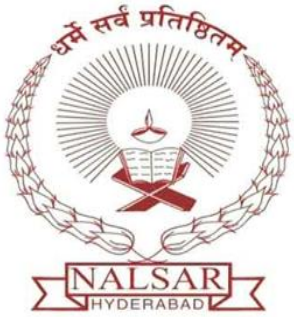

Centre for Aerospace & Defence Laws (CADL)

Directorate of Distance Education

NALSAR University of Law, Hyderabad

Course Material

M.A. (SECURITY AND DEFENCE LAWS)

1.1.1. GENERAL PRINCIPLES OF LAW

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(For private circulation only)

NALSAR University of Law, Hyderabad (Print 2020)
Re-Print 2022
(For private circulation only)

1.1.1 GENERAL PRINCIPLES OF LAW

Introduction: It is a well-known legal maxim '*ignorantia juris neminem excusat*' which means that '*ignorance of law is no excuse*'. This is one of the most fundamental principles of law followed since time immemorial. With the growing complexities in the nature of a society, legal awareness is of utmost importance as it is the foundation on which civil society is based. Knowledge of law helps students to understand their own rights and obligations as a responsible citizen of a country and a member of the global community. Law has an impact on every small aspect of our lives; therefore knowledge of law can open new avenues of professional opportunities that you were previously unaware of.

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

Every action of ours is governed by a code of conduct, be it moral or legal; direct or indirect. Law is a system of rules which regulates human conduct in the society. Legal systems are often based on moral, legal, ethical or religious principles and are enforced by the police and criminal justice systems such as the courts. Therefore, knowledge about the practical aspects of law is as important as knowledge about theory and principles of law.

For this reason, a paper on the '***General Principles of Law (GPL)***' is designed with the intention of providing the course participants with an overall understanding of the fundamental concepts and principles of law and also develop a perspective on the functioning of law in government, society and our lives. Below is a brief overview of the contents of the modules:

Module I - Introduction to Law

Having regard to the importance of the fundamental understanding of law, the first module of this paper focuses on basic concepts, definition and source of law. It gives a brief background to the meaning of law and its varied forms. The module will also look into the law reforms and the transition of law as per the changing needs of a growing society. Without public enforcement agencies the concept of law will just remain an abstract notion. The module further goes on describing the classification of global legal systems, legal system amongst International Institutions and countries *inter se* and the impact of globalization on legal systems.

Module II – Constitutional Law and Administrative Law

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

Module III: Indian Judicial and Legal System

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

Module IV – Dispute Settlement: The Role of ADR, ODR and Peaceful Settlements of Disputes

This module briefly covers two important dispute resolution mechanisms i.e. Alternative Dispute Resolution (ADR) mechanism and Online Dispute Resolution (ODR) are capable of providing a substitute to the conventional methods of resolving disputes. ADR offers to resolve all type of matters including civil, commercial, industrial and family etc., where people are not being able to start any type of negotiation and reach the settlement. Generally, ADR uses neutral third party who helps the parties to communicate, discuss the differences and resolve the dispute. It is a method which enables individuals and group to maintain co-operation, social order and provides opportunity to reduce hostility are covered in the fourth module. This module also covers Online Dispute Resolution ("ODR") mechanism which is the newest entrant to the family of ADR. The Online Dispute Resolution is definitely a new technique for resolving disputes and is obviously, a technology centric mechanism. ODR employs either arbitration, negotiation, mediation or all of them combined. ODR is, in fact, area specific and specialised method for resolving disputes. ODR essentially is a techno-savvy mechanism for resolving disputes by using: (a) internet related tools like e-mail; and (b) videoconferencing and teleconferencing etc.

Module V – Interface Between Law and Technology

There has always been a close yet conflicting relationship between Law & Technology and the matter of whether Law should follow technology, or the other way around has always been a subject matter of debate. More often than not, Law has always struggled to keep pace with technological developments. Keeping these debates in mind, the fifth module is introduced to study further the interface between Law and Technology.

The same module discussed various new and emerging technologies such as virtual reality (VR), Internet of Things (IoT), Artificial Intelligence (AI), Automation, Big Data, Block Chain, 3D Printing, Cyber Technology, Cloud Computing, Crypto Currency, Drones, Energy, Genetic, Geo Special, Mobile, Machine learning Nano, Robotics Technologies etc. which have indeed become an indispensable part of our daily lives and are changing the living patterns of the human beings. However, each of these technologies and many more to come have bring along with it numerous legal challenges like Privacy, Security, Jurisdiction, Liability, IP Protection, Taxation, use of e-evidence etc. are covered in this module.

Module VI- Legal Research Methodology and Project Writing Techniques

Research is a desire to search or to find out or to explore an unknown area in order to find an answer. It is a quest for acquiring knowledge. Research is a careful investigation or inquiry especially through search for new facts in any branch of knowledge. Legal Research means research in law which deals with the principles of law and legal institutions. The objective may be to discover new facts or to verify the existing facts, to propound a new legal concept or to analyses existing law and give suggestions for a new law.

In order to successfully complete a research project a researcher must be aware of the methods of undertaking a research. A research method is a systematized investigation to gain new knowledge about the phenomena or problems. In a broader sense the research methodology includes the research methods as well as the philosophy and practice of the whole research process. A good research method is crucial for conducting proper research and getting useful results. This module is designed to give an insight into the meaning and significance of research methods for legal research and aims to provide an understanding of the various types of research methods and the different techniques of legal research and legal writing with a view to equip the students for further research in law.

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MODULE – I

INTRODUCTION TO LAW

MODULE I - INTRODUCTION TO LAW

Significance of Law: One of the most important functions of law in any society is to provide stability, predictability and continuity so that people can know how to order their affect. If any society is to service, its citizens must be able to determine what is legally right and legally wrong. They must know what sanctions will be imposed on them if they commit wrongful acts. If they suffer harm as a result of others wrongful acts they must know how they can seek compensation. By setting forth the rights, obligations and privileges of its citizens, the law enables individuals to go about their business with confidence and a certain degree of predictability.

Although law has various definitions, they all are based on the general observation that law consists of enforceable rules governing relationships among individuals and between individuals and their society. In some societies, these enforceable rules consist of unwritten principles of behavior. In other societies, they are set forth in ancient or contemporary law codes. In India, our rules consist of written laws and court decisions created by modern legislative and judicial bodies. Regardless of how such rules are created, they all have one feature in common: they establish rights, duties, and privileges that are consistent with the values and beliefs of their society or its ruling group.

Why Study Law? Law impacts on every human activity undertaken within society. Imagine going to work in the morning. Decide whether you wish to drive or take the train. If you drive, the road rules will help you get to your office safely. If you take the train, the contract you make by buying a ticket will oblige the rail company to take you there. When you get to your office, your employment contract (or some statute) will determine what you do and how much you get paid. Imagine just about any activity, and you will find law in attendance – sometimes helping, sometimes hindering.[1] Hence Law affects everything, and studying it gives you the freedom to develop your interest in almost anything, from geopolitics in international law to medicine in tort law and offers the opportunity to develop a range of skills and explore many aspects of human life. It gives you the chance to sharpen your mind, strengthen your understanding, and deepen your experience across the full range of humanities and social sciences.

In his book Letters to a law student, Nicholas J Mc Bride mentions four primary reasons to study law.[2] First is to sharpen your mind; training in law is great at helping you learn how to think carefully, imaginatively and sensibly. Even though the law touches most aspects of our lives, its concepts and institutions often remain mysterious and highly contentious; legal education will demand that you structure and evaluate arguments for and against propositions that are susceptible to reasoned debate, hence engaging you in critical thinking about important issues, challenging your beliefs and improving your tolerance for uncertainty. The second is Rhetoric; Studying law is the closest you can come to getting a course in what the ancient Greeks and Romans would have called rhetoric: the art of persuading someone to adopt a particular point of view by speaking and writing effectively. Thirdly, it helps you

[1] SURI RATNAPALA, JURISPRUDENCE (3 ed. 2017), https://www.cambridge.org/core/books/jurisprudence/6C4F2D2460862D1B31D26219AE980B3A.
[2] NICHOLAS MCBRIDE & JASON N.E. VARUHAS, LETTERS TO A LAW STUDENT (3 ed. 2014).

form your own views and ideas as to what sort of society we should live in and puts you in a good position to provide an informed contribution to shaping the future of our society – whether simply by voting in elections or by working within politics yourself. Of course, it might be argued that studying philosophy at university would serve just as well to prepare you for a career in politics. However, there is a crucial difference. When you study philosophy, you are looking at a set of thinkers' abstract ideas as to how society should be ordered. But law exists at the cutting edge of shaping society. As a result, law-makers have a special responsibility that philosophers are not subject to – the ideas for arranging society that law-makers give effect to have to work in practice. And Lastly, the skills and knowledge that you acquire as a law student are invaluable for a range of different careers. Training in law can give you the skills to be a successful lawyer but also a successful producer, politician, manager, journalist, diplomat, or police officer; a law degree equips you for almost any profession that requires intellectual strength combined with a practical approach to the world.

Why Introduction to Law in First Semester and its Significance: The very purpose of this course is to enhance the basic knowledge and understanding of Law, particularly for the working people in Aerospace and Defence Industry. Law is a massive ocean of topics; from the origin of law to the execution of the law, a student will get to understand by studying this subject. This module introduces students to the basic concepts and skills necessary to engage meaningfully in the study of law. Students will be introduced to the "idea" of law, given a foundation in the composite elements and structures of the English legal system, the post-independence legal system, as well as an understanding of the global/comparative dimension in which any domestic legal system exists.
The module will also give students a grounding in the key skills necessary for undertaking legal studies, including an understanding of judicial reasoning and precedent, statutory interpretation and how and when to draw on appropriate academic commentary.
Objectives and learning outcomes of the module

- To equip students to demonstrate basic knowledge of the core concepts and analytical skills necessary for the study of law as a distinct discipline, and to interpret and evaluate the operation of the key rules and principles of the subject
- To develop the capacity to present and evaluate arguments on the basis of these key rules and principles
- To be able to evaluate the appropriateness of different approaches to solving legal problems
- To have the ability and capacity to take-up more complex study in the field of law

Definition, Nature, Sources, and Significance of Law: Law is a system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties. Also known as rules or regulations, code of conduct, etc. laws are essentially made and enforced by the government; they are meant to control or regulate our behavior, and unlike moral rules, they can be enforced by the courts. It is a notional pattern of conduct to which actions do or ought to conform. Though this definition seems to make complete sense, it is only a part of what law actually is. A large body of Laws are based mainly on general principles of justice, fair play, and convenience,

which have been worked out by governmental bodies to regulate human activities. In a broader sense, 'Law' denotes the whole process by which organized society, through government bodies and personnel (Law-makers, Courts, Tribunals, Law Enforcement Agencies, and Executive, Penal and corrective Institutions, etc.) attempt to apply rules and regulations to establish and maintain peaceful and orderly relations amongst the people in the society. Yet, What answer would you give to the question, what is Law? The chances are that though you understand the significant role it plays in your life; you have never considered this question. Law is Law. It exists. This may not require much attention than the question what is weather? Or what is a wheel? Yet the question 'what is law?' differs from these two questions in that in seeking to define the nature of law, we are seeking to define an abstraction. Law may be manifested in physical objects or in physical deeds (a statute or a policeman's act in arresting an offender). But Law, being an abstract term, cannot, like a wheel, be defined in terms of its physical characteristics. How, then, would you define the term law? You may be able to know a law when you see one, but it may nonetheless be hard put for you to describe the law's essential nature. [3]

Various jurists have defined the meaning of the law; however, there is no unanimity of opinion regarding the true definition of law. The reason for lack of consensus on the subject is that the subject has been viewed and dealt with by different jurists so as to formulate a general theory of legal order at different times and from different points of view, that is to say, from the point of view of nature, source, function, and purpose of the law, to meet the needs of a certain given period of legal development. Therefore, it is not practicable to give a precise and definite meaning to the law, which may hold good for all times to come. However, it is desirable to refer to some of the definitions given by different jurists so as to develop an understanding of the term "law". By the end of this section, when several jurists' views on this matter have been considered, you may find yourself in a position to decide whose opinions seem to closest to providing an answer to this.

In the following pages we will discuss some prominent theories and definitions of law. For clarity and a better understanding of the nature and meaning of the law, we may classify the various definitions into five broad schools of thought:

(a) Legal Positivism
(b) Natural Law,
(c) Historical,
(d) Sociological, and
(e) Realistic.

(a) Legal Positivism: The main feature of legal positivism is its insistence that the law of society be identified purely by 'social facts' and that one does not need a moral argument to work out the content of the law. The legal positivist does not deny that law is very often influenced by morality or even that there may be necessary connections between law and morality; however, according to them, the validity of the law is independent of its moral content. A law is considered valid if it has been created by the will of those that have had sovereign power over others.[4] The great figures of the tradition of legal positivism are

[3] J. G. RIDDALL, JURISPRUDENCE (1999).
[4] Tim S. Gray, *Leviathan, in* OXFORD COMPANION TO BRITISH HISTORY (2009).

usually considered to include Bentham (1748–1832), Austin (1790–1859), Herbert Hart (1907–1992), and Joseph Raz. However, legal positivism's true philosophical origins probably reside in the great seventeenth-century philosopher, Thomas Hobbes. For Hobbes, the law was an exercise in the expression of the sovereign will. As Hobbes commented: "The civil laws are the commands of him who hath the chief authority for direction of the future actions of his citizens."[5]

In this view of the law, the laws are essentially rules laid down and upheld by the sovereign, and the sovereign is the person or persons with effective authority in a society. The law represented for Hobbes the sovereign's will and judgment as to what the law's subjects, the citizens, must do. The Hobbesian conception of law, 'the command theory,' was later developed by the two great positivist thinkers of the nineteenth century, Jeremy Bentham and John Austin. According to Austin, "Law is the aggregate of commands set by man as politically superior, or sovereign, to men as a political subject." In other words, the law is the "command of the sovereign," and it obliges a specific course of conduct or imposes a duty and is backed by a sanction.

The law of any society with a 'sovereign' was to be identified by asking two fundamental questions: (a) who is the 'sovereign'? (Austin believed every organised society had a 'sovereign' who obeyed no other authority and was itself obeyed by the bulk of the population), and (b) what has the sovereign commanded? In this simple way, any society's law could be distinguished from the norms of morality, religion, and custom of that society. Therefore, legal positivism recognizes that the virtue of law is that it forms a public and dependable set of standards for the guidance of officials and citizens, whatever the disagreements in that society over the dictates of morality, religion, or custom. Thus, the command, duty, and sanction are the three elements of the law.[6] 'The command theory' of Bentham and Austin was effectively replaced by the 'rule of recognition' of **Hart's** analysis (in essence, that the identification of law was to be made upon the observance of the behaviour of legal officials and how they identified legal rules in their society) as the test for the identification of law.[7]

Another influential Positivist thinker is **Hans Kelsen**. Kelsen propounded what is known as a 'pure theory of law.' According to him, the law is a 'normative science.' Law does not attempt to describe what actually occurs but only prescribes certain rules. The science of law to Kelson is the knowledge of the hierarchy of normative relations where all norms derive their power from the ultimate norm called *Grundnorm*.[8] For Kelsen, the 'basic norm' gave sense to normative statements such as 'the law says X ought to be done.' Kelsen was fond of drawing parallels between his basic norm and religious faith. Although many persons do not believe in God, those persons who do believe in God presuppose in their religious faith, the basic norm that 'God's commandments ought to be obeyed.' Similarly, those who have 'faith' or 'belief' in their own legal system's justified normativity presuppose a basic norm that the constitution of that legal system ought to be obeyed. In other words, normativity, like

[5] *Id.*
[6] JOHN AUSTIN, AUSTIN: THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed., 1995).
[7] H. L. A. HART, THE CONCEPT OF LAW (1961).
[8] HANS KELSEN ET AL., GENERAL THEORY OF LAW AND STATE (1990).

beauty, is in 'the eye (or rather mind) of the beholder.' Kelsen explained the foundational significance of the basic norm to his pure theory of law in Introduction to the Problems of Legal Theory (1934): *the pure theory of law works with this basic norm as a hypothetical foundation. Given the presupposition that the basic norm is valid, the legal system resting on it is also valid. The basic norm confers on the act of the first legislator – and thus on all other acts of the legal system resting on this first act – the sense of 'ought'. . .rooted in the basic norm, ultimately is the normative import of all the material facts consisting the legal system.*

(b) Natural Law/Idealistic Definition of law: Let us begin our discussion on natural law theory with an illustration. Suppose your university is selecting a football team to represent the university at the National Inter-University Football match. You are a reasonably good player and have been preparing hard throughout the year to get into the football team. However, the Vice-Chancellor of the University announces that only those whose parents can sponsor the University's participation in the Football league would be considered part of the team. He justifies it by stating that the university cannot spend its limited financial resources on sports, and those who are willing to pay to be a part of the team would be more dedicated and sincere. He is also of the view that he is competent to make any rule regarding participation in the sport.

The question arises, if you are a football player coming from a low-income family, how would you feel about the rule? You many agree that the Vice-Chancellor is competent to make any rule regarding the University's participation in the sport. You may also agree that there is some truth to his justification of the rule. Yet, you may feel that there is something unjust or unfair to the rule which excludes you for participating in the sport just because you are economically weak. Your feeling that such rule is unjust is actually the recognition of the principle that law must possess something beyond validity. The content of the law must satisfy a higher test of Fairness. The belief of a higher standard to evaluate ordinary aw is the basis of the Natural Law theory.[9] Hence, natural law is often contrasted with the 'positive law' (discussed above) where the law is valid if it is promulgated formally by the state and enforced through defined sanctions and is not conditional on its fulfilling some higher standards or purpose.

Natural law has been an enduring concept in jurisprudence, ranging from Aristotle, who held that there is a natural law which 'everywhere possesses the same authority and is no mere matter of opinion,' through Cicero, who taught that 'Nature herself has placed in our ears a power of judging,' and Aquinas for whom the natural law was 'the participation of the eternal law in the rational creature,' to today's natural lawyers such as John Finnis who view law from the perspective of its ultimate moral function which is taken to be the ability of law to co-ordinate human activity for the common good. The insight that modern natural law theory offers to contemporary legal theory is that the human institution of law can only be fully understood if we understand the ultimate moral value of law to human society.

In the words of the central figure in natural law theory, Thomas Aquinas 'Law is an ordinance of reason for the common good.' This basic insight is lost if we merely focus on describing the crucial elements of law and a legal system or concentrate too fully on common

[9] N.K. JAYAKUMAR, LECTURES IN JURISPRUDENCE (2010).

law adjudication. As Aquinas pointed out, there is an intimate connection between the institution of law and the proper (as in the sense of morally correct) governance of society: 'Law is the primary proper means of co-ordinating civil society.'[10] This view of the 'bigger picture' than that provided by mainstream jurisprudence is perhaps the most significant contribution natural law theory can make to legal theory today. As Professor Finnis comments, the true tradition of natural law theory is not about the rather obvious insight that morality often affects the law but, instead, is about pointing out the true requirements of morality to provide a rational basis for the activities of legislators, judges, and citizens.[11] This is linked to the ultimate purpose of natural law theory, which is to show, according to Finnis, how law and legal institutions can be justified – on what conditions, and to criticize those legal institutions by showing how they are defective. A Students' problem is often to decide which 'type' of natural law is being referred to since the term has been used in so many different senses. It is essential, therefore, to check the precise historical and juristic context of the term.

St. Thomas Aquinas occupies an important place in the history of the development of natural law doctrine. His theory is also often called the 'Divine Law Theory.' For him, Law is to be understood as part of God's plan for mankind – this belief is central to his theory. Aquinas begins his examination and interpretation of the law by considering 'morality.' The very basis of moral obligation is to be discovered within man's nature. Built into his nature is a group of God-given 'inclinations'. They include self-preservation, propagation of the species, and (reflecting man's rationality) an inclination towards a search for truth. Man is guided by a simple and basic moral truth – to do good and to avoid evil. Because man is rational, he is under a natural obligation to protect himself and to live peacefully within society.

A peaceful, ordered society demands human laws, fashioned for the direction of social behaviour. These human laws will arise from man's rational capacity to discern correct patterns of 'good conduct.' The rules underlying human laws will derive from a moral system that ought to be taken into account by all mankind – a sort of 'natural law.' For Aquinas, the 'Divine Law' – *Lex Divina* – is the eternal law governing man and may be known by him through direct revelation, as in the Scriptures, for example, The Ten Commandments. Man requires a type of law that can direct him to his end, namely, eternal happiness; such law contains no errors and forbids all sins, allowing no evil to go unpunished. The Greeks, on the other hand, regarded law as being closely related to justice and ethics. Nature is conceived as a relation or an order of things. As a part of nature, man is endowed with the ability of active reasoning; and it distinguishes him from all other creatures of nature.

Law, according to Greek philosophers, consists of rules in accordance with reason and nature. Man's power of reason enables him to suppress instinct and act against his dictates. It inspires a sense of good and evil. Induces conduct, which is consistent with good and forbids evil conduct. The criteria, which distinguish good from evil, right conduct from wrong conduct, are the instinctive laws of nature. Socrates declared such laws are immutable principles. Plato refined it by stating that contribution to social harmony must measure the goodness of law because all individual interests must be subject to social welfare. Aristotle

[10] BRIAN DAVIES & LEONORE STUMP, THE OXFORD HANDBOOK OF AQUINAS (2012).
[11] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2011).

argued that man had a natural purpose and an end, so natural law, known through human reason, could provide an adequate guide. Even the Ancient Hindu view was that 'law' is God's command and not of any political sovereign. Everybody, including the ruler, is bound to obey it. Thus, 'law' is a part of "Dharma". The idea of "justice" is always present in the Hindu concept of law.

The 19th century Natural law theory is spearheaded by Lon Fuller and Ronald Dworkin. Lon Fuller propounded that in order to identify and call a legal system as genuine there must be an inner morality. This inner morality must constitute following eight principles:

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

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

(c) *Historical Definition of Law:* This school considers law in a direct relationship with the life of the community. The central question that this approach raises is as to how did law evolve? The historical approach believes that law evolved, as did language, by slow process and law, like language, is a peculiar product of the nation's genius. The historical approach rejects Austin's conception of law as the command of sovereign and state that the source of law is not the command of the sovereign, not even the habits of the community but the instinctive sense of right possessed by every race. The real source of law lies deep in the mind of men. The most important and influential jurist of historical school is Friedrich Carl von Savigny. His most important contribution to the understanding of the law was his theory that the nature of any particular system of law was a reflection of the spirit of the people who evolved it. He called it *Volkgeist*. Savigny's theory of law can be summarized as follows:

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

(d) *Sociological Definition of Law:*

This approach to defining law maintains that achieving a proper understanding of the concept of law requires a sociological analysis rooted in the social conditions in which the law and

legal ideas are fashioned and employed. Such a sociological account of law usually rests on three closely related claims: that we cannot truly grasp the meaning of law except as a 'social phenomenon,' that an analysis of legal concepts provides only a partial explanation of 'law in action', and that law is merely one form of social control.[12] Leon Duguit, Ihering, Eugene Ehrlich, and Roscoe Pond are the major proponents of this school.

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

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

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

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

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

[12] RAYMOND. WACKS, UNDERSTANDING JURISPRUDENCE : AN INTRODUCTION TO LEGAL THEORY (2005).

Laws are made effective:

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

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

Sources of Indian Law: One question that frequently comes to our mind is as to what is the source of law? Most people may think of Acts passed by the legislature as the source of law. However, if we think further on this question, it may necessarily occur to us that there are many other sources of law as well. The very expression source of law is not free from ambiguity. Some jurists even make a distinction between 'law' and the 'source of law.' John Chipman Gray Considers laws as the rules authoritatively laid down by the Courts in their decisions. According to him, law sources are set of legal and non-legal materials upon with judges customary fall back in fashioning the rules that structure the law. Such sources include acts of legislative organs, judicial presidents, customs, opinions of experts, and principles of morality.

The approach of grey and those who support him consider only the rules laid down by the Courts as law, and everything else as the source of law. Following a different approach, other writers equate sources of law with the official, authoritative text from which formulated legal rules usually derive their force. These include the Constitution, statutes, treaties, executive orders, judicial opinions, etc. Yet another sense in which the expression sources of law is used to denote certain bodies of law which have served as a traditional reservoir of legal rules and principles, such as the Common law, equity, and the Canon law. For a moment, let us leave aside the controversy over the meaning of the expression 'sources of law' and try to find out the different sources of law. A clear understanding of the sources of law is crucial for a proper understanding of the nature of law. A study of the sources of law is also important because it helps us answer questions about the validity of the law.

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

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

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

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

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

Customs or Customary Law: Custom is the most ancient of all the sources of law and has held the most important place in the past, though its importance is now diminishing with the growth of legislation and precedent. A study of the ancient law shows that in primitive society, people's lives were regulated by customs, which developed spontaneously according to circumstances. It was felt that a particular way of doing things was more convenient than others. When the same thing was done again and again in a particular way, it assumed the form of custom.

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

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

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

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

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

Conventional Customs: These are also known as "usages." These customs are binding due to an agreement between the parties, and not due to any legal authority independently possessed by them. Before a Court treats the conventional custom as incorporated in a contract, the following conditions must be satisfied:

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

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

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

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

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

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

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

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

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

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

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

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

court decision becomes a precedent to be followed in similar cases is known as doctrine of stare decisis.

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

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

High Courts

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

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

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

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

Supreme Court

The expression ‘all courts’ used in Article 141 refers only to courts other than the Supreme Court. Thus, the Supreme Court is not bound by its own decisions. However, in practice, the

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

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

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

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

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

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

subordinate judiciary is concerned, but it is only conditionally authoritative when cited before a Division Bench of the same High Court.

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

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

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

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

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

Statutes or Legislation: Legislation is that source of law which consists in the declaration or promulgation of legal rules by an authority duly empowered by the Constitution in that behalf. It is sometimes called Jus scriptum (written law) as contrasted with the customary law or jus non-scriptum (unwritten law). Salmond prefers to call it as "enacted law". Statute law

or statutory law is what is created by legislation, for example, Acts of Parliament or of State Legislature. Legislation is either supreme or subordinate (delegated).

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

The rule-making power of the executive is, however, hedged with limitations. The rules made by it are placed on the table of both Houses of Parliament for a stipulated period and this is taken as having been approved by the legislature. Such rules then become part of the enactment. Where a dispute arises as to the validity of the rules framed by the executive, courts have the power to sit in judgement whether any part of the rules so made is in excess of the power delegated by the parent Act.

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

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

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

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

The personal law of Mohammedans is to be found in

(a) The holy Koran.
(b) The actions, percepts and sayings of the Prophet Mohammed which though not written during his life time were preserved by tradition and handed down by authorised persons. These are known as Hadis.

(c) Ijmas, i.e., a concurrence of opinion of the companions of the Prophet and his disciples.
(d) Kiyas or reasoning by analogy. These are analogical deductions derived from a comparison of the Koran, Hadis and Ijmas when none of these apply to a particular case.
(e) Digests and Commentaries on Mohammedan law, the most important and famous of them being the Hedaya which was composed in the 12th century and the Fatawa Alamgiri which was compiled by commands of the Mughal Emperor Aurangzeb Alamgiri.

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

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

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

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

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

The object of law is order which in turn provides hope of security for the future. Law is expected to provide socio-economic justice and remove the existing imbalances in the socio-economic structure and to play special role in the task of achieving the various socio-

economic goals enshrined in our Constitution. It has to serve as a vehicle of social change and as a harbinger of social justice.

Classification of Laws

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

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

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

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

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

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

India has two systems of law, one territorial and one personal. For example, the Special Marriage Act applies to all people in the territory of India. The fact that some persons or categories of persons are excluded from the provisions of the Act does not change its nature to personal. On the other hand, the Hindu Succession Act applies to Hindus, and is therefore personal. The fact that it is also applicable in the territory of India does not make it territorial.

Procedural v. Substantive Laws: Procedural Laws deals with the rules and regulations that govern the procedures of civil, criminal and administrative courts. The basic purpose of these laws is to ensure that the principles of due process and fundamental justice are followed in all

the cases which is brought before a court. In particular these laws lay down the procedures which are to be followed once a case reaches the court docket. From the manner in which parties are informed to the steps that should be followed in examination of evidences to the presentation of oral arguments till the time the final decision if delivered and executed, these laws cover and govern each and every intricate details of court procedures. Procedural laws would thus include within its ambit various laws on civil and criminal procedures.

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

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

Operative Tools of Law

Rights and Duties: Bentham who is the forerunner of Analytical School of thought states that the relationship between State and its subjects and inter-se is governed law and law is nothing but distribution of rights and obligation amongst them. In fact all modern legal systems are constructed on the edifice of this principle only.

General meaning of term Right and duty

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

Relationship between Right and duty

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

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

Legal Meaning of term Right

According to Salmond: "A legal right is an interest recognized and protected by a rule of legal Justice – an interest the violation of which would be a legal wrong done to whom

whose interest it is and respect for which is a legal duty". For Holland, "A right means a capacity residing in one man of controlling with the assent and assistance of the state the acts of the other". According to Ihering such of those interests that have gained legal protection can be regarded as legal rights.

Classification of Rights

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

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

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

Fundamental Rights: Every person by virtue of being a human is entitled to certain inalienable and exclusive rights. They are inalienable and exclusive rights as their absence would negate the very existence of human being and their presence guarantees the most basic freedoms that would ensure peaceful and purposeful life. There is hardly any modern democratic constitution without these rights. They are referred with different names in different constitutions. Indian Constitution calls them as "Fundamental Rights". These rights have been explained in detail in module 3 which deals with the constitutional framework of India.

Public Rights

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

and the giving of advice on any legal matter. It is important to note that such legal assistance can be pertaining to either pending litigation or pre-litigation. This application can be made before any legal service authority i.e., Taluk legal service committee or District legal service committee. On receipt of such application legal service committees shall refer such matter to Lok-Adalat which has jurisdiction to try the case and resolve the matter.

Right to Information: To Promote Transparency and Accountability in the Working of every Public Authority, the Right to Information Act,2005 is enacted so as to provide for setting up the practical regime of right to information for citizens' to secure access to information under the control of public authorities. Any citizen can apply in writing or through electronic means in English or Hindi or in the official language of the area, to the Public Information Officer, specifying the particulars of the information sought for. He needn't give reason for seeking information but one has to pay nominal fee as may be prescribed. The information must be furnished within thirty days from the date of application and it must be in forty eight hours in case of information concerning the life or liberty of a person. If there is failure to provide information within the specified period is a deemed refusal. If information sought is covered by exemption from disclosure u/S.8 or if it infringes copyright of any person other than the State as per S.9, information need not be given. There is an appellate authority which and Central and State information commission to ensure the functioning of the Act. The law imposes penalties on officer who fail furnish information.

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

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

- Not to kill any human being: Every person is under an obligation not to be cause intentional death of any other human being and it prohibited and punishable under Sec. 299 & 300 r/w 302 IPC. Sec.304 IPC prohibits and punishes for causing death

of a human being with knowledge. Sec - 304 A IPC imposes punishment for death caused by rash or negligent act.

- Not to cause any injury to any person: Every person has a right not to get hurt by other. As such law imposes obligation on every individual not to cause voluntarily hurt to others. Sec.319 to 326 IPC sets out certain rules with respect injuries inflicted against law and imposes punishments on violators.
- Not to deal with property of any person in manner against the Law. Not to deal with property of any person in manner against the Law: Law permits only legal acquisition or possession of property. It imposes liabilities on those who acquire or possess property against law. Some of those obligations are not to commit theft, extradition, cheating, and forgery.
- Not to injure the reputation: Next to life and liberty, reputation is the one man craves for. Thus, any injury to reputation is treated an offence. Sections: 499 & 500 IPC sets out positive obligations on every person not to injury the reputation of others and imposes liabilities in the event of violation.

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

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

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

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

Right to take divorce: Any married person either under Hindu law or Muslim law is entitled for Divorce. S.13 of Hindu Marriage Act, 1956 sets grounds for seeking divorce. They are: a) Adultery b) renunciation of the world Desertion c) Cruelty d) Insanity e) Leprosy f) Venereal diseases g) Conversion h) Presumption of death: unheard for seven years i) has not complied

with a decree of Restitution of Conjugal rights for one year or more after the passing of decree j) has not resumed cohabitation for one year or upwards after the passing of a decree for judicial separation.

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

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

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

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

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

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

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

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

Other Remedies under Civil Law

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

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

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

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

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

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

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

- Grant of succession certificate.

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

- Death
- Imprisonment for life
- Imprisonment, which is of two descriptions, namely:—

    - Rigorous, that is, with hard labour;
    - Simple;
- Forfeiture of property;
- Fine.
- Court can also award compensation.

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

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

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

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

- ❖ Review/Repeal of obsolete laws: The commission is required to identify laws which have become obsolete and useless and are no longer required to be implemented in the current societal setup. This function also includes identifying those legislations that have become inconsistent with the existing climate of economic liberalization and need change. The function of identification also includes identification of those laws which require complete or partial modifications. Thereafter the commission considers the suggestions put forth by various expert groups, ministries, other governmental departments and the non-governmental organizations on the proposed changes to be introduced and propose amendments to be made.
- ❖ Review of Judicial Administration: The objective of the said function is to ensure that the judiciary is responsive to the reasonable demands of the changing times. It does seek to secure elimination of delays, speedy clearance of arrears and reduction in costs so as to secure quick and economical disposal of cases without affecting the cardinal principle that decision should be just and fair, simplification of procedure to reduce and eliminate

technicalities and devices for delay so that it operates not as an end in itself but as a means of achieving justice and improvement of standards of all concerned with the administration of justice.

- ❖ Examine the existing laws in the light of Directive Principles of State Policy and to suggest ways of improvement and reform and also to suggest such legislations as might be necessary to implement the Directive Principles and to attain the objectives set out in the Preamble to the Constitution.
- ❖ Examine the existing laws with a view for promoting equality and suggesting amendments thereto.
- ❖ Revise the Central Acts of general importance so as to simplify them and to remove anomalies, ambiguities and inequities.
- ❖ Consider the requests for providing research to any foreign countries to know the global best practices as may be referred to it by the Government through Ministry of Law and Justice (Department of Legal Affairs).

Classification of Global Legal System: Although each country has its own legal system, yet all of them are connected to each other on the basis of common traits and features. These features are common because their sources are very few and can be counted on fingers, and there lies the basis of classification of legal systems. On the basis of such classification, the Legal Systems of the world can be divided into four broad categories: (a) Common Law System, (b) Civil Legal System, (c) Religious Legal System, and (d) Customary legal System.

1. Common Law System:

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

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

By the beginning of the 14th century, the Court of Chancery arose and began to administer justice by the side of common law courts. Equity was finally absorbed into the general law when the Judicature Act, 1873 united the common law and equity jurisdictions. Though equity and common law have become coordinate parts of a single system of general law, the

original jurisdiction between them still persists and the term common law is even now used in contrast with equity.

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

In its historical origin, common law was taken to mean the whole of the law of England including equity. Statute law was referred to separately because of its authority. In modern times, statute law was developed to a very great extent and even certain portions of the common law are undergoing a slow transformation into statute law by the process known as codification. The term Common law is still used to mean the whole of the law of England when it is contrasted with the foreign systems of law like Roman law or French law.

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

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

(b) *Composition of Judicial Institutions:* Second common feature of the Common Law family is that the judges of the Courts are highly skilled persons who have specially studied the discipline of law and possess practical experience in legal administration either as advocates or judges. A judge, in other words, cannot be a lay person or even a scientist. He must be a person of legal background, either as an advocate or a judge or at least with a degree in law. This feature of Common Law makes the judicial institutions a separate set of professional persons. This might be one of the reasons why the judgments rendered by them are technical and based upon the finer details of the bare provisions of law. This leads to a better quality of judgment due to which these judgments carry authority when they are rendered by experienced judges or advocates. As an example, you can say that in India the judges at the trial Court or District Court are selected on the basis of an entrance examination where the

minimum eligibility is a degree in law and the judges of High Courts and Supreme Court are selected from among those with at least 10 years of practice as advocates or judges. Persons outside the legal background cannot become judges of the State or Central government. So, the social background of judges in Common Law system is not diverse, but very limited.

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

(d) *Acts, Statutes passed by Competent Authorities*: A very important feature of Common Law system is that though the legislations passed by competent authorities such as the Parliament and Legislatures are given an authoritative place which is binding on the judges, whenever the judges find any gaps in the Acts or Statutes passed by the Parliament, they can make suitable interpretations to fill the gap in these Acts. In other words, the judges and advocates of the Common Law system would think that the Acts are very abstract and the rules contained in those Acts are very general in nature. These general and abstract rules are incapable in themselves to be applied in all facts and circumstances. Facts of every case would be so peculiar that it would be very difficult to apply the general and abstract form of rule which may need suitable additions and interpretations. That addition and interpretation is as important as the bare provision of general and abstract law. For example, the punishment prescribed by the Act passed by Indian Parliament for the commission of murder ranges from life imprisonment to death penalty. However, it has not been prescribed in what situations punishment would be life imprisonment or death. The judges have filled this gap and made their own addition into the law by holding that the 'rarest of rare cases' would be suitable for the death penalty whereas the others would only get life imprisonment.

2. Civil Legal System:

Civil law is a legal system inspired by Roman law, the primary feature of which is that laws are written into a collection, codified, and not determined, as in common law by judges[13].Conceptually, it is the group of legal ideas and systems ultimately derived from the Code of Justin, but heavily overlaid by Germanic, ecclesiastical, feudal, and local practices, as well as doctrinal strains such as natural law, codification, and legislative

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

positivism. It holds legislation as the primary source of law, and the court system is usually inquisitorial, unbound by precedent, and composed of specially-trained judicial officers.

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

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

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

A prominent example of civil law would be the Napoleonic Code, named after French emperor Napoleon Bonaparte. The Code comprises three components: the law of persons, property law, and commercial law. Rather than a catalog of judicial decisions, the Code consists of abstractly written principles as rules of law.[14]

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

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

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

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

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

In later times, civil law became codified as customary law that were local compilations of legal principles recognized as normative. Sparked by the age of enlightenment, attempts to codify private law began during the second half of the 18th century, but civil codes with a lasting influence were promulgated only after the French Revolution, in jurisdictions such as France.

