings except, where proceedings for correction or interpretation of the award or making of arbitral award have been initiated under sec. 33 or where an application under sec. 34(1) for setting aside an arbitral award is adjourned by the court to enable the arbitral tribunal to resume the arbitral proceedings or to take any other action for eliminating the grounds for setting aside the award. [Sec. 32].

Correction and interpretation of award' additional award

Although an award has been made it may require correction, interpretation or additional award.

Correction of any computation, clerical or typographical or any other errors of a similar nature occurring in the arbitral award.

Interpretation of a specific point or part of the award.

Additional award as to claims presented in arbitral proceedings but omitted from the award.

The provisions of sec. 31. relating to form and contents apply also to correction, interpretation and additional award.

Correction may be made suo motu by arbitral tribunal within thirty days from the date of the award but not thereafter.

A request may be made by a party with notice to the other party within thirty days from receipt of arbitral award unless other period is agreed upon in this regard –

a) for correction of errors of the nature specified above;
b) for interpretation as stated above, where there is an agreement between the parties for so doing;
c) for additional award if there is no contrary agreement between the parties.

If the request of a party is felt justified by the arbitral tribunal it is to take action, that is make the correction, give interpretation within thirty days from the receipt of such notice and in case of a request for additional award it is to be made within sixty days from receipt of such notice unless the time if felt necessary is extended by the arbitral tribunal himself. [Sec. 33].

RECOURSE AGAINST ARBITRAL AWARD

Application for setting aside arbitral award

Recourse against an arbitral award may be had only by an application to a Court for setting it aside on the following grounds –

1) The party making an application for having it set aside furnishes proof that –
   i. a party was under some incapacity; or
   ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or

iii. no proper notice of the appointment of an arbitrator or of the arbitral proceedings was served on the applicant, or he was otherwise unable to present his case; or

iv. the arbitral ward deals with a dispute not contemplated by or not falling within the terms of the submission, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that if the good part is severable from the bad part of the arbitral award only the bad part of the decision may be set aside; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or

2) the Court finds that –

a) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

b) the arbitral award is in conflict with the public policy of India. Without prejudice to the generality of the expression, an award is said to be in conflict with the public policy of India if it was induced or affected by fraud or corruption or it was in violation of ther obligations of confidentiality of matters relating to conciliation proceedings imposed by sec. 75 or the bar on admissibility of evidence of conciliation proceedings placed under sec. 81 of the Act.

The time limit prescribed for making an application for setting aside an arbitral award is three months from the date of receipt of arbitral award or from the date of the disposal of the request for correction, interpretation or additional award under sec. 33. where such a request had been made. The Court is empowered to extend this time limit by a further maximum period of thirty days, but not thereafter on being satisfied that the applicant was prevented by sufficient cause from making the application within the prescribed time.

On receipt of an application for setting aside of an arbitral award the Court may, where it is appropriate and is so requested by a party, instead of adjudicating on the grounds raised, adjourn the proceedings for a period of time to be determined by the Court to enable the arbitral tribunal to deal with the grounds and to eliminate them to the extent possible either by resuming the arbitral proceedings or taking other suitable action. [Sec. 34].

FINALITY AND ENFORCEMENT OF ARBITRAL AWARDS

Finality of arbitral awards

Subject to the provisions of Part I, an arbitral award is final and binding on the parties and the persons claiming under them respectively. [Sec. 35]. In other words, it cannot be considered as final and binding until the time limit prescribed therein for correction, interpretation, or additional award and setting aside, as the case may be, has expired.

Enforcement of award

Where no application for setting aside an arbitral award is made or it has been refused, or the period of limitation prescribed, for appealing against an order refusing to set it aside has expired, it can be enforced in accordance with the provisions of the Code of Civil Procedure, 1908 as if it were a decree of the Court. [Sec. 36].

APPEALS AND MISCELLANEOUS

Appealable orders :An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely –

a) an order of a Court granting or refusing to grant an interim measure of protection under sec. 9;

b) an order of a Court setting aside or refusing to set aside an arbitral award under sec. 34;

c) an order of the arbitral tribunal accepting the plea that the arbitral tribunal does not have jurisdiction [sec. 16(2)], or that it is exceeding the scope of its authority. [sec. 16(3)];

d) an order of the arbitral tribunal granting or refusing to grant an interim measure of protection under sec. 17.

No second appeal shall lie from an order passed in appeal under this section, but this bar against second appeals shall not affect or take away any right to appeal to the Supreme Court. [Sec. 37].