Codification, however, is by no means a defining characteristic of a civil law system. For example, the statutes that govern the civil law systems of Sweden and other Nordic countries are not grouped into larger, expansive codes like those found in France and Germany.[15] Furthermore, many common law jurisdictions have codified parts of their laws, for example, the federal statutes in the United States Code, and much Australian criminal law. There are also so-called "mixed systems" that combine aspects of both common and civil law systems, such as the laws of Scotland, Louisiana, Namibia, the Philippines, Quebec, Sri Lanka, Mauritius, South Africa, and Zimbabwe.[16]

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

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

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

Some systems of civil law do not fit neatly into this typology, however. The Polish civil law developed as a mixture of French and German civil law in the 19th century. After the reunification of Poland in 1918 five legal systems (French code civil from the Duchy of

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

Warsaw, German BGB from Western Poland, Austrian ABGB from Southern Poland, Russian law from Eastern Poland and Hungarian law from Spisz and Orawa) were merged into one.

Law in the state of Louisiana is based in part on civil law. Louisiana is the only U.S. state partially based on French and Spanish codes and ultimately Roman law, as opposed to English common law.[17] In Louisiana, private law is based on the Louisiana Civil Code. The current state of Louisiana law has converged considerably with US law.

3. Religious Legal System

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

The first treatise on international law was the Introduction to the Law of Nations written at the end of the 8th century by Muhammad al-Shaybani, an Islamic jurist of the Hanafi school[18], eight centuries before Hugo Grotius wrote the first European treatise on the subject. Al-Shaybani wrote a second more advanced treatise on the subject, and other jurists soon followed with a number of other multi-volume treatises written on international law during the Islamic Golden Age. They dealt with both public international law as well as private international law.

These early Islamic legal treatises covered the application of Islamic ethics, Islamic economic jurisprudence and Islamic military jurisprudence to international law, and were concerned with a number of modern international law topics, including the law of treaties; the treatment of diplomats, hostages, refugees and prisoners of war; the right of asylum; conduct on the battlefield; protection of women, children and non-combatant civilians; contracts across the lines of battle; the use of poisonous weapons; and devastation of enemy territory.[19] The Umayyad and Abbasid Caliphs were also in continuous diplomatic negotiations with the Byzantine Empire on matters such as peace treaties, the exchange of prisoners of war, and payment of ransoms and tributes.

After Sultan al-Kamil defeated the Franks during the Crusades, Oliverus Scholasticus praised the Islamic laws of war, commenting on how al-Kamil supplied the defeated Frankish army

[17] Ibid.
[18] Kelsay, J.,"AL-SHAYBANI AND THE ISLAMIC LAW OF WAR", Journal of Military Ethics.
[19] Aboul-Enein, H. Yousuf and Zuhur, Sherifa, ISLAMIC RULINGS ON WARFARE, p. 22, Strategic Studies Institute, US Army War College, Diane Publishing Co.,

with food. The Islamic legal principles of international law were largely based on Qur'an and the Sunnah of Muhammad, who gave various injunctions to his forces and adopted practices toward the conduct of war. The most important of these were summarized by Muhammad's successor and close companion, Abu Bakr, in the form of ten rules for the Muslim army. Islamic private international law arose as a result of the vast Muslim conquests and maritime explorations, giving rise to various conflicts of laws. A will, for example, was "not enforced even if its provisions accorded with Islamic law if it violated the law of the testator." Islamic jurists also developed elaborate rules for private international law regarding issues such as contracts and property, family relations and child custody, legal procedure and jurisdiction, religious conversion, and the return of aliens to an enemy country from the Islamic world. Democratic religious pluralism also existed in classical Islamic law, as the religious laws and courts of other religions, including Christianity, Judaism and Hinduism.

Islamic law also introduced "two fundamental principles to the West, on which were to later stand the future structure of law: equity and good faith", which was a precursor to the concept of *pacta sunt servanda* in civil law and international law. Islamic law also "introduced it to international relations, making possible the systematic development of conventional law, which became a partial substitute for custom."[20]

Islamic law also made "major contributions" to international admiralty law, departing from the previous Roman and Byzantine maritime laws in several ways. These included Muslim sailors being "paid a fixed wage "in advance" with an understanding that they would owe money in the event of desertion or malfeasance, in keeping with Islamic conventions" in which contracts should specify "a known fee for a known duration", in contrast to Roman and Byzantine sailors who were "stakeholders in a maritime venture, in as much as captain and crew, with few exceptions, were paid proportional divisions of a sea venture's profit, with shares allotted by rank, only after a voyage's successful conclusion." Muslim jurists also distinguished between "coastal navigation, or cabotage," and voyages on the "high seas", and they also made shippers "liable for freight in most cases except the seizure of both a ship and its cargo." Islamic law also "departed from Justinian's Digest and the Nomos Rhodion Nautikos in condemning slave jettison", and the Islamic Qirad was also a precursor to the European commenda limited partnership. The "Islamic influence on the development of an international law of the sea" can thus be discerned alongside that of the Roman influence.[21]

Hindu Law: Hinduism is a way of life, a Dharma. The word Dharma is derived from the Sanskrit word “dhri” which means “to hold together.” Those who profess the Hindu Dharma and seek to follow it are guided by spiritual, social, legal and moral rules, actions, knowledge and duties which are responsible for holding the human race together. Dharma does not mean religion: it is the law that governs all actions. The Hindu religion not only consists of rules encompassing the rights and duties of kings and warriors, but also provides norms of Desa Dharma that govern inter-State relations. Hinduism is based on numerous texts.[22] The laws of

[20] Boisard, Marcel A. (July 1980), "On the Probable Influence of Islam on Western Public and International Law", International Journal of Middle East Studies
[21] Tai, Emily Sohmer (2007), "Book Review: Hassan S. Khalilieh, Admiralty and Maritime Laws in the Mediterranean Sea (ca. 800-1050): The "Kitāb Akriyat al-Sufun" vis-à-vis the "Nomos Rhodion Nautikos", Medieval Encounters
[22] Manoj Kumar Sinha, HINDUISM AND INTERNATIONAL HUMANITARIAN LAW, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-858-p285/$File/irrc_858_sinha.pdf

armed conflicts were founded in ancient India on the principle of humanity. The ancient Hindu texts clearly recognized the distinction between military targets, which could be attacked, and non-military persons and objects, which could not be attacked. Warfare was thus largely confined to combatants, and only the armed forces were legitimate targets.[23]

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

It is sufficiently clear that in terms of the ideals of humanitarianism of ancient India the laws of war were more progressive. The modern laws of war were developed mainly by The Hague Peace Conferences of 1899 and 1907, and in the four Geneva Conventions of 1949 and the two 1977 Additional Protocols thereto. India is party to the four Geneva Conventions of 1949 and has incorporated them into its municipal law. Although it did not sign the two Additional Protocols, the non-formal nature of its adoption of them has not hindered the effective implementation of international humanitarian law in India. Hinduism believes that war is undesirable and must be avoided because it involves the killing of fellow human beings.[24]

4. Customary Law

Today, hardly any political entity in the world operates under a legal system which could be said to be typically and wholly customary. Custom can take on many guises, depending on whether it is rooted in wisdom born of concrete daily experience or more intellectually based on great spiritual or philosophical traditions. Be that as it may, customary law still plays a sometimes significant role, namely in matters of personal status, in a relatively high number of political entities with mixed legal systems. This obviously applies to a number of African countries but is also the case, albeit under very different circumstances, as regards the law of China or India, for example. Customary international laws are those aspects of international law that are derived from custom.

[23] The humanitarian principles are largely articulated in The Hague Conventions of 1899 and 1907 and the four Geneva Conventions of 1949 and their two Additional Protocols. For the texts see Handbook of the International Red Cross and Red Crescent Movement, ICRC, Geneva, 1994.

[24] V. S. Mani, "International humanitarian law: An Indo-Asian perspective", International Review of the Red Cross, No. 841, 2001, pp. 59-76.

Coupled with general principles of law and treaties, custom is considered by the International Court of Justice, the United Nations, and its member states to be among the primary sources of international law. For example, the law of War and Peace originated as a form of customary law before they were codified in the Hague Conventions of 1899 and 1907, the Geneva Conventions, and other treaties. The vast majority of the world's governments accept in principle the existence of customary international law, although there are many differing opinions as to what rules are contained in it. The Statute of the International Court of Justice acknowledges the existence of customary international law in Article 38(1)(b). This Article is incorporated in the United Nations Charter by Article 92.[25]

Customary international law consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way.[26] It follows that customary international law can be discerned by a "widespread repetition by States of similar international acts over time. Acts must occur out of sense of obligation; Acts must be taken by a significant number of States and not be rejected by a significant number of States." A marker of customary international law is consensus among states exhibited both by widespread conduct and a discernible sense of obligation.

A peremptory norm is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted. Examples include various international crimes; a state which carries out or permits slavery, genocide, war of aggression, or crimes against humanity is always violating customary international law. Other examples accepted or claimed as customary international law include the principle of non-refoulement, immunity of visiting foreign heads of state, and the right to humanitarian intervention.

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

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

a) ***Role of Treaties:*** Treaties are a form of agreement between or amongst countries and international organizations which are regulated by International Law. There are around two hundred countries and several hundreds of international organizations, such as the United Nations, World Trade Organization, World Intellectual Property Organization. You might wonder how these countries and international organizations would interact with each other? Do you not think that mutual agreement is one possible way out to achieve that objective? This kind of agreement is called by various names such as Treaty, Convention, Pact, Covenant, Protocol, Charter, and even simply an Agreement. You might know the names of several such Treaties. The famous examples may be: Versailles Treaty, Kyoto Protocol, Pact of Paris, Charter of the United Nations, and International Covenant on Civil and Political Rights. These Treaties bind the Nations to carry out their responsibilities according to their provisions. If they would not observe those responsibilities, it would amount to breach of a treaty and some kind of compensation would have to be paid by the violating country. There is a fundamental principle in this legal system which says: "Treaties must be observed in good faith". This principle has become a guiding factor in the continued observance of treaties in International Legal System.

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

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

d) ***South Asian Association for Regional Co-operation (SAARC):*** South Asian Association for Regional Co-operation was established on 8 December 1985 by the South Asian countries of India, Bangladesh, Bhutan, Pakistan, Nepal, Sri Lanka, and Maldives. Afghanistan also became a member of this organization in 2007. Many Agreements and

Conventions have been concluded under the auspices of SAARC, such as Agreement on South Asian Free Trade Area (SAFTA), Agreement on Avoidance of Double Taxation, Convention on Combating and Prevention of Trafficking in Women and Children for Prostitution, Regional Convention on Suppression of Terrorism. It has launched visa exemption scheme also whereby for some defined categories of entitled persons, there would be no requirement of a visa to enter any country of 'SAARC'. These are some of the remarkable achievements of this regional organization which works on the basis of treaties recognized by the International Legal System.

Impact of Globalization on Legal Systems: *Globalization as a Recent Trend:* Globalization of law is a recent trend in the development of law and legal systems throughout the world. It is important to note the difference between the internationalization of law, which has been around for quite some time, and the globalization of law. The prevalence of non-state actors, as well as inter-governmental legal institutions has decreased the sovereignty of nation-states more significantly than the use of international law. International law is based on the sovereignty of nation-states, whereas the trend of globalization of law is to some degree eroding that sovereignty by reducing the power of the nation-states to control the development of the law. Almost all legal analysts acknowledge that there has been some globalization of the law. They differ with respect to their characterization of that development, and the normative conclusions that they draw from it. The central debate, therefore, focuses on the extent to which the interplay of private and public forces is harmonizing legal thinking and legal behavior.[27]

Globalization is reshaping the fixed and firm boundary between domestic and international spheres and changing our conceptions of the proper domain of domestic and international politics and law. In reformulating the entrenched disciplinary assumptions underlying these conceptual definitions of the national and the international, we necessarily move the concept of sovereignty to the foreground when analyzing the relationship between globalization and law. There is no doubt that the process of globalization is transforming traditional conceptions and constructions of sovereignty; the conventional image of a sovereignty associated with exclusive territorial jurisdiction is no longer theoretically or empirically serviceable in the face of the internationalization of economic and social activity. International law, like international relations, relies on a political theory of sovereignty to buttress its conceptual framework. In a sense, the concept of sovereignty stands in much the same relation to the disciplines of international law and international relations as does the concept of markets to the discipline of economics. Given the rapid globalization of the economy, the growth of regional institutions like the European Union (EU), and the emergence of international regulatory regimes, the conventional notion of a sovereign State has limited efficacy. The concept of the sovereign State as an entity that has exclusive jurisdiction over its territory (with the concomitant limitation on external encroachment on its power), as well as the notion of an internal sovereignty reflected in the internal unity of the State and its "monistic" legal order, needs rethinking. The notion of a single unified system of internal sovereignty has become increasingly problematic in a global political economy

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

surrounded by islands of sovereignty, rather than by a single, central decision-making authority.[28]

An example can be taken from the Polish scenario in which, first of all it is important to understand that Polish legal system is based on the civil law system developed in Europe over many years. Poland has codified law and that is why the main sources of that law are Constitution, codes, statues and international treaties. The Polish legal system is divided into public and private law categories. Public law, mainly which is constitutional, criminal and administrative laws, is a type of law where exists relation between some government department or agency and people and their organizations. Private law regulates relations between private individuals and organizations. Because of the globalization process, Poland needed to transform its legal system to be more coherent with international relations. That's why currently, it is not hard to run business activity in Poland for foreign entities. Also the Polish International Private Law had to be transformed. The International Private Law includes principles of conflict of law which state will be used to a certain situation. Nationality, place of residence seat, and situation of the object will affect using a concrete legal system.[29]

Concept of Convergence: Among the phenomena generally included under the label of "globalization," there are undeniably strong pressures toward harmonization and homogenization of legal systems. In comparative law, there is a concept of "convergence", which means, to refer to the degree to which modern legal systems are becoming more and more alike. Significant pressures toward convergence are created by, on the one hand, the forces of international trade, which tend to demand harmonized commercial law because significant differences in local law stand as impediments to international trade, and, on the other hand, by the international human rights and democratization movements, which are arguably based on the values of western liberal democracy and which seek to have all domestic and international legal systems adopt certain characteristics of western liberal democratic law. While the various religious-based traditions of law (Jewish, Islamic, or Hindu, for example) pose obvious barriers to convergence, the thesis of ever-increasing convergence seems plausible with respect to the two main western traditions of law, the common and the civil law.[30] Legal systems are flexible, and rationality prevails, so however much they are bound to the internal logical unfolding of their own legal tradition or family, through transpositions and fertilisation, transmigration of ideas, institutions and structures occurs and causes legal systems as a whole, and areas of law, in particular, to change. Legal systems are driven by their internal dynamics and by the external dynamics of transmigration. This movement and change can be dubbed 'convergence' or 'divergence within harmony.' The results are mixed legal systems and areas of law that are themselves mixed systems.

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

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

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

MODULE - II

CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

MODULE II – CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

Constitutional and administrative laws are the areas of law which establish and regulate the institutions of government within states. They also encompass the internal governance of supranational legal orders. They are increasingly concerned with the relationship between internal and external legal norms and the interaction between multiple layers of government within and beyond states.

The Constitution is the ground norm when it comes to legislations. It determines the powers of the different wings of the government and protects the citizens against any violation of their rights. The courts interpret the Constitution, resulting in the execution of the aforesaid functions of the Constitution. It also unbridled powers in the legislature, thereby preventing it from delegating essential legislative powers arbitrarily. The validity of very executive action is also seen in reference to power given to it by the legislation. Constitutional law enjoys the status of prime moderator monitoring the three branches of the government and in turn installs a yardstick upon which the extent of rules and policies made can be measured.

Administrative law is that law which deals with the relationship between a country's citizens with the government. It determines the organizational and power structure of the administration and quasi-judicial bodies to enforce the rule of law. Administrative law is primarily concerned with governmental and administrative actions and process and puts in a control mechanism to prevent administrative agencies from spiraling out of control. It is not codified law and rather has developed over time. It ensures that the authorities don't misuse or abuse the powers vested in them.

Hence, it is important to study the Constitutional Law and Administrative Law to understand the function of government, various public/governmental institutions.

CONSTITUTIONAL LAW

Introduction: The constitution of any country is the most important piece of legislation. It is a legal document having a special legal sanctity, which sets out the framework and the principal functions of the organs of the government of a State, and declares the principles governing the operation of those organs. It determines law and rules, and describes the form of the government, the relationship between the citizens and the various structures of the government.

Almost all democratic governments now have written constitutions. A Nation's Constitution is called legal heir of its past and testator of its future. It lays down the basic structure of the government according to which the people are to be governed. It also sets out the rights and duties of citizens, and also regulates the relationship of State and Citizen.

The Constitution of India is considered as the supreme law of the land (supreme Lex loci). It frames fundamental political principles, procedures, practices, rights, powers, and duties of the government. It imparts constitutional supremacy and not parliamentary supremacy, as it

is not created by the Parliament but, by the Constituent Assembly, and adopted by its people, with a declaration in its Preamble.

Drafting of the Indian Constitution: Even though many scholars start the journey of Indian constitution from 1935, the fact remains that its seeds were sowed with the arrival of British in India in 1600. Evolution of Constitution of India can be discussed in four phases which are as under: -

- I Phase - from 1600 to 1773 (Arrival of the East India Company, Establishment of Presidencies in Madras, Bombay and Calcutta, Appointment of Governors, Toning up of administration of justice, Introduction of English legal system etc)
- II Phase- from 1773 to 1857 (Regulating Act 1773, Act of Settlement 1781, Establishment of Supreme Courts at Calcutta, Bombay & Madras, Role of Privy Council, Introduction of Adalat System, streamlining of local self-government, Appointment of Law Commission, Codification of laws, and Governor General in Council exercising Legislative and Executive functions)
- III Phase- From 1857 to 1946 (Indian High Courts Act 1861, Founding of Indian National Congress 1n 1885, Indian Councils Act 1892, 1909 - Government of India Act 1915- Dyarchy- , -Government of India Act 1919-Demand for responsible Government-The Nehru Report 1928 on Constitutional Reforms- Poorna Swaraj day 26th January 1930-Simon Commission Report 1930 -I Round Table conference 1930-31-Gandhi-Irwin Pact 1931- II Round Table Conference 1931- Ramsay MacDonald's Communal Settlement,1931-Poona Pact 1932-III Round Table Conference 1933- Government of India Act 1935- Cripps Offer & Quit India Movement 1942- Cabinet Mission Plan 1946-Objective Resolution, 13 December 1946)
- IV Phase- From 1946 to 1949 (Formation of Provincial Government 1946, - Constituent Assembly 1946 –Objective Resolution to determine constitution of free India-Non-cooperation of Muslim League- Mountbatten Plan & Partition of India-Indian Independence Act 1947-Drafting of Constitution- Drafting Committee +21 other Committees)

Journey from Government of India Act 1935 to the Constituent Assembly Debates: During 1930s Indian freedom struggle had reached its epitome. The spirit of fighting and driving away the British had penetrated each and every strata of the society and its members and as far as the British were concerned, they knew that it was getting day by day to suppress the freedom fighters. British also were well aware that they needed the support of Indians in facing and fighting in one of the most destructive war ever fought in the world history i.e. the World War II.

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

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

Salient Features of the Government of India Act: ***Provincial Autonomy:*** The system of Dyarchy was abolished and with it the system of revenue and executive council also had to bid adieu. The council of ministers primarily administered all the provincial subjects barring few crucial exceptions like Law and Order for which the Head Government was responsible. These ministers were chosen from the elected members of the provincial legislature and were collectively responsible to it.

All India Federation States: The enactment also proposed setting up of an All India Federation which would be primarily comprised of the British India and the Princely States. These units were further sub-categorized into eleven governor's provinces, six chief commissioner's provinces and all those princely states that had consented to become a part of the same. Such an accession was supposed to be completely voluntary and was to be executed through an Instrument of Accession in favour of the Crown.

Introduction of Dyarchy at the Central Level: The federal subjects were further categorized into Reserved subjects and Transferred Subjects. Where the former included crucial subjects like Defence, Ecclesiastical Affairs, External Relations and Tribal Affairs, the remaining areas of governance formed a part of the latter. The Reserved Subjects were supposed to be administered by the Governor General along with the aid of three executive counselors. Transferred subjects were required to be administered by the Governor General with the aid of Council of Ministers.

Bicameral Legislature: It also established a federal bicameral legislature consisting of a Upper House i.e. Council of States and a Lower House i.e. the Federal Assembly. The strength of the Upper house was fixed at 260 out of which 104 members were nominated by the rulers to present the Indian states. 6 members were to be nominated by the governor-general whereas the remaining members were required to be elected. The lower house comprised of 375 members out of which 250 represented British India and 125 represented the Indian States. The members of the British India were indirectly elected enjoying a tenure of five years unless the house was dissolved earlier by the Governor General. Six provinces were given the Bicameral System of Legislature.

Establishment of a Federal Court: Primarily function of this court was to adjudicate inter-state disputes and matters concerning the interpretation of the Constitution. However the Privy Council remained the final court of appeal.

Division of law making powers in to three lists i.e., Federal List, Provincial List and Concurrent List with residuary powers vested in the Governor General

Establishment of an Advisory Body in place of the Indian Council

Separation of Burma from India w.e.f. April 1937

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

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

Salient Features of the Indian Constitution: The following are the key features of the Indian Constitution:

- Longest written constitution (Originally 395 Articles & 8 Schedules)
- Sovereign, Socialist ,Secular & Democratic Republic
- Parliamentary System of Government
- Partly Federal and partly Unitary
- Fundamental Rights
- Directive Principles of State Policy
- Fundamental Duties
- Independent Judiciary
- Emergency Provisions
- Partly Rigid and Partly Flexible etc

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

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

Parliamentary Form of Government: The constitution of India established a parliamentary form of government both at the Centre as well as at the state level. In this respects the

drafters have adopted the British model in toto as India was accustomed to that form of the government. The essence of a Parliamentary form of government is its responsibility to the legislature. The President is the constitutional head but the real executive power vests with the Prime Ministers and his Council of Ministers who are collectively responsible to the Lok Sabha. The members are elected for a period of five years.

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

Fundamental rights and fundamental duties: The Indian constitution provides an elaborate list of Fundamental Rights to the citizens of India, which cannot be taken away or abridged by any law made by the states (Article 12–35). Similarly, the constitution also provides a list of 11 duties of the citizens, known as the Fundamental Duties (Article 51A).

Directive principles of state policy: The Indian constitution mentions certain Directive Principles of State Policy (Article 36–51) which that government has to keep in mind while formulating new policy.

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

Independent judiciary: The constitution provides an independent judiciary (Article 76) which ensures that the government is carried on in accordance with the provisions of the constitution and acts as a guardian of the liberties and fundamental rights of the citizens.

Emergency powers: The constitution vests extraordinary powers, known as Emergency Powers in the President during emergencies out of armed rebellion or external aggression or due to failure of constitutional machinery in the state (Article 352–360).

Preamble

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

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

The Preamble to our Constitution serves, two purposes:

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

Crucial principles imbibed in the Preamble:

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

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

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

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

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

Justice: The term Justice in the Preamble embraces three distinct forms: Social, economic and political, secured through various provisions of the Fundamental and Directive Principles.

Social justice in the Preamble means that the Constitution wants to create a more equitable society based on equal social status. Economic justice means equitable distribution of wealth among the individual members of the society so that wealth is not concentrated in few hands. Political Justice means that all the citizens have equal right in political participation. Indian Constitution provides for universal adult suffrage and equal value for each vote.

Liberty: Liberty implies absence of restraints or domination on the activities of an individual such as freedom from slavery, serfdom, imprisonment, despotism etc. The Preamble provides for liberty of thought, expression, belief, faith and worship.

Equality: Equality means absence of privileges or discrimination against any section of the society. The Preamble provides for equality of status and opportunity to all the people of the country. The Constitution strives to provide social, economic and political equality in the country.

Fraternity: Fraternity means feeling of brotherhood. The Preamble seeks to promote fraternity among the people assuring the dignity of the individual and the unity and integrity of the nation.

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

The following are the fundamental rights expressly guaranteed under our constitution:

- Right to Equality (Articles 14-18)
- Right to Freedoms (Articles 19-22)
- Right against Exploitation (Articles 23-24)
- Right to Freedom of Religion (Articles 25-28)
- Cultural and Educational Rights (Articles 29-30)
- Right to Constitutional Remedies (Articles 32-35)

Right to Equality: Equality is one of the objectives of the Constitution as enshrined in the Preamble in the form of equality of status and opportunity. Articles 14 to 18 guarantee their implementation in different forms. The right to equality stands at forefront of success of

democratic life . In fact, in all modern constitutions it is the first fundamental right. The term equality has many connotations. They are: Reasonable Classification, Protective Discrimination, Compensatory Discrimination, Rule of law, Rule against Arbitrariness, Principles of Natural Justice etc. All these tools ensure operation of equality in reality.

Protective discrimination: Article 14 of Constitution says all persons are entitled to equality before law and equal protection of laws. and there shall be no discrimination on any grounds whatsoever. However, equality doesn't mean equality that is measured with scale. The rights guaranteed by Articles 15 to 18 emanate from Article 14. Article 15 deals with prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. It also permits State to undertake certain beneficial measures to protect women and children under its Cluse (2), and for advancement of Socially and Educationally Backward Classes, Scheduled Castes and Scheduled Tribes under its Cluse (4). Clause (5) of Article 15 empowers the country to make reservations with regard to admissions into educational institutions both privately run and those that are aided or not aided by the government. From this rule only the minority run institutions such as the Madarsas are exempted. Clause (6) is added to provide reservations to economically weaker sections for admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30. The amendment aims to provide reservation to those who do not fall in 15 (5) and 15(4) (effectively, SCs, STs and OBCs).The EWS reservations are therefore to be provided to a maximum extent of 10%.

Article 16 deals with equality of opportunity in matters of public employment and makes provision for reservation in favour of backward classes ,Scheduled Castes,Scheduled Tribes and EWS(Maximum 10%) . Article 17 abolishes untouchability, and makes its practice an offence by itself.Article 18 abolishes titles except in case of academic and military distinctions.The Supreme Court in 1996 in the case of Balaji Raghavan v.Union of India, declared that Bharta ratna and Padma awards do not fall within the meaning of titles but such awards have to be given only to the deserving persons,Further it was also directed not use the as either suffixes or prefixes by the awardees.

An analysis of the right to equality denotes that it imbibes in itself the concept of Rule of Law, Test of Reasonable Classification, Rule against Arbitrariness, concept of Protective and Compensatory Discrimination. The following is the test adopted by Supreme Court to determine any measure taken by legislature or executive in the name of Test of reasonable classification. The classification or discrimination on any ground is permissible if following two conditions are satisfied:

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

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

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

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

The Principles of Natural Justice is also one of the tools to ascertain absence of Arbitrariness. The Principles of Natural Justice are:

- No man shall be condemned unheard (Based on the Latin maxim-Audi Alteram Partem which means hear the other side - Rule of fair Hearing)
- Judge/Authority shall not have any bias -whether monetary, personal or subject matter (Based on the Latin maxim-Nemo Judex Causa in - Rule against Bias)
- Every decision of state should be based on reasons (Speaking order/reasoned decisions).

The above principles are to be followed by all the administrative and quasi- judicial authorities while taking decisions to ensure that 'Justice should not only be done but clearly and manifestly should appear to be done'

Rule of Law: Rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite. Prof. A.V. Dicey developed the concept . The rule of law contemplated the absence of wide powers in the hands of governmental officials. & wherever there is discretion, there is room for arbitrariness. It reflects notions of a government of laws, the supremacy of the law, and equality of all before the law.

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

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

the State and the Chief Justice of India. This method of appointment guarantees that judges appointed to the High Court would be persons of ability, integrity & independence.

A question has sometimes been asked as to what would happen if the Government–be it State or Central–did not carry out the decisions of the Court. It denotes the legal principle that law should govern a nation, and not arbitrary decisions by individual government officials.

Freedom of Speech and Expression: Justice Brandies and Holmes, in *Whitney v. California* very firmly stated: Liberty is a means to end and vice versa. Framers of our constitution believed that freedom to think as you will and to speak as you think is means indispensable to the discovery and spread of political truth. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. Constitutional framers are quiet conscious of right to Freedom of speech and expression importance in a Democratic country governed by rule of law and as such crystallized this norm in A.19 of the Constitution in variety of forms. They are:

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

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

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

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

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

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

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

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

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

Directive Principles of State Policy: The Directive Principles of State Policy contained in Part IV, Articles 36-51 of the Indian constitution constitute the most interesting and enchanting part of the constitution. The Directive Principles may be said to contain the philosophy of the constitution. The idea of directives being included in the constitution was borrowed from the constitution of Ireland. As the very term "Directives" indicate, the Directive principles are broad directives given to the state in accordance with which the legislative and executive powers of the state are to be exercised. As Nehru observed, the governments will ignore the directives "Only at their own peril." As India seeks to secure an egalitarian society, the founding fathers were not satisfied with only political justice. They sought to combine political justice with economic and social justice.

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

The socialists on the other hand, make enjoyment or rights conditional on the fulfillment of duties. They claim that "he who does not work, neither shall he eat." The constitution of the

world's first socialist country, that of Soviet Union contains a list of fundamental rights immediately followed by a list of fundamental duties. It is clearly asserted that the enjoyment of fundamental rights is conditional on the satisfactory performance of fundamental duties.

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

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

- to abide by the constitution and respect its ideal and institutions;
- to cherish and follow the noble ideals which inspired our national struggle for freedom;
- to uphold and protect the sovereignty, unity and integrity of India;
- to defend the country and render national service when called upon to do so;
- to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional diversities, to renounce practices derogatory to the dignity of women;
- to value and preserve the rich heritage of our composite culture;
- to protect and improve the natural environment including forests, lakes, rivers, and wild-life and to have compassion for living creatures;
- to develop the scientific temper, humanism and the spirit of inquiry and reform;
- to safeguard public property and to abjure violence;
- to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavor and achievement.

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

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

However, these fundamental duties are not mere expressions of pious platitudes. Courts will certainly take cognizance of laws seeking to give effect to fundamental duties. Further, the fundamental duties enumerated in Art. 51A constitute a constant reminder to the citizens that they have duties in building up a free, egalitarian and healthy society. These are expected to act as damper to reckless and anti-social activities on the part of some individuals. Finally,

the very fact that these duties figure in the constitution, keeps the door open for the duties to be given higher constitutional status in future through constitutional amendments.

Relationship between Centre and State: After independence India adopted the federal structure for, perhaps, administrative convenience. There is dual policy, with the Union Government at the Centre and the state governments at the periphery—each enjoying powers assigned to them. The autonomy of the states is so adjusted with the Centre that the latter can perform its function of ensuring unity of the country. The legislative relations between the Centre and the states determined in accordance with the provisions of the Article 246 of the Constitution. The legislative powers are categorized in three lists—Union List with 97 subjects, States List with 66 and Concurrent List with 47 subjects. Residuary legislative powers rest with the Parliament. Moreover when there is state of emergency, Parliament can make laws on the subjects given under Union List. In the case of a conflict between the laws made by the state and the laws passed by the Centre the central law will prevail.

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

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

Indian Judiciary: Indian Justice System: A unique feature of the Indian Constitution is that, despite its Federal system and the existence of the Central and State laws with their predefined spheres of application, there exists a single integrated system of Courts which administers both the central and the state laws.

Hierarchy of the Courts in India: The Supreme Court of India and the High Courts are the two constitutional courts that are vested with major powers to protect the Fundamental Rights of the citizens and also to interpret the Constitution and other laws (for detailed discussion see Module III).

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

passed by him should be subject to the confirmation by the High Court. (See for details Sections 28 and 29 of Criminal Procedure Code.)

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

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

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

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

The Constitution of India recognizes three forms of Emergency:

- National Emergency
- State Emergency
- Financial Emergency

***National Emergency*:** The Constitution of India has provided for imposition of emergency caused by war, external aggression or internal rebellion. This is described as the National Emergency. This type of emergency can be declared by the President of India if he is satisfied that the situation is very grave and the security of India or any part thereof is threatened or is likely to be threatened either, By war or external aggression or By armed rebellion within the country.

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

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

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

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

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

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

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

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

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

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

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

Amendment Provisions: Though a rigid constitution is a classified feature of the Indian constitution but its flexibility to the changing needs of the society provides it adaptable to a federal structure as well and hence the Indian Constitution has often be classified as a quasi-federal form of government. That there have been more than 100 amendments in last 70 years proves this fact.

The amendment provision of the constitution refers to the process of altering the provisions of the Indian Constitution. The said procedure is laid down under Article 368 of the Indian constitution. The amendment provision was included by the drafters in an attempt to ensure the sanctity of the constitution of India and consequently provide a safeguard from the exercise of arbitrary power by the Parliament.

The Constitution provides procedures for three categories of amendments:

***Amendment by Simple Majority*:** Constitutional provisions like Article 4 (i.e. admission and establishment of new states), Article 169 (i.e. power to abolish or create legislative councils in states), Para 7(2) of Schedule V (administration and control of the Schedule Areas and Scheduled Tribes) and Para 21(2) of Schedule VI(power of the Parliament to enact laws amending the Sixth Schedule which contains provisions for the administration of Tribal Areas in the States of Assam, Meghalaya, Tripura and Mizoram) can be altered by way of a Simple Majority such as that required for the passing of any ordinary law.

***Amendment by Special Majority*:** Amendment by Special Majority along with Ratification by State Legislature: If the amendment seeks to make any change in any of the provisions mentioned in the proviso to article 368, it must be ratified by the Legislatures of not less than one-half of the States. These provisions relate to certain matters concerning the federal structure or of common interest to both the Union and the States viz., the election of the President (Articles 54 and 55); the extent of the executive power of the Union and the States (Articles 73 and 162); the High Courts for Union territories (Article 241); The Union Judiciary and the High Courts in the States (Chapter IV of Part V and Chapter V of Part VI); the distribution of legislative powers between the Union and the States (Chapter I of Part XI and Seventh Schedule); the representation of States in Parliament; and the provision for amendment of the Constitution laid down in article 368. Ratification is done by a resolution passed by the State Legislatures.

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

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

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

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

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

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

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

Doctrine of Pith and Substance: One of the proven methods of examining the legislative competence of a legislature with regard to an enactment is by the application of the doctrine of pith and substance. This doctrine is applied when the legislative competence of the legislature with regard to a particular enactment is challenged with reference to the entries in various lists. If there is a challenge to the legislative competence, the courts will try to ascertain the pith and substance of such enactment on a scrutiny of the Act in question. In this process, it is necessary for the courts to go into and examine the true character of the enactment, its object, its scope and effect to find out whether the enactment in question is genuinely referable to a field of the legislation allotted to the respective legislature under the constitutional scheme. This doctrine is an established principle of law in India recognized not

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

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

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

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

Indian Constitution and Recent Developments: Since 2015, 26th November has been celebrated as the Constitution Day in our country. This year the day marks the completion of seven decades since the adoption of the constitution by the Constituent Assembly. In the life of a nation seventy years of constitutional governance calls for introspection as well as retrospection. It is said that Constitution is the legal heir of the past and testator of the future therefore it is appropriate time to make an audit of the working of the constitution so far in the light of the intention of its framers.

Probably, no other democratic constitution in the world has faced so many challenges as our supreme *lexi loci*. Right from the first year of its working, there have been more than 100 amendments to the Constitution of India. They include those relating to special provisions for the advancement of any socially and educationally backward classes or for the Scheduled Castes and the Scheduled Tribes, land reforms, reorganization of states and union territories, correcting regional imbalances, realizing the goals of directive principles, imposition of the President's rule in certain States, conferring constitutional status on National Commissions of SC,ST and BC, abolition of right to property as a fundamental right, insertion of fundamental duties, anti-defection law, proposal to establish national judicial appointments commission(NJAC), GST and 10% reservation for EWS etc. This list is only illustrative.

If we recall the intentions of the framers of the Constitution, on November 25, 1949, Dr. Ambedkar spoke of the need to give up the grammar of anarchy, to avoid hero-worship, and to work towards a social – not just a political – democracy. He also forewarned about the dangers inherent in hero-worship by observing that there is nothing wrong in being grateful to great men who have rendered life-long services to the country but there are limits to

gratefulness, and that Bhakti in religion may be a road to the salvation of the soul but in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship. Regarding the social democracy he observed that political democracy cannot last unless there lies at the base of it social democracy.

On the importance of fraternity he emphatically stated that fraternity means a sense of common brotherhood of all Indians – of Indians being one people. He was prophetic about the evil effects of casteism and remarked that 'the United States has no caste problem. In India there are castes. The castes are anti-national. In the first place because they bring about separation in social life. They are anti-national also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality.' Dr. Ambedkar's views are as relevant today as were at the time when they were expressed on the day before this great constitution was adopted.

On analyzing the working of our constitution during the last seven decades, we notice that the political executive has made certain significant efforts to implement the objects of constitution in letter and spirit though a certain kind of authoritarianism had emerged in the early 1970s and it has been raising its head sporadically since then. .The 24th Constitutional amendment (1971) proposed to dilute the effect of the I.C.Golaknath v.State of Punjab (1967) which gave primacy to fundamental rights over the constitutional amendments , since they are within the purview of law. It conferred unlimited amending power on the Parliament and by declared that constitutional amendment is not a law for the purpose of fundamental rights. However the Supreme Court by majority exhibited its judicial statesmanship by upholding the amendment on one hand but by pronouncing that no constitutional amendment can affect Basic Features of the constitution including fundamental rights. The Basic features doctrine has been the sine qua non for testing any constitutional amendment made after 1973.

The 39th Constitutional amendment which proposed to shield the elections of the prime minister and other holders of constitutional positions from judicial review was struck down in Indira Nehru Gandhi vs. Raj Narain (1975) leading to imposition of the infamous national emergency in June 1975. It reiterated that rule of law and judicial review are basic features of the constitution.

The 42nd amendment made significant changes like introduction of fundamental duties, giving primacy to directive principles over fundamental rights while making laws, and amending the Preamble to include the words socialist and secular before republic etc. A journalist commented that this amendment neither amended nor mended the constitution but ended it. 43rd and 44th amendment, 1978 had undone some of the changes made by the 42nd amendment during the Janata Government. In Minerva Mills v.Union of India (1980), the Supreme Court declared that harmony between fundamental rights and directive principles is a basic feature of the constitution. Maneka Gandhi v.Union of India (1978) expanded the horizons of life and personal liberty in India thanks to the judgments of Justice P.N.Bhagwati and Js.Krishna Iyer.Anti Defection Law was introduced by 52nd amendment, 1985 to arrest the immoral and undemocratic trend of legislators elected on political party ticket defecting to other political parties though it made an exception in the form of split and merger. The 91st amendment (2004) strengthened the anti defection law to some extent by removing splits as an exception, and also restricted the size of ministry to one fifteenth of

legislators of the concerned lower house. The 99th amendment proposed to introduce the NJAC in place of the Supreme Court introduced Collegium system in 1993 but the same was struck down as an affront to independence of judiciary, a basic feature of the constitution in 2015. The 101st amendment introduced the Goods and Services Act (GST) as an exercise of cooperative federalism to streamline the indirect taxes in India. The 103rd amendment(2019) introduced 10% reservations to Economically Weaker Sections (EWS).The year 2019 also witnessed the abolition of Article 370 which conferred special status on Jammu and Kashmir, and also the trifurcation of the State into union territories.

A look at the above 100 plus amendments shows that Indian Constitution has been formally changed more than 100 times during 70 years of its working .The US Constitution of 1787 has been amended only 27 times since 1789 and the Australian Constitution of 1900 has been amended only 8 times till now. The Indian experience should be taken as either as the dynamic character of our constitution or as the compulsion of political expediency.

The unfinished agenda of the constitution includes revitalizing the anti-defection law to make it more effective, streamlining the process of formation of coalition governments, conferring more powers on the States, making education as a concurrent subject, making the compensatory discrimination more scientific, enactment of uniform civil code, introduction of judicial accountability, and prevention of corruption. Though, not envisaged as an imperium in imperio, the judiciary appears to have performed its constitutional role better by way of judicial activism and liberal interpretation of constitution and laws. Evolution of basic structure theory, applying speed-breakers on misuse of the President's rule, monitoring the issue of mining licenses to stop indiscriminate exploitation of natural resources, acting as a catalyst to ensure some success in environmental protection, and introducing safeguards against violation of human rights etc.

It is absolutely necessary to realize that the supreme law is applicable to all the citizens. The present day society seems to be more divided as compared to the one which has been inherited in 1947.It is alarming that fraternity, about which Dr. Ambedkar eloquently spoke in the Constituent Assembly along with equality and liberty, seems to have become a casualty. Subversion of the constitution and dilution of constitutional values by the rulers and also the governed would have catastrophic results which our great country could afford to tolerate.

It is appropriate to recollect the words of Dr.Rajendra Prasad who famously observed that "If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country". It is also said that the people get the governments they deserve. The question is there the statesmen of capacity, character and integrity?

ADMINISTRATIVE LAW

Introduction: Administrative law is the bye-product of the growing socio-economic functions of the State and the increased powers of the government. With the growth of the society, its complexity increased and thereby presenting new challenges to the administration. In the modern society, the functions of the state are manifold, In fact, the modern state is regarded as the custodian of social welfare and consequently, there is not a

single field of activity which is free from direct or indirect interference by the state. Along with duties, and powers the state has to shoulder new responsibilities. The growth in the range of responsibilities of the state thus ushered in an administrative age and an era of Administrative law.

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

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

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

The advantage of the administrative process is that it could evolve new techniques, processes and instrumentalities, acquire expertise and specialization, to meet and handle new complex problems of modern society. Administration has become a highly complicated job needing a good deal of technical knowledge, expertise and know-how. Continuous experimentation and adjustment of detail has become an essential requisite of modern administration. At times, administration is explained in a negative manner by saying that what does not fall within the purview of the legislature or the judiciary is administration.

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

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

- Are adequate precautions being taken to ensure that the administrative agencies follow in discharging their functions such procedures as are reasonable, consistent with the rule of law, democratic values and natural justice?
- Has adequate control mechanism been developed so as to ensure that the administrative powers are kept within the bounds of law, and that it would not act as a power drunk creature, but would act only after informing its own mind, weighing carefully the various issues involved and balancing the individual's interest against the needs of social control?

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

A democracy will be no better than a mere façade if the rights of the people are infringed with impunity without proper redressed mechanism. This makes the study of administrative law important in every country. Administration in India is bound to multiply further and at a quick pace. If exercised properly, the vast powers of the administration may lead to the welfare state; but, if abused, they may lead to administrative despotism and a totalitarian state a careful and systematic study and development of administrative law becomes a desideratum as administrative law is an instrument of control of the exercise of administrative powers.

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

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

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

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

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

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

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

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

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

A famous jurist ***Hobbes*** has written that there was a time when the society was in such a position that man did not feel secured in it. The main reason for this was that there were no such things as administrative powers. Each person had to live in society on the basis of his own might accordingly to Hobbes, "In such condition, there was no place for industry, arts, letters and society. Worst of all was the continual fear of danger, violent death and life of man solitary poor, nasty and brutish and short.

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

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

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

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

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

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

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

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

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

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

The fundamental constitutional principle, inspired by John Locke, holds that “the individual can do anything but that which is forbidden by law, and the state may do nothing but that which is authorised by law". Administrative law is the chief method for people to hold state

bodies to account. People can apply for judicial review of actions or decisions by local councils, public services or government ministries, to ensure that they comply with the law. The first specialist administrative court was the *Conseil d'État* set up in 1799, as Napoleon assumed power in France. Whatever be the correct position, there always exists an area of overlap between constitutional law and administrative law. In India, this corresponds to the whole constitutional mechanism for the control of administrative authorities – Articles 32, 136, 226, 227, 300 and 311. It can also include the study of administrative agencies provided for in the Constitution itself. Further, it may include the study of constitutional limitations on delegation of powers to the administrative authorities and also those provisions of the Constitution which restrict administrative action; for example, the Fundamental Rights.

Constitutional Law viewed through Administrative Eyes: Since the English Constitution is unwritten, the impact of constitutional law upon administrative law in England is insignificant and blurred. As Dicey observes, the rules which in other countries form part of a constitutional code are the result of the ordinary law of the land in England. As a result, whatever control the administrative authorities can be subjected to, if any, must be deduced from the ordinary law, as contained in statutes and judicial decisions. But, in countries having written constitutions, there is an additional source of control over administrative action. In these countries there are two sources or modes of exercising judicial control over the administrative agencies – constitutional and non-constitutional. The written constitution imposes limitations upon all organs of the body politic. Therefore, while all authors attempt to distinguish the scope of administrative law from that of constitutional law, they cannot afford to forget not to mention that in a country having written constitution with judicial review, it is not possible to dissociate the two completely.

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

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

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

constitutional guarantees and limitations and it is the duty of the courts to protect the individual from a breach of his rights by the departments of the Government or other administrative agencies.

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

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

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

Constitutional Impact on Administrative Adjudication: In order to provide speedy and inexpensive justice to employees aggrieved by administrative decisions, the Government set up the Central Administrative Tribunal (CAT) in 1985, which now deals with all cases relating to service matters which were previously dealt with by courts up to and including the High Courts. Establishment of the Central Administrative Tribunal under the Administrative Tribunals Act, 1985 is one of the important steps taken in the direction of development of administrative law in India. The Administrative Tribunals Act while stimulating the development of administrative law, drew its legitimacy and substance from the constitutional law and was passed by Parliament in pursuance of Article 323-A of the Constitution. Dr. Rajeev Dhavan comments on the new tribunal system envisaged under Art. 323-A: “The Forty-second Amendment envisaged a tribunal structure and limited review powers by the High Courts. In the long run, this could mean a streamlined system of tribunal justice under the superintendence of the Supreme Court. Properly worked out such a system is not a bad one. It would be both an Indian and a common law adaptation of the French system of *droit administratif*."

Although the relationship between constitutional law and administrative law is not very emboldened to be seen with naked eyes but the fact remains that concomitant points are neither so blurred that one has to look through the cervices of the texts with a magnifier to

locate the relationship. The aforementioned veracities and illustrations provide a cogent evidence to establish an essential relationship between the fundamentals of both the concepts. If doubts still persist, the very fact that each author, without the exception of a single, tends to differentiate between the two branches of law commands the hypothecation of a huge overlap.

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

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

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

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

It is difficult to classify the functions of the executive, as there is no perfect and scientific formula to distinguish the functions performed by the executive is whether a legislative or an executive or a judicial in given case. Justice Hedge rightly states, "the dividing line between and administrative power and quasi-judicial power is quit thin and is being gradually

obliterated ...” But for sake of understanding, broad classification can be done basing on the judgments of Hon’ble Supreme Court and High Courts of various states respectively.

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

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

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

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

1. Disciplinary proceedings against students. 2. Disciplinary proceedings against an employee for misconduct. 3. Confiscation of goods under the sea Customs Act, 1878. 4. Cancellation, suspension, revocation or refusal to renew license or permit by licensing authority. 5. Determination of citizenship. 6. Determination of statutory disputes. 7. Power to continue the detention or seizure of goods beyond a particular period. 8. Refusal to grant ‘no objection certificate’ under the Bombay Cinemas (Regulations) Act, 1953. 9. Forfeiture of pensions and gratuity. 10. Authority granting or refusing permission for retrenchment. 11. Grant of permit by Regional Transport Authority.

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

Rule-application action or administrative action – Though the distinction between quasi-judicial and administrative action has become blurred, yet it does not mean that there is no distinction between the two. If two persons are wearing a similar coat, it does not mean that there is no difference between them. The difference between quasi-judicial and administrative action may not be of much practical consequence today but it may still be relevant in determining the measure of natural justice applicable in a given situation. In *A.K. Kraipak v. Union of India*, the Court was of the view that in order to determine whether the action of the administrative authority is quasi-judicial or administrative, one has to see the nature of power conferred, to whom power is given, the framework within which power is conferred and the consequences. Therefore, administrative action is the residuary action

which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument. It is based on subjective satisfaction where decision is based on policy and expediency. It does not decide a right though it may affect a right. However, it does not mean that the principles of natural justice can be ignored completely when the authority is exercising "administrative powers". Unless the statute provides otherwise, a minimum of the principles of natural justice must always be observed depending on the fact situation of each case.

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

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

Doctrine of Separation of Powers: This concept was originated by "Aristotle" and was developed by Lock. But it was given a base and made popular by French jurist, Montesqeu. The theory of separation of powers divides the governmental functions into three categories, namely, 1.Legislative power; 2. Judicial power; 3. Administrative power. According to this theory these three powers should be held by different bodies and should not be vested in one body and should not be fused one with the other. Actually, this concept was originated by "Aristotle" and was developed by Lock. However it was given a base and made popular by French jurist, Montesqeu through his great work Esprit Des Lois (The spirit of Laws) in the year1748.

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

According to the ***Black Stone*** "if the legislative, the executive and the judicial functions were given to one man, there was end of personal liberty. The Lord Acton also observes the same

view of point that is “every power tends to corrupt and absolute power tends to corrupt absolutely”.According to Friedman and Benjafield “each of the three function of the Government contains elements of other two and that any rigid attempt to define and serious inefficiency in Government”. Thus, it is impossible to stick to this doctrine, as the modern state being a welfare state has to solve many complex socio-economic problems. Justice Frankfurter also states “enforcement of a rigid concept of separation of powers would make modern government impossible.

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

Thus, it is rightly pointed out by the ***C.K.Takwani*** in his book that “on the whole, the doctrine of separation of powers in the strict sense is undesirable and impracticable and, therefore, it is not fully accepted in any country. Nevertheless, its value lies in the emphasis on those checks and balances which are necessary to prevent and abuse of enormous powers of the executive. The object of the doctrine is to have a government of law rather than of official will or whim”.

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

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

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

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

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

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

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

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

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

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

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

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

Important Components of Rule-of-Law Reforms:

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

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

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

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

Natural Justice meant many things to many writers, lawyers and systems of law. It is used interchangeably with Divine Law, Jus Gentium and the Common Law of the Nations. It is a concept of changing content.

The principles of natural justice are firmly grounded under various Article of the Constitution. With the introduction of the concept of substantive and procedural due process in Article – 21 of the Constitution all that fairness which is included in the principles of natural justice can be read into Article – 21 when a person is deprived of his life and personal liberty In other areas it is Article – 14 which incorporates the principles of natural justice. Article – 14 applies not only to discriminatory class legislation on but also to arbitrary or discriminatory State action. Because violation of natural justice results in arbitrariness therefore violation of natural justice is violation of Equality Clause of Article – 14. Therefore, now the principle of natural justice cannot be wholly disregarded by law because this would violate the fundamental rights guaranteed by Articles – 14 and 21 of the Constitution. There are mainly two Principles of Natural Justice.

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

Rule against Bais

'Bias' means an operative prejudice whether conscious or unconscious in relation to a party or issue. Therefore, the 'Rule Against Bias' strikes against those factors which may improperly influence a judge in arriving at a decision in any particular case. The requirement of this principle is that the judge must be impartial and must decide the case objectively on the basis of the evidence on record. Therefore if a person, for whatever reason, cannot take an objective decision on the basis of evidence on record he shall be said to be biased. A

decision which is a result of bias is a nullity and the trial is "Coram non-judice". Inference of bias, therefore, can be drawn only on the basis of factual matrix and not merely on the basis of insinuations, conjectures and surmises. Bias manifests variously and may affect the decision in a variety of ways.

Personal Bias: Personal Bias arises from a certain relationship equation between the deciding authority and the parties which incline him/her unfavourably or other-wise on the side of one of the parties before him/her. Such equation may develop out of varied forms of personal or professional hostility or friendship. How-ever, no exhaustive list is possible.

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

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

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

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

In a case, the Supreme Court quashed the notification of the Government which had conferred powers of a Deputy Superintendent of Police on the General Manager, Haryana Roadways in matters of inspection of vehicles on the ground of departmental bias. In this case private bus operators had alleged that the General Manager of Haryana Roadways who

is a rival in business in the State, cannot be expected to discharge his duties in a fair and reasonable manner he would be too lenient in inspecting the vehicles belonging to his own department.

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

Preconceived Notion Bias: 'Bias' arising out of preconceived notions is a very delicate problem of administrative law. On the one hand, no judge as human being is expected to sit as a blank sheet of paper, on the other, preconceived notions would vitiate a fair trial.

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

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

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

The test of adequacy of 'Notice' will be whether it gives sufficient information and material so as to enable the person concerned to put up an effective defence. Therefore, the contents of notice, persons who are entitled to 'Notice' and the time of giving 'Notice' are important matters to ascertain any violation of the principles of natural justice. Sufficient time should also be given to comply with the requirement of notice. Thus, when only 24 hours were given to demolish a structure alleged in a dilapidated condition, Court held that notice is not proper. In the same manner where notice contained only one charge, the person cannot be punished for any other charge for which notice was not given. However, the requirement of notice will not be insisted upon as a mere technical formality, when the concerned party clearly knows the case against him and is not thereby prejudiced in any manner in putting up an effective defence.

Right to Present Case and Evidence: The adjudicatory authority should afford reasonable opportunity to the party to present his/her case. This can be done through writing or orally at the discretion of the authority unless the statute under which the authority is functioning directs otherwise. The requirements of natural justice are met only if opportunity to represent is given in view of the proposed action.

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

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

Legal Representation: Normally representation through a lawyer in any administrative proceeding is not considered an indispensable part of the rule of natural justice as oral hearing is not included in the meaning of fair hearing. This denial of legal representation is justified on the ground that lawyers tend to complicate matters, prolong the proceedings and destroy the essential informality of the proceedings. Factory Laws do not permit legal representation, Industrial Dispute Acts allows it with the per-mission of the Tribunal and some Statutes like Income Tax Act permit legal representation as a matter of right. However, the Courts in India have held that in situations where the person is illiterate, or the matter is complicated and technical, or expert evidence is on record or a question of law is involved, or the person is facing a trained prosecutor, some professional assistance must be given to the party to make his right to defend himself meaningful.

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

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

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

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

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

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

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

The idea of 'Post-Decisional Hearing' has been developed to maintain a balance between administrative efficiency and fairness to the individual. This harmonizing tool was developed by the Supreme Court in '*Maneka Gandhi v. Union of India'*. In this case on 1st June, 1976 the passport of the petitioner, a journalist, was impounded in public interest by an order of the Government without furnishing any reasons therefore. The petitoner, being aggrieved by such artbitary action of the government filed a petition before the Supreme Court under Article-32 challenging the validity of the impoundment order. One of the contentions of the government Techniques of Law was that the rule of *audi alterm partem* must be held to be excluded because it may frustrate the very purpose of impounding the passport.

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

The other aspect of the matter is that the party, against whom an order is passed, in fair play, must know the reasons of passing such order. It has a right to know the reasons. The orders against which appeals are provided must be speaking orders. Otherwise, the aggrieved party will not be in a position to demonstrate before the appellate authority as to in which manner, the order passed by the initial authorities is bad or suffers from illegality. The Supreme Court

has many times taken the view that non-speaking order amounts to depriving a party of a right of appeal. It has also been held in some of the decisions that the appellate authority, while reversing the order must assign reasons for reversal of the findings.

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

Exclusion in Emergency: In exceptional cases of emergency where prompt preventive or remedial action, is needed, the requirement of notice and hearing may be obviated.

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

Exclusion in case of routine matters: A student of the university was removed from the rolls for unsatisfactory academic performance without giving any pre-decisional hearing. In the same manner when the Commission cancelled the examination of the candidate because, in violation of rules, the candidate wrote his roll number on every page of the answer, the Supreme Court held that the principles of natural justice are not attracted. Court observed that the rule of hearing is strictly construed in academic discipline as if this is ignored it will not only be against public interest but would also erode social sense of fairness. However, this exclusion shall not apply in case of disciplinary matters or where the academic body permits non-academic circumstances.

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

Natural justice may be excluded if its effect would be to stultify the action sought to be taken or would defeat and paralyse the administration of the law. The Supreme Court *in Maneka Gandhi v. Union of India* observed: "Where an obligation to give notice and opportunity to be heard would obstruct the taking of prompt action, especially action of a preventive or remedial nature, right of prior notice and opportunity to be heard may be excluded by implication."

Exclusion in Cases of Legislative Actions: Legislative action, may be plenary or subordinate, is not subjected to the rules of natural justice because these rules lay down a policy without reference to a particular individual.

Where No Right of the Person is Infringed: Where no right has been conferred on a person by any statute nor any such right arises from common law, the principles of natural justice are not applicable. The Supreme Court held that after the expiry of the prescribed period of

any limited tenancy, a person has no right to stay in possession and hence no right of his is prejudicially affected which may warrant the application of the principles of natural justice.

Exclusion in Case of Statutory Exception or Necessity Techniques of Law: Disqualification on the ground of bias against a person will not be applicable if he is the only person competent or authorized to decide that matter or take that action.

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

Delegated Legislation: One of the most significant developments of the present century is the growth in the legislative powers of the executives. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law it only supplements the law under the authority of legislature.

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

I. Certain emergency situations may arise which necessitate special measures. In such cases speedy and appropriate action is required. The Parliament cannot act quickly because of its political nature and because of the time required by the Parliament to enact the law.
II. The bulk of the business of the Parliament has increased and it has no time for the consideration of complicated and technical matters. The Parliament cannot provide the society with the requisite quality and quantity of legislation because of lack of time. Most of the time of the Parliament is devoted to political matters, matters of policy and particularly foreign affairs.
III. Certain matters covered by delegated legislation are of a technical nature which require handling by experts. In such cases it is inevitable that powers to deal with such matters is given to the appropriate administrative agencies to be exercised according to the requirements of the subject matter. "Parliaments" cannot obviously provide for such matters as the members are at best politicians and not experts in various spheres of life.
IV. Parliament while deciding upon a certain course of action cannot foresee the difficulties, which may be encountered in its execution. Accordingly various statutes contain a 'removal of difficulty clause' empowering the administration to remove such difficulties by exercising the powers of making rules and regulations. These clauses are always so worded that very wide powers are given to the administration.
V. The practice of delegated legislation introduces flexibility in the law. The rules and regulations, if found to be defective, can be modified quickly. Experiments can be made and experience can be profitability utilized.

However the attitude of the jurists towards delegated legislation has not been unanimous. The practice of delegated legislation was considered a factor, which promoted centralization.

Delegated Legislation was considered a danger to the liberties of the people and a devise to place despotic powers in few hands. It was said that delegated legislation preserved the outward show of representative institutions while placing arbitrary and irresponsible power in new hands. But the tide of delegated legislation was high and these protests remained futile.

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

The essential legislative functions consist in making a law. It is to the legislature to formulate the legislative policy and delegate the formulation of details in implementing that policy. Discretion as to the formulation of the legislative policy is prerogative and function the legislature and it cannot be delegated to the executive.

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

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

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

The problem of administrative discretion is complex. It is true that in any intensive form of government, the government cannot function without the exercise of some discretion by the officials. But it is equally true that absolute discretion is a ruthless master. Discretionary

power by itself is not pure evil but gives much room for misuse. Therefore, remedy lies in tightening the procedure and not in abolishing the power itself.

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

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

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

(2*) Control at the stage of the exercise of discretion* - In India, unlike the USA, there is no Administrative Procedure Act providing for judicial review on the exercise of administrative discretion. Therefore, the power of judicial review arises from the constitutional configuration of courts. Courts in India have always held the view that judge-proof discretion is a negation of the rule of law. Therefore, they have developed various formulations to control the exercise of administrative discretion.

In India the administrative discretion, thus, may be reviewed by the court on the following grounds:

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

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

ii. *Malafide or Bad faith*: - If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court. Malafide exercise

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

iii. *Irrelevant consideration*: - The decision of the administrative authority is declared void if it is not based on relevant and germane considerations. The considerations will be irrelevant if there is no reasonable connection between the facts and the grounds.

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

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

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

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

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

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

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

i. *Non-application of mind*: - Where an authority is given discretionary powers it is required to exercise it by applying its mind to the facts and circumstances of the case

in hand. If he does not do so it will be deemed to have failed to exercise its discretion and its action or decision will be bad.

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

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

The doctrine of legitimate expectation is to be confined mostly to right of fair hearing before a decision, which results in negativing a promise, or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate does not require the fulfillment of the expectation where an overriding public interest requires otherwise.

A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation, which it would be within its powers to fulfill. The protection is limited to that extent and a judicial review can be within those limits. A person, who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is foundation and thus he has *locus standi* to make such a claim.

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

The main characteristics of Administrative Tribunals are as follows:

- Administrative Tribunals is the creation of a statute.
- An Administrative Tribunals is vested in the judicial power of the State and thereby performance quasi-judicial functions as distinguished form pure administrative functions.

- Administrative Tribunals is bound to act judicially and follow the principles of natural justice.
- It has some of the trapping of a court and are required to act openly, fairly and impartially.
- An administrative Tribunal is not bound by the strict rules of procedure and evidence prescribed by the civil procedure court.

Structure of the Tribunals: The Administrative Tribunals Act 1985 provides for the establishment of one Central Administrative Tribunal and a State Administrative Tribunal for each State like Haryana Administrative Tribunal etc; and Joint Administrative Tribunal for two or more states. The Act provides for setting up of State Administrative Tribunals to decide the services cases of state government employees. There is a provision for setting up of Joint Administrative Tribunal for two or more states. On receipt of specific requests from the Government of Orissa, Himachal Pradesh, Karnataka, Madhaya Pradesh and Tamil Naidu, Administrative Tribunals have been set up, to look into the service matters of concerned state government employees. A joint Tribunal is also to be set up for the state of Arunachal Pradesh to function jointly with Guwahati bench of the Central Administrative Tribunal.

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

The Tribunal, may, however admit any application even after one year, if the applicant can satisfy the Tribunal that he/she had sufficient cause for not making the application within the normal stipulated time. Every application is decided by the Tribunal or examination of documents, written representation and at times depending on the case, on hearing of oral arguments. The applicant may either appear in person or through a legal practitioner who will present the case before the Tribunal. The Administrative Tribunals are not bound by the procedure laid down in the code of Civil Procedure 1908. They are guided by the principles of natural justice. Since these principles are flexible, adjustable according to the situation, they help the Tribunals in molding their procedure keeping in view the circumstances of a situation.

Judicial Control of Administrative Action: It is admitted fact that the administrative authorities now a days are conferred on wide administrative powers which are required to be controlled otherwise they will become new despots. The Administrative Law aims to find out the ways and means to control the powers of the administrative authorities. In the context of increased powers for the administration, judicial control has become an important area of administrative law, because Courts have proved more effective and useful than the

Legislature or the administration in the matter. "It is an accepted axiom" observed Prof. Jain & Jain that "the real kernel of democracy lies in the Courts enjoying the ultimate authority to restrain all exercise of absolute and arbitrary power. Without some kind of judicial power to control the administrative authorities, there is a danger that they may commit excess and degenerate into arbitrary authorities, and such a development would be inimical to a democratic Constitution and the concept of rule of law. "

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

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

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

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

The provisions of Article 13 are: Article 13 (1) provides that all laws in force in the territory of India immediately before the commencement of the Constitution of India, in so far as they are inconsistent with the provision of Part III dealing with the fundamental rights shall, to the extent of such inconsistency, be void. Article 13 (2) provides the State Shall not make any law which takes away or abridges the fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void. Article 245 makes it clear that the legislative powers of Parliament and of the State Legislatures are subject to the provisions of the Constitution.

The doctrine of ultra vires has been proved very effective in controlling the delegation of legislative function by the legislature and for making it more effective it is required to be applied more rigorously. Sometimes the Court's attitude is found to be very liberal. Supreme Court has held that the legislature delegating the legislative power must lay down the

legislative policy and guideline regarding the exercise of essential legislative function, which consists of the determination of legislative policy and its formulation as a rule of conduct.

The Court is not against the vesting of the discretionary power in the executive, but it expects that there would be proper guidelines or normal for the exercise of the power. The Court interferes when the uncontrolled and unguided discretion is vested in the executive or administrative authorities or the repository of the power abuses its discretionary power. The judicial review is not an appeal from a decision but a review of the manner in which the decision has been made. The judicial review is concerned not with the decision but with the decision making process.

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

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

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

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

MODULE - III

INDIAN JUDICIAL AND LEGAL SYSTEM

MODULE III: INDIAN JUDICIAL AND LEGAL SYSTEM

Legal Theory and its Origin: In order to begin with understanding the judiciary, it is important to answer the question "What is law?" The legal theory for the purpose of clarity, attempts to not only define law but also emphasises on the need to find its origin. Ancient Jurists like Salmon defined law as the body of principles recognized and applied by the state in the administration of Justice whereas Austin defined law as a general command of the sovereign individual or a sovereign body. According to Hart Law is the combination of primary rules of obligations and secondary rules of recognition. Hence, law is a broader term which may be defined as different kinds of rule and principles, acts, regulations, ordinances, statutes, orders, reason, morality, etc.

The Natural Law Theory emphasises that there are laws that are imminent in nature and is closely associated with morality, history and intentions of God. Natural law theory accepts that law can be considered and spoken of *both* as a sheer social fact of power and practice, *and* as a set of reasons for action that can be and often are sound as reasons and therefore normative for reasonable people addressed by them. This dual character of positive law is presupposed by the well-known slogan "Unjust laws are not laws."[31]

Sources of Law

The two main sources of law include Formal sources and Material sources. The Material sources can be further divided into legal and historical sources. As per Salmon, formal sources are those sources from which the law derives its force and validity whereas material sources are sources from which the matter of law takes shape. Legal material sources are the sources which are recognized as such by the law itself and are authoritative and allowed by the courts as of right. The historical material sources are unauthoritative lacking formal recognition by the law as they have no legal recognition and include customs, judicial decisions/precedent, acts of legislature, equity and conventions.

Doctrine of Separation of Powers

The doctrine of separation of powers focuses on the idea that the governmental functions must be based on a tripartite division of legislature, executive and judiciary. The three organs need to be separate, distinct and sovereign in order to not trespass the territory of the other. The doctrine was propounded by Aristotle who first perceived and saw that there is a specialization of function in each Constitution developed this doctrine. Subsequently, various other theorists like Montesquieu, John Locke and James Harrington described these functions as legislative, executive and judicial.

According to Montesquieu the three organs of the Government have separate functions. The function of the legislature is to make laws while the function of the executive is to execute them and that of the judiciary is to enforce and interpret them. He concluded that none of these three organs should control or interfere with the exercise of the functions of the other organs and that one organ should not exercise the functions of other organs.

[31]https://plato.stanford.edu/entries/natural-law-theories/, last visited on 25th September, 2020

The basic concept of the separation of powers would mean that the same persons should not form part of more than one of the three organs of government, one organ of the government should not control or interfere with the work of the other and lastly, one organ of government should not exercise the functions of another.

Organs

The Legislature, the Judiciary and the Executive are the pillars of democracy. Hence, the system of checks and balances is one of the most salient features of our constitutional scheme. The three organs can practically not be segregated into compartments due to their interdependence on each other to ensure efficacious governance. The Parliament exercises political and financial control over the Executive, and there are inherent checks and balances to keep each organ within the limits of Constitutional power.

The Legislature has been accorded high-esteem in the Indian Constitution. It is primarily concerned with enactment of general rules of law that are germane to all aspects of the conduct of its citizens and institutions. The Parliament is the Union Legislature of India comprising two bodies namely Lok Sabha and the Rajya Sabha and enacts laws, impose taxes, authorizes borrowing, and prepares and implements the budget, has sole power to declare war, can start investigations, especially against the executive branch, appoints the heads of the executive branch and sometimes appoints judges as well as it has the power to ratify treaties.

The Judiciary acts as the interpreter of the Constitution and as custodian of the rights of the citizens through the process of judicial review. This mandates the judiciary to interpret the laws but not to make them. They are not to lay down the general norms of behavior for the government.

Historical Evolution of the Indian Legal System

Laws in Ancient India were primarily regulated through established customs and religious norms many of which have found their way into the current Indian legal system.

Hindu Law- Dharma

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

There are three sources of Dharma or Hindu law. The first source is the Veda or Vedas. The four primary Vedas are the Rigveda, Yajurveda, Samaveda, and Atharvaveda. They are collections of oral texts of hymns, praises, and ritual instructions. Veda literally means revelation. The second source is called Smriti, which literarily means 'as remembered' and it refers to tradition. They are the humanly authored written texts that contain the collected traditions. The Dharmashastra texts are religion and law textbooks and form an example of the Smriti tradition. Since only a few scholars had access to direct knowledge or learning from the Vedas, Smritis are the written texts to teach others. These texts are considered to be

authoritative because they are believed to include duties and practices that must have been sourced from the Vedas and they are accepted and transmitted by humans who know the Vedas. In this way, a connection is made between the Veda and smriti texts that make the latter authoritative. The third source of dharma is called the 'âchâra', which means customary law. Âchras are the norms of a particular community or group. Just like the smriti, chra finds its authority by virtue of its connection with the Vedas. Where both the Vedas and the Smritis are silent on an issue, a learned person who knows the Vedas can consider the norms of the community as dharma and perform it. This way, the Vedic connection is made between the Veda and the âchâra, and the âchâra becomes authoritative.

Pre and Post-Independence India

The common law system was a system of law based on recorded judicial precedents- came to India with the British East India Company. The company was granted charter by King George I in 1726 to establish "Mayor's Courts" in Madras, Bombay and Calcutta (now Chennai, Mumbai and Kolkata respectively). Judicial functions of the company expanded substantially after its victory in Battle of Plassey and by 1772 company's courts expanded out from the three major cities.

In the process, the company slowly replaced the existing Mughal legal system in those parts. Following the First War of Independence in 1857, the control of company territories in India passed to the British Crown. Being part of the empire saw the next big shift in the Indian legal system. Supreme courts were established replacing the existing mayoral courts. These courts were converted to the first High Courts through letters of patents authorized by the Indian High Courts Act passed by the British parliament in 1862. Superintendence of lower courts and enrolment of law practitioners were deputed to the respective high courts.[32]

The application of common law in India evolved during the 19thcentury when certain laws were codified and proper courts were being established under the Charter of 1861. Before the 19th century, the Supreme Court was established and applied the laws of England as far as applicable to India. Later in the 20th century, when the Federal court was established, it also applied the laws of England in spite of many laws that were codified like Indian Penal Code 1862, Civil Procedure Code, 1908 but before independence common law was the major source of framing laws in India. India after independence adopted the parliamentary system of government which is followed in Britain. The Constitution of India is said to be a replica of Govt of India Act, 1935.

Many other laws that were made during the British rule still continue to exist even after independence like the Indian Contract Act, 1872, Indian Partnership Act, 1932, Sales of Goods Act, 1930, Indian Penal Code, 1862, etc. Although these laws have been amended over the years, it can be stated that the Common Law System of Britain laid the foundation of the Indian legal system. The constitution of India is heavily influenced by the government of India act 1935.The concept of rule of law, judicial precedent and other principles of public law had been introduced in India due to common law. The doctrine of precedent was introduced in the 18th century through the Royal Charter.

[32]http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom/

Judiciary: Functions, Importance and an Essential Quality of Judiciary:

The Judiciary plays the important role of not only interpreting and applying the law but also adjudicating upon controversies between one citizen and another and between a citizen and the state. It is the function of the courts to maintain the rule of law in the country and to assure that the government runs according to law.

Functions of Judiciary and Its Importance:

1. To Give Justice to the people:

The first and foremost function of the judiciary is to give justice to the people, whenever they may approach it. It awards punishment to those who after trial are found guilty of violating the laws of the state or the rights of the people.

The aggrieved citizens can go to the courts for seeking redress and compensation. They can do so either when they fear any harm to their rights or after they have suffered any loss. The judiciary fixes the quantity and quality of punishment to be given to the criminals. It decides all cases involving grant of compensations to the citizens.

2. Interpretation and Application of Laws:

One of the major functions of the judiciary is to interpret and apply laws to specific cases. In the course of deciding the disputes that come before it, the judges interpret and apply laws. Every law needs a proper interpretation for getting applied to every specific case. This function is performed by the judges. The law means what the judges interpret it to mean.

3. Role in Law-making:

The judiciary also plays a role in law-making. The decisions given by the courts really determine the meaning, nature and scope of the laws passed by the legislature. The interpretation of laws by the judiciary amounts to law-making as it is these interpretations which really define the laws.

Moreover, 'the judgements delivered by the higher courts, which are the Courts of Records, are binding upon lower courts. The latter can decide the cases before them on the basis of the decisions made by the higher courts. Judicial decisions constitute a source of law.

4. Equity Legislation:

Where a law is silent or ambiguous, or appears to be inconsistent with some other law of the land, the judges depend upon their sense of justice, fairness, impartiality, honesty and wisdom for deciding the cases. Such decisions always involve law-making. It is usually termed as equity legislation.

5. Protection of Rights:

The judiciary has the supreme responsibility to safeguard the rights of the people. A citizen has the right to seek the protection of the judiciary in case his rights are violated or threatened to be violated by the government or by private organisations or fellow citizens. In all such cases, it becomes the responsibility of the judiciary to protect his rights of the people.

6. Guardian of the Constitution:

The judiciary acts as the guardian of the Constitution. The Constitution is the supreme law of the land and it is the responsibility of the judiciary to interpret and protect it. For this purpose the judiciary can conduct judicial review over any law for determining as to whether or not it is in accordance with the letter and spirit of the constitution. In case any law is found ultra vires (unconstitutional), it is rejected by the judiciary and it becomes invalid for future. This power of the court is called the "Power of Judicial Review".

7. Power to get its Decisions and Judgments enforced:

The judiciary has the power not only to deliver judgments and decide disputes, but also to get these enforced. It can direct the executive to carry out its decisions. It can summon any person and directly know the truth from him.

In case any person is held:

(i) Guilty of not following any decision of the court, or
(ii) Of acting against the direction of the court, or
(iii) Misleading the court, or
(iv) Of not appearing before the court in a case being heard by it, the Court has the power to punish the person for the contempt of court.

8. Special Role in a Federation:

In a federal system, the judiciary has to perform an additionally important role as the guardian of the constitution and the arbiter of disputes between the centre and states. It acts as an independent and impartial umpire between the central government and state governments as well as among the states. All legal centre-state disputes are settled by the judiciary.

9. Running of the Judicial Administration:

The judiciary is not a department of the government. It is independent of both the legislature and the executive. It is a separate and independent organ with its own organisation and officials. It has the power to decide the nature of judicial organisation in the state. It frames and enforces its own rules.

These govern the recruitment and working of the magistrates and other persons working in the courts. It makes and enforces rules for the orderly and efficient conduct of judicial administration.

10. Advisory Functions:

Very often the courts are given the responsibility to give advisory opinions to the rulers on any legal matter. For example, the President of India the power to refer to the Supreme Court any question of law or fact which is of public importance.

11. To Conduct Judicial Inquiries:

Judges are very often called upon to head Enquiry Commissions constituted to enquire into some serious incidents resulting from the alleged errors or omissions on the part of government or some public servants. Commissions of enquiry headed by a single judge are also sometimes constituted for investigating important and complicated issues and problems.

Appointment, Transfer and Removal of Judges

The appointment and transfer of Judges tends to being influenced by the executive even though we advocate for independence of judiciary. Article 124 of the Constitution provides for the appointment of the Supreme Court judges by the President upon due consultation with such of the judges of the Supreme Court and High Court as the President may deem necessary. The proviso to the article further states that in case of appointment of a judge other than the Chief Justice, the Chief Justice shall always be consulted. Similarly the President shall appoint every judge of the High Court upon due consultation with the CJI, the State Governor and the Chief Justice of that High Court.