The miscellaneous provisions relate to

1) Deposits [Sec. 38].

2) Lien on arbitral award and deposits as to costs [Sec. 39].

3) Arbitration agreement not discharged by death of party thereto [Sec. 40].

4) Provisions in case of insolvency [Sec. 41].

5) Jurisdiction [Sec. 42].

6) Limitations [Sec. 43].

Deposit of costs in advance

The arbitral tribunal may fix the amount of the deposit or supplementary deposit, as the case may be, as an advance for the costs likely to be incurred in arbitral proceedings in terms of sec. 31(8) in respect of the claim submitted to it and order a separate amount of deposit for the counter-claim submitted by the respondent. The parties are required to deposit this amount of advance in equal shares. Where a party fails to pay his share the other party may pay that share, where the other also does not pay the share of the defaulting party, the arbitral tribunal may suspend or terminate the arbitral proceedings in respect of the claim or counter-claim of the defaulting party.

Upon termination of the arbitral proceedings, the arbitral tribunal shall render accounts of the deposits received to the parties and return the unexpended balance, if any, to the party or parties, as the case may be. [Sec. 38].

Lien on arbitral award

The arbitral tribunal shall have a lien on the arbitral ward for any unpaid costs of the arbitration, this is, however, subject to any contrary provision in the arbitration agreement and the power of Court to release the lien under this section.

Where an arbitral tribunal refuses to deliver its award except on payment of the costs demanded by it, a party may make an application to the Court. The Court may order the arbitral tribunal to deliver the arbitral award to the applicant on payment into court of the costs demanded and after an inquiry pass further order as to a reasonable sum of costs to be paid to the arbitral tribunal out of the amount deposited in court and refund of balance to the applicant.

The arbitral tribunal is entitled to appear and be heard on any such application. No such application can be made where the fees demanded have been fixed by written agreement between the party and the arbitral tribunal.

The Court may make orders regarding costs of arbitration where any question relating to it arises and there is no sufficient provision concerning it in the arbitral award. [Sec. 39].

Effect of death

Arbitration agreement not to be discharged by death of party thereto – An arbitration agreement shall not be discharged nor shall the mandate of an arbitrator be terminated by the death of any party thereto, but shall in such event be enforceable by or against the legal representative of the deceased provided the right of action survives.

Where under any law any right of action is extinguished by the death of a person the operation of that law will remain unaffected by the provisions of this section. [Sec. 40].

Provisions in case of insolvency

Where a party to a contract containing an arbitration clause later became insolvent and the receiver adopts the contract, the arbitration clause will be enforceable by or against the receiver in respect of all such matters as are covered by the contract. In case of contracts, not adopted by the receiver any other party or the receiver may apply to the judicial authority having jurisdiction in the insolvency proceedings requesting for an order that any matter to which the arbitration agreement applies which is required to be determined in connection with or for the purposes of the insolvency proceedings be referred to arbitration. The judicial authority will exercise its discretion, and if having regard to all the circumstances of the case it is of the opinion that the matter ought to be determined by arbitration, it may make an order accordingly. The expression receiver used in this section includes an Official Assignee. [Sec. 41].

Jurisdiction

Effective and exclusive jurisdiction of single Court over arbitral proceedings – where with respect to an arbitration agreement any application is made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising in that matter shall be made in that Court and in no other Court. The provisions of this section override and shall prevail over Part I and any other law. [Sec. 42].

Limitations

Limitation Act, 1963 is applicable to arbitration – Provisions of the limitation Act shall apply to arbitrations. For the purposes of reckoning the prescribed period of limitation an arbitration shall be deemed to have commenced on the date referred to in sec. 21.

Where an arbitration agreement for submission of future disputes to arbitration contains a time bar clause providing that any claim would be barred unless some step is taken to commence arbitration proceedings within a time fixed, and a dispute arises to which the agreement applies then notwithstanding that the time so fixed has expired the Court has discretionary power to extend time for such period as it thinks proper where just cause exists if undue hardship would otherwise be caused.

Where an award is eventually set aside by the Court, the period between the commencement of the arbitration proceedings and the date of the setting aside order of the Court shall be excluded in computing the period of limitation prescribed under the Limitation Act for commencement of any proceedings with respect to the disputes so submitted. [Sec. 43].