The requirement of consultation is compulsory and does not mean that the President has to abide by their decisions but nevertheless the President is under a duty to deliberate on the issue with respective authorities. In ***S.P. Gupta v. Union of India***[33], also known as the Judges Transfer case, the majority held that no primacy need to be given to the opinion of the Supreme Court of India but rather it is the executive which has the primacy in the given matter. However in the matters of appointment of the judges of the High Court; the opinion of the CJI should be given greatest significance. The Supreme Court unanimously agreed with the meaning of the term consultation in Article 212, 22, 124(1)* of the constitution. In the above, Supreme Court Advocates on Record case, the Supreme Court held that the Chief Justice shall have to consult two other senior most Judges of the Supreme Court before sending his opinion. The Supreme Court laid down the following guidelines:

a) Individual initiation of high constitutional functionaries in the matter of appointment of Judges reduced to minimum. It gives privacy to the Chief Justice of India but puts a check on him to consult at least two of his senior most colleagues.
b) Constitutional functionaries must act collectively in Judicial Appointments.
c) Appointment of Chief Justice of India by seniority only.

[33] AIR1982 SC 149

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

The Supreme Court, while upholding the Independence of Judiciary in appointment of Judges of the Supreme Court and High Court, on the basis of the term "consultation" under Article 217(1)* and 222 of the constitution in the formation of the opinion of the Chief Justice of India after consultation has to be sent to the President. Two senior most Judges of the Apex Court have to assist the Chief Justice of India to form an opinion. However, the question regarding political interference in the matter of appointment of Supreme Court and High Court Judges, still exists and after, the court has been striving to maintain the Independence. But in 93rd Constitutional Amendment Act of 2005 provides for the establishment of National Judicial Commission.

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

a) Constitution of the commission to be chaired by the Honorable Chief Justice of India with two senior most Judges of the Supreme Court, Minister In-charge of law and Justice, Union of India , and an eminent citizen to be nominated by the President, as its member.
b) Powers of the Commission regarding appointment of the Supreme Court and High Court Judges, and matters incidental thereto.
c) Powers of the Commission to take action in cases of complaints against Judges and the matters incidental thereto.
d) Association of the Chief Minister of the concerned state in the matter of appointment of High Court Judges.

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

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

basic structure of the constitution as held by the Supreme Court in ***Kesavananda Bharathi Vs State of Kerala***[34].

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

Independence of Judiciary

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

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

Hierarchy of Indian Courts: The main feature of the Indian judiciary system is the hierarchical structure of courts. The courts are structured with very strong judiciary and hierarchical system as per the powers bestowed upon them. This system is strong enough to make limitation of court with its jurisdiction and exercise of the power. The Supreme Court of India is placed at the top of the hierarchical position followed by High Courts in the

[34] AIR1973 SC 1461

regional level and lower courts at micro level with the assignment of power and exercising of the same for the people of India.

1. Supreme Court of India

The Supreme Court of India is the highest level of court of Indian juridical system which was established as per Part V, Chapter IV of the Constitution of India which endorses the concept of Supreme Court as the Federal Court to play the role of the guardian of the esteemed constitution of India with the status of the highest level of court in the status of appeal cases.

1.1. Constitution Regulation of Supreme Courts: As conferred by Articles 124 to 147 of Indian Constituency, the jurisdiction and composition of the Supreme Court is being fixed. This court is primarily of the status of appellate court. This court is accepting the appeals of cases which are being heard in the High courts situated in different states and union territories with dissatisfaction of related parties. This court also accepts writ petitions with the suspected occurrence of activities which may infer about violation of human rights and subsequent petitions are accepted to hear and judge the consequences of such happenings.
These types of petitions are accepted under Article 32 of Indian constitution. This article confers the right to ensure remedies through constitution. This court also hears about such serious issues which need to be attended with immediate attention.

1.2 History: The Supreme Court started its operations on 28th January 1950 with the inaugural sitting, the day since when the constitution of independent India had been effectively applicable. The court had already taken care of more than 24,000 judgments as per report of the Supreme Court.

1.3 Structure and Application: This court is comprised of the Chief Justice along with 30 other judges to carry on the operation of the court. The proceeding of the Supreme Court is being heard only in the language of English. The Supreme Court is governed by the Supreme Court Rules which was published in the year 1966. The same had been fixed under the Article 145 of the Constitution of India to ensure the regulation of procedures and practices of the Supreme Court. This article is passing through the process of upgrading with the presently enforced Article as per the Supreme Court Rules, 2013.

2. High Court of India

2.1 Constitution: High Courts are second Courts of Importance of the democracy of India. They are run by Article 141 of the Constitution of India. They are governed by the bindings conferred by the Supreme Court of India so far judgments and orders are concerned. The Supreme Court of India is the highest level of courts and is responsible for fixing the guidance to the High Courts set by precedence. High courts are the types of courts which are instituted as the courts powered by constitution with the effect of Article 214 Part IV Chapter V of the Indian Constitution. There are 24

high courts in India taking care of the regional juridical system of India out of which Kolkata High Court is the oldest.

2.2 Jurisdiction: These courts are mainly confined to the jurisdiction of state, group of states or Union Territory. They are being empowered to govern the jurisdiction of lower courts like family, civil and criminal courts with other different courts of the districts. These courts are of the statute of principal civil courts so far originality of jurisdiction is concerned in the related domain of the states and the other district courts.

These courts are treated as subordinate to High Courts by status. But High Courts are mainly exercising their jurisdiction related to civil or criminal domain if the lower courts are proved incapable of exercising their power as per authorization extended by law. These situations may be generated through the inability of financial or territorial jurisdiction. There are specific areas in which only High Courts can exercise the right for hearing like cases related to Company Law as it is designated specially in a state or federal law.

But normally the high courts are involved in the appeals raised in the cases of lower courts with the writ petitions as conferred in Article 226 of the Constitution of India. The area of writ petitions is also the sole jurisdiction of high courts. The jurisdiction of High Court is varying so far territorial jurisdiction is considered.

2.3 Official structure and application: The appointments of the judges of High Courts are executed by the President of India with the consultation of the Chief Justice of India, the Chief Justice of High Court and the Governor of the state or union territory. Decision on the number of judges in High Court is mainly dictated considering the higher number of either the average of organization of main cases for the last years as per the average nationally calculated or the average rate of main cases disposed per judge per year in the respective high court. The high courts with handling of most of the cases of a particular area are provided with the facility of permanent benches or branches of the court situated there only. To serve the complainants of remote regions the establishment of circuit benches had been made to facilitate the service with the schedule of operation as per the occurrence of visit of the judge.

3. The Lower Courts of India

3.1 District Courts

Constitution:

The basis of structuring of district courts in India is mainly depending upon the discretion of the state governments or the union territories. The structure of those courts are mainly made considering several factors like the number of cases, distribution of population, etc. Depending upon those factors the state government takes the decision of numbers of District Courts to be in operation for single district or clubbing together different adjacent districts.

Normally these types of courts exercise their power of juridical service in district level. These courts are covered by the administrative power of the High Courts under which the district courts are covered. The judgments of the district courts are subject to review to the appellate jurisdiction of the respective high court.

Structure and Jurisdiction:

The district courts are mainly run by the state government appointed district judges. There are additional district judges and assistant district judges who are there to share the additional load of the proceedings of District Courts. These additional district judges have equal power like the district judges for the jurisdiction area of any city which has got the status of metropolitan area as conferred by the state government. These district courts have the additional jurisdictional authority of appeal handling over the subordinate courts which are there in the same district specifically in the domain of civil and criminal affairs.

The subordinate courts covering the civil cases, in this aspect are considered as Junior Civil Judge Court, Principal Junior and Senior Civil Judge Court, which are also known as Sub Courts, Subordinate Courts. All these courts are treated with ascending orders. The subordinate courts covering the criminal cases are Second Class Judicial Magistrate Court, First Class Judicial Magistrate Court, and Chief Judicial Magistrate Court along with family courts which are founded to deal with the issues related to disputes of matrimonial issues only. The status of Principal Judge of family court is at par with the District Judge.

There are in total 351 district courts in operation out of which 342 are of states while 9 are of union territories.

3.2 Village Courts

Constitution Structures and Features

The village courts are named as Lok Adalat or Nyaya Panchyat which means the service of justice extended to the villagers of India. This is the system for resolving disputes in micro level. The need of these courts is justified though the Madras Village Court Act of 1888. This act is followed by the development post 1935 in different provinces, which are re-termed as different states after the independence of 1947.

This conceptual model had been started to be sued from the state of Gujarat consisting of a judge and two assessors since 1970s. The Law Commission had recommended in 1984 to form the Nyaya Panchayats in the rural areas with the people of educational attainment. The latest development had been observed in 2008 through initiation of Gram Nyaylayas Act which had sponsored the concept of installation of 5000 mobile courts throughout the country. These courts are assigned to judge the petty cases related to civil and criminal offence which can generate the penalty of up to 2 years imprisonment.

So far, as per the available statistics of 2012, there are only 151 Gram Nyaylayas which are functional in this big country which is far below the targeted figures of 5000 mobile courts. While trying to find the basic reasons for this non achievement, it was found as financial constraints followed by shown reluctance by the lawyers, respective government officials and police.

Judicial Courts and Procedures:

1. Civil Court Structure

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

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

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

A magistrate of second class may not pass a sentence exceeding imprisonment of one year. Similarly, a magistrate of first class may not pass a sentence of more than 3 years. A session judge can pass an order of execution but the same has to be necessarily confirmed by the concerned High Court. The civil branch of lower judiciary is headed by a district court. As is clear by the name itself a district court is to be established in each district according to the Civil Procedure Code. Other courts subordinate to the district courts are the sub-divisional court and Munsiff court with the latter being subordinate to the former.

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

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

2. Criminal Court Structure

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

3. High Court

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

4. Sessions Court

Every state is required to establish a court of session for every sessions division which will be presided over by a judge appointed by the HC. The HC may also appoint Additional Session Judges and Assistant Sessions Judges to exercise jurisdiction in the court of the session. An assistant sessions judge is subordinate to the sessions judge.

5. Courts of Judicial Magistrates

In every district of the state the government may upon proper consultation with the HC establish courts of judicial magistrate of first class and second class as it may deem necessary. The Presiding Officers of such courts will be appointed by the HC. Any JMFC can act as the Chief Judicial Magistrate of the District upon due

appointment from HC. His main function would be to guide, supervise and control other magistrates.

6. Courts of Metropolitan Magistrates

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

7. Courts of Executive Magistrates

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

Quasi-Judicial Framework

1. Consumer Tribunals

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

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

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

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

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

1.1 Complaint

a) An unfair trade practice or a restrictive trade practice has been adopted by any trader;
b) The goods bought by him or agreed to be bought by him suffer from one or more defects;
c) The services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.
d) A trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods.
e) Goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provisions of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods.

1.2 Who can file a complaint?

a) Consumer
b) A Registered Consumer Organization
c) Central or State Government & one or more consumers, where there are numerous consumers having the same interest. No stamp or court fee is needed

1.3 Grounds of Complaint

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

1.4 Procedure to be followed by the Consumer Courts

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

The remedy under the Consumer Protection Act is an alternative in addition to that already available to the aggrieved persons/consumers by way of civil suit. In the complaint/appeal/petition submitted under the Act, a consumer is not required to pay any court fees but only a nominal fee.

1.5 Where Laboratory Test is required

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

On receipt of such complaint -

a) The District Forum should refer a copy of the complaint to the opposite party directing him to give his version of the case within a period of thirty days which can be extended to forty five days.
b) The District Forum may require the complainant to deposit specified fees for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question.
c) The District Forum will obtain a sample of the goods, seal it, authenticate it and refer the sample so sealed to the appropriate laboratory for an analysis or test, whichever may be necessary, with a view to finding out whether such goods suffer from any defect.
    i. The District Forum will remit the fees to the appropriate laboratory to enable it to carry out required analysis or test. The laboratories supposed to report its findings to the District Forum within a period of fifty-five days. This period is extendible by the District Forum.
d) Upon receiving laboratory's report, its copy will be forwarded by the District Forum to the opposite party along with its own remarks.
e) In the event of any party disputing the correctness of the findings, or the methods of analysis or test adopted by the appropriate laboratory, the District Forum shall require the objecting party to submit his objections in writing.
f) The District Forum will give an opportunity of hearing to the objecting party.
g) The District Forum shall issue appropriate order after hearing the parties.

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

1. On receiving the complaint, the District Forum should refer a copy of the complaint to the opposite party directing him to give his version of the case within a period of thirty days which can be extended to forty five days.
2. The opposite party on receipt of a complaint referred to him may-
3. admit the complaint
4. deny or dispute the allegations contained in the complaint, or
5. omits or fails to respond within the time given by the District Forum.
6. Where the opposite party admits the allegation, the District Forum should decide the matter on the basis of the merits of the case and the documents before it.
    i. Where the opposite party denies or disputes the allegations made in the complaint, the District Forum will proceed to settle the dispute on the basis of evidence brought to its notice by both the parties.
    ii. Where the opposite party omits or fails to respond within the time given by the Forum, the District Forum will proceed to settle the dispute on the basis of evidence brought to its notice by the complainant.

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

1.7 Time Period for Complaint

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

1.8 Penalties

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

1.9 Enforcement of Order

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

In case, any amount is due from any person under an order of Consumer Court. The person entitle to that amount can apply to consumer court and court can issue a certificate for the said amount to the Collector of the District (by whatever named called) and the Collector after receiving that certificate from court shall proceed to recover the amount in the same manner as arrear of land revenue. After recovery by Collector, the amount is paid to entitle person.

1.10 Appeal

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

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

In the case of Nizam Institute of Medical Sciences vs. Prasanth S. Dhananka and ors[35], the respondent, then 20 years of age and a student of engineering complained of recurring fever and was examined but the cause of the fever could not be identified. Hence, the respondent

[35] 2010AC J38

visited the Appellant hospital and it was revealed that a mass in the left hemithorax with posterior mediastinal erosion of the left 2nd, 3rd and 4th ribs. On the advice of the Cardio Thoracic Surgeon, the complainant was admitted to the hospital on 19th October, 1990 and the operation was performed on 23rd October, 1990 and the tumor was excised. The Complainant developed acute paraplegia with a complete loss of control over the lower limbs, and some other related complications. The complainant was also discharged untimely from the hospital and was completely paralyzed with no change in his sensory deficit. The complainant filed a complaint before the National Consumer Redressal Commission on 5th April, 1993 alleging utter and complete negligence on the part of Dr. P.V Satyanarayana and other doctors and also making NIMS vicariously liable. NIMS had appealed to the Supreme Court in 1999 after NCDRC had awarded Rs14 lakh to be paid to the complainant, Rs1.5 lakh to his father and Rs 25,000 as costs. The Supreme Court delivered the verdict and asked Nizam's Institute of Medical Sciences (NIMS) to pay Rs1 crore to Prashant S. Dhananka as compensation, enhancing the penalty awarded earlier by the National Consumer Disputes Redressal Commission (NCDRC).

2. Administrative Tribunals

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

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

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

Department of Administrative Reforms and Public Grievances is the nodal agency of the Government for Administrative Reforms as well as redressal of public grievances relating to

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

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

3. Telecom Dispute Settlement and Appellate Tribunal

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

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

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

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

4. Company Law Board

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

Rules 1991. The Company Law Board will be succeeded over by the National Company Law Tribunal, which will govern all companies under the Companies Act, 2013.

In terms of Section 10F of the Companies Act, any person aggrieved by any decision or order of the Company Law Board may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order.

5. National Green Tribunal

The National Green Tribunal has been established on 18th October, 2010 under the National Green Tribunal Act, 2010 for effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto. It is a specialized body equipped with the necessary expertise to handle environmental disputes involving multi-disciplinary issues. The Tribunal shall not be bound by the procedure laid down under the Code of Civil Procedure, 1908, but shall be guided by principles of natural justice.

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

6. Income Tax Appellate Tribunal

In pursuance of the recommendations made by the Select Committee, the Legislature introduced Chapter IL-A (Section 5A) in the Indian Income-tax Act in 1941 and 25.1.1941 was notified as the appointed date from which the Tribunal came into being. Subject to minor variations consequent on the expansion of the Tribunal and extension of its jurisdiction the section remained unchanged in its essentials till the repeal of the Income-tax Act, 1922 with effect from 1.4.1962. In the income-tax Act of 1961, the constitution and functions of the Tribunal have been set out in sections 252 to 255. There is no fundamental change either in the constitution or in the functions of the Tribunal due to enactment of the new Income-tax. Act. The Bench, as a rule, consists of two-members--one Judicial and one Accountant Member. The Wealth tax Act and the Gift Tax Act introduced in sixties however did not specifically require the Bench of one members each of a class and it may a bench of any two members, Judicial or Accountant. A provision was also made for the constitution of special three-member Benches (consisting of two members of one class and one of the other) and enabling a single member (judicial or accountant) authorized in that behalf, to dispose of small appeals.

7. Debt Recovery Tribunal

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

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

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

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

The Indian Advocates Act, 1961

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

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

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

Ombudsman

An ombudsman or public advocate is usually appointed by the government or by parliament, but with a significant degree of independence, who is charged with representing the interests of the public by investigating and addressing complaints of maladministration or violation of rights. In some countries an Inspector General, Citizen Advocate or other official may have duties similar to those of a national ombudsman, and may also be appointed by the legislature. Below the national level an ombudsman may be appointed by a state, local or municipal government, and unofficial ombudsmen may be appointed by, or even work for, a

corporation such as a utility supplier or a newspaper, for an NGO, or for a professional regulatory body.

Whether appointed by a legislature, the executive, or an organization (or, less frequently, elected by the constituency that he or she serves), the typical duties of an ombudsman are to investigate complaints and attempt to resolve them, usually through recommendations (binding or not) or mediation. Ombudsmen sometimes also aim to identify systemic issues leading to poor service or breaches of people's rights. At the national level, most ombudsmen have a wide mandate to deal with the entire public sector, and sometimes also elements of the private sector (for example, contracted service providers). In some cases, there is a more restricted mandate, for example with particular sectors of society. More recent developments have included the creation of specialized Children's Ombudsman and Information Commissioner agencies.

In some jurisdictions an ombudsman charged with handling concerns about national government is more formally referred to as the "Parliamentary Commissioner" (e.g. the United Kingdom Parliamentary Commissioner for Administration, and the Western Australian state Ombudsman). In many countries where the ombudsman's remit extends beyond dealing with alleged maladministration to promoting and protecting human rights, the ombudsman is recognized as the national human rights institution. The post of ombudsman had by the end of the 20th century been instituted by most governments and by some intergovernmental organizations such as the European Union.

Indian Judiciary under the Indian Constitution

The Constitution of the Supreme Court: As per Article 124, the Parliament has the power to make laws regulating the constitution organization, jurisdiction and powers of the Supreme Court. Subject to such legislation, the Supreme Court consists of the Chief Justice of India and not more than thirty (30) other judges.

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

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

Appointment and Eligibility: To be appointed as a judge for the High Court the person should be an Indian citizen with ten years of experience as a judicial officer or ten years of

experience as a advocate of the High Court. Their tenure shall be till the age of 62 years. Acting judges can be appointed but only for a period of two years.

The Basic Structure of the Constitution: The doctrine of Basic structure emphasizes on the lack of power of the parliament to alter or destroy the basic features of the Constitution. As the Constitution is stated to be the fundamental law of the land, all the laws are enforced based on the Constitution. In ***Kesavananda Bharati Sripadagalvaru vs. State of Kerala***[36], the scope of the power of amendment of the Constitution under Article 368 was decided by a 13-judge bench. It concept of the basic structure of the Constitution was laid down and it included Supremacy of the constitution, Secular character of the constitution, Demarcation of power among the legislature, executive, and judiciary, Integrity and unity of the nation, Democratic and republican form of government and Sovereignty of the nation.

The landmark judgment overruled ***Golak Nath*** and it was held that the parliament will have the right to amend the Constitution provided that the "basic structure' was not altered and that the basic structure was sacrosanct. It was stated that the Parliament's constituent powers was subject to inherent limitations and that the Parliament cannot use its amending powers under Article 368 to damage, destroy, emasculate, abrogate, change or alter the basic structure of the framework of the Constitution.

Doctrine of Eclipse: The Doctrine of Eclipse is a principle which ensures that the fundamental rights are being prospective. It can be invoked in the case of Article 13(1) when dealing with pre-constitutional laws. It safeguards pre-constitutional laws from being wiped out entirely. The doctrine states that all laws which are in force in India immediately before the commencement of the Constitution and are inconsistent with the provisions of Part III of the Constitution shall be void to the extent it is inconsistent.

The law becomes invalid only to the extent of it being overshadowed by the Fundamental Rights and hence the inconsistency of the eclipse law can be removed by amending the fundamental right. Once the amendment is made, the law becomes operative and valid. In the case of ***BhikajiNarainDhakras vs. State of Madhya Pradesh***[37], the Central Provinces and Berar Motor Vehicles Amendment Act, 1947 authorized the State Government to regulate and take all motor transport businesses and was hence challenged as it violated Article 19(1) (g) of Part III of the Constitution. As the act was pre-constitutional the Doctrine of Eclipse was applied and the act was made inoperative. In 1951 when Article 19(1) (g) was amended, it overturned the Eclipse and made the law enforceable against citizens and non-citizens. The Supreme Court held that *"the effect of the amendment was to remove the shadow and to make the impugned Act free from all blemish and infirmity"* and stated that it will still be enforceable against non-citizens.

Directive Principles of State Policy: The Directive Principles of State Policy lays down the guidelines for the state and are reflections of the objectives which were laid down under the Preamble of the Constitution. Though the DPSPs are not enforceable by the courts for their violations, the Constitution declares DPSPs as the fundamental principles which govern the

[36]AIR1973 SC 1461
[37]AIR1955SC781

country and hence, it shall be the duty of the state to apply these principles in making laws and the state authorities are under the moral obligation to impose the same. The DPSPs can be classified into three categories- Socialistic Principle, Gandhian Principles and Liberal Intellectual Principles. Justifiable rights, the ones which were enforceable in a court of law are included in Part III of the Constitution whereas the non-justifiable rights were listed as directive principles. They were included in P art IV of the Constitution of India as Directive Principles of State Policy.

The DPSPs are laid down under Articles 36 to 51 of the Constitution. Many DPSPs have become enforceable by becoming a law and have also widened the scope of fundamental rights. When the question whether DPSPs enshrined in Article IV can have primacy over the fundamental rights as conferred by Part III of the Constitution, it was held in the case of ***Minerva Mills vs. Union of India***[38] that the doctrine of harmonious construction needs to be applied as neither DPSPs nor fundamental rights has precedence to each other and both are complementary in nature. Hence, both are required to be balanced.

Article 21 of the Constitution: When the Aadhaar card was made mandatory by the government in order to access government services and benefits, a retire High Court Judge Puttaswamy filed a case against the Union of India before a nine-judge bench of the Supreme Court challenging the right to privacy as guaranteed under the Constitution. The historical judgment in ***Justice K.S. Puttaswamy and Ors. Vs. Union of India (UOI) and Ors***[39] held that privacy is an integral aspect of Part III of the Constitution which lays down the fundamental rights including freedom of speech and expression, protection of life and personal liberty. In earlier judgments like *MP Sharma* in the year 1954, an eight-judge bench held that right to privacy was not protected by the Constitution and in the case of ***Kharak Singh***[40] decided by a six-judge bench in the 1962, which also held that right to privacy is not protection under the Constitution, stands overruled.

The Apex Court stated that though right to privacy is not an absolute right, it is an intrinsic part of the right to life and personal liberty under Article 21. The Judges held that there was a need to implement data protection laws in India and that law must regulate national security exceptions that allow for interception of data by State. Further, the judgment stated that the state must create a balance in order to protect the individual privacy. A triple test was introduced in order to check any invasion of privacy by state or non-state actor and includes legitimate aim, proportionality and legality. The judgment also led to the decriminalization of homosexuality in India under Article 21 of the Constitution in ***Navtej Singh Johar vs. Union of India.***[41]

In the case of ***Olga Tellis & Ors. v. Bombay Municipal Corporation & Or***[42], the state of Maharashtra in the year 1981 and the Bombay Municipal Corporation (BMC) decided to evict the inhabitants of the pavement and residents of the slums of Bombay. The then Chief

[38] AIR1986SC 2030
[39] 2017(14) SC ALE375
[40] JT1995(4)SC551
[41] MANU/SCOR/00577/2018
[42] AIR1986SC 180

Minister, Mr. A. R. Antulay ordered on July 13 to evict the inhabitants of slums and pavements of Bombay and deport them to their place of origin. The eviction had to proceed in accordance with Section 314 of the Bombay Municipal Corporation Act of 1888.

They filed a court order petition in the Bombay High Court for a restraining order that prevented State Government officials and the Bombay Municipal Corporations from implementing the directive of the Chief Minister. The Bombay High Court granted an interim mandate until July 21, 1981 and the respondents agreed that the cabins will not be demolished until October 15, 1981. Contrary to the agreement, on July 23, 1981, the petitioners were forced into the State Transport buses in order to be deported from Mumbai. This action was challenged by the petitioner alleging that it violates Articles 19 and 21 of the Constitution and also requested a statement that Sections 312, 313 and 314 of the Bombay Municipal Corporation Act of 1888 violate Articles 14, 19 and 21 of the Constitution.

The main argument of the Petitioners was that the right to life guaranteed by Article 21 includes the right to a livelihood and that they will be deprived of their livelihood if they are expelled from their slums and their sidewalks its expulsion would amount to a deprivation of life and, therefore, is unconstitutional. Further, the Court assumed that the factual accuracy of the premise that if the petitioners are expelled from their homes, they will be deprived of their means of subsistence. The question the Court which was considered is whether the right to life includes the right to a means of subsistence. The right to life conferred by Article 21 is vast and far-reaching.

Public Interest Litigation: It may be easy to know when such litigation is presented. Yet defining it has taxed judicial minds. Some say it is a 'nebulous concept' and is beyond definition. Others try to define it by delineating its characteristic features. A Judge in Australia identifies it by the public character to which the litigation relates evidenced by: properly bringing proceedings to advance a public interest; that proceedings contribute to the proper understanding of the law in question; and have involved no private gain.

The effect of this decision is really a crucial determining factor. Whether the action is brought by a singular individual or an organization or as a class action, or even where the remedy sought may benefit the applicant directly, the litigation may yet be in the public interest if the impact of the decision will serve the wider public interest.

As Lord Diplock said in the English House of Lords:

> *"There would be a grave lacuna in our system of public law if a pressure group, like the Federation, of even a single public spirited tax-payer, were prevented by out-dated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get unlawful conduct stopped."*

This dictum was adopted in Malaysia in the leading public interest litigation case, Mohamed bin Ismail v Tan Sri Haji Othman Saat in these terms:

"... if they (public authorities) transgress any law or constitutional directive, then any public- spirited citizen, even if he has no greater interest than a person having regard for the

due observation of the law, may move the courts and the courts may grant him the appropriate legal remedy in its discretion"

Technical definition of PIL: The term Public Interest Litigation (PIL) is composed of two words; 'Public Interest' and 'Litigation'. The words 'Public Interest' mean "an expression which indicates something in which the general public or the community at large has some pecuniary interest, or some interest by which their legal rights or liabilities are affected." The word 'litigation' on the other hand means "a legal action, including all legal proceedings initiated in a Court of Law with the purpose of enforcing a right or seeking a remedy."

Hence, lexically the expression 'Public Interest Litigation' denotes a legal action initiated in a court of law for the enforcement of public interest where the rights of an individual or a group have been affected.

1. Important Features of PIL

Through the mechanism of PIL, the courts seek to protect human rights in the following ways:

a) By creating a new regime of human rights by expanding the meaning of fundamental right to equality, life and personal liberty. In this process, the right to speedy trial, free legal aid, dignity, means and livelihood, education, housing, medical care, clean environment, right against torture, sexual harassment, solitary confinement, bondage and servitude, exploitation and so on emerge as human rights. These new reconceptualized rights provide legal resources to activate the courts for their enforcement through PIL.

b) By democratization of access of justice. This is done by relaxing the traditional rule of locus standi. Any public spirited citizen or social action group can approach the court on behalf of the oppressed classes. Courts attention can be drawn even by writing a letter or sending a telegram. This has been called epistolary jurisdiction.

c) By fashioning new kinds of reliefs under the court's writ jurisdiction. For example, the court can award interim compensation to the victims of governmental lawlessness. This stands in sharp contrast to the Anglo-Saxon model of adjudication where interim relief is limited to preserving the status quo pending final decision. The grant of compensation in PIL matters does not preclude the aggrieved person from bringing a civil suit for damages. In PIL cases the court can fashion any relief to the victims.

d) By judicial monitoring of state institutions such as jails, women's protective homes, juvenile homes, mental asylums, and the like. Through judicial invigilation, the court seeks gradual improvement in their management and administration. This has been characterized as creeping jurisdiction in which the court takes over the administration of these institutions for protecting human rights.

e) By devising new techniques of fact-finding. In most of the cases the court has appointed its own socio-legal commissions of inquiry or has deputed its own official for investigation. Sometimes it has taken the help of National Human Rights Commission or Central Bureau of Investigation (CBI) or experts to inquire into human rights violations. This may be called investigative litigation.

2. PIL as An Instrument of Social Change

PIL is working as an important instrument of social change. It is working for the welfare of every section of society. The innovation of this legitimate instrument proved beneficial for the developing country like India. PIL has been used as a strategy to combat the atrocities prevailing in society. It's an institutional initiative towards the welfare of the needy class of the society. In ***Bandhu Mukti Morcha v. Union of India***[43], SC ordered for the release of bonded labourers. In ***Murli S. Dogra v. Union of India***, court banned smoking in public places. In a landmark judgement of Delhi Domestic Working Women's Forum v. Union of India ((1995) 1 SCC 14), Supreme Court issued guidelines for rehabilitation and compensation for the rape on working women. In ***Vishaka v. State of Rajastha***[44] Supreme court has laid down exhaustive guidelines for preventing sexual harassment of working women in place of their work.

3. Criticism of PIL

The debates over the limits of Judicial Activism in the area of PIL, have been vigorous. A private members bill entitled "Public Interest Litigation (Regulation) Bill, 1996" was tabled in the Rajya Sabha. The statement of objectives and reasons stated that PIL was misused in the name of providing justice to the poor sections of the society and also that PIL cases were given more priority over other cases which led to pending of several "general section cases" in the court for years. However, the bill was not passed.

Bearing in mind the power and importance of PIL in making the Constitution a living reality for every citizen and also the efforts channelled through the medium of PIL jurisprudence in providing justice to the deprived, the process is positively succeeding, following the logic of its nature. In a country Characterized by numerous "Variable Ethnicity" and religious diversity, working via the pattern through a comprehensive bureaucracy, a grieved, poor, deprived citizen does find it hard to seek justice because of economic disability or lack of "Know-How" or even due to red-tapism. The only option left before the deprived next to a miracle is a PIL petition.

E-Courts System in India: The Indian judiciary comprises of nearly 15,000 courts situated in approximately 2,500 court complexes across the country. The Indian judiciary has faced a huge number of pending cases in district and subordinate courts which sets the background for implementation of ICT in courts. The e-courts project is enabling courts to make justice delivery system affordable and cost-effective with the implementation of ICT in judicial system. This would help in improving the court processes and rendering citizen-centric services. The mission mode project aimed at developing, installing and implementation of automated decision-making and decision-support systems in the Supreme Court, the High Courts and the subordinate courts across the nation. Under the e-Courts mission mode project, it is proposed to implement ICT in Indian judiciary in 3 phases Phase II, which is currently is in progress, aims at setting up of centralised filing centres, digitization of documents, adoption of document management systems, creation of e-filing and e-payment

[43] AIR1984SC802
[44] AIR1997SC3011

gateways. However, there is lack of awareness about the potential of e-court project among judges as well as public at large.

1. Concept of E-Courts

E-courts are aimed to make legal processes easier and more user friendly. In an e-court, the entire work is executed digitally, wherein, the information that is shared and generated is stored as a database and synched to particular software. This software can be accessed by litigants, judges and advocates anytime and anywhere. The primary intention of e-courts is to make the justice delivery system affordable, speedy, transparent and accountable by limiting the paper filings. The e-courts mission mode project is conceptualised on the basis of the "National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary -2005" prepared by the e-Committee of the Supreme Court of India. The Strategic Plan suggested a three-phased implementation plan for incorporating ICTs into Indian courts.

2. Components of Indian E-Judiciary System

The main components of E-Judiciary System in India are:

a) **Creation of Computer Room at all the complexes/ site preparation:** A dedicated area for housing the servers and related ICT equipment (computer server room/ CSR) has been set up at each subordinate court complex. A Judicial Service Centre has also been setup in each court complex, as a citizen service interface counter for provision of various services such as case filing and status enquiry.

b) **Providing Laptops and Laser Printers to Judicial Officers:** Laptops have been provided to each judicial officer to enable them to work from their chamber, court room and home office in an effective manner. The project aims to enhance the capacity of all judicial officers to supervise and guide the process of computerization of courts.

c) **ICT Training for Judges &their Staff:** ICT training will be imparted to judicial officers and court staff to make them familiar with and proficient in the use of ICT tools.

d) **Technical Manpower:** Technical manpower is deployed at all district courts, High Courts, High Court Benches and Supreme Court under the project. The technical manpower provides 'troubleshooting' support and necessary maintenance and training support at the court complex and assistance in the transition from a manual case management system towards an ICT-enabled one.

e) **Computer Hardware:** To make the subordinate courts ICT-enabled in the country, each court complex has been equipped with the required computer hardware such as desktops, printers, servers and scanners. Each judge and his/ her support staff is provided with four client machines and three printers; common service sections are provided with thin clients and printers, and ICT hardware such as servers and scanners are installed in computer server rooms in each court complex.

f) **Communication, Connectivity and Local Area Network:** Procurement and installation of Local Area Network (LAN) in all court complexes. Internet connectivity for judges/ court complexes. All court complexes are connected under

the State Wide Area Network (SWAN) and also provided last mile connectivity from SWAN's Point of Presence (PoP) to the court complexes.

g) **Power Back-up:** UPS and DG sets have been provided to create the necessary power back-up facilities for ICT infrastructure in a court complex. UPS provides power back-up to desktops and servers; DG sets are used to provide power back-up to ICT infrastructure in the Computer Server Room and the Judicial Service Centre.

h) **Upgrade of ICT Infrastructure of the Supreme Court and High Courts:** The existing ICT infrastructure has been upgraded at the Supreme Court and all High Courts by providing additional servers, client machines, networking equipment, power infrastructure, cabling, etc.

i) **Development of Application Software:** Unified National Core version 1.0 of the Case Information Software has been developed and deployed in district and subordinate courts to automate the case management lifecycle and all major processes such as case filing, scrutiny, registration, allocation and court diary/ proceedings. Cause lists, case status, certified copies of orders and copy of judgments will also be made available for online download or viewing. This is in use in almost all the states.

j) **System Software, Office Tools:** System software such as an Operating System for servers and desktops and office tools has been provided to client machines/ servers.

k) **Digital Signature:** Digital signature certificates have been provided to all judicial officers. It enables them to sign the judgement or any electronic official documents digitally when required.

l) **Creation & Upgrading of Centralized facility for system administration:** A centralized facility has been established for maintaining the Network Operating Centre and central database, managing the judicial data grid and sustaining the dedicated portal for use by the entire judiciary. NIC state data centres will be used to co-locate servers for the judicial data of each High Court and a National Data Centre will be set up in the NIC Data Centre along with one Disaster Recovery site.

m) **Video Conferencing in approximately at 500 locations:** Video conference connectivity is being established in 500 locations between prisons and district courts to allow virtual interfacing of a judge with witnesses, holding conferences and meetings, production of under-trial prisoners, etc. The facility would need to be installed in the prisons and within the court complex premises.

3. Key Stakeholders of E-Judiciary System In India

a) Organisation:
- High Courts and Subordinate Courts

b) Monitoring Agency:
- Department of Justice, GoI
- E-Committee, Supreme Court of India

c) Officials:
- Judicial Officers
- Office bearers (Registrar &Central Project Co-ordinator)
- Court Staff (Court Master, Clerk, ICT Specialist/System Administrator)

d) Beneficiaries
- Advocates and Litigants

e) Implementing Agency
- NIC

4. Benefits of E-Judiciary System

The important benefits of the E-Judiciary System are the following:

a) Allows electronic monitoring of court-wise case pendency and other key monitoring parameters with reference to courts.
b) Greater control over management of cases leads to faster disposal of cases and reduction in pendency.
c) Decrease in the time and effort on daily operational activities and a reduction in the movement of stakeholders to courts.
d) Efficient and effective service delivery in consonance with access to justice for all, ensuring fast and fair trials.
e) Citizen can avail of services at the Judicial Service Centre or access the information through the Web at any time and from anywhere.

Challenges of E-Judiciary System in India

The e-Courts Integrated Mission Mode Project has noteworthy objectives where the main aim is ICT enablement at the courts in districts and taluq level courts. It has provided hardware, application software, namely, the Case Information System, and training to judges and court officials to run the system. The project has achieved more than 90% in ICT deployment. At the same time, it is an achievement in terms of asset creation. All the outcomes could not be achieved due to various challenges.

a) **Upgrade of infrastructure:** The existing courthouses in subordinate courts should be revamped since the current rooms are tiny. The Judicial Service Centre and server room should be located in two different rooms of the courthouse. Proper road directions should be given to reach the Judicial Service Centre. Power back-up should be provided in all the court complexes, consisting of a DG set and UPS.

b) **Increase in supply of hardware:** Hardware is provided under the e-Courts project, but it is not adequate to convert the entire system to a computerised one. Therefore, it is necessary to provide enough computers, printers and scanners along with other computer accessories. The quality of computers, printers, scanners and Internet connectivity should be thoroughly checked and improved.

c) **Capacity building in terms of manpower:** Specialised manpower should be hired to run the system efficiently. They should have thorough technical knowledge. The position of court managers remains vacant or is not floated in various courts. This position should be created and competent young people should be hired in all the subordinate courts. The responsibility of technical staff and the court manager should be clearly laid out. An appropriate incentive mechanism may attract skilled people. The new position should be permanent and contract staff can be hired in the transition phase, with renewal of their contracts based on performance.

d) **Continuous training to concerned officials:** Since court officials play a crucial role in the e-Courts project as end-users, they need long-term training. A report published by the Judicial Commission of New South Wales, Australia mentions that they have been providing computer training to their staff for more than two decades. The training programme should include the provision of fresh training for new employees along with a refresher course for old employees. Judicial officers also need training on a regular basis.

e) **Continuous data entry:** Data entry should be done on a continuous basis so that the latest case update always takes place in all the court complexes irrespective of its physical location. Change management should be serious enough to make the data entry process uninterrupted.

f) **Improvement in connectivity:** Court complexes in remote locations suffer due to low connectivity. One main important condition for the success of the project is uninterrupted connectivity. Internet as well as electrical connectivity needs to be improved.

g) **Awareness creation:** Awareness creation about the project is of utmost importance for the success of the project. Awareness should be increased among citizens since computerisation in the courts is meant to improve the service delivery mechanism. This is possible through campaigns on the radio and television. Since the majority of users lack education, such campaigns through audio-visual media would be helpful. A demo of the project could be run in the court complexes through display board or kiosks. Lawyers also lack knowledge about the e-Courts project. They play a crucial role as a link between litigants and the judicial system.

h) **Customisation of application software:** The CIS application needs to be customised. The application software could consist of a core version along with a peripheral version. The core version may be controlled by NIC while lower courts in different states may have the access to customise the database using the peripheral version. Security of data can be maintained through proper data classification.

5. Current Status of E-Court Project

The project envisages deployment of Hardware, Software and Networking to assist district and Taluk level courts in streamlining their day to day functioning. Key functions such as case filing, allocation, registration, case work-flow, orders and judgments will be ICT enabled. Cause-Lists, Case-Status, Orders, and Judgments will be made available on the web and made accessible to litigants, advocates and general public. The project aims to build a National Grid of key Judicial information available all round the clock in a reliable and secure manner.

For Data management, already the Application software developed by NIC called Case Information System (CIS) Software for District and sub-ordinate courts has been tested in many of the major pilot sites and is being fully functional now. Automated Mailing Service is

recently launched which gives the information to particular litigants and lawyers all the developments by a single mail. SMS Push Service has been widely used across the country and more popular in remote areas where mobile phones without internet facility are used by the litigants and lawyers. The government has brought online connectivity to about 2,992 district and lower courts across the country by the end 2018.Under the latest phase of the e-courts programme, the state-run Bharat Sanchar Nigam Limited (BSNL) will connect subordinate courts with 'wide area network' connectivity at a cost of 167 crores. Video-conferencing facilities between 488 court complexes and 342 corresponding jails are also installed. The NJDG is an online platform that now provides information on proceedings and decisions of 16,089 computerised district-level courts. The applications of e-filing, e-pay, and NSTEP (National Service and Tracking of Electronic Processes) created under the e-Courts project were launched first. The second phase of the e-Courts project is implemented by Department of Justice during 2015 – 19 under the guidance of e-Committee, Supreme Court of India for ICT enablement of all district and subordinate courts in the country. The number of electronic transactions transacted under e-court project as per the data available on e-Taal is very high and are amongst top 5 performers with number of electronic transactions being more than 40 crore.

Virtual Courts in India: The COVID-19 pandemic has disrupted the justice delivery system like never before. The compulsions associated with 'social distancing' coupled with lockdown directives have led courts and tribunals to shut their premises to the public. At the same time, recognizing that a complete shut-down of the justice-delivery system is undesirable, judicial administrators have turned to technology to meet the challenges posed by the pandemic. Various judicial and quasi-judicial bodies, led by the Supreme Court, have been conducting hearings online.

However, while these measures are commendable, they are not sufficient. This is because of the following reasons:

- The virtual system of functioning has not been adopted by all judicial and quasi-judicial institutions across the country.
- Institutions which have adopted this system have only been employing it for select matters i.e. to hear and dispose of urgent/extremely urgent matters.
- The current situation is unpredictable. It is impossible to say for how long 'social distancing' directives and restrictions on movement will remain in force. It is likely that these preventive measures will be continued for some time even after the present threat has subsided.

In the present circumstances, it is essential that the judicial and quasi-judicial machinery takes steps not only to remain operational but to achieve maximum functionality (as far as may be) at the earliest. The virtual courts system can be of great assistance in achieving this goal.

In this backdrop, the directions passed by the Supreme Court, on 6 April 2020, for the conduct of court proceedings across the country via video conferencing (VC), during the period of the outbreak of the COVID-19 pandemic are a welcome step. Broadly, the Supreme Court has directed as under:

- All High Courts shall ensure functioning of the judicial system through use of VC technologies and to this end, shall decide the modalities for use of VC technologies after considering relevant factors (such as peculiarities of the judicial system in every state as well as the dynamically developing public health situation).
- District Courts in every state shall adopt VC technologies prescribed by the appropriate High Court.
- Courts shall make VC facilities available for those litigants who do not have access to these facilities, including by appointment of advocates as "amicus curiae" and making VC facilities available to such advocates (if necessary).
- Till such time as the High Courts frame rules in this regard, VC technologies shall primarily be used for hearing arguments, both, at the trial as well as appellate stages. However, evidence shall not be recorded using VC facilities except with the parties' mutual consent.
- The directions shall remain in force till such time as further orders are passed by the Supreme Court.

On 7 April 2020, the High Court of Telangana passed directions for conduct of hearings via video-conferencing in the state during the period of COVID-19 lockdown. It is expected that other High Courts as well as tribunals will adopt similar measures in the coming days.

Separately, on 8 April 2020, the Bombay High Court issued special directions in connection with live-streaming of matters listed for hearing on 9 April 2020 before His Lordship the Hon'ble Mr. Justice G S Patel. Previously, the Kerala High Court had live-streamed its hearings for the general public via Zoom App.

The decision to make proceedings being conducted in the time of COVID-19 accessible to all via live-streaming is a welcome move. In doing so, our courts have sustained a primary principle of the justice system, namely, justice must not only be done but seen to be done.

Recent Landmark Judgments

1. *Anuradha Bhasin and Ors. vs. Union of India*[45]

When the Constitutional Order was issued by the President, applying all provisions of the Constitution of India to the State of Jammu and Kashmir due to the prevailing circumstances, on the same day, the District Magistrates, apprehending breach of peace and tranquility and hence, imposed restrictions on movement and public gatherings by virtue of powers vested under Section 144, Code of Criminal Procedure. Due to the said restrictions, the Petitioner stated that the movement of journalists was severely restricted and aggrieved by the same, the Petitioners filed the petition seeking issuance of an appropriate writ for setting aside or quashing any and all order(s), notification(s), direction(s) and/or circular(s) issued by the Respondents under which any/all modes of communication including internet, mobile and fixed line telecommunication services have been shut down or suspended or in any way made inaccessible or unavailable in any locality. Further, the Petitioners sought the issuance of an appropriate writ or direction directing Respondents to immediately restore all

[45]AIR2020SC 1308

modes of communication including mobile, internet and landline services throughout Jammu and Kashmir in order to provide an enabling environment for the media to practice its profession. The main issue was whether freedom of speech and expression and freedom to practice any profession, or to carry on any occupation, trade or business over Internet was part of fundamental rights and imposition of restrictions under Section 144 of Code of Criminal Procedure was valid.

The Supreme Court held that the internet is also a very important tool for trade and commerce. The globalization of the Indian economy and the rapid advances in information and technology have opened up vast business avenues and transformed India as a global IT hub. There was no doubt that there are certain trades which are completely dependent on the internet and that such a right of trade through internet also fosters consumerism and availability of choice. Therefore, the freedom of trade and commerce through the medium of the internet is also constitutionally protected under Article 19(1)(g), subject to the restrictions provided under Article 19(6). It was further held that the freedom of speech and expression and the freedom to practice any profession or carry on any trade, business or occupation over the medium of internet enjoys constitutional protection under Article 19(1)(a) and Article 19(1)(g). The restriction upon such fundamental rights should be in consonance with the mandate under Article 19(2) and (6) of the Constitution, inclusive of the test of proportionality. This judgment concluded that right to internet is a fundamental right.

2. Shayara Bano vs Union of India and others[46]

In the case of *Shayara Bano vs Union of India and others,* the petitioner challenged that the practice of Talak-ul-Biddat, also known as Triple Talaq. The draconian practice allowed husbands to repudiate his wife by giving a divorce thrice in one sentence and was also irrevocable in nature. An appeal under Article 14 was filed challenging its validity. The Supreme Court laid down the judgment holding the practice of triple talaq unconstitutional and stated that it was not an essential practice and was not protected by the exceptions laid down in Article 25. Article 25 carried the right of every person to freely practice and propagate any religion of choice and it can be restricted only in the context of exceptions such as public order, health, morality and other provisions of Part III of the Constitution. The said practice was against the other provisions of Part III namely Article 14 of the Constitution.

The Court also dwelled upon religious practice and stated that essential religious practices are those on which the religion was founded upon. Only if taking away of a practice causes a substantial change in the religion then such a practice can be called as ‘an essential religious practice”. The Court stated that though it was being practiced by the Hanafi School, it was considered to be sinful and was also against the tenets of the Quran. It was further held that the practice of triple talaq was against theology and laws and cannot be validated just because it was being followed by numerous people as a custom. Hence, it was declared to be unconstitutional and was set aside.

[46] AIR2017 SC 4609

3. Indian Hotel and Restaurant Association (AHAR) and Ors. Vs. The State of Maharashtra and Ors.[47]

In the year 2005, the Maharashtra government had imposed a ban on dance performances in bars with the exception of hotels rated in 3 stars and above, as provided for, under section 33 A and 33 B of the Bombay Police Act. The Public rational offered was that these performances were obscene and morally corrupt. All the dance performance licences were cancelled with the immediate effect resulting in unemployment of approx. 75,000 women workers which led the affected parties to file petitions in the Bombay High court. The High Court gave judgement against the government which led to appeal in the Supreme Court. On 10thJuly, 2013 the Supreme Court affirmed the High Court's order.

In order to escape the order, the respondents instead of abiding by the order, swiftly and cleverly introduced the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurants and Bar Rooms and Protection of Dignity of Women (Working therein) Act, 2016 and the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurants and Bar Rooms and Protection of Dignity of Women (Working therein) Rules, 2016 which had provisions on the same lines as that of the section 33A and 33B of the Bombay Police Act. The provisions of the said Act and the conditions mentioned in the said Rules were so stringent that it was impossible for anyone to fulfill them. It ensured that no licenses were issued to any of the establishments. Therefore, three writ petitions were filed under Article 32 of the Constitution of India, namely, WP (CIVIL) NO. 576 OF 2016, WP (CIVIL) NO. 24 OF 2017 and WP (CIVIL) NO. 119 OF 2017 before the Supreme Court of India challenging the same. Since this batch of three Writ Petitions had raised similar issues and prayers, they were heard together and disposed by a common judgment. The Supreme Court allowed dance bars to reopen, but imposed regulations. It said there should be a mandatory written contract between owners and performers, and said there was no need for CCTV surveillance inside the bars. The three-judge bench of Justices AK Sikri, Abdul Nazeer and Ashok Bhushan set aside Section 6 of the Maharashtra Prohibition of Obscene Dance in Hotels, Restaurants and Bar Rooms and Protection of Dignity of Women (Working therein) Act, 2016which forbade the granting licenses to discotheques.

4. *Shah Faesal and Ors. vs. Union of India (UOI) and Ors.*[48]

Earlier in the year 2019, the President's Rule was imposed in exercise of powers under Article 356 of the Constitution of India in the State of Jammu and Kashmir, which was subsequently extended. Further, two Constitution Orders were issued by the President in exercise of his power under Article 370 of Constitution of India. Challenging the constitutionality of said orders, Petitioners raised the contention that the present matter needs to be referred to a larger Bench as there were contrary opinions by two different Constitution Benches on the interpretation of Article 370 of the Constitution. The two judgments in conflict were the Prem Nath Kaul case and Sampath Prakash case. It was held that the judgments could not be interpreted in a vacuum and separate from their facts and context. Further, the observations made in a judgment cannot be selectively picked in order to give

[47]AIR2019SC 589

[48](2020)2MLJ536

them a particular meaning. The Court compared the previous judgments and stated that in Prem Nath Kaul, the Court had to determine the legislative competence of the Yuvaraj in passing a particular enactment. The enactment was passed during the interregnum period, before the formulation of the Constitution of State of Jammu and Kashmir, but after coming into force of the Constitution of India.

The Court observed that the framework of Article 370(2) of the Indian Constitution was such that any decision taken by the State Government, which was not an elected body but the Maharaja of the State acting on the advice of the Council of Ministers which was in office by virtue of the Maharaja's proclamation, prior to the sitting of the Constituent Assembly of the State, would have to be placed before the Constituent Assembly, for its decision as provided under Article 370(2) of the Constitution. It was stated that the Constitution Bench in the Prem Nath Kaul case did not discuss the continuation or cessation of the operation of Article 370 of the Constitution after the dissolution of the Constituent Assembly of the State. This was not an issue in question before the Court, unlike in the Sampat Prakash case where the contention was specifically made before, and refuted by, the Court. The Court held that there was no conflict in the judgments passed in Prem Nath Kaul case and the Sampat Prakash case.

5. The Secretary, Ministry of Defence Vs. Babita Puniya and Ors.[49]

In 1992, the Central government issued a notification allowing females to join certain cadres of the army like induction in Short Service Commission (hereinafter SSC), Intelligence Corps, Corps of Signals, Regiment of Artillery, Army Service Corps, Education Corps, the Judge Advocate General's Department, etc. Prior to this, the roles were limited to medical, dental, and military nursing service. The provision under Section 12 of the Army Act, 1950 that prohibited the recruitment of "females" into the army except- and to the extent that- the Central Government allows. Women engaged in these services seek parity with the male officers in obtaining permanent commissions.

In February 2003, Babita Puniya, a practicing advocate, filed a writ petition in the nature of public interest litigation at Delhi High Court, seeking permanent commission for female officers recruited through SSC in the army, at par with their male counterparts. Many other women officers (both air and army officers) separately filed a petition for the same and hence all the petitions were tagged with Babita's petition. Towards the end of 2005, the Ministry of Defence issued a notification extending the validity of the appointment scheme of the Indian Army for the women officers. In the year 2006, a notification was issued allowing the SCC women officers to serve for a maximum of 14 years.

Major Leena Gaurav again filed a writ petition on 16th October 2006 primarily to challenge the conditions of service imposed by the circulars previously and also seeking for the permanent commission for the women officers. In 2007 Lt Col Seema Singh for the same issue moved to the court. In 2008, the center decided to grant permanent commission to SSC women officers in some departments such as the Army Education Corps, Judge Advocate

[49] AIR2020SC 1000

General, and the corresponding branches in the Air Force and Navy. Post which many other petitions were filed challenging the circular issued in 2006 and 2008.

Finally, in 2010, the Delhi High Court decided to club all the petitions and directed Centre and defence ministry to provide the permanent commission to SSC women officers of the Air Force and Army who had opted for it and not yet granted. After the order of the Delhi High Court, Army challenged the order in the Supreme Court but it very rightly refused to uphold the order and said to implement the orders given by the Supreme Court. In 2018, the Central Government told the Supreme Court that it is considering granting permanent commission to women recruited through SSC in the army. In February, 2019 the government issued guidelines that permanent commission will be granted to the women officers but prospectively and commissioned that only those women will be eligible who commissioned after this order is notified keeping the serving officers out of the ambit of the permanent commission. It granted a permanent commission to new SSC officers in eight combat roles.The major issues which were raised in the Supreme Court were whether women should be granted Permanent Commission in the Indian Army, whether the guidelines issued by the Government of India dated 15th February 2019 should be implemented and the conditions governing the Women Officers in the Indian Army.

The Supreme Court bench led by Justice D.Y.Chandrachud challenged the notions given by the Union and stated that they are entrenched in stereotypical assumptions of ascribed gender roles for women. He further stated that it is a clear violation of their fundamental rights guaranteed under Article 14 of the Indian Constitution. He said that although Article 33 of the Indian Constitution did allow for restrictions on Fundamental Rights in armed forces it is also clearly mentioned that it could be restricted only to the extent that it was necessary to ensure the proper discharge of duty and maintenance of discipline. It was decided that policy decision taken by the union allowing the women officers in PCs through SSC are subject to some conditions.

MODULE - IV

DISPUTE SETTLEMENT: THE ROLE OF ADR AND ODRS

MODULE IV – DISPUTE SETTLEMENT: THE ROLE OF ADR, ODR AND PEACEFUL SETTLEMENTS OF DISPUTES

Part I: Alternate Dispute Resolution

Introduction: The concept of Alternative Dispute Resolution (ADR) mechanisms is a substitute to the conventional methods of resolving disputes. The process of resolving a dispute through the court system is expensive and time consuming. Litigating even the smallest complaint is costly and because of the backlog of cases pending in many courts, several years may pass before a case is actually tried. For these and other reasons, more and more business persons are turning to **Alternative Disputes Resolution (ADR)** as a means of settling their disputes. ADR offers to resolve all type of matters including civil, commercial, industrial and family etc. Generally, ADR uses a neutral third person who helps the parties to communicate, discuss the differences and resolve the dispute. It is a method which enables individuals and group to maintain co-operation, social order and provides opportunity to reduce hostility, which is why it is also known as amicable dispute resolution mechanism.

Importance of ADR in India: ADR is of special importance for India. The Indian judicial system is overburdened with more than 3 crore cases lying pending before it. ADR methods can play an important role in reducing this burden from the shoulders of Indian courts. ADR provides various modes of settlement including, *arbitration, conciliation, mediation, negotiation* and *Lok Adalat*. Here, negotiation means self-counselling between the parties to resolve their dispute but it doesn't have any statutory recognition in India. ADR is also founded on such fundamental rights, article 14 and 21 which deals with equality before law and right to life and personal liberty respectively. ADR's motive is to provide social-economic and political justice and maintain integrity in the society enshrined in the preamble. ADR also strive to achieve equal justice and free legal aid provided under article 39-A relating to Directive Principle of State Policy (DPSP).

Few Important provisions related to ADR

- **Section 89** of the Civil Procedure Code, 1908 provides that opportunity to the people, if it appears to court there exist elements of settlement outside the court then court formulate the terms of the possible settlement and refer the same for: Arbitration, Conciliation, Mediation or Lok Adalat.
- The Acts which deals with Alternative Dispute Resolution are **Arbitration and Conciliation Act, 1996 and The Legal Services Authority Act, 1987**

Advantages of Alternative Dispute Resolution

- Less time consuming: people resolve their dispute in short period as compared to courts
- Cost effective method: it saves lot of money if one undergoes in litigation process.
- It is free from technicalities of courts, here informal ways are applied in resolving dispute.
- People are free to express themselves without any fear of court of law. They can reveal the true facts without disclosing it to any court.

- Efficient way: there are always chances of restoring relationship back as parties discuss their issues together on the same platform.
- It prevents further conflict and maintains good relationship between the parties.
- It preserves the best interest of the parties.

Terms to Know

- Arbitration - A process similar to an informal trial where an impartial third party hears each side of a dispute and gives a decision; which is final and binding on the parties. Binding and Non-Binding - A binding decision is a ruling that the parties must abide be whether or not they agree with it; a non-binding decision is a ruling that the parties may choose to ignore
- Arbitrator - An impartial person given the power to resolve a dispute by hearing each side and coming to decision and pass an award
- Hearing - A proceeding in which evidence and arguments are presented, usually to a decision maker who will issue ruling
- Mediation - A collaborative process where a mediator works with the parties to come to a mutually agreeable solution;

Various modes of Alternative Dispute Resolution

Arbitration: The process of Arbitration cannot exist without a valid arbitration agreement. In this method parties refer their dispute to one or more persons called arbitrators. Decision of arbitrator is binding on the parties and their decision is called 'Award'. The object of Arbitration is to obtain fair settlement of dispute outside of court without necessary delay and expense.

- Any party to a contract where arbitration clause is there, can invoke arbitration clause either himself or through their authorized agent which refer the dispute directly to the arbitration as per the Arbitration clause. Here, arbitration clause means a clause whereby parties agree to refer the dispute to arbitration. Initially, applicant initiates an arbitration by giving a notice to the other party to refer the dipute to arbitration and appoint an arbitrator.
- Once the tribunal is established then the proceedings start byfiling a statement of claim.
- Statement of claim is a written document filed in the court or tribunal for judicial determination and a copy also sent to the defendant in which the claimant describes the facts in support of his case and the relief he seeks.
- The respondent replies to the arbitration by filing an answer against the arbitration claim of claimant that specifies the relevant facts and available defenses to the statement of claim.
- Arbitrators selection is the process in which the parties receive lists of potential arbitrators and select the panel to hear their case.
- Then there is the exchange of documents and information in preparation for the hearing called 'Discovery'.
- The parties meet in persons to conduct the hearing in which the parties present the arguments and evidences in support of their respective cases.

- After the witnesses examined and evidences are presented, then there in conclusion arbitrator gives an 'Award' which is binding on the parties.

An important amendment has been introduced by the 2015 Amendment Act (Section 29-A) according to which an award has to be passed with a period of 2 months from the date the tribunal enters upon the reference.

Section 8 of *Arbitration and Conciliation Act, 1996* provides if any party disrespects the arbitral agreement and instead of moving to arbitration, moves that suit to civil court, other party can apply the court for referring the matter to arbitration tribunal as per the agreement but not later than the date of submitting his first statement on the substance of the dispute. The application must include a certified copy of arbitration agreement and if courts satisfy with it, the matter will be referred to arbitration.

Major kinds of Arbitration

(1) Ad-hoc Arbitration: Arbitration is said to be ad hoc when it is not only agreed to but also arranged by the parties themselves. The parties create the procedure to conduct arbitration proceedings also. If they fail to do so then it becomes the responsibility of the arbitration tribunal. This enables the parties to tailor the procedure to its needs.

(2) Institutional Arbitration: When arbitration is conducted under the supervision of an institution in accordance with its rules of procedure it is termed as institutional arbitration. There are various institutes e.g. International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Singapore international Arbitration Centre (SIAC), American Association of Arbitration (AAA) etc. to name a few which have their own set of rules to conduct the proceedings.

(3) Statutory Arbitration: It is mandatory arbitration which is imposed on the parties by operation of law. In such a case the parties have no option as such but to abide by the law of land. It is apparent that statutory arbitration differs from the above 2 types of arbitration because (i) The consent of parties is not necessary; (ii) It is compulsory Arbitration; (iii) It is binding on the Parties as the law of land; For Example: Section 31 of the North Eastern Hill University Act, 1973, Section 24,31 and 32 of the Defence of India Act, 1971 and Section 43(c) of The Indian Trusts Act, 1882 are the statutory provision, which deal with statutory arbitration.

(4) Domestic and International Commercial Arbitration: If both the parties to an arbitration agreement are from India the arbitration is called domestic arbitration and when at least one of the parties is from outside India the arbitration is international arbitration.

International Conventions on Arbitration India is a party to the following conventions:

• The Geneva Convention on the Execution of Foreign Arbitral Awards, 1927; and
• The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.

India became a party to the 1958 Convention on 10th June, 1958 and ratified it on 13th July, 1961. The government of India in consonance with the United Nations Commissions on International Trade Law (UNCITRAL) drafted the Arbitration and Conciliation Act, 1996. The purpose of this act was to make a provision for an arbitral procedure that is just, efficient and encourages the settlement of disputes.

Advantages and Disadvantages: One distinct advantage of ADR over traditional court proceedings is its procedural flexibility. It can be conducted in any manner to which the parties agree. It may be as casual as a discussion around a conference table or as structured as a private court trial. Also unlike the courts, the parties have the freedom to choose the applicable law, a neutral party to act as Arbitrator in their dispute, on such days and places convenient to them and also fix the fees payable to the neutral party. ADR being a private process offers confidentiality which is generally not available in court proceedings. While a court procedure results in a win-lose situation for the disputants, in an ADR process it is a win-win situation for the disputants because the solution to the dispute emerges with the consent of the parties. Lastly, as compared to court procedures, considerable time and money is saved in ADR procedures. Another benefit of ADR is that the parties can choose someone who is knowledgeable about the subject matter of the dispute. For example, in a construction 10 dispute, the parties may want to retain an arbitrator who has a vast knowledge of construction, rather than rolling the dice with a judge who may have little or no knowledge of the industry. Some court systems have started their own arbitration programs whereby certain types of cases (usually small cases) are referred to a court-related arbitrator for resolution.

Some of the perceived downsides to arbitration are:

1) It is still expensive
2) No appeal can be made against an award even if it is wrong. Though it can be set aside on certain grounds like violation of public policy. .
3) In comparison to national courts the powers vested in arbitrators are very limited.

Mediation: Mediation is an Alternative Dispute resolution where a third neutral party aims to assist two or more disputants in reaching agreement. It is an easy and uncomplicated party centred negotiation process where third party acts as a mediator to resolve dispute amicably by using appropriate communication and negotiation techniques. This process is totally controlled by the parties. Mediator's work is just to facilitate the parties to reach settlement of their dispute. Mediator doesn't impose his views and make no decision about what a fair settlement should be.

The process of Mediation works in various stages. They are,

- Opening statement
- Joint session
- Separate session and,
- Closing

At the commencement of mediation process, the mediator shall ensure the parties and their counsels should be present.

- Initially in the opening statement he furnishes all the information about his appointment and declares he does not have any connection with either of parties and has no interest in the dispute.
- In the joint session, he gathers all the information, understand the fact and issues about the dispute by inviting both the parties to present their case and put forward their perspective without any interruption. In this session, mediator tries to encourage and promote communication and manage interruption and outbursts by the parties.
- Next is separate session, where he tries to understand the dispute at a deeper level, gathers specific information by taking both the parties in confidence separately.
- Mediator asks frequent questions on facts and discusses strengths and weaknesses to the parties of their respective cases.
- After hearing both the sides, mediator starts formulating issues for resolution and creating options for settlement.
- In the case of failure to reach any agreement through negotiation in mediation, mediator uses different Reality check technique like:

Best Alternative to Negotiated Agreement (BATNA)

It is the best possible outcome both the party come up with or has in mind. Its suitable situation as each party thinks about their most favorable scenario looks like.

Most Likely Alternative to Negotiated Agreement (MLATNA): For a successful negotiation the result always lies in the middle, mediator after considering both the parties comes up with most likely outcome. Here result is not always in the middle but little left or right of the Centre depending on negotiation situation.

Worst Alternative to Negotiated Agreement (WATNA): It the worst possible outcome a party has in their mind for what could happen during negotiation. It may be helpful to the parties and mediator to examine the alternative outside the mediation(specifically litigation) and discusses the consequences of failing to reach agreement like: effect on the relationship of the parties or effect on the business of the parties. It is always important to consider and discuss the worst and most probable outcomes, it's not always people get the best outcome.

Mediator discusses the perspective of the parties about the possible outcome at litigation. It is also helpful for the mediator to work with parties and their advocates to come to a proper understanding of the best, worst and most probable outcome to the dispute through litigation as that would help the parties to acknowledge the reality and prepare realistic, logical and workable proposals.

Conciliation: It is the process of facilitating an amicable resolution between the parties, whereby the parties to the dispute use conciliator who meets with the parties separately to settle their dispute. Conciliator meet separately to lower the tension between parties, improving communication, interpreting issue to bring about a negotiated settlement. There is

no need of prior agreement and cannot be forced on party who is not intending for conciliation. It is different from arbitration in that way.

- The party initiating conciliation shall send to the other party a written invitation to conciliate under this part, briefly identifying the subject of the dispute.
- Conciliation proceedings shall commence when the other party accepts in writing the invitation to conciliate.
- If the other rejects the invitation, there will be no conciliation proceedings.

Above provision clearly states conciliation agreement should be an extemporary agreement entered into after the dispute has but not before. Parties are also permitted to engage in conciliation process even while the arbitral proceedings are on(section 30).

Lok Adalat: Lok Adalat is called 'People's Court' presided over by a sitting or retired judicial officer, social activists or members of Legal profession as the chairman. National Legal Service Authority(NALSA) along with other Legal Services Institutions conducts Lok Adalats on regular intervals for exercising such jurisdiction. Any case pending in regular court or any dispute which has not been brought before any court of law can be referred to Lok Adalat. There is no court fees and rigid procedure followed, which makes the process fast. If any matter pending in court of referred to the Lok Adalat and is settled subsequently, the court fee originally paid in the court when the petition filed is also refunded back to the parties.

Parties are in direct interaction with the judge, which is not possible in regular courts. It depends on the parties if both the parties agree on case long pending in regular court can be transferred to Lok Adalat. The persons deciding the cases have the role of statutory conciliators only, they can only persuade the parties to come to a conclusion for settling the dispute outside the regular court in the Lok Adalat. Legal Services Authorities (State or District) as the case may be on receipt of an application from one of the parties at a pre-litigation stage may refer such matter to the Lok Adalat for which notice would then be issued to the other party. Lok Adalats do not have any jurisdiction to deal with cases of non-compoundable offenses.

Benefits: The benefits that litigants derive through the Lok Adalat are many.

1. First, there is no court fee and even if the case is already filed in the regular court, the fee paid will be refunded if the dispute is settled at the Lok Adalat.
2. Secondly, there is no strict application of the procedural laws and the Evidence Act while assessing the merits of the claim by the Lok Adalat. The parties to the disputes though represented by their advocate can interact with the Lok Adalat judge directly and explain their stand in the dispute and the reasons therefore, which is not possible in a regular court of law.
3. Thirdly, disputes can be brought before the Lok Adalat directly instead of going to a regular court first and then to the Lok Adalat.

4. Fourthly, the decision of the Lok Adalat is binding on the parties to the dispute and its order is capable of execution through legal process. No appeal lies against the order of the Lok Adalat whereas in the regular law courts there is always a scope to appeal to the higher forum on the decision of the trial court, which causes delay in the settlement of the dispute finally. The reason being that in a regular court, decision is that of the court but in Lok Adalat it is mutual settlement and hence no case for appeal will arise. In every respect the scheme of Lok Adalat is a boon to the litigant public, where they can get their disputes settled fast and free of cost.

Requirement for ADR Process in Intellectual Property Disputes: The scholarly efforts of the makers of licensed innovation are esteemed based on the indication of the rights appended to 'intellectual output'. Intellectual-property protection gives a pointer to the maker to apply his controls over outsiders, who, without his consent, attempt to utilize his rewards for all the hard work. The method of reasoning for the formation of rights gets vanquished on the off chance that they can't be implemented. The proprietors of licensed innovation must be their guard dogs and make a plan of action to the Courts for the encroachment of their privileges. Indian Courts have taken a mammoth jump towards the advancement of a protected innovation system in India; be that as it may, the accessible assets could be put to better and legitimate use by the Courts in India if the other contest goal is sent. Matters identified with patent law and copyright law, which include convergence with science and comprehension of innovation, need unique arbitrating officials, who can appreciate the interdisciplinary idea of the current case without lifting a finger.

The constrained idea of assurance given to the proprietor of protected innovation rights, calls for creating systems to execute prompt and quick equity. While assessing the presentation appeared by the Indian legal executive in cases identified with licensed innovation rights, the Supreme Court of India has on account of *Shree Vardhman Rice and Gen Mills v. Amar Singh Chawalwala* held that "Without going into the benefits of the discussion, we are of the feeling that the issues identifying with trademarks, copyrights and licenses ought to be at long last chosen speedily by the Trial Court rather than just giving or declining to give a directive. In the issues of trademarks, copyrights, and licenses, the case is predominantly battled between the gatherings about the transitory directive and that continues for a considerable length of time and years and the outcome is that the suit is not chosen at last. This isn't appropriate. In our assessment, in issues identifying trademarks, copyright, and licenses, the stipulation to Order XVII Rule 1(2) C.P.C. ought to be carefully agreed to by all the Courts, and the knowledge about the suit in such issues ought to continue on an everyday premise and the last judgment ought to be given regularly inside four months from the date of the recording of the suit."

Emphasizing its position in *Bajaj Auto Ltd. v. TVS Motor Company Ltd*., the Supreme Court of India held that "experience has indicated that in our nation, suits identifying with the issues of licenses, trademarks and copyrights are pending for a long time and prosecution is, for the most part, battled between the gatherings over transitory order. This is an unacceptable situation, and thus, we had passed the above-cited request in the previously mentioned case to serve the parts of the bargains. We direct that the headings in the

previously mentioned request be completed by all courts and councils right now and reliably." It is clear that because of unjustifiable postponement in the removal of cases and the expensive prosecution which could drag out the assurance agreed to the work, as opposed to advancing the advancement of mentally secured work, the oppressed gatherings are choosing interchange contest goals components for the headway of licensed innovation rights in India. Also, the business idea of the exchanges engaged with the dominant part of protected innovation-based cases requests such a methodology.

Points of interest in utilizing ADR in settling IP disputes: The benefits of ADR are progressively perceived. They incorporate the accompanying:

- **A Solitary Strategy-** Court case in global IP questions can include a huge number of methodology in various wards with a danger of conflicting outcomes. Through ADR, the gatherings can consent to determine in a solitary system a question including a correct that is secured in various nations, in this way maintaining a strategic distance from the cost and unpredictability of multi-jurisdictional case.

- **Neutrality-** ADR acts as a neutral umpire. Neither of the parties can enjoy its home litigation advantages.

- **Expertise-** The best part of this untraditional way of resolving disputes is that the parties can choose the arbitrator who is expert in their field

- **Confidentiality-** The best and most secure approach to keep up the classification is to determine the disputes through ADRs. Being parties centric it gives immense importance to secrecy and confidentiality.

Part II: Online Dispute Resolution

Online Dispute Resolution: The term ODR refers to an array of dispute resolution procedures. Some are fully automated, others, although they take place exclusively online, involve a neutral human. A large group of processes that are included in ODR use digital technologies to lesser degrees. Thus, online dispute resolution is not a monolithic concept – for this reason, some authors argue that it is more accurate not to speak of ODR, but rather of ODR techniques , or even of "a plethora of online dispute resolution services" devoted to the expeditious and speedy resolution of disputes. The term ODR is used for mechanisms as different as dispute prevention (education, outreach, rating and feedback programs), ombudsman programs, blind bidding, automated negotiation, early neutral evaluation and assessment, mediation/conciliation, mediation-arbitration (binding and/or non-binding), arbitration, expert determination, "executive tribunals" or "virtual juries". Based largely on traditional (offline) alternative dispute resolution methods, such as mediation or arbitration, and various hybrids thereof, ODR is sometimes equivalently labelled as e-ADR. Technology via the Internet is considered a dominant feature of ODR as canvassed in legal literature.

The field of out-of-court dispute resolution has grown and flourished alongside the rapid advance of technology for almost thirty years. Yet, a successful relationship between ADR and technology could not have happened without the appearance of the commercial Internet and World Wide Web a decade ago. Since then, one of the main challenges facing the global network is how to resolve a growing number of cross-border disputes in the electronic environment. Diverse legal and non-legal obstacles such as physical, linguistic and cultural distances between parties, juridical difficulties concerning the applicable law, competent jurisdiction and enforcement of judgments make traditional methods of dispute resolution ineffective in the online environment. It has been argued that these deficiencies may significantly hamper further development of the Internet and electronic commerce. Although not free from similar and other concerns, ODR is being depicted as the potentially optimal method to resolve disputes arising on the Internet.

Online dispute resolution (ODR) is a branch of dispute resolution which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of all three. Online dispute resolution ("ODR") is conceived as a means to achieve some of the most powerful legal ideals of the Western legal tradition, which include:

(1**) Legal Certainty**: In making individual plans, decisions, and choices everyone is entitled to know what the law is in advance.

(2) **Access to Justice:** Everyone involved in a dispute shall be entitled to an easily accessible redress mechanism that provides for a timely resolution and effective remedies at reasonable cost.

ODR is concerned with the civilized (i.e. peaceful) resolution of disputes between private parties, and, secondly, with the prevention of such conflicts through the provision of legal certainty. National legal systems fulfill the former function by offering plaintiffs to litigate disputes before state courts which exercise mandatory jurisdiction over defendants, and the latter by making the litigation process public, thus allowing for the proliferation of precedent, as well as by the enactment of codifications of rules of law.

Regarding the dispute resolution function of private law, there are a variety of functional equivalents to litigation available, which are collectively referred to as alternative dispute resolution (ADR). On the one hand ODR relates to the resolution of disputes that result from online conduct, i.e. from communications and transactions which come about through the use of the Internet Domain name disputes are a prominent example as are disputes related to ecommerce. On the other hand, ODR relates to the use of online communication technology in the resolution process, even if the dispute itself has an offline origin. The provision of alternative dispute resolution (ADR) services on the Internet has become quite popular. Online dispute resolution (ODR) in India is in its infancy stage and it is gaining prominence day by day. With the enactment of Information Technology Act, 2000, e-commerce and egovernance have been given a formal and legal recognition.

Human beings, when it comes to disputes relating to money or status, are all the same, everywhere round the globe. Selfishness, strength of money-power for protracting litigation or ego is common features. If the conciliation /mediation solutions have been successful in

other countries, they must and will succeed here also. Where the problems are same, the solutions could be similar, though there may be differences in degree or the methodology adopted. The procedure for conciliation/mediation are today part of the systems of almost every judicial administration both in common law countries as well as in countries governed by civil law systems

Definitions: Dispute resolution techniques range from methods where parties have full control of the procedure, to methods where a third party is in control of both the process and the outcome. These primary methods of resolving disputes may be complemented with Information and Communication Technology (ICT). When the process is conducted mainly online it is referred to as ODR, i.e. to carry out most of the dispute resolution procedure online, including the initial filing, the neutral appointment, evidentiary processes, oral hearings if needed, online discussions, and even the rendering of binding settlements. Thus, ODR is a different medium to resolve disputes, from beginning to end, respecting due process principles. ODR was born from the synergy between ADR and ICT, as a method for resolving disputes that were arising online, and for which traditional means of dispute resolution were inefficient or unavailable.