Enforcement of Foreign Awards

The foreign awards which can be enforced in India are as follows: - (a) New York convention award (made after 11 the October, 1960) (b) Geneva convention award - made after 28th July, 1924, but before the concerned Government signed the New York convention. Since most of the countries have signed New York convention, normally, New York convention awards are enforceable in India. New York convention was drafted and kept in United Nations for signature of member countries on 21 st December, 1958. Each country became party to the convention on the date on which it signed the convention.

Foreign award" means an arbitral award on differences relating to matters considered as commercial under the law in force in India. The foreign awards which can be enforced in India are as follows: -

- New York convention award - made after 11 the October, 1960
- Geneva convention award - made after 28th July, 1924.

Conciliation Procedure

Part III of the Act makes provision for conciliation proceedings. In conciliation proceedings, there is no agreement for arbitration. In fact, conciliation can be done even if there is arbitration agreement. The conciliator only brings parties together and tries to solve the dispute using his good offices. The conciliator has no authority to give any award. He only helps parties in arriving at a mutually accepted settlement. After such agreement they may draw and sign a written settlement agreement. It will be signed by the conciliator. However after the settlement agreement is signed by both the parties and the conciliator, it has the same status and effect as if it is an arbitral award. Conciliation is the amicable settlement of disputes between the parties, with the help of a conciliator.

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Offer for Conciliation

The conciliation proceedings can start when one of the parties makes a written request to other to conciliate, briefly identifying the dispute.

The conciliation can start only if other party accepts in writing the invitation to conciliate. Unless there is written acceptance, conciliation cannot commence. If the other party does not reply within 30 days, the offer for conciliation can be treated as rejected

Appointment of Conciliator: There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

- In conciliation proceedings with one conciliator, the parties may agree on the name of a sole conciliator;
- In conciliation proceedings with two conciliators, each party may appoint one conciliator;
- In conciliation proceedings with three conciliators, each party may appoint one conciliator and the parties may agree on the name of the third conciliator who shall act as the presiding conciliator.

Conciliation Proceedings

Submission of statements to conciliator - The conciliator, upon his appointment, may request each party to submit to him a brief written statement of his position and the facts and grounds in support thereof, supplement by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party shall send a copy of such statement, documents and other evidence to the other party.

The conciliator may request a party to submit to him such additional information as he deems appropriate.

The conciliator is not bound by the Code of Civil Procedure, 1908 (5 of 1908)or the Indian Evidence Act, 1872.

Role of conciliator:- (The conciliator shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute. The conciliator shall be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party to hear oral statements, and the need for a speedy settlement of the dispute.

The conciliator may, at any stage make proposals for a settlement of the dispute. Such proposals need not be writing or need not be accompanied by a statement of the reasons therefor.

Administrative assistance

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator, may arrange for administrative assistance by a suitable institution or person.

Communication between conciliator and parties

The conciliator may invite the parties to meet him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place shall be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

Disclosure of information

When the conciliator receives factual information concerning the dispute from a party, he shall disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate:

- Provided that when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, conciliator shall not disclose that information to the other party.

Co-operation of parties with conciliator-

The parties shall in good faith co-operate with the conciliator and, in particular, shall endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

Suggestions by parties for settlement of dispute-

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

Settlement agreement-

(1) When it appears to the conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

(3) When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

(4) The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

Status and effect of settlement agreement -

The settlement agreement shall have the effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under section 30.

Confidentiality-

The conciliator and the parties shall keep confidential all matter relating to the conciliation proceedings. Confidentiality shall extend also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

Termination of conciliation proceedings-

The conciliation proceedings shall be terminated

(a) by the signing of the settlement agreement by the parties; on the date of the agreement;

(b) by a written declaration of the conciliator, after consultation with the parties, in the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Resort to arbitral or judicial proceedings-

The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject- matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings, where, in his opinion, such proceedings are necessary for preserving his rights.

Costs-

Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and given written notice thereof to the parties. “costs” means reasonable costs relating to-

(a) the fee and expenses of the conciliator and witnesses requested by the conciliator, with the consent of the parties;

(b) any expert advice requested by the conciliator with the consent of the parties;

(c) any other expenses incurred in connection with the conciliation proceedings and the settlement agreement.

The costs shall be borne equally by the parties unless the settlement agreement provides for a different appointment. All other expenses incurred by a party shall be borne by that party.

Supplementary Provisions

- The High Court has the power to make rules under this act.
- Removal of difficulties by Central Government through provisions made under the Act.
- Rules made by Central Government subject to approval by parliament.
- The present Act overrules the previous Acts.

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