Nature of ODR

Online and Offline Model of ODR: The potential use of the Internet to resolve International disputes can be divided into two distinct areas: using Internet-related technology to resolve "real world" disputes online or partially online and using the Internet to resolve disputes arising on the Internet itself. For instance, in offline dispute, you can have a clause in your contract with your supplier for resolution of dispute using one of the ODR platform. As far as online disputes are concerned, the platform you are dealing with might have an inbuilt mechanism as is the case with EBay.

Procedures adopted for ODR

Online Negotiation: Forums such as Cyber Settle uses Negotiation for Dispute Resolution. Online negotiation can be of two types, closed model and open model.

Close Model– Online negotiation thrives on technological changes through blind bidding which is one of the most prevalent dispute resolution services available online. The common characteristic of these processes is the parties' submission of monetary offers and demands which are not disclosed to their negotiating counterpart, but are compared by computer in rounds. If the offer and demand match, fall within a defined range or overlap the case is settled for the average of the offer and demand, the matching amount, or the demand in the event of an overlap. If the claim is settled, the participants are immediately notified via email

Open Model– Under the open model, a party can view the other's party offer or demand only after having made a demand or offer. Whenever any offer is within twenty per cent of any demand, there is settlement of the median.

Online Mediation: A typical online mediation procedure takes place as follows. The complainant initiates it by completing a confidential form on the provider's website. Then, a mediator contacts the respondent in order for him/her to participate. Both parties set forth the mediation ground rules. The mediator communicates with the parties, sometimes jointly and sometimes individually, to facilitate an agreement. If an agreement is reached, it usually takes the form of writing.

Thus, the online process does not differ very much from the offline process, except for the expanded use of technology. Email is the mediator's best friend for purposes of framing and moving discussion forward. But email was already used by offline mediators. In online mediation, websites such as Smart Settle, Legal Face Off etc. are providing online mediators with new tools to supplement email with other communication tools including electronic conferencing, online chat, video-conferencing, facsimile and telephone.

Online arbitration: Online arbitration proceeds along different communication stages (process agreement, initial presentations, rebuttals, consideration, and decision). Arbitration is in general a much less complicated communication process than mediation. In the simplest arbitration, software that allows positions to be stated and documents to be shared may provide a sufficient frame for the process. There are many arbitration service provider in abroad such as American Arbitration Association. AAA is known for handling large, complex cases. In 2011, 46% of the arbitration filed with the AAA involved claims $1,000,000 or more.

ODR is ideal for India: All the three approaches mentioned above may be used in India. However, currently the third approach – arbitration approach – is used by NIXI and with success. The other two approaches may work when the system develops and the thinking evolves. At present, there is no use of these approaches in India. The use of ODR shall be to supplement the offline dispute settlement system. For a large number of business disputes with low value and having disputants at geographically far places, ODR seems to be the best bet. The salient features of ODR which make it ideal for such business disputes in India are:

Speed: One of the most attractive features of ODR is its speed. Litigants in India are used to getting matters resolved through the court system in years or decades. Even a suggestion that this can be done by ODR in months or weeks is music to their ears. Businesses will do anything to get their matters resolved speedily. And, this is precisely the reason why business litigants use the services of extra-legal institutions (even mafia) to get a speedy settlement. Private Banks are known to use the services of muscle-men to get the loan amounts back. It was noticed by the Supreme Court and it came down heavily to hold that banks or for that matter no one can use force to get the money back.

Convenience – Necessity: ODR is surely much more convenient than the normal ADR or litigation. It would be a very attractive feature for the people who already have access to the other systems of dispute resolution, for instance, ADR and litigation. However, for have-nots, who do not have access to justice due to several reasons – poverty, illiteracy, lack of awareness, etc. – convenience is not the deciding factor. They want to get their disputes resolved and for them speedy and efficacious decision is much more important than

convenience. Thus, convenience is an additional advantage for the elite class of the society. However, in case ODR achieves tremendous success vis-à-vis business disputes in India, it is sure that this convenience shall become a necessity.

Ease of access: Anyone with access to internet can have access to ODR. And for access to internet, one does not have to have a computer and internet facility at home or business. Access is available through a very large number of cyber cafés, which are mushrooming in every nook and corner of India. The charges are as low as Rupees 10 for an hour (approximately 20 cents). There are plans by the government to have internet facility in each and every village. Local Self Government is the model to be followed after amendments in the Indian Constitution about fifteen years ago. The 73rd and 74th amendments to the Indian Constitution in 1992 are milestones in establishing democratic decentralised administration through local self-government in India. Even a low cost simple computer – called 'Simputer' – has been developed for use in remote areas where even electricity is not available. Indian computer companies are selling a few models of the usual desktop for even less than Rs. 10,000 (approximately USD 200) and used desktops are available for as low as USD 40. These can very well be used by 'Gram Panchayats' (local governing body in villages) for providing access to internet. Several telecommunications companies have made the latest technology available for internet through cellular phones. Thus, access should not be such a major problem in the years to come. However, it will definitely take some years, may be five, before it can be said with confidence that internet is available to the remotest village in India.

Efficient time management: In face to face (F2F) proceedings, the disputants with their lawyers have to be physically present at every date scheduled in the court or other tribunals. ODR does not require travel and attendance, hence, the business executives are available for the company. The same is true for customers or even in non-commercial disputes for other persons. This flexibility allows efficient time management and also gives a chance to prepare the case well and make an argument as compared to the court where oral arguments have to be made and rebutted at the same time.

Cost Savings: Since, no travel is required in ODR, there is a significant saving in travel costs directly and a more significant saving indirectly in terms of availability of the disputant for the major portion of time which would have otherwise been lost in travel. This saving is most evident in cases involving international business disputes. Additional costs of board and lodging in another city where the court is situated are also saved from being incurred.

Easy storage of digital data Storage of documents is pathetic in lower courts in India. With rooms and rooms full of papers from floor to ceiling, it often becomes impossible to find a particular file in time. There have been instances when court files have been destroyed by termites, seepage of rain water, excess humidity through the walls or destroyed due to short circuit of electric wires resulting in avoidable fire. Not to mention the natural calamities like floods which recently happened in Mumbai in 2005. Thus, this is not a phenomenon in villages of small towns but can also happen in a metro like Mumbai. Digital storage shall secure the data in a neat manner and can be retrieved as and when required. With a large number of software engineers and computer companies, there is no dearth of talent or hardware for such storage.

No Geographical Barriers: In India, the Supreme Court has its seat in New Delhi and the High Courts have their Principal Seats and Benches in the capital or another important city of the provinces. Besides these higher courts, each district has a District and Sessions Court which is the highest court in the lower judiciary. Many times, it becomes very difficult for litigants to travel from remote villages even to the district courts, what to talk of the High Courts and the Supreme Court. The inconvenience of frequent travel to the courts without any or very little forward movement in the matters has a toll on the litigants and a large number of them get frustrated by sheer waste of time, effort and money. Thus, more often than not, it results in not having access to justice for a large section of the Indian population. Moreover, for disputes having subject value too low, disputants are not even interested to waste their resources knowing it fully well that it is better to 'forgive and forget' rather than be 'penny wise and pound foolish'

Since ODR does not require any travel, a disputant living in the remotest area of India can take part in the proceedings from his home itself, provided internet is accessible. This feature of ODR makes it one of the most easily available systems of dispute resolution. It is also true for international disputes. Thus, availability of getting disputes resolved by ODR shall encourage disputants to get their disputes resolved rather than suffer silently.

Problems ODR faces in India: The road for ODR in India is bumpy. ODR may have a number of advantages and unique features which can help resolution of disputes in India, there are a number of problems in using ODR for dispute resolution. Some of these problems are as follows:

Trust and Confidence: Trust is the sine qua non of any dispute resolution system. India's Supreme Court and High Courts are independent and command enormous respect. This respect emanates from the trust the citizenry have in them. It is not sure how much trust and confidence the people have for ODR institutions.

Technology: People in general have distrust in technology. Some people in India do not even use bank ATMs as they fear that in case the machine does not give them the correct amount, there is no person available at that time to whom they can complain. There is a phobia for technology also because of unfamiliarity and a sense of foreign involvement. It is true that ODR system was not devised in India and hence, the technology associated with it also comes from west. This feeling gives a sense of insecurity and fear that one may become a slave to this technology. This is truer for the older generation. Younger people are more adept at using technology. They are much more confident as they, in fact, create this technology. Indian software engineers write a substantial amount of global software including legal software. Thus, there is a clear case of age bias.

Lawyers: Shakespeare had written in one of his plays, 'The first thing we do, let's kill all the lawyers'. Advocates of ODR will surely agree with it. The lawyers are one of the biggest hurdles with their mind-set of adversarial methods of dispute resolution. Also, there is a potential conflict with the fee earning of lawyers if ODR is followed. Lawyers in general are not trained for ODR in law schools. This makes the task difficult for the disputant to take a decision to go for ODR when the lawyer is strongly in favour of litigation. The primary task

of a lawyer is to advise his clients on appropriate remedies and courses of action. Advise by lawyers is fine for the court matters, but without any proper training for ODR, who will advise them for ODR mechanisms. Thus, dependence on lawyers should be reduced which means more awareness for the businessmen and masses.

Access: The digital divide between IT haves and IT have-nots makes access at this time more difficult for the weaker sections of society. Issue of access to ODR shall broaden this gulf. People with all the resources generally have familiarity with the system and they can with some effort use the system for their own use. This makes the case for empowerment of the weaker sections by providing them access stronger.

Barriers: Educational barriers shall prevent the uneducated from accessing ODR. Language also becomes a barrier. English is generally the language used for internet and ODR, while a large portion of work in lower courts is done in vernacular. The preference for English shall put the locals at a disadvantage. Cultural barriers may also pose a problem. ODR system transcends national boundaries as well as different cultures. This fact must be taken into account. India – a country known for its 'unity in diversity' – is of continental dimensions and a large number of different cultures thrive under the common umbrella. This fact is taken care of in different courts in India, however, it is not certain how these differences shall be factored in ODR

Personnel: Adequate number of qualified personnel to man the ODR institutions and provide counsel to consumers and businesses is one of the major obstacles. The lawyers who have been trained for decades together for the traditional form of practice would find it next to impossible to switch over to the new trend of dispute resolution called ODR. Arbitrators (decision makers in any role – negotiator, mediator, conciliator, etc.) in ODR need to be specially trained for this special task. Teaching is not at all done for ODR in universities and professional schools. Even ADR lags behind. Law schools have very few courses on ADR and hence, it is difficult to get good law graduates with sufficient knowledge of ODR.

ODR not suitable for all disputes: Like ADR, ODR is also not suitable for all disputes. Questions of intricate legal complexity are best decided in a court of law. Matters of criminal nature, matrimonial disputes, and matters involving rights of citizens as against the State are some of the examples which cannot be decided by ODR system. The matters which can best be decided are business disputes – B2C and B2B. The rest of the disputes may be resolved in the years to come by some suitable modifications in the model used.

Need for Robust online ADR and ODR Mechanisms during COVID-19 Pandemic: In the current scenario where everything is chaotic, the need for moving to an online platform is immense. However, in a situation where urgent issues are already pressurizing the Courts with heaving burdens, thereby cluttering the digital medium, an issue like arbitration is better being held up for the future. Anyways, to ease the burden upon offline arbitrators the online arbitration mechanism shall be highly significant in the post corona period.

- The Supreme Court of India has sought to ensure access to justice during the ongoing pandemic. Since March 2020, the Supreme Court has issued orders stating that it

would hear urgent matters via video conferencing and prescribed standard operating procedures, including for advocates and parties for mentioning cases, e-filing and hearings. Several High Courts and District Courts have also initiated online hearings. The Supreme Court notified that physical appearance in court may be permissible if parties consent and subject to availability of the bench and social distancing norms.

Given the existing backlogs and uptick in Covid-related disputes, arbitration may be the preferred forum as opposed to judicial proceedings. The arbitration community has steadily adopted new technologies over time to assist in resolution of disputes. For instance, it has become fairly common practice for case management conferences to be conducted via video-conferencing and where circumstances justify it, cross-examination of some witnesses and experts may take place remotely. Electronic document storage and trial presentation are a practical option for international arbitrations and will now be the new normal for domestic arbitrations in India. Parties in India may accordingly resolve their disputes online via arbitration and approach courts only for reliefs and/or enforcement of the arbitral award. Arbitration is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, parties opt for privatization of justice instead of going to court. Depending on the nature of the dispute, the potential advantages of arbitration include: Time, Flexibility, Cost, Expertise, The Department of Justice in 2018, urged government entities to explore alternative methods for settlement of disputes such as mediation, arbitration, conciliation, online or otherwise. The department of Justice noted that there were more than three crore cases pending in various courts and 46% of these involved government entities. The increasing support for arbitration by private parties, government and judiciary could ensure ease of doing business and make India a preferred destination for foreign direct investment.

Systems for the Future: Vision of ODR: Justice DY Chandrachud, **Judge, Supreme Court of India**, on Technology and Access to Justice

The question today is *how well* can we adopt technology to enhance access to justice and strengthen rule of law. Technology can be disruptive and there is a technological divide in India. We should use technology to promote a sense of inclusive justice, justice for which the system is meant to deliver a service.

- Parameters of ODR:
  - Technology to promote user confidence in the process
  - Incorporate elements of design thinking to understand user needs for an ODR platform
  - Employ data management tools to ensure predictability, consistency, transparency, and efficiency of the judicial process

Overall, *we need a fundamental change in mind-set* – dispute resolution to be seen not as a court where justice is administered, but as a service which is availed of. Commercial dispute resolution has certain important values which must sub serve the usual court system – and

that is the importance of ODR in technology. (1) Process to be participative (2) Party autonomy

ODR to have a multi-pronged, multi sectorial initiative that focuses on:

- Dispute resolution: resolving disputes that reach the courts through open, efficient, transparent process
- Dispute containment: Only those disputes that require judicial resolution should reach the courts. Matters which do not require judicial resolution shouldn't reach the courts at all.
- Dispute avoidance: Facilitate and ensure through ODR that a problem does not reach the stage of a dispute. This would ensure a problem does not become a dispute.

Process automation is minimal use of technology. Use technology to transform avoiding and containing disputes, and resolve if necessary. There is a difference between pre litigation ODR and court annexed mediation. Parties are entrenched at the time of court-annexed mediation. Pre-litigation ODR is even before a dispute has reached the stage of a dispute. ODR can step in before erosion of trust takes place between the parties, and before partners become adversaries.

Responsibility of all the stakeholders:

- The providers of technology enabled services: The tech enabled service providers create a platform where parties can be made aware of their rights, the remedies which are available to them, and create facilities for negotiation and mediation with neutrals.
- Professional bodies: who will offer trained personnel. They could be law firms on a standalone basis, or as a consortium of service providers.
- Industry: The industry must internalise dispute containment and dispute avoidance, perhaps by introducing contractual clauses, which mandate the requirement of going to mediation or negotiation before accessing any legal remedies.
- Governments and courts: Important to understand where disputes arise, what aggravates them, what mitigates them. Open API’s to unlock creativity and entrepreneurial energy of private sector players in the judicial process. The Government can also identify disputes most suitable for ODR. This is an opportunity for the Government to employ objective AI tools to aid government litigation.

Create mechanisms for incentives and disincentives for taking recourse to ODR. And finally, in the short term, in the context of COVID, we have to create incentives for recourse to ODR by recognizing the role of private, voluntary ODR by encouraging businesses to seek recourse to ODR technology.

Enabling Action for Nationwide ODR Justice Sanjay Kishan Kaul, Judge, Supreme Court of India, How do we encourage pre-litigation ODR that does not have to come to court first: *Feasible Models and Enforceability*

- Litigants do want their disputes resolved expeditiously. Today, we can benefit from people having learnt from mediation and set up private mediation institutions, and is the time to rope in private mediation platforms along with court annexed mediation.
- Platforms must ensure that the various steps and processes of mediation can happen online, and ensure confidentiality for people to trust the process.
- While the current unforeseen situation is unpalatable, we can make good of difficult situations. Resolving COVID related disputes should be of importance, and ODR can be employed for those purposes. Eventually, ODR can be employed for other cases, including personal disputes. ODR is most suitable for commercial disputes.
- Identify methodology for Government to settle some of the Government litigation, to ensure clarity and predictability for the Government officers to do so.
- Inspiration can be drawn from the Hong Kong Government model of introducing an ODR scheme for MSME, and an "opt-out" model will work better in the Indian context than an "opt-in" model where parties would be hesitant to experiment with mediation.
- Opt-out model compels the parties to sit together, which enables parties to resolve disputes., after which they can explore mediation and arbitration. Italian model that requires people to approach mediation before filing a case will be useful to the initiation of mediation in India.
- Mediation and Conciliation Project Committee, headed by Justice Nariman, J. Malhotra and myself as its members have taken an initiative of constituting a committee to draft a possible central legislation for mediation which can be proposed to the central government. This Committee has representation from expert lawyers mediators with proposed consultation with some expert foreign mediators based in Singapore and U.S, and the whole process should be complete very soon.
- Everybody, including the Government is concerned because of the unfortunate situation that we must resolve disputes. In fact, this resolution of disputes is part of the economic revival.

Anoop Kumar Mendiratta, Law Secretary, Government of India, on Technology and Alternative Dispute Resolution

- The aim is to provide an affordable, accessible, and effective ODR and the concern remains how can the Government and various stakeholders can facilitate ODR.
- At a time when technology plays a crucial role, ODR is much more than replicating the existing process of ADR online. The objective is to contain and resolve disputes also using analytical insights.
- For a transformative impact, we need to develop digital infrastructure to reach the masses, and we also need a change in mindsets. The statutory framework would also require some incidental changes.
- Identify disputes suitable for ODR. Collaboration between ODR centres and public institutions could be explored for Motor Accident Claims Tribunals, banking disputes, service disputes, etc.
- The Government is open minded and shall help alleviate concerns regarding ODR. Functioning between the private ODR players and the ADR providers needs to be complemented to ensure that online resolution can reach the different industries, locations and parts of the country and also support the public institutions in a big way.

Unlocking Opportunities for ODR Justice Indu Malhotra, Judge, Supreme Court of India, on the Potential and Possibilities of Online Dispute Resolution

- ODR which was at an infancy stage in India, has now acquired greater importance due to COVID19.
- Advantage of ODR is that it will provide expeditious resolution of disputes. Further it is far less expensive, and economical as well.
- So far, India has followed the opt-in model, which means that option of going into mediation is voluntary. Italian model, by contrast, is the opt-out model, under which it is mandatory to enter into mediation for at least one session, and then the parties have the liberty to opt out if they feel so.
- A hybrid of the two may be more successful for India, because the opt-in model may defeat the purpose of mediation. It should be made mandatory, and should cover about three sessions, otherwise the parties may treat it as a mere formality, and opt-out after the first session is over. A hybrid of the opt-in opt-out model may work better for India.
- Another area which has great potential for dispute resolution through the ODR mechanism are IBC disputes. ADR modes should be used by creditors and debtors to resolve issues in the shadow of insolvency, particularly now post COVID19. Low volume, high volume cases could be referred to online dispute resolution
- A scheme similar to the Hong Kong ODR Scheme for the MSME sector could be formulated for India for commercial disputes having high volume and low-value transactions.
- The need of the hour today is to develop a robust ODR platform, which is easily accessible, user-friendly, less expensive and efficient for resolution of disputes.

The Uniform Domain Name Dispute Resolution Policy (UDRP): Conventionally arbitration involves dispute resolution through the delivery of legally binding decisions, i.e. has the same enforceability before the Courts as any other judgements. Non-binding arbitration processes may also be effective when using ODR tools, as settlements are often encouraged by them. Moreover, self-enforcement measures may review the effects of non-binding processes. The most significant example is in the creation of UDRP by Internet Corporation for Assigned Names and Numbers (ICANN) UDRP has been referred to as an administrative process by some commentators. In any case, the UDRP has created a clear global ODR process, allowing trademark owners inefficient fight against cybersquatting. The UDRP is used for resolving disputes between trademark owners and users of registered domain names in bad faith purporting to resell it for profitable exchange, or taking advantage of a trademark reputation.

Challenges in Online Arbitration: Besides being a boom in the dispute settlement system, it comes with its own challenges and difficulties. Online Arbitration faces challenges in relation to-

1. Power or system failure and potential inaccessibility- For some individuals, access to computers and internet may be a great challenge. Even after gaining access to a

computer and internet, they might not be comfortable in using it. The proceedings may last for hours and the requirement of continuous internet access may pose a threat for those having limited access.

2. Place of arbitration- determination of seat of arbitration is one of the greatest difficulty faced in online arbitration. It is important to decide the place of arbitration as it will determine the jurisdiction of courts for setting aside the award. The place of the arbitration can be decided by the parties. In case parties fail to decide the issue, this is decided by the arbitrator.
3. Confidentiality issue- since online mediation creates an electronic record, this may pose a great threat to privacy and confidentiality. This could enable a party to print out and distribute e-mail communications without the knowledge of the other party.
4. Less effective- any dispute can be redressed more effectively if the parties to the dispute are personally and physically present before the arbitrator. Moreover, online communications do not express the pitch, tone and volume of the participants.
5. Limited scope- Online dispute typically concern small sums of money. It has a limited range of disputes. It handles only those issues where the amount of settlement is the only undetermined issue.

ODR Implications: Present Realities, Pressing Problems and Future Prospects

The current state of the regulatory framework for online dispute resolution: At the peak of the Internet boom of the late 1990s, it appeared that ODR was developing at a satisfactory pace without the involvement of government. The easy availability of high-tech venture capital allowed ODR enterprises to appear and grow quite rapidly. Both governments and business stakeholders were anxious to foster marketplace competition. Many ODR providers called for a hands-off approach from government and argued that ODR services would "take root on their own." Regulations were kept to a minimum in order to encourage new entrants and greater consumer choice. Self-regulation initiatives, such as codes of conduct or trustmarks, were growing "slowly but steadily."

E-commerce industry was encouraged to build ODR into business practices but not required, or overseen, to do so. As reported by the UNCTAD Report, when the US government convened its first conference on ODR in June 2000 at the Federal Trade Commission it was clear that "it was leaning toward industry self-regulation." "In the freewheeling spirit of the Internet revolution, self-regulation seemed the logical course. Somewhat surprisingly, even when the Internet bubble burst, the regulatory approach to the ODR did not change. In 2002, it was – as noted by Rule – "very hands-off", and government agencies both in Europe and America "seemed to be content with self-regulation." It is needless to say that the self-regulation approach has been always preferred by business wishing to avoid additional regulation whenever possible. Thus, while businesses have often supported the application of ODR, especially to B2C disputes, at the same time they have wanted "government to avoid getting involved." As discussed by Rule, "businesses mostly want to implement ODR programs to shield them from liability and court proceedings", for example, "many businesses are interested in binding arbitration with their consumers and business partners for exactly this reason. The fear of financial exposure in court is a formidable one. The fear of class action lawsuits is also formidable.

The first doubts regarding the self-regulation approach were raised by consumer groups having a long history of disagreement with business interests. These doubts arose when some e-companies suggested that ODR be integrated into their e-commerce systems as a mandatory step: that is, disputants would have to engage in ODR before being permitted to go to court. Because most consumer groups were "steadfast in their demand that consumers must retain access to court", they expressed their strong objections to such suggestions. As a result, consumer advocacy groups became willing to entertain the possibility of government intervention in setting and enforcing new standards for ODR. Then, not only consumer organizations, but also other not-for-profit entities, governments and international bodies raised concerns regarding the performance of ODR providers, particularly in the B2C context. The shortcomings had to do with the lack of transparency in the conduct of ODR providers, the lack of standards for ensuring the neutrality of providers and neutrals employed by them, the lack of appropriate complaint mechanisms, and the failure to accommodate cultural and linguistic differences.

Even when facing these clear deficiencies, ODR stakeholders and policy-makers did not decide to (or were not able to) take any decisive steps to correct the regulatory framework. By and large, their actions were limited to the sphere of norms. Diverse non-binding and unenforceable standards for ODR service provision have been issued. Among the organizations that have compiled these standards were the OECD, the G-8, the European Union, governmental agencies in Canada, Australia, Japan, New Zealand and the United States, the International Chamber of Commerce, the Better Business Bureau, the Global Business Dialogue, and the Trans-Atlantic Consumer Dialogue. On the one hand, it proves that the problem has really existed and attracted a lot of public attention. On the other hand however, as noted by Rule, "it is easy to get lost in all of these different standards documents." Their regulatory influence upon ODR practice appears debatable.

There are several reasons for governments to open the door to more aggressive regulatory involvement. The hands-off approach, in which the driving force is the power of the marketplace, has been unsuccessful in regulating online dispute resolution. The power and dynamics of the ODR market forces are currently weak. The hands-off approach could be potentially effective if the market had just emerged and many new players were appearing. This would be also an effective approach for a developed market where clients do derive benefits from real competition between businesses. Neither of these is however the ODR market of today. This is a market of insufficient information and limited client choice. ODR providers experience difficulties getting new cases. E-companies do not seek to attract more clients by offering them more convenient modes of dispute resolution.

In their recent book, Ponte and Cavenagh suggested that "e-companies must tread carefully in their selection of ODR providers. At a minimum, an e-business should determine if the ODR provider belongs to relevant professional organizations, adheres to current ADR ethical standards, requires specialized ODR training for its neutrals, and complies with the ABA Task Force's Recommended Best Practices." Although generally plausible, "the minimum" proposed by Ponte and Cavenagh appears somewhat troublesome, and often hardly achievable. First, there are many ADR/ODR professional organizations and it may be difficult to find out which one is "relevant". Second, ADR ethical standards (again, the

question arises which ones are "relevant") will not always be fully adequate for ODR. By trying to merely transfer ADR standards to the ODR world, the role of technology and other unique challenges of ODR may be overlooked. Finally, while the ABA Task Force's Recommended Best Practices may appear important in one way or another to ODR providers in the United States and North America, they are in fact only one of numerous standards, and remain largely unknown worldwide.

The exclusive reliance on market forces, free competition, and privately-made norms in the context of regulation of online dispute resolution raises important concerns. "Dispute resolution" is not a regular product or service. It is debateable whether market and norms, in the absence of law, are capable of providing adequate incentives to put ODR programs in place and make them fair and effective.

Major deficiencies of the current ODR regulatory framework: There are numerous issues in online dispute resolution that presently appear "insufficiently regulated." As discussed, this state of "insufficient regulation" results not only from lack of comprehensive ODR law, but also from the weaknesses of the other modalities of regulation. Certainly, law is not always the best means to regulate. In cyberspace, like in the physical world, law, market, norms, and architecture all interact to regulate human behaviour. To take an example, if an ODR provider charges too much for their services, such a problem should rather be solved by market than by law. If the provider ignores clients' emails about their pricing, likewise, norms seem to be more appropriate than law. If the provider tries to use a non-existing credit card number, they will probably fail not because it is forbidden by law, but because a computer system will not recognize a given number. Finally, when fraudulent charges are made to a client's credit card, law must come into play. Thus, law and the other modalities co-regulate the field of online dispute resolution. Some of the deficiencies of the existing ODR regulatory framework have been already illustrated in the previous sections of this paper, this section highlights and explains them in more detail.

Several issues arguably ought to be regulated by law, and no other modality of regulation seems to be capable of replacing law in these situations. Such an issue is for instance whether an ODR clause contained in a contract, or increasingly often in a website's terms of use, should be enforceable. This problem cannot be satisfactorily answered by technology, market, nor any norms other than law. It appears to be the necessary role of legislative authorities and courts to deal with the problem of ODR clauses' enforceability. Likewise, such issues as whether the limitation period should be suspended while the parties are attempting to resolve their dispute by ODR (and if yes, under what conditions), the extent of evidential privilege (whether all or some ODR communications are protected from disclosure in any subsequent proceedings), the (de-)localization of ODR (e.g., "place of arbitration" has been traditionally needed to establish a "territorial" link to *lex arbitri*), liability of ODR neutrals and ODR providers, and finally, enforceability of a settlement or award, also seem to inevitably belong to the domain of law.

It should be noted that some of these issues are somewhat regulated, although only in a few jurisdictions, and in relation to B2C disputes. In general, in disputes with consumers, a wide range of consumer protection laws may come into play, and ODR providers often look to a handful of existing laws concerning B2C offline alternative dispute resolution and try to guide their conduct based on them. This situation is not satisfactory for at least three major reasons, however. First, repeatedly, all parties suffer from legal uncertainty. The mantra in this paper is that the growth of, and confidence in, online dispute resolution are inherently dependant on legal certainty. Second, in the online settings, the distinction between consumers and businesses becomes vague. When entering into a standard online agreement with, say, Microsoft, the bargaining power of small or even medium enterprises is not different from one represented by a consumer Arguably, such businesses should be granted wider protection, similar to consumer laws, when contracting on the Internet. Finally, consumer protection laws are currently territorially limited and differentiated which stands in stark opposition to the multi-jurisdictional and "borderless" nature of cyberspace.

Several important issues in the ODR regulatory framework of ODR come down to the problem of lack of transparency and appropriate information. In this context, not only law, but all the modalities of regulation should play their roles. At present, many commentators observe that it is difficult "to get accurate information about ODR and ODR providers." While most ODR providers disclose information on the services they offer, inadequate information is given on their governing structure, funding models, fees, officials and shareholders, and finally, users and results of ODR processes. Yet transparency should be a baseline standard for online dispute resolution. As noted by Rule, this issue "enters into dispute resolution in two different ways: on the front end, parties need to understand what they're getting involved in; […] on the back end, it is also important to have transparency in ODR processes for outside observers." The latter category is certainly more problematic given the traditionally confidential nature of out-of-court dispute resolution. However, it is important to allow outsiders to get a sense of what mechanisms are being used to increase the overall confidence towards ODR.

The regulatory framework should ensure that full information about both the tools, the neutrals, and the service provider in general, etc., is disclosed. This is necessary to enable Internet users to make truly "informed choices" concerning not only specific ODR providers, but also websites where they shop online and different options of dispute resolution. Since the other modalities of regulation presently fail to ensure adequate standards and incentives, it appears plausible to impose certain minimal disclosure requirements by law.

For e-companies, in turn, information on applicable dispute resolution procedures could become an important component of each commercial website. It is debateable to what extent (if any) that should be enforced by law. Currently, the provisions regarding dispute resolution are frequently "buried" at the end of the website's terms and conditions. Therefore, the majority of the website's visitors have no idea of what would happen in case of a dispute. Yet, there is no doubt that the dispute resolution procedure's terms should be brought to the users' attention in an effective fashion. They could be provided at least with an easily accessible hyperlink, or a dispute resolution icon, on the main page of a given website which would lead directly to the dispute resolution clause. This would allow potential customers to

identify the existence of an ODR policy or program before making any purchases. In this way, again, one could make a more informed choice whether to continue to interact with a given website. Such a standard is not unprecedented: many corporate websites have recently implemented similar changes in relation to personal data and privacy policies. Finally, in an effort to help educate consumers and other businesses about ODR, e-businesses could provide hyperlinks to major ODR resource centres that offer objective descriptions of ODR processes and specific ODR providers and services on their websites.

Today, lack of complete information on ODR provider's governing structure, business connections, etc., often raises doubts relating to the independence of ODR providers and their stakeholders, as well as the neutrality and impartiality of individual mediators or arbitrators. The Consumers International 2001 Report has found that most online ADR sites do not give adequate assurance of impartiality of their services. There is a risk that ODR providers will become too closely tied to business organizations because the latter are the most important customers of the former. It is needless to say that while ODR providers should stay focused on the needs of their customers, they should not get "too close." Thus, a number of authors expressed concerns about neutrality and fairness of ODR processes. Rule observed that "ODR often encroaches on legal rights, such as due process." In addition, on the Internet, consumers can easily trade-off fairness of a dispute resolution procedure for other, primarily economic, values. The Internet enables online shoppers to look for better prices all around the world. When they do so, they frequently forget about other aspects of each offer, such as whether and how a dispute would be handled. Certainly, all the modalities of regulation have their roles to ensure that ODR processes are fair, impartial and transparent – technology, because – as suggested by Thiessen and Zeleznikow – the quality of neutrality can be improved with automation; markets, because the fair terms of handling complaints and dispute resolution may attract more clients; finally, norms and especially law, to protect the fundamental rights.

Only law is capable of protecting the right to trial, however. ODR programs by and large are currently neither binding nor mandatory based on law; nonetheless, many businesses want them to be mandatory, if not by virtue of law, then as a result of other norms (most often diverse contractual obligations). Consumer groups argue that the reason why businesses want ODR to be a compulsory stage for online disputes is that "it provides an additional step in the process that might dissuade some consumers from escalating their complaint." In addition, ODR programs which are not entirely voluntary appear problematic in light of the fact that many Internet users still do not have convenient access to technology or do not have sufficient IT skills. The validity of mandatory ODR clauses is largely untested and "it is unclear whether or not such pre-dispute clauses will also find judicial support." In this context, law appears to be the only modality of regulation that can guarantee that consumers will not lose their ability to obtain redress in a public forum like a court.

Law should also be an ultimate means to regulate liability of the individuals or entities responsible for ODR processes. As observed by Rule, so far regulatory discussions have focused on the administrative organizations, including most importantly ODR providers. Yet, this approach tends to overlook the role played by other ODR stakeholders. First and foremost, it appears crucially important to set enforceable standards applicable to all ODR

neutrals. While ODR providers usually have brick-and-mortar offices incorporated in one jurisdiction or another, and might be relatively easily held accountable for any irregularities, online mediators and arbitrators can work and travel anywhere in the world, subject to a wide variety of different laws and jurisdictions. Accountability of online neutrals is therefore harder to ensure. In addition, it is easier for them to make mistakes than in ADR, especially, when they use sophisticated technology. Moreover, an ODR process is shaped not only by "live" participants but also by online architecture and software tools designed by "anonymous" software engineers. Many rules of ADR practice presume that the process is being run by a human, and in the world of ODR, they must be reformulated. A central problem is no longer solely how to combat human neutrals' tendencies to be inefficient, erratic, or biased. The problem is getting more complicated: in ODR, inefficiency, errors or bias can be hidden under nicely crafted computer interface, in the way a program was constructed. Liability for any "errors" in ODR software will be often a multi-faceted issue. Rule wrote that "having your own technological platform is like owning an elephant; yes, you own it, but you still have to feed it every day and find a place for it to sleep at night. And every day the elephant gets a little older." For that reason, many ODR providers prefer outsourcing ODR technology than building it themselves. Such ODR technology is often protected by patents and copyrights. Providing a clear set of rules concerning liability for errors and mistakes in ODR processes is difficult, albeit desirable.

Other technology-related regulatory issues in ODR are data security and confidentiality. While the former relies primarily on technology and the latter – on law and norms, in fact they seem closely interrelated. The security of currently utilized ODR platforms and techniques (and as a result confidentiality of ODR processes as well) raises some concerns. For example, unencrypted email which is now widely used is extremely vulnerable to interception. Confidentiality is a key concern in any dispute resolution process. In the field of ODR, parties need to have full confidentiality guarantees not only from a neutral but also an ODR provider, and all other persons who can have electronic access to information the parties do not wish to disclose. Data protection methods, including encryption, secure servers, or password protocols, must be important components of ODR programs. Again, some analogies to privacy laws come to mind. It seems plausible that ODR providers should be required to commit themselves to similar standards and efforts as those who run personal information databases under privacy laws. There is consensus among scholars and practitioners that "because of the often sensitive nature of the information shared in online dispute resolution procedures, system administrators must put the highest priority on top-level security and data protection."

Finally, last but not least, lack of trust, in the context of the Internet sometimes referred to as e-confidence, is another consequence of "insufficient regulation" in the ODR field. Lack of trust is viewed as one of the main obstacles to the continuing growth of the Internet's global marketplace in general, and the ODR phenomenon in particular. These two aspects are closely interrelated: if e-commerce is to reach its full potential, consumers must have confidence in ODR. Even if there are no insuperable legal obstacles to online arbitration or mediation within the current legal framework, lack of legal certainty and public confidence in online dispute resolution hampers the growth of ODR. While in the traditional environment, trust is earned mostly through a neutral's behaviour during the dispute

resolution process, online, the process of building trust can be redesigned and enriched. It has been argued that it could be "more informational than behavioural." Building trust is a function of all the modalities of regulation: law, norms, market and technology are all important.

PART III: Global Security and Peaceful Settlements of Disputes

International Disputes: What is Dispute? A 'dispute' was defined by Permanent Court of International Justice (PCIJ) in the Mavromattis Palestine Concessions (Greece v UK) 1924 PCIJ: 'a disagreement on a point of law or fact, a conflict of legal views or interests between parties'. Disputes are characterized by: (1) specific disagreements concerning matters of fact, law, or policy between (2) two or more parties so that (3) a claim or assertion by one party is met with refusal, counterclaim, or denial by another. International Disputes- Between Inter State, States and individuals, Corporate Bodies, Non State entities- All subject to International Regulations. Disputes can be of various Kinds-'Legal" and "Justiciable". Different form "conflict of interest"-such as Political and Non justiciable. "Legal Disputes"-capable of judicial settlement by application of existing law and ascertainable rules of international Law. Business disputes are increasingly becoming multijurisdictional and multi-party in nature. International disputes are those in which the rivaling claims are based on international law. This will normally go hand in hand with the parties being (at least so-called 'limited') subjects of international law.

Kinds of dispute Settlements: Peaceful/Pacific and Coercive or Compulsive Dispute Settlements, Obligation for the peaceful settlement of international disputes, Methods of international dispute settlement--Diplomatic methods and Legal methods, Diplomatic methods of dispute settlement, Negotiation, Good offices and mediation, Inquiry and fact finding and Conciliation, Legal methods of dispute settlement: Arbitration and Judicial settlement, Compulsive or forcible means of settlement, Retorsion, Reprisals, Embargos, Pacific Blocked, Interventions including wars. Attitude of Parties that determines its justifiability- i.e., willingness to accept the decision of international Tribunal for solving dispute. It's well established in International Law that "no state can without its consent, be compelled to submit its dispute with other State, either to Mediation, or to arbitration or to any other Kind of Pacific Settlement Issues Relating to International Disputes including: Jurisdiction, Access, Mandate of the Court or Tribunal, Evidentiary Rules and Principles, Procedural issues, Judgements, Awards or Decisions Remedies and Enforcement.

Evolution of International Dispute Settlement Mechanism: International armed conflicts have shifted from being primarily interstate to becoming predominantly intra-State. Collective global problems are driving the development of collaborative problem-solving approaches. New actors and an increasingly interconnected international community are demanding increased participation in adjudicatory forums, challenging the wisdom of State-centric approaches. International courts and tribunals are proliferating, deepening expertise while creating uncertainty. These changes are symptomatic of a more global and interconnected world. In adapting to these changing demands and conditions, old practices evolve and new ones emerge.
During the Hague Peace Conferences of 1899 and 1907,28 States met in order to strengthen

the collective capacity to promote peace and prevent war. To do so, they adopted the *Convention for the Pacific Settlement of International Disputes* to 'insure the pacific settlement of international differences' and established the Permanent Court of Arbitration ('PCA'). After World War I the Covenant for the League of Nations established the Permanent Court of International Justice ('PCIJ'), which operated from 1922 to 1946, as the first permanent international tribunal with general jurisdiction. It delivered opinions in 29 cases and 27 advisory opinions during this period. After World War II the United Nations ('UN') Charter established the International Court of Justice ('ICJ') as its principal judicial organ 'whose function is to decide in accordance with international law such disputes as are submitted to it.' This brief historical narrative serves to illustrate that the development of IDR and means for promoting peace through interna¬tional law are interconnected.

Today, the UN Charter provides the framework for understanding the modem international dispute resolution (IDR) regime. The fundamental purpose of dispute resolution is linked to the purpose of the United Nations 'to maintain international peace and security.' The UN Charter prohibits the threat or use of force unless it is authorized by the UN Security Council or necessary for self- defence. In addition, Article 2(3) requires Members to settle disputes peacefully, and Article 33 provides the list of available methods for doing so. These IDR methods have traditionally been grouped by type (diplomatic, legal, political), aim (prevention, management, resolution), and enforcement status (binding or nonbinding). They include negotiation, defined as direct communication between disputing parties for the purpose of reaching agreements that will settle or resolve a dispute, as well as legal methods of judicial settlement and arbitration (referred to collectively as adjudication). There are several diplomatic or non-legal third- party processes. Mediation is where an impartial third-party facilitates a process for effective communication of issues and interests with the aim of fostering problem solving between the disputing parties. Conciliation is a process where a third-party, typically in the form of a commission or panel, provides an impartial examination of the dispute and suggests settlement terms. Fact-finding and inquiry, often combined, offer tools for establishing the facts of a dispute in order to provide a foundation for additional IDR methods. In addition to these three methods, other approaches include facilitation, good offices, truth and reconciliation and peace-building. The methods for engaging in the pacific resolution of international disputes are intended for both legal disputes as well as for those that arise from armed conflict. These methods, along with the institutions that support their use, constitute the IDR regime that provides States, and increasingly non-State actors, with 'decision-making procedures.

Since the early 1950s a considerable body of literature has emerged around the concept and practice of the peaceful settlement of disputes, particularly in the UN context. While most of this literature is legalistic—tending to concentrate on the elaboration of Article 33 and its modalities—there now also exists a substantial pool of case studies examining the practical application of these techniques. Since 1990, analysis and advocacy of conflict prevention have effectively burgeoned, as successive Secretaries-General have seized upon the removal of the Cold War yoke to adopt a more activist approach to conflict prevention. *An Agenda for Peace,* Boutros Boutros-Ghali's response to the General Assembly's appeal for a revitalized UN role in this area, found resounding approval among member states. His successor, Kofi Annan, went further still, calling for the inculcation of a 'culture of prevention' within the UN, and elsewhere,[2] and the Secretary-General Antonio Guterres, whose tenure commenced

in January 2017, has pledged a commitment to ‘a surge in diplomacy for peace’ to combat the recent spike in political violence and disrespect for long established international norms.

This part of the module addresses two components of the core UN objective. The peaceful settlement of disputes is dealt with, which traces the development of pacific dispute settlement and examines the provisions under Article 2 (3) and Article 33 of the UN Charter. It then names the key actors and organs within dispute settlement, as well as the tools available for this purpose. Part Two turns to conflict prevention, tracing its underlying principles and conceptual evolution, policy acceptance, and growing and varied operational applications. The module concludes by raising some critical issues about the current state and future directions for the peaceful settlement of disputes and conflict prevention.

Global Security and Peaceful Settlement of Disputes

With a view to replacing aggression with cooperation in international relations, the United Nations has championed both the norm and practice of the peaceful settlement of disputes. Article 2 of the Charter lays out the principles under which the UN and its members are required to pursue the aims of Article 1. Article 2 (3) states that ‘all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.’ As noted by Bruno Simma, ‘the principle of the peaceful settlement of disputes occupies a pivotal position within a world order whose hallmark is the ban on force and coercion.’3 This principle, therefore, creates certain obligations for member states and responsibilities for the UN’s principal organs. States themselves bear primary responsibility for the pacific settlement of disputes, while the Charter enumerates institutional arrangements to facilitate the pursuit of this principle. The Charter’s emphasis on the peaceful settlement of disputes has been echoed and elaborated in subsequent declarations and resolutions. The ‘Friendly Relations

Declaration,’ set out in General Assembly resolution 2625 (XXV) of October 1970, attempted to specify the scope and content of the principle of the peaceful settlement of disputes. The Manila Declaration on the Peaceful Settlement of International Disputes of 1982 (approved in General Assembly resolution 37/10 of November 1982) provided a more detailed exposition, as it defined the substantive duties of states in peaceful dispute settlement, as well as the competencies of relevant UN organs. In resolution 40/9 of November 1985, the General Assembly appealed solemnly to all states to resolve conflicts and disputes by peaceful means.

The December 1988 General Assembly resolution 43/51, ‘Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in this Field,’ features preventive measures and represents an important milestone. It departs from the more restricted scope of Article 2 (3), which addresses only existing disputes, not potential ones. Similarly, Boutros-Ghali’s recommendations in An Agenda for Peace, reaffirmed in General Assembly resolution 47/120 of December 1992, highlighted within the pacific settlement of disputes the importance of preventive diplomacy, fact-finding, and involvement of the General Assembly, and urged states to find early solutions to disputes through peaceful means. The 2005 World Summit Outcome document devoted four paragraphs to the ‘Pacific Settlement of

Disputes,'4 reconfirmed periodically over the subsequent decade by world leaders—underlining the salience of peacemaking in intergovernmental practice today.

The Scope of Article 2 (3): The state obligation to settle disputes peacefully, enshrined in Article 2 (3) of the Charter, applies only to international disputes; indeed, at the founding 1945 United Nations Conference on International Organization held in San Francisco, the Four Powers (China, the Soviet Union, the United Kingdom, and the United States) saw to it that the word 'international' was added to the article, explicitly limiting the injunction to disputes of a trans-border nature, in deference to the principle of sovereignty.

'International' disputes, however, are not restricted to those between states: also applicable are those disputes involving other entities, including international organizations, 'de facto regimes, ethnic communities enjoying a particular kind of status under international law, national liberation movements,' and 'peoples who are holders of the right of self-determination.'5 This does not imply that a government is obliged to stand by as an insurgency movement grows or to initiate steps towards a peaceful resolution, unless the group has a legitimate right to self-determination.6 Non-state actors are also required to resolve disputes peacefully. Charges brought by an individual against a state for non-compliance with human rights obligations do not create an international dispute. Only when one party to a human rights treaty requires a second party to comply with its legal obligations might an international dispute arise.

A controversial question is whether reprisals and counter-measures can legitimately be used in instances where the dispute arose due to an unlawful act by one party. There is in general no prohibition on counter-measures, provided these do not entail the use of force and do not contravene ius cogens, or widely accepted norms codified in international law.7

Article 33: Intent and Scope: Article 33 (1) catalogs various methods to be employed by states to settle disputes pacifically: The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. Although usually interpreted as an elaboration of Article 2 (3), Article 33 (1) speaks more broadly of 'any dispute' without making any stipulations about its international scope. Further, it hints that internal disputes can jeopardize international peace and security. One explanation for this difference is that Article 33 was intended to address disputes in their incipient stages, prior to the activation of the UN. Article 33 also clarifies that, while it is the obligation of all states to resolve systematically and regularly all disputes through peaceful means, the UN organs are obliged to act only when international peace and security is in danger.

Article 33 (2) continues: 'The Security Council shall, when it deems necessary, call upon parties to settle their disputes by such means' (i.e., negotiation, enquiry, mediation, etc.). This article, therefore, also aims to demarcate the responsibilities of the parties to the conflict from those of the UN. 'First of all', it is the responsibility of parties to seek peaceful resolution; thereafter, the provisions of Chapter VI or Chapter VII apply. The responsibility to seek means of settling disputes peacefully extends not only to the states directly involved

in conflict but also to third party states that have the right to bring any issue to the Security Council or the General Assembly. Likewise, it applies to all entities that enjoy the protection of the ban on the use of force, such as national liberation movements and de facto regimes. Their responsibility continues even after armed hostilities begin. Nevertheless, states are not obliged to exhaust diplomatic options before approaching the International Court of Justice (ICJ) for legal remedy. Also, their responsibility continues even after they refer the matter to a UN body, or a UN body seizes it.

Measures for the Peaceful Settlement of Disputes: The Charter is very precise about the ways and means by which all member states must seek the peaceful settlement of disputes, with the use of force permitted only in self¬defense. Despite the injunction to use exclusively peaceful means, states may resort to such counter-measures as are acceptable under international law and the principles of the Charter. However, that counter-measures are in some instances permitted does not negate the fundamental obligation to refrain from the threat or use of force. The list in Article 33 (1) is not a prescriptive register of priorities but rather a set of options for realizing the peaceful settlement of disputes—indeed, as Simma observes, '[many] of these procedures are rarely resorted to or are even waiting for their first test of practice.'8 Several legal texts explain in detail each of the mechanisms put forward; particularly detailed is the manual developed by the UN's Legal Office, which provides comprehensive descriptions of each procedure. For the purposes of this chapter, a brief overview of the eight main categories is in order—negotiation, enquiry, mediation, conciliation, arbitration, international tribunals, regional organizations, and 'other peaceful means.'9

Negotiation: The tool of negotiation enjoys a special place among the pacific measures listed in Article 33 (1)—not least because negotiations are a universally accepted method of dispute resolution and possess several advantages. One important feature is flexibility: negotiations can be applied to conflicts of a political, legal, or technical nature. Moreover, since only the concerned states are involved, negotiation empowers the parties themselves to steer the process and shape its outcome to deliver a mutually accepted settlement. A key disadvantage of negotiation is its inherent basis in compromise between the parties, a drawback that often leads to the imposition of a solution by the stronger over the weaker party. The UN Legal Office manual provides a step-by-step guide to the different types of negotiation, as well as the phases, methods, and outcomes of each.11 In 1998, the General Assembly adopted resolution 53/101, 'principles and guidelines for international negotiations,' which underlines the duty of states to act in good faith in negotiations. Extensive literature addresses negotiation processes, styles, and outcomes.

Inquiry or Fact-Finding: Two parties to a dispute may initiate a commission of inquiry or fact-finding to establish the basic information about the case, to see if the claimed infraction was indeed committed, to ascertain what obligations or treaties may have been violated, and to suggest remedies or actions to be undertaken by the parties. These findings and recommendations are not legally binding, and the parties ultimately decide what action to take. A commission of inquiry may usefully be employed in parallel with other methods of dispute resolution—for instance, negotiation, mediation, or conciliation—as factual clarity is an important factor in any dispute resolution strategy. In 1991, the General Assembly adopted resolution 46/59, which contains detailed rules for fact-finding by organs of the UN,

and the UN Legal Office manual explains in detail the process and phases of inquiry.13 Notably, such commissions precede the UN, and originated in The Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907.14

Mediation and Good Offices: Mediation refers to the offer by a third party of its good offices to the parties to a dispute in the interest of seeking a resolution and preventing an escalation of the conflict. The third party mediator may be an individual, a state or group of states, or an international or regional organization. The function of the mediator is to encourage the parties to undertake or resume negotiations. The mediator may also proffer proposals to help the parties identify a mutually acceptable outcome. These good offices may be offered by the mediator, or solicited by one or both conflicting parties. A fundamental prerequisite is that all parties accept the mediator. Although Article 33 does not specifically use the term in its list of measures, 'good offices' is listed in the UN Legal Office manual, as well in other studies of dispute settlement, as a distinct method. However, the manual also notes that 'mediation' and 'good offices' can substitute for each other.

Conciliation: Conciliation combines fact-finding and mediation. A conciliation commission functions not only to engage in enquiry—to set out clearly the facts of the case—but also to act as a mediator, to propose solutions mutually acceptable to the disputing parties. Such commissions may be permanent, or temporarily established by parties to a particular dispute. The commission's proposals are not binding, but each party has the option of declaring unilaterally that it will adopt the recommendations. Several international treaties feature provisions for the systematic referral of disputes for compulsory conciliation. The 1969 Vienna Convention on the Law of Treaties articulated a procedure for the submission by states of requests to the UN Secretary-General for the initiation of conciliation. On 11 December 1995, the General Assembly adopted resolution 50/50, containing the UN Model Rules for the Conciliation of Disputes between States, which substantiates and clarifies conciliation procedures.

Arbitration: The most concrete achievement of the 1899 Hague Peace Conference was the establishment of the Permanent Court of Arbitration (PCA), located in the Peace Palace in The Hague. Arbitration represents a 'qualitative leap' over the other measures, as it necessitates the settlement of the dispute in accordance with existing international legal standards.20 Parties agree to submit disputes to arbitration, and thereby commit to respect in good faith the outcome, which is binding. The PCA, which is always accessible, has competence in all arbitration cases submitted to it by agreement of the parties involved. The PCA provides a list of arbitrators, appointed by states parties to the Hague Convention, from which parties submitting a dispute to arbitration can choose.

International Tribunals: The term 'international tribunals' refers to the International Court of Justice and other courts with international jurisdiction. Depending on the definition employed, there are currently between seventeen and forty international courts and tribunals.22 Normally, the decisions of an international tribunal are definitive and cannot be appealed—see, for example, Article 60 of the Statute of the ICJ.23 The advantage of permanent international tribunals over arbitral courts is that they are better situated than an ad hoc tribunal to become seized of a matter, since they already exist.24 Normally, cases brought to the ICJ cover: the interpretation and application of treaties; sovereignty over

territory and border disputes; maritime borders and other matters related to the law of the sea; diplomatic protection afforded to foreigners; the use of force; violations of contracts; and principles of customary international law.

Regional Agencies or Arrangements: Article 33 leaves scope for the referral of a dispute to 'regional agencies or arrangements,' which refers to both regional treaties and regional organizations. Chapter VIII is devoted to 'regional arrangements,' and their role in dispute settlement is addressed specifically in Article 52. The UN's dispute settlement manual describes the resolution mechanisms and procedures of the Arab League, the Organization of American States, the Organization of African Unity (now reconstituted as the African Union), the Council of Europe, the Conference on Security and Co-operation in Europe (now the Organization for Security and Co-operation in Europe, or OSCE), the European Communities (now the European Union), and the Economic Community of West African States (ECOWAS). Also mentioned are the European and American human rights systems, as well as the African Charter on Human and Peoples' Rights. If an agreement is unsuccessfully brokered by the regional body, the dispute may be referred to the Security Council.

Other Peaceful Means: Notwithstanding the extensive menu of measures listed in Article 33, the last item— 'other peaceful means'—effectively lifts any bar on options for action by the parties to a dispute. The UN's dispute settlement manual describes three categories of measures: The first category includes entirely original measures, such as consultations and conferences, or the referral of a dispute to a political organ or non-judicial organ of an international organization; **T**he second category features those cases in which states have adapted the methods named in Article 33, including, for example, when parties agree in advance that the report of a conciliation commission will be binding rather than non-binding; and * the third category contains instances in which a single organ employs two or more of the listed measures, such as when a treaty may provide for the progressive application of a range of methods.

Responsible Actors and Organs: Several actors and organs within the UN system have responsibilities in the peaceful settlement of disputes. Although Chapters VI and VII of the Charter focus on the role of the Security Council, the Council is by no means the sole agent in the peaceful settlements of disputes. In fact, the principal responsibility lies first with the parties to the conflict, who may settle the dispute themselves or refer it to any of the mandated international institutions. The secondary responsibility falls on the Security Council to call upon the parties to settle their disputes, including by those means set out in Chapter VI. Thereafter, the General Assembly may, under Articles 11 and 12, bring issues to the attention of the Security Council. Article 99 then empowers the Secretary-General to act to secure the peaceful settlement of disputes. Finally, the ICJ provides recourse to judicial remedy. The respective roles of the major actors and organs are discussed below.

Parties to the Conflict: Article 2 (3) creates an obligation 'primarily incumbent' on all UN member states that applies to all disputes, 'whether they are connected with the UN Charter or rooted in other subject-matters.'26 Since this principle has become an established part of customary law, states have the right to bring any dispute to the attention of the General Assembly or the Security Council, at any time. As such, the principle of peaceful means is

not optional, and states have a legal obligation to endeavor to settle their disputes through pacific means. However, while the principle obliges states to pursue peaceful outcomes in good faith, it does not oblige them to arrive at a particular result. Thus, a violation of the principle occurs when a state is proved to have worked against a peaceful outcome—not if states do not agree a resolution.

Security Council: As the principal UN organ with—in the words of Article 24 (1)—'the primary responsibility for the maintenance of international peace and security,' the Security Council has a central role in peaceful dispute resolution, once the parties themselves have proved unable or unwilling to negotiate a settlement. The Council's responsibilities are specified not only under Chapter VI but also under both Chapter VII, applicable in more acute situations requiring enforcement, and Chapter VIII, applicable to regional arrangements. Since the end of the Cold War the Security Council devoted greater attention and resources to dispute settlement, doing so with growing effectiveness, despite criticisms of inconsistency.27 This is manifested visibly in the surge in peacekeeping missions mandated by the Council since 1989, notwithstanding criticism of its failure to act more recently in Syria and eastern Ukraine. The Security Council also extended its purview to address—besides conflict prevention—humanitarianism, human rights, democratization, terrorism, violence against women, and armed non-state actors.

General Assembly: Although Chapter VI makes only passing reference to the General Assembly's role in the peaceful settlement of disputes, during the Cold War, the Assembly filled the gap in Council capacity to address conflicts. Most notably, during the Korean War, the General Assembly offset the gridlock among the permanent five arising from the end to the Soviet Union's boycott of the Security Council, and the latter's subsequent incapacitation. 'Uniting for Peace,' instituted in November 1950 by General Assembly resolution 377 (V), specifically authorized continued UN peace enforcement in Korea, stating: if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to members for collective measures, including in the case of a breach of peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.

Uniting for Peace has been invoked ten times, allowing the General Assembly to assume the mantle of the Security Council when it fails to act. However, with the post¬Cold War revitalization of the Security Council, the Assembly has been marginalized in dispute settlement, despite several calls from the Secretary-General and others for its more active role. During the 2003 deadlock over Iraq, several NGOs turned to Uniting for Peace for authority to be shifted from the Security Council to the General Assembly.29 Similarly, between 2012 to 2017, the General Assembly was unable to act to quell violence in Syria and eastern Ukraine, when the Security Council failed to do so.

Secretary-General: Charter Article 99 provides for the role of the Secretary-General within the pacific settlement of disputes. Successive Secretaries-General have taken an activist approach to this mandate, using their good offices and mediation efforts to contribute to

dispute resolution, as well as preventive diplomacy and conflict prevention. Indeed, the legacies of Secretaries-General are often evaluated by their success as mediators, and by extension by the degree of influence they enjoy, their political acceptability, and perceived neutrality. Each of the now nine Secretaries-General has sought to play a decisive role in the key conflicts of their respective tenures, albeit with varying success.31 This mandate has been exercised personally, but also through staff in the Secretariat and ad hoc appointments— in particular special envoys and special representatives.

The first incumbent, Norway's Trygve Lie, demonstrated the Secretary-General's dispute settlement function. A high-profile figure, he exercised his authority in the Korean War. His assertiveness incurred the hostility of the Soviet Union and brought about his resignation in 1952. Next, Sweden's Dag Hammarskjold developed a unique and skillful approach of 'combined public and private multilateral diplomacy.'33 He advocated preventive rather than corrective action, and was active particularly in the Congo conflict. However, Hammarskjold also alienated Moscow. Had he not died in a tragic accident in 1961, he might have struggled against Soviet opposition in pursuing his mandate.

The third Secretary-General, U Thant of Burma, was soft-spoken and given to quiet diplomacy. He successfully steered the Congo operation to completion, but was criticized for withdrawing the peacekeeping operation from the Sinai in 1967, under pressure from President Gamal Abdel Nasser of Egypt. Nevertheless, he is described as a 'courageous and skillful' Secretary-General who 'salvaged the prestige, independence and effectiveness of his office.' Next, Kurt Waldheim, of Austria, is judged as overly deferent to the major powers and too anxious about his reelection. His efforts in Cyprus, the Middle East, southern Africa, and elsewhere, are considered noteworthy.35

Javier Perez de Cuellar of Peru revived the UN Secretary-General's potential in conflict mediation and resolution. Although he attracted less publicity than his predecessors, his achievements are notable: the end of the Iran-Iraq war; Soviet withdrawal from Afghanistan; Namibian independence; the arduously negotiated Salvadoran peace agreements. Egypt's Boutros Boutros-Ghali's An Agenda for Peace revitalized debate on the UN's capacity to maintain international security. However, his outspoken positions, often countering some permanent five members, made him unpopular, and ultimately, they led to the non-renewal of his tenure. Kofi Annan, a career UN official from Ghana, worked vigorously to foster a culture of prevention. In 2001, in recognition of these efforts, the Nobel Peace Prize was awarded to Kofi Annan and the UN, and in 2005 he bolstered the UN's dispute settlement capabilities through the creation of the Mediation Support Unit (see below).

Similar to Kurt Waldheim, Ban Ki-moon's tenure is viewed as overly deferent to the great powers, resulting in a reluctance to employ Article 99 and his good offices actively for dispute settlement. However, as detailed in Part II of this chapter, the policy and operational development of conflict prevention made important strides between 2007 and 2016. This set the stage for a forward-leaning Secretary-General, Antonio Guterres of Portugal, to take office in 2017 and declare prevention as his top priority. The Secretary-General's Special Envoys, Special Representatives, and Mediation Support Unit Many successes attributed to particular Secretaries-General are in fact owed to the meticulous work and perspicacity of their special envoys and representatives. Though the latter now are mainly deployed in

support of post-conflict peacebuilding, several outstanding individuals, nominated by Secretaries-General as personal representatives to mediate conflicts, have made valuable contributions.36

At the 2005 World Summit, member states endorsed the Secretary-General's proposals to strengthen his capacity to bring his 'good offices' to bear in conflict prevention and resolution. Pursuant to this commitment, the Department of Political Affairs (DPA) created a Mediation Support Unit for UN peace envoys in the field.37 It provides, as an on-call resource to UN special envoys and representatives, a team of eight full-time mediation advisors, with specialized skills in such areas as constitutions, transitional justice, process design, gender and inclusion, and security arrangements. This is supplemented by a larger network of standby mediators. 'In addition to providing highly-valued training, the MSU has deployed expert mediators to complement UN negotiators with much-needed technical and mediation skills and innovative mediation methodologies, such as in support of the UN Secretary-General's peace envoy in Syria', explains Dr. Ibrahim Gambari, who oversaw the unit's creation when serving as UN Under-Secretary-General for Political Affairs.38

International Court of Justice: Established in 1945, the ICJ represents the last rung in the ladder of dispute settlement, providing for judicial remedy when enquiry, consultation, negotiation, and mediation have failed. The settlements of the ICJ are binding upon states parties; however, member states submit to the Court voluntarily, even if they have ratified its Statute. The differences between the ICJ and other international courts have been the subject of many scholarly examinations.39 So too have the proliferation of other international and ad hoc tribunals and their implications for the ICJ's authority.40 The ICJ has been criticized for not pulling its full weight. The ICJ is also often condemned as irrelevant because of a supposedly habitual noncompliance with its judgments. However, there are indications that, in fact, the ICJ generally enjoys a high degree of compliance. One review concluded that, of the judgments on fourteen contentious cases occurring after the Cold War, 'five have met with less compliance than the others, although no state has been directly defiant

Conclusion: Globalization presents changes, challenges and opportunities for the discipline of international dispute resolution and is redefining the paradigm for global peace and security. The UN Charter has served as guidance for the role of international dispute resolution in the 20th century. But a changing world order demands transforming old tools for a new era. Now is the time to advance international dispute resolution to meet the complexities of the 21st century.

MODULE - V

INTERFACE BETWEEN LAW AND TECHNOLOGY

MODULE V – INTERFACE BETWEEN LAW AND TECHNOLOGY

Humankind is in the midst of a colossal technological revolution. Technology is rapidly evolving, and it in turn is shaping and getting increasingly embedded in our own lives, histories and futures. Recent advances in the areas such as information technology and telecommunications technology are changing lives by offering new means of exchanging information, transacting business and influencing the economic and social clusters of societies around the globe.

These revolutions are considerably different from the previous technological revolutions in terms of rate of development, degree of interconnectivity achieved between individuals and societies, and scale of impact on the society. Information technology and its uses have grown exponentially over a relatively short period of time. It has brought business, governance and societal components into a single interconnected ecosystem. Further, it has completely overhauled business practices, governance structures and cultural interactions. One of the most remarkable elements of the knowledge based revolution is its limitless future possibilities.

It has ushered in an age of rapid innovation. While it has raised the standard of living by allowing the governments to deliver public services more efficiently and effectively, at the same time it has also tested the limits of governmental control by creating new forms of inefficiencies. This struggle is particularly visible when it comes to rule making. Inherent natures of legal systems and present technologically driven society and business are diametrically opposite. Laws and regulations are tailored to be stable and long-serving whereas current technologically driven global environment is in a constant flux. This dichotomy is manifested in number of areas and it adds to the uncertainty wrought by technological revolution.

Disruptive nature of the current technological revolution has made already uncertain future even more difficult to predict. For instance, information technology enabled e-commerce is projected to be the future of global trade, but the form of this commerce and its repercussions on job structure, poverty, standard of living, industry etc., are unclear. Another challenge is that technology can raise inequality across the world. One of the biggest tasks to be tackled in the 21st century will be to ensure that whatever be the impact of e-commerce, it is meted out in a fair and equitable manner. It should bridge the global North-South gap, instead of widening it.

The Relationship between Law and Technology: The relations between law and technology are both simple and exceedingly complex. At the most elementary level, technology consists in the application of labor to create a product, to generate a service or otherwise to produce a desired result. Technology develops as ways are found to produce new results or to produce old results using fewer or less costly inputs. Law is generally understood to exist as a set of rules adopted by a society's governing institutions that are applicable to all of its inhabitants.[50] All modern societies have established institutions

[50] See H.L.A. HART, THE CONCEPT OF LAW 89-96 (1961). Hart divides rules into "primary rules of obligation" and secondary rules. Primary rules are those that govern behavior and facilitate contracting and

charged with making determinations about the applicability and interpretations of these rules. They have also established institutions that enforce the rules. Law and technology interact when legal rules foster or retard the development of technology. They also interact when society decides that technology produces undesirable results and employs legal rules to contain or modify those results.

New and Emerging Technologies and its Legal Issues

Introduction: Significant technological advances are being made across a range of fields, including information communications technology (ICT); artificial intelligence (AI), particularly in terms of machine learning and robotics; nanotechnology; space technology; biotechnology; and quantum computing to name but a few. These breakthroughs are expected to be highly disruptive and bring about major transformative shifts in how societies function. The technological advances in question are driven by a digital revolution that commenced more than four decades ago. These innovations are centered on the gathering, processing, and analyzing of enormous reams of data emerging from the information sciences with implications for countless areas of research and development. These advances promise significant social and economic benefits, increased efficiency, and enhanced productivity across a host of sectors.

But there are mounting concerns that these technologies and how they are used will pose serious challenges, including labor force dislocations and other market disruptions, exacerbated inequalities, and new risks to public safety and national security. The technologies are mostly dual use, in that they can be used as much to serve malicious or lethal purposes as they can be harnessed to enhance social and economic development, rendering efforts to manage them much more complex.1 Relatively easy to access and use, most of them are inherently vulnerable to exploitation and disruption from both near and far.

In parallel, geopolitical tensions around the world are growing, and most countries increasingly view these technologies as central to national security. The potential for misuse is significant. And greater economic integration and connectivity mean that the effects and consequences of technological advances are far less localized than before and are liable to spread to countries and industries worldwide.

Technological innovation is largely taking place beyond the purview of governments. In many cases, the rate of innovation is outpacing states' ability to keep abreast of the latest developments and their potential societal impacts. And even if one or a handful of national governments devise policies for managing these effects, the global reach of many emerging technologies and their impacts requires new approaches to multilateral governance that are much more difficult to agree on. A greater number and variety of actors must be involved to initiate, shape, and implement both technical and normative solutions. Yet, like governments, many of these other actors do not have (or simply do not invest in) the means to consider the broader, cross-border societal implications of their investments, research, and innovations. When they do so, identifying the most relevant or effective policy-oriented or normative-focused platforms to discuss these implications can be challenging, not least because existing

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other fulfilling activities. Secondary rules are concerned with interpreting, applying, and enforcing primary rules.

platforms sometimes do not consider the variety of actors implicated, the cross-border reach of the technologies in question, and the different value and political systems at play. This is particularly the case when technologies are designed for profit-making alone and their trajectories are entirely dependent on market forces.

In short, since the invention of the agriculture in the Fertile Crescent, the humanity has witnessed continuous technological developments. Such developments affect the human society in positive and negative ways. For example, an airplane allows the quick transportation of passengers, whereas an atomic bomb provides its users with an opportunity to destroy entire nations. The governments put efforts to regulate technology in such a way as to enhance its positive effects and ameliorate its negative consequences. For example, there are governmental regulations related to the use of cookies (i.e., small files which are stored on a user's computer), drones, wearable devices (e.g., smart watches and Google Glass), and social networking platforms. The regulation of new and emerging technologies is not an exception.

Evolution of Technology:

Ancient Technology - Invention of ramp to aid construction processes; Bronze technology used in Mesopotamia; City planning and sanitation technologies in Indus Valley Civilization; Seafaring technology; Early Seismic detectors by Chinese Civilization; Water Lifting Technologies; Wheel Technology and so on. ***Medieval Technology*** - Renaissance and Reformation Movement. Invention of Printing Press; Sea Roots and Sea Trade; Vertical Windmill; Textile manufacturing; Paper making Technology; Steam Engine; Railway Transportation. ***Modern Technology*** - Broadband Internet Access; Quantum Computers; Nanotechnology; Biotechnology; Whole genome sequencing; Scramjets and Drones

Industrial Revolutions and Technology: The First Industrial Revolution started in Britain around 1760s, was about coal, water and steam, bringing with it the steam engine and innovations that enabled the large scale manufacturing of goods and products, such as textiles. Its impact on civilization was immense. The advent of the steam engine in the 18th century led to the first industrial revolution, allowing production to be mechanized for the first time, and driving social change as people became increasingly urbanized. The Second Industrial Revolution came about with the invention of electricity and enabled mass production. Dating from the late 1860s to early 1900s, it allowed much of the progress of the first industrial revolution to move beyond cities and achieve scale across countries and continents. The inventions of the semiconductor, personal computer and the internet marked the Third Industrial Revolution starting in the 1950s and 60s. This is also referred to as the "Digital Revolution." The Third Industrial Revolution was all about computers. Transistors, which eventually allow for the ultimate in scale: globalization. A third industrial revolution saw the emergence of computers and digital technology. This led to the increasing automation of manufacturing and the disruption of industries including banking, energy, and communications.

Fourth Industrial Revolution-4IR or Industry 4.0: Prof. Klaus Schwab, Founder and Executive Chairman of the WEF and author of a book The Fourth Industrial Revolution is instrumental of 4IR. 2016 article, Schwab wrote that "the 4IR has the potential to raise global income levels and improve the quality of life for populations around the world." He future

said “technological innovation will also lead to a supply-side miracle, with long-term gains in efficiency and productivity. Transportation and communication costs will drop, logistics and global supply chains will become more effective, and the cost of trade will diminish, all of which will open new markets and drive economic growth.” Schwab also suggested the revolution could lead to greater inequality, “particularly in its potential to disrupt labor markets.” Furthermore, the job market may become increasingly segregated into “low-skill/low-pay” and “high-skill/high-pay” roles, which could escalate social tension. According to Schwab, “the changes are so profound that, from the perspective of human history, there has never been a time of greater promise or potential peril.”

The Fourth Industrial Revolution will profoundly affect people’s lives as AI and increased automation see many types of jobs disappear. At the same time, entirely new categories of jobs are emerging. Strategic business and technology advisor Bernard Marr said that computers and automation will come “together in an entirely new way, with robotics connected remotely to computer systems equipped with machine-learning algorithms that can learn and control the robotics with very little input from human operators.”

He added, “Industry 4.0 introduces what has been called the ‘smart factory,’ in which cyber-physical systems monitor the physical processes of the factory and make decentralised decisions.” As the Fourth Industrial Revolution reshapes the future of work, businesses must prepare their people for the new world that lies ahead. This often means an increased focus on continual learning, building more on-ramps to new types of jobs, and a commitment to diversity.

The Fourth Industrial Revolution represents a fundamental change in the way we live, work and relate to one another. It is a new chapter in human development, enabled by extraordinary technology advances commensurate with those of the first, second and third industrial revolutions. These advances are merging the physical, digital and biological worlds in ways that create both huge promise and potential peril. The speed, breadth and depth of this revolution is forcing us to rethink how countries develop, how organisations create value and even what it means to be human. The Fourth Industrial Revolution is about more than just technology-driven change; it is an opportunity to help everyone, including leaders, policy-makers and people from all income groups and nations, to harness converging technologies in order to create an inclusive, human-centred future. The real opportunity is to look beyond technology, and find ways to give the greatest number of people the ability to positively impact their families, organisations and communities.

According to Professor Klaus Schwab the new age is differentiated by the speed of technological breakthroughs, the pervasiveness of scope and the tremendous impact of new systems. The Fourth Industrial Revolution covers wide-ranging fields such as Artificial intelligence, The Internet of Things (IoT), robotics, autonomous vehicles, 3D printing, nanotechnology, biotechnology, materials science, energy savings, computing, etc. A hyper connectivity-based intelligent technology revolution triggered by the development of artificial intelligence (AI), big data, and other digital technologies that is expected to give rise to innovative transformations in not only industries but also the national system, society, and people’s everyday lives.

It's important to appreciate that the Fourth Industrial Revolution involves a systemic change across many sectors and aspects of human life: the crosscutting impacts of emerging technologies are even more important than the exciting capabilities they represent. Our ability to edit the building blocks of life has recently been massively expanded by low-cost gene sequencing and techniques such as CRISPR; artificial intelligence is augmenting processes and skill in every industry; neurotechnology is making unprecedented strides in how we can use and influence the brain as the last frontier of human biology; automation is disrupting century-old transport and manufacturing paradigms; and technologies such as blockchain and smart materials are redefining and blurring the boundary between the digital and physical worlds.

Pros and cons of the Fourth Industrial Revolution:

Pros of Fourth Industrial Revolution: Fourth Industrial Revolution has the potential to raise global income levels and improve the quality of life for populations around the world. Technology has made possible new products and services that increase the efficiency and pleasure of our personal lives. Ordering a cab, booking a flight, buying a product, making a payment, listening to music, watching a film, or playing a game—any of these can now be done remotely. In the future, technological innovation will also lead to a supply-side miracle, with long-term gains in efficiency and productivity. Transportation and communication costs will drop, logistics and global supply chains will become more effective, and the cost of trade will diminish, all of which will open new markets and drive economic growth. Moreover, humanity is facing chronic social problems, such as low birthrates, population ageing, and environmental and transportation issues, which can be solved through intelligent service innovation, thereby improving people's quality of life and leading to the creation of new growth engines Through the intelligent technology-based enhancement of productivity, it is possible to overcome the limitations of capital and labor input, create new sources of growth, and increase the competitiveness of the service sector, including the healthcare and finance industries.

Higher productivity: In the next 5-10 years, it's estimated that productivity will increase by 5-8%. This is mainly because of increased automation. Improved quality of life: Technology has made possible new products and services that increase the efficiency and pleasure of our personal lives. One Channel CEO, Bernard Ford, exemplifies this by mentioning how "ordering a cab, booking a flight, buying a product, making a payment, listening to music, watching a film, playing a game" and even controlling the lights and temperature in our homes can be done remotely

New markets: a fusion of technologies that is blurring the lines between physical, digital, and biological spheres" will create new markets and growth opportunities. Lower barrier to entrepreneurship: new technologies such as 3D printing for prototyping, the barriers between inventors and markets are reduced. Entrepreneurs can now establish their companies and test various products with lower start-up costs without the traditional time and cost constraints often encountered with traditional prototyping methods.

The cons of the Fourth Industrial Revolution: *Inequality*: It is all about who gets the benefits of these technologies and of the results they help produce. For developing countries

there are technological and infrastructure challenges and skill challenges that are not easy to overcome.

Cyber security risk: When everything is connected, the risk of hacking data and tampering with it or using it for malicious intent is now more prevalent. It challenges the very nature of identity and privacy, especially with the increased use of data analytics and machine learning. Core industries disruptions: For example Taxis are competing against Uber, Traditional television and cinema compete with Netlfix and YouTube, the hotel industry with Air BnB and any store is competing against Amazon.

Ethical issues: With improved AI, genetic engineering, and increased automation, there are new ethical concerns and questions of morality. With access to more data about an individual and a group of individuals, the risk of using it for personal gain and manipulation is even greater at the same time, as the economists Erik Brynjolfsson and Andrew McAfee have pointed out, the revolution could yield greater inequality, particularly in its potential to disrupt labor markets. As automation substitutes for labor across the entire economy, the net displacement of workers by machines might exacerbate the gap between returns to capital and returns to labor. In addition to being a key economic concern, inequality represents the greatest societal concern associated with the Fourth Industrial Revolution.

Understanding New and Emerging Technologies: We all have been witnesses to the recent technological advancements which have made our lives easier and these have now become indispensible part of our daily lives. The technology is always evolving and changing. With this evolving it also brings new challenges as well. The term emerging technology encompasses the advanced and the newest technologies which includes various technologies such as Artificial Intelligence (AI), Additive Manufacturing (AM), Blockchain Technology, Big Data, Internet of Things (IoT), Virtual Reality (VR) Cognitive Technology, Cyber technology, Crypto Currency, Genetic Engineering Techniques, Social Networking, Geospatial data, Nanotechnology, various health techs, Hypersonic Weapons, Human-Computer Interaction, various Energy techs, Immersive Media etc. However, each of these technologies and many more to come have bring along with it numerous legal challenges as a consequence of which, law is said to struggle to keep pace with the latest technological developments.

As mobile devices have become more and more common, lawyers have been taking increasing advantage of the ability to work remotely. The days when lawyers were tied to offices are over. In the recent times when we are facing crucial challenges like fighting with Covid-19, work from home has become a mandate and it has been made possible due to the technological developments. Social media has become a legitimate tool for marketing and even doing business. Lawyers have increasingly come to embrace the power of social media and its potential for growing business.

New and Emerging Technologies: The term “New and Emerging Technologies” (NET) encompasses the most novel, advanced, and prominent innovations that are developed within various fields of current modern technology. The current examples of NET include, for example, zero-emission cars that run on hydrogen, next-generation robotics, genetic engineering techniques, developments in artificial intelligence; nanotechnology, social networking, etc.

The scope of the term "New and Emerging Technologies" (NET) has been in a process of continuous expansion. Two decades ago, most NET were related to artificial intelligence machines. The popularity of augmented reality, nanotechnology, Internet of Things, and 3D printing started growing at the beginning of the current century.

Irrespectively of their type, NET have serious social implications. They shape our homes, businesses, and governments. A large number of Facebook's 1,44 billion monthly actively users use social networking at home. One can visit a restaurant in London in which the menus are projected directly onto the tables and orders are submitted digitally to the kitchen. Government authorities have set up facial recognition systems allowing them to identify and monitor people attending public events.

Although NET certainly bring benefits to the humanity, they also pose challenges. For example, the physical objects comprising the Internet of Things can allow hackers to receive far more information about their victims than hackers currently can. The solutions to the challenges posed by NET are three, namely, (1) research, (2) development, and (3) regulation. In this article, we will focus on the latter solution only.

Legal Issues of New and Emerging Technologies: Major legal issues concerning the above technologies includes Privacy law (, i.e., the law that regulates the collection, use, processing, and disclose of personal information. Under most privacy laws, personal information is defined as information which identifies an individual or allows an individual to be identified), Security laws, determination of Jurisdiction, Liability, IP Protection laws (Copyright law, i.e., the law that governs the ownership and use of creative works; Patent law, i.e., the law that regulates the rights to inventions), Taxation law, use of e-evidence (i.e., the law that governs the proof of facts in legal proceedings) etc. For example, use of Artificial intelligence and the allied technologies raise many complex legal issues and challenges such as determining liability- whether civil or criminal liability would apply to a certain situation, personal injury claims etc. AI's ability to create works that would otherwise be recognised as IP created by a human raises questions as to who owns such IP, and moreover, who is liable when such works infringe another party's IPR?

Similarly, Block chain has the ability to cross jurisdictional boundaries as the nodes on a block chain can be located anywhere in the world can pose a number of complex jurisdictional issues. It has also implications for data privacy, particularly where the relevant data is personal data or metadata sufficient to reveal someone's personal details. Similarly, the laws dictating drone operations are complex, to account for all the ways drones are currently used and how they could be used in the future.

The New Emerging Technologies (NET) also poses challenges such as Security vulnerabilities threatening the privacy of NET users, Unlawful collection of personal data through social networking platforms, Using NET for unlawful surveillance etc.

The applicability of laws regarding the emerging technologies also raises questions such as which laws will be applicable in different scenarios due to the transborder nature of the crimes. What is further challenging is the transnational impact of these technologies. Technologies like these have raised major concerns on the issue of Privacy on the data it collects. Cross border impact of such technologies has often crippled the execution of laws

which have a territorial implementation. Managing such technologies from a legal standpoint now requires the attention and cooperation from international community including the international institutions.

Despite having a few laws regulating the issues emerging out of the use of new technologies, we do not have a clear legal framework to address all the issues. Those issues which can be regulated by Acts have lacunas which hamper the implementation of such acts.

Traditional and Modern New Technologies and Legal Issues: Major legal issues concerning "New and Emerging Technologies" (NET) are broadly two types: Traditional: Technology and its Impact on State Sovereignty, State Jurisdiction, State Responsibility, Privacy, Security. Modern: Technology Impact on legal issues regulating the use and mis-use of data, evidence, Protection of creative works, and inventions including IP, Mobile, Biometric mobile, Facial recognition technology, biotechnology, genetic testing, nanotechnology, synthetic biology, computer privacy, autonomous robotics etc.,

These technologies are generating fair amount of litigation, and presented concerns regarding the possibility of intrusive governmental surveillance and needs new approaches to ensure appropriate and timely regulatory responses. Advances in technology pose new challenges for international governance. In an increasingly inter-connected world, new technology raises legal issues relating to its use, distribution and control.

Legal Question: The existing legal regime is unable to deal effectively with new and innovative technologies are also raising lot of legal Questions like:

- Do machines have morality?
- What legal liability regime should we adopt for damages arising from these Technologies?
- Which ethical guideline should we adopt to orient its advancement?
- Is anticipative regulation justified for certain classes of risks in applications of these technologies?
- Should legal systems resort to the precautionary principle to avoid dealing with the risks of a rapidly changing technological trajectory?
- Are technology-based initiatives necessary, or is a product-specific approach more appropriate?
- Can a line be drawn between legal and ethical guidance in this context?

Internet and State Sovereignty: ***State Sovereignty, Sovereign Equality and International Law***: Traditionally, the concept of state sovereignty is evolved on the basis of boundary. Since the end of World War, the notion of state sovereignty has been interpreted on two levels: internal and external. Internal sovereignty means that a state has supreme jurisdiction over the people, resources, and all other authorities within the territory its control. On the other hand, external sovereignty means that the territorial integrity of a state is inviolate. Both levels of state sovereignty are centered the idea of frontiers.

The 1648 Peace of Westphalia, emphasized states' legitimacy over territory, the territorial state has marked the cornerstone of the modern international Relations and International Legal systems. The concept of sovereignty lies at the heart of the existence of all States.

It is a reflection of their "exclusive, supreme and inalienable legal authority to exercise power within their area of governance''. A sovereign State possesses legal, executive and judicial powers and has authority over its subjects within its territory, to the exclusion of all other States. In the past few years, evidence of the erosion of state sovereignty has increased. These challenge to the state's control powers to a great extent associated with the rapid development of communication technology. Two of these challenging forces to be investigated at the sections below are the free market and private corporation as well as the free flow of information and the media industry.

The debate is increasingly polarized among those who believe that the Internet undermines state sovereignty and those who believe that it strengthens liberal democracy. Concerning the Internet are

a) the confusion between privately owned digital networks and public digital space,
b) the multiple meanings of commercialization of the Net, and
c) the possibilities for regulating the Net.

The US government's "Framework for Global Electronic Commerce," a blueprint for Internet governance, argues that because of the Internet's global reach and evolving technology, regulation should be kept to a minimum. It also suggests that in the few areas where rules are needed, such as privacy and taxation, policy should be made by quasigovernmental bodies such as the World Intellectual Property Organization (WIPO) or the OECD. A common theme in the cyberspace literature is that the Internet constitutes a threat to the traditional cornerstone of international politics: the sovereign state.

What role the Internet plays in, and what impact it has on, national and global governance?

Recent development raises a host of technological, political, economic, anthropological, legal, and philosophical issues that emanate from the impact of the Internet and cyberspace on the sovereign state and conceptions of national and global governance.

The nature of each state is important, as is the philosophical basis for each state's conception of sovereignty. But philosophical assumptions, explicit and buried, also deserve critical attention to avoid complacency about the future role of the Internet in international relations.

The ongoing shaping of cyberspace into public and private digital spaces forces us to see the Internet as an arena in which power and legitimacy clash.

The Internet's potential for becoming the medium of a global marketplace and a forum for a collection of traditional and novel political activities is rapidly becoming reality. The growth in the use of the Internet has been one of the most interesting technological and political developments of the late twentieth century. Walter Wriston, writing about the revolution of the Information Age, stated that "sovereignty, the power of a nation to stop others from interfering in its internal affairs, is rapidly eroding."

Many forces today, such as trade, global capital flows, and environmental degradation, are thought to undermine sovereignty. The developing conventional wisdom seems to be that the Internet is joining the assault on sovereignty and will, perhaps more than any of the other globalization forces, contribute to relegating sovereignty and its traditional trappings to the

ash heap of history. It argued that developing conventional wisdom by arguing that the Internet has the potential to strengthen national and global governance-thus enhancing sovereignty rather than destroying it. From the perspective of national governance, the Internet can be harnessed to promote the Rule of Law, which is critical for good governance of societies all over the world. Globally, the Internet can contribute to international cooperation by: (1) strengthening international law; (2) strengthening economic interdependence; (3) empowering non-governmental organizations and improving their abilities to contribute productively to the development of international regimes designed to deal with global problems; and (4) supporting international security mechanisms.

Technology and State Jurisdiction:

The current Internet technology creates ambiguity for sovereign territory because network boundaries intersect and transcend national borders. At one level, this technologically-created ambiguity challenges sovereign jurisdiction. Yet, the evolution of the Internet's technological infrastructure is intertwined with sovereign jurisdiction because the relationship between technology and law is dynamic. As sovereign states grapple with the challenges of existing technologies, they still must protect their citizens in the online environment.

The debates over Internet jurisdiction, however, mask deep and fundamental objections to state authority. Jurisdiction fits within a broader struggle over the respect for the rule of law in the Information Society. In effect, jurisdiction over activities on the Internet has become one of the main battlegrounds for the struggle to establish the rule of law in the Information Society.

Parts of the Internet community have long sought to divorce the applicability of sovereign law from their online activities. While the days of Internet separatism have waned, many technology players continue to advocate in favor of legal immunity for online activities. Yahoo! exemplifies this view. As a proponent of technological immunity, Yahoo! believes that democratically chosen laws should not apply to its online activities. In the now famous French case, the U.S. company transmitted images of Nazi objects that were constitutionally protected in the United States, but illegal to display in France where the users were located and where Yahoo! targeted advertising. Yahoo! unsuccessfully argued that France did not have personal jurisdiction over the U.S. company because it was operating on the Internet from the United States and that French law did not apply to the images because they were stored on a server in the United States. Yahoo! also argued that the technology offered it no means to comply with French law. When the French courts rejected the technology-based defenses and ruled against Yahoo!, the company went forum shopping and sought to deny enforcement of the French order by suing for a declaratory judgment in federal court in California. In essence, the U.S. Internet company wanted to avoid the application and enforcement of a law it did not like in a country where it did business over the Internet. Although Yahoo! found a willing accomplice at the U.S. district court in the company's effort to obtain immunity from financial liability, the U.S. court of appeals overturned the lower court decision and held that the California court had no personal jurisdiction over the French parties and that France had every right to hold Yahoo! accountable in France.

With the advent of the internet and the transmission of information and transacting of business across borders, a host of issues have cropped up on the legal front. The traditional

approach to jurisdiction invites a court to ask whether it has the territorial, pecuniary, or subject matter jurisdiction to entertain the case brought before it. With the internet, the question of 'territorial' jurisdiction gets complicated largely on account of the fact that the internet is borderless. Therefore, while there are no borders between one region and the other within a country there are no borders even between countries. The computer as a physical object within which information is stored has given way to 'cyberspace' where information is held and transmitted to and from the 'web.' So where is this 'place' where the information is 'held'?

State jurisdiction implies the competence to prescribe rules of law, the jurisdiction to enforce the prescribed rules of law and the jurisdiction to adjudicate. Accordingly, it is of three types: legislative jurisdiction, executive jurisdiction and judicial jurisdiction. Although legislation is primarily enforceable within a State territory, it may extend beyond its territory in certain circumstances.

Civil Jurisdiction: the state has a right to exercise civil jurisdiction in respect of all who are found on its territory. Criminal jurisdiction: an analysis of the national codes of criminal law and criminal procedure and the writings of international publicists disclose five general principles on the basics of which the criminal jurisdiction is claimed by states at present - Territorial principle, Nationality principle, Protective principle, Universality principle, Passive personality principle.

Internet and Jurisdiction: "Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location.

The rise of the global computer network is destroying the link between geographical location and: (1) the power of local governments to assert control over online behavior; (2) the effects of online behavior on individuals or things; (3) the legitimacy of a local sovereign's efforts to regulate global phenomena; (4) the ability of physical location to give notice of which sets of rules apply.

The NET thus radically subverts the system of rule-making based on borders between physical spaces, at least with respect to the claim that Cyberspace should naturally be governed by territorially defined rules." In other words the international legal system's traditional rules for jurisdiction depend on localization of conduct or harm. The Internet challenges all three kinds of jurisdiction: prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction, because it is difficult to localize legally relevant conduct occurring in the Internet. The NET creates ambiguity for sovereign territory because activities transcend national borders and boundaries. For example, jurisdiction over activities on the Internet has become a battleground for the struggle to establish the rule of law in the Information Society.

'Denial of service' -- initial wave of cases seeking to deny jurisdiction, choice of law and enforcement to states where users and victims are located constitutes a type of 'denial of service' attack against the legal system. In effect, the defenders of hate, lies, drugs, sex, gambling and stolen music use technologically based arguments to deny the applicability of rules of law interdicting their behavior. Are innovations in information technology going to undermine the technological assault on state jurisdiction?

Some of the earliest attempts to reject state authority relate to personal jurisdiction. In the United States, courts have had great trouble figuring out how to apply traditional jurisdiction principles to Internet activities. To satisfy the Due Process Clauses of the U.S. Constitution, a defendant must have sufficient minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" The Supreme Court, in ***Asahi Metal Industry Co. v. Superior Court***,[51] was more exacting, and limited personal jurisdiction to cases in which the defendant "purposely avail[s]" himself of the forum. In essence, as the Supreme Court also held in ***World-Wide Volkswagen v. Woodson***,[52] personal jurisdiction is subject to a test of reasonableness. Similar standards exist in foreign states where a court's competence to hear the case depends on the defendant's nexus with the forum state. For example, the Brussels and Lugano Conventions on jurisdiction for intra-European disputes look to various forms of contact between defendants and the state asserting jurisdiction.

Personal jurisdiction*:* In the Internet context, defendants have generally claimed that a remote forum is precluded from jurisdiction because the contacts are only established through a server that is not within the forum. Defendants assert that their activities are not directed at the forum state. This type of argument challenges the very ability of sovereign states to protect their citizens within their borders from online threats. Among the early U.S. cases, the Western District of Pennsylvania in ***Zippo Manufacturing v. Zippo Dot Com, Inc.***[53] distinguished between active and passive web sites and held that remote, passive web sites did not accord personal jurisdiction to the forum. More recently, courts have looked to online targeting and to deleterious effects within the forum to determine if personal jurisdiction is appropriate. The effects approach is also gaining currency outside the United States. In ***Dow Jones & Co. v. Gutnick,***[54] the High Court of Australia subjected Dow Jones to suit in Australia for defamation in that country under Australian law arising from a web posting on a U.S.-based server. Likewise, the High Court of Justice in the United Kingdom found that Governor Arnold Schwarzenegger's campaign manager could be sued for defamation in the British courts as the result of statements about a U.K. resident that appeared on a newspaper website in the United States.

One of the advantages of the Internet over other methods of communication and commerce is that it enables access to a much wider, even a worldwide, audience. Spatial distance and national borders are irrelevant to the creation of an Internet business and sales horizons across borders. In a sense, a person can be everywhere in the world, all at once. This ease of communication raises a vital legal question, when a person puts up a website on his home server and allows access to it from all points on the globe, does he subject himself to the governance of every law- and rule-maker in the world? Under the current system, in order to decide what state's or nation's laws govern disputes that arise over Internet issues, a court first must decide "where" Internet conduct takes place, and what it means for Internet activity to have an "effect" within a state or nation.

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[51] 480 U.S. 102, 112 (1987)

[52] 444 U.S. 286, 297 (1980) (holding that a defendant needs to have "conduct and connection with the forum State . . . such that he should reasonably anticipate being haled into court there").

[53] 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

[54] 6 (2002) 210 C.L.R. 575 [Austl.], available at http://www.4law.co.il/582.htm

Even apart from the Internet, this border-centric view of the law creates certain difficulties in an economy moving toward globalization. Entire bodies of law have been developed by every nation to deal with the resolution of international conflicts of law, conflicts that arise when geography and citizenship would allow a dispute to be decided by the laws of more than one country, and the laws of those countries are not consistent with each other. Conflicts of law are particularly likely to arise in cyberspace, where the location of an occurrence is never certain, where ideological differences are likely to create conflicting laws, and where rules are made not only by nations and their representatives, but also by sub-national and transnational institutions.

Choice of Law: The next type of attack against sovereign authority seeks to deny the applicability of the substantive law if it is not the law of the place where the Internet activity was launched, such as the place where the server is located. This blanket denial of prescriptive jurisdiction undermines the basic objective of conflict of laws jurisprudence, which is to avoid forum shopping and promote an efficient resolution of disputes when cases have international dimensions. Network technology pushes the localization of activities for choice-of-law purposes toward the transmission end-points. However, the attack against the law where users are located encourages forum shopping, to locate the infrastructure for the conduct of Internet activities within legal safe havens.

Sovereign authority, nevertheless, asserts itself against Internet activists. In ***Twentieth Century Fox Film Corp. v. I Crave TV,***[55] a film studio fought successfully to apply U.S. copyright law to streaming video on the Internet and obtained an injunction against a Canadian service that could legally stream video in Canada from servers in Canada. In France, the Yahoo! court determined that the French penal code applied to Yahoo!'s activities because the illegal content could be visualized in France. The United Kingdom recently followed the same approach in a libel case, finding the place of downloading dispositive for the choice of law. For privacy, the Children's Online Privacy Protection Act in the United States contains a choice of law provision in its definitions that applies the protections of the American statute to any website, regardless of its place of origin, that collects personal information from children. The European Directive on data privacy contains a similarly expansive choice of law rule that purports to apply European substantive law to any organization that uses means within the European Union to collect personal data.

Enforcement of judgments: The recognition of foreign judgments in these attack cases will often be problematic. As the Yahoo! case illustrated, public order rules at the place where Internet activity is launched may conflict with those of the place where the activity has its effects. Even the international conventions on recognition of foreign judgments provide an exception to enforcement when there is a conflict with the public order of the enforcing state.

Courts are also especially ill-equipped to evaluate the nuances of foreign public order decisions. The Yahoo! case illustrates this difficulty particularly well. At the district court level, Yahoo! introduced a misleading translation of the French decision.[56] The key passage

[55] Nos. Civ.A. 00-121, Civ.A. 00-120, 2000 WL 255989, at *3 (W.D. Pa. Feb. 8, 2000)

[56] The translation of the French opinion was prepared for the U.S. court by one of the French attorneys representing Yahoo!'s French subsidiary in the French proceeding. Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 169 F. Supp. 2d 1181, 1185 (N.D. Cal. 2001) ("translation attested accurate by Isabelle

of the order in the French version was translated word-for-word with the exception of a qualifying phrase. This qualifying phrase was simply omitted in the English translation. The original court decision ordered Yahoo!: *"de prendre toutes les mesures de nature à dissuader et à rendre impossible toute consultation sur Yahoo.com du service de ventes aux enchères d'objets nazis."* This was translated as "to take all necessary measures to dissuade and render impossible any access via Yahoo.com to the Nazi artifact auction service . . . ." Instead of properly translating measures de nature as either "available measures" or "the type of measures," the translation for the U.S. court ignored "de nature" and added the word "necessary," a term that does not appear at all in the original language. The effect of this distorted translation is to convert the filtering obligation from one of good faith efforts that is found in the original to one of successful results in the translation. At the same time, the translation distorted the term "Nazi objects" by translating it as "Nazi artifacts." This distortion creates an implication not found in the original text that the items had historical value. Such distortions in translation can serve to increase the sense of conflict over public order values. Indeed, the display of Nazi artifacts with historical connotations is expressly permitted by the French law

Implementation of NET/NEST in India:

In January 2020, the Ministry of External Affairs (MEA) took the progressive step to establish India's first, New and Emerging Strategic Technologies (NEST) division. The development comes close on the heels of the government allowing all network equipment makers, including Huawei, to participate in 5G trials. NEST will act as the nodal division within the ministry for issues pertaining to new and emerging technologies. It will help in collaboration with foreign partners in the field of 5G and artificial intelligence. Its mandate shall include, but not be limited to, evolving India's external technology policy in coordination with domestic stakeholders and in line with India's developmental priorities and national security goals. It will also help assess foreign policy and international legal implications of new and emerging technologies and technology-based resources, and recommend appropriate foreign policy choice. Many of the new and emerging technologies have significant implications for diplomacy, national security and global rule-making. NEST will negotiate technology governance rules, standards and architecture, suited to India's conditions, in multilateral and plurilateral frameworks.

Emerging technologies are generally used to refer to advanced and futuristic technology at a given point in time. While thirty years ago it would have referred to the Internet, today it means artificial intelligence, biotechnology, nanotechnology, 3D printing and quantum computing. These technologies are crucial for giving impetus to innovation, economic progress and social development, and can place early adopters at the head of the pack by leapfrogging traditional barriers to development and ushering in unprecedented technological advancement. Security concerns may be attached to the technology itself, such as health risks connected with biotechnology, or cyber security risks associated with the Internet of Things (IoT), and need to be addressed through a different policy approach. On the other hand, dual use and disruptive technologies — which refers to tech that can enhance military and offensive capability — can also significantly undermine India's strategic interests.

Camus, February 16, 2001"), rev'd 379 F.3d 1120 (9th Cir. 2004), reh'g en banc granted 399 F.3d 1010 (9th Cir. 2005)

Going forward, the NEST division has its work cut out for it. Apart from looking at the form and substance of what the division can do, the initiative can also provide a platform to engage with specialists and trained professionals to frame emerging technology-related policies. This is where the division can be truly experimental; that is, by adopting a cross-sectional approach that not only considers economic, security and technical aspects, but also makes efforts to engage with both public and private stakeholders to frame meaningful policies. When it comes to navigating an uncertain world fraught with geopolitical rivalries and rapidly evolving technologies, the many challenges to India also give it an opportunity to demonstrate its inventiveness towards approaching new foreign policy questions.

General Legal issues that arise in Application of such Technologies:

With the advent of new technologies our lives have become very easy. The technology is always evolving and changing. With this evolving it also brings new challenges as well. The term emerging technology encompasses the advanced and the newest technologies which includes various technologies such as Artificial Intelligence (AI), Additive Manufacturing (AM), Blockchain Technology, Big Data, Internet of Things (IoT), Virtual Reality (VR) Cognitive Technology, Genetic Engineering Techniques, social networking etc. These technologies although are considered boons for the societal development also pose certain risks when misused. Some of the issues are discussed below:

1. **Determination of Jurisdiction:** The most important issue that calls for attention is the issue of jurisdiction. Now this issue poses a difficult challenge while determining jurisdiction of cyber space. In case of online transaction determining jurisdiction becomes difficult because of the fact that in case of online jurisdiction multiple parties reside in different places and whether the jurisdiction lies on the place where the cause of action arises or on the place where parties reside becomes an issue. Also there are other challenges as well where the hackers hack into the system from somewhere else and do some unlawful activity and also in cases of deep fakes where the images can be morphed and circulated. The main concern is that these crimes are trans-border crimes in nature so determination of jurisdiction poses real threat.
2. **Admissibility of evidence:** Another issue that needs attention while addressing the emergence of new technology is the admissibility of evidence. In general cases the online evidence is not admissible in courts. The gathering of evidence without the authorization also seems difficult. Another issue which is very concerning in present time is the authenticity of such evidence given the fact that the hackers can hack into any system and alter or modify information at any given time.
3. **Privacy:** Privacy becomes another issue when we speak about the new emerging technology. Some of the technologies may have pre-installed malware which might make the security vulnerable and by the use of social network platforms it becomes easier for the hackers to get access to the personal data and there are also a few technologies like RFID or the Beacons technology which allows the hackers to transfer data which automatically identifies the tags attached to objects using radio frequency signals.
4. **Copyright infringement:** The holder of Intellectual property rights such as copyright and patent also face numerous challenges as well. Sometimes the copyrighted material gets published online without the permission of the author and if it contravenes the

doctrine of 'fair use' then it becomes unlawful. The person who uses whole or substantial part of copyrighted material without permission will be liable for copyright infringement. Data piracy can also be an example of this. There are also controversies related to patenting software as well.

a) Unlawful use of user-generated content created by NET;
b) Unlawful publication of copyright content on social networks; and
c) Unlawful collection of copyrighted content from social networks.

5. **Cyber warfare:** Not only these issues, there also are a lot of controversy regarding the emerging technologies which are military in nature such as the introduction of cyber warfare and also emergence of new technologies as well to potentially enhance the performance of a soldier. Also the introduction of nanotechnology such as mini robots and micro sensor nets despite providing facilities like carry devices and water from any environment, doesn't provide the immunity against heavy explosive weapons or nuclear weapons.
6. **Healthcare facilities:** Even in health care sectors we have seen the news of robot assisted surgeries in the recent past and also to reduce the work load of the employees in the hospital and to make it more efficient and save time the records of patients have also made to be digitalized in the hospitals. There have been numerous cases where errors were detected in test results and in a few cases the records were also found to have been tampered with. The issue of who should bear the liability in these cases remained unanswered.
7. **Applicability of Laws:** The applicability of laws regarding the emerging technologies is that the crimes being trans-border in nature, the question arises as to which laws will be applicable in different scenarios. We have different laws for regulating these different situations that might arise. Such as we have copyright Act and Patent Act to regulate the copyright infringements and patent law infringement. for addressing the jurisdictional issues on cyber law, we have the Information Technology Act, 2008.

Regarding Health Law, India is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Supreme Court held that Article 21 of the Constitution of India in relation to human rights has to be interpreted in conformity with international law. Further, Article 25 [2] of the Universal Declaration of Human Rights and Article 7 (b) of the International Covenant on Economic, Social and Cultural Rights have been cited by the Supreme Court while upholding the right to health by a worker. These covenants find statutory acceptance in the Statement of Objects and Reasons of The Protection of Human Rights Act, 1993. In addition, human rights commissions are empowered to study treaties and other international instruments on human rights and make recommendations for their effective implementation. In the recent past, many complaints of alleged medical negligence and deficient service by private and government hospitals and medical professionals have been filed with the national or state Human Rights Commissions.

Regarding Privacy, although we don't have any direct laws regulating privacy but privacy has been guaranteed as a fundamental right under article 21 of the Indian constitution and also for data protection the Information Technology Act can be used as well.

Despite having a few laws regulating the issues emerging out of the use of new technologies, we do not have a clear legal framework to address all the issues. Those issues which can be regulated by Acts have lacunas which hamper the implementation of such acts.

Ethical Issues: Lastly, we need to address the ethical issues concerning the emerging technologies that arise in certain circumstances. Now when we get choices to go for corrective therapy to change appearances, intelligence or even sexual orientation, the question remains how far the technology should be used while not crossing the ethical and moral boundaries.

A Few Specific Emerging Technologies and Legal Issues:

This part is further divided into 4 sub- parts. This part will discuss the issues related to data and its various aspects and usages. The first part talks about Data flow, followed by Data analysis and Data Usages with a discussion on Data- Gray parts in the last part.

Data Flow: Concept and Applications:

Data- Meaning and Types: Data has earned monikers like the new oil, new currency and lifeblood of the digital economy. There is no exhaustive definition of data. In a general sense, it is described in terms of numbers, characters, symbols, images, sounds, and electromagnetic waves, bits – that constitute the building blocks from which information and knowledge are created. In the context of digital world, data can be understood as all the information generated and collected during an online activity. It includes information directly provided by the user; information indirectly and automatically produced regarding sites visited, time spent online, products bought and sold etc.; and information produced upon analysis of direct and indirect information. Data can be classified into various categories on the basis of source, nature and method of collection:

i. Data can be distinguished into *captured data* and *exhaust data* on the basis of the source. Captured data is the deliberate product of measurement i.e. information intentionally and directly captured such as name, address, credit card details etc. On the other hand, exhaust data is a by-product of the main function rather than the primary product i.e. online imprint left by the user in the form of websites visited, videos watched, posts liked etc.
ii. Based on the method of collection data is categorised into active and passive data. Active user data collection, involves explicitly asking users for information, preferences, and opinions. While users are often reluctant to enter information due to time and privacy issues, if the Websites can offer some service or product in return for the information, users may be compelled to provide some level of information to the site. It is also called volunteered data. In contrast, passive data is the trail of data produced automatically during an online activity. It is a by-product of everyday technological existence. Passive data collection requires no explicit action on the user's part and in fact, user often has little awareness of the data collection effort. It uses the interactions between Web clients and servers to collect and store information about the user actions or reactions to information provided on a Web site. As a result, this information – and its intrinsic monetary value – often goes unnoticed by Internet users. It is also known as automated data. In short, automated data is generated as an inherent, automatic function

of the device or system, whereas volunteered data is traded or gifted by people to a system.

iii. Based on the nature of the data, it is categorized into *personal* and *non-personal data*. European directive defines personal data as "any information relating to an identified or identifiable natural person ("data subject")". It further defines identifiable person as one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity. *Non-personal data* is data which does not lead to identification of a particular person. *Personal data* is considered sensitive data due to deep ramification of its misuse.

iv. Another category of data is ***Big Data.*** As per Rob Kitchin, any data is classified as Big Data if it possesses these characteristics- huge volume, consisting of terabytes or petabytes of data; high velocity, being created in or near real time; extensive variety, both structured and unstructured; exhaustive in scope, striving to capture entire populations of systems; finegrained resolution, aiming at maximum detail, while being indexical in identification; relational, with common fields that enable the conjoining of different data-sets; flexible, with traits of extensionality (easily adding new fields) and scalability (the potential to expand rapidly). The key features of *Big Data* are three Vs – volume, velocity and variety. That is, data must be huge in volume, collected at rapid velocity in real time and contains information from wide variety of sources. Radical expansion and integration of computation, networking, digital devices and data storage has provided a robust platform for the explosion in big data, as well as being the means by which big data are generated, processed, shared and analysed.

It is important to note that ***Big Data*** and personal data do not always overlap. If Big Data sources personal information such as credit card details, user name, location, and health record it is called *personal Big Data*. On the other hand, ***Big Data*** may purely comprise of *non-personal data* like traffic data, astronomical data, weather and climate data, and crop pattern data and is not attributed to single entity or person.

Big data related activities can lead to privacy breach i.e. identification of an individual in three scenarios:

a. If it contains personal data.
b. If personal data contained in Big Data is not sufficiently anonymised. Here 'anonymised' means making it impossible to identify an individual from the data itself or from that data in combination with other data, taking account of all the means that are reasonably likely to be used to identify them. If anonymisation is not sophisticated enough, re-identification tools can be used to reverse it.
c. Personal data may be obtained by combining separate anonymous Big Data sets

In recent years, use of Big Data has increased considerably in private and public sector. Major beneficiaries of Big Data are public sector services, healthcare sector, insurance services, transportation services and banking sector.98 It is used to analyze claims and transactions in real time, identifying large-scale patterns across many transactions or detecting anomalous behaviour from an individual user, to detect fraud. It also uses data collected from social media to provide real-time insights into how the market is responding to products and campaigns. With those insights, companies adjust their pricing, promotion,

and campaign placement on the fly for optimal results. Companies such as DataSift provide marketing insights by collecting data from Twitter (via Twitter's GNIP service), Facebook and other social media. Big Data is also used for keeping patient history, disaster response and preparedness, traffic management, preparing population estimates etc.

Data Analysis and role of AI: Data in itself is not valuable unless it is processed and converted into actionable results. The value derived from Big Data is partially a function of amount of data created, but more due to ability to use that data in real time to make smarter, more efficient decisions. This ability comes from data analytics. Data analytics is a sub-area of Big Data which comprises of process of converting raw data into valuable resource. It can be described as taking Big Data and creating predictive model to obtain actionable insights. Companies and governments then base their decision on such insights. Rob Kitchin lists four types of data analysis, namely data mining and pattern recognition; data visualisation and visual analytics; statistical analysis; and prediction, simulation and optimisation.

A discussion on data analytics is incomplete without examining artificial intelligence (AI). AI is also a method of data analytics. However, it stands apart from other methods due to its ability to learn from the data in order to respond intelligently to new data and adapt its outputs accordingly. This unique ability enables AI to cope with the analysis of big data in its varying shapes, sizes and forms.

Its objective is to make informed choices and conduct tasks after analyzing the repercussions of choices like a human being. Like all software, AI works with the data provided through an interface of a data source and a pre-determined algorithm. These algorithms are created with the help of machine learning. Machine learning is defined as "…the set of techniques and tools that allow computers to 'think' by creating mathematical algorithms based on accumulated data." Thus, machine learning is a tool to create AI. Further, the amount of data created plays a great role in the efficiency of AI. As the amount of data that informs AI grows exponentially, AI will grow exponentially more accurate and be able to parse the smallest detail. Thus, the complexity of the input source and the sophistication of the algorithm are the deciding factors in the development of an AI system.

There are two types of AI- narrow and general. Narrow or weak AI is designed to perform narrow tasks such as facial recognition or internet searches. However, the long-term goal of the field of AI is to create general AI (AGI or strong AI). While narrow AI may outperform humans at specific tasks like chess or mathematical equations, AGI, if materialized, is expected to outperform humans at nearly every cognitive task.

The design of an AI system has been outlined to imitate the workings of a human brain. This involves a complicated mix of various disciplines such as Computer Science, Biology, Psychology, Linguistics, Mathematics, and Engineering. In order to make a machine replicate the reasoning, learning and problem solving abilities of a human brain, scientists have been trying to replicate in machine code the way a human brain produces new neural networks as a person learns a new skill, performs multiple tasks simultaneously and prioritizes them.

In Canada, the Treasury Board Secretariat of Canada (the "Board") is looking at issues around the responsible use of AI in government programs and services.[12] On March 2, 2019,

the Board released a Directive on Automated Decision-Making, which takes effect on April 1, 2019, to ensure that AI driven decision-making is compatible with core administrative law principles such as transparency, accountability, legality, and procedural fairness.[13]

To grasp an understanding of the legal aspects of AI, one of the central questions will be how the law will evolve in response to AI. Will it be through the imposition of new laws and regulation or will it be through the time-honoured tradition of having our courts develop new laws by applying existing laws to new scenarios precipitated by technological change?

AI has already been used and accepted in a number of US decisions. In *Washington v Emanuel Fair*, the defence in a criminal proceeding sought to exclude the results of a genotyping software program that analysed complex DNA mixtures based on AI while at the same time asking that its source code be disclosed. [14] The Court accepted the use of the software and concluded that a number of other states had validated the use of the program without having access to its source code. In *State v Loomis*, the Wisconsin Supreme Court held that a trial judge's use of an algorithmic risk assessment software in sentencing did not violate the accused's due process rights, even though the methodology used to produce the assessment was neither disclosed to the accused nor to the court.

In Canada, litigation involving AI is in its early stages. In 2018, the *Globe and Mail* reported that a lawsuit involving an AI system had been commenced in Quebec. Adam Basanta created a computer system that operates on its own and produces a series of randomly generated abstract pictures. Mr. Basanta was now being sued in Quebec Superior Court for trademark infringement because of an image created by the system. Amel Chamandy, owner of Montreal's Galerie NuEdge, claimed that a single image from Mr. Basanta's project *All We'd Ever Need Is One Another* violated the copyright on her photographic work *Your World Without Paper (*2009*)* and the trademark she owns associated with her name.

AI is also being utilized to render judicial decisions. In Argentina, AI is being used to assist district attorneys in writing decisions in less complex cases such as taxi licence disputes that presiding judges can either approve, reject or rewrite. Using the district attorneys' digital library of 2,000 rulings from 2016 to 2017, the AI program matches cases to the most relevant decisions in the database, which enables it to guess how the court will rule. Thus far, judges have approved all of the suggested rulings—33 in total.

Now we will discuss some of the issues that arise during the application of AI. Below, are a few examples.

I. Data Privacy

The enactment of the European Union (EU) General Data Protection Regulation (GDPR) raised some concerns for organizations collecting Big Data, a term that has come to be synonymous with large data sets that fuel machine learning. Just like the GDPR in the EU, the recent Personal Data Protection Bill 2018 (Data Privacy Bill) in India, intends to make organizations accountable for the personal data processed and stored by them. For instance, the Data Privacy Bill has expanded the applicability of processing-related requirements by importing a wider definition to ‘personal data’. Moreover, the Data Privacy Bill gives the

data principal (i.e. the person whose data is collected) the right, inter alia, to have his information erased. Such requirements are bound to pose challenges for Big Data.

II. Torts

Machine learning constantly evolves, making more complex decisions based on the data it operates on. While most outcomes are anticipated, there is the distinct possibility of an unanticipated or adverse outcome given the absence of human supervision. The automated and artificial nature of AI raises new considerations around the determination of liability. Tort law has traditionally been the mechanism used in the law to address changes in society, including technological advances. In the past, the courts have applied the established analytical framework of tort law and have applied those legal principles to the facts as they are presented before the court.

We start the tort analysis with the following questions: Who is responsible? Who should bear liability? In the case of AI, is it the programmer or developer? Is it the user? Or is it the technology itself? What changes might we see to the standard of care or the principles of negligent design? As the AI evolves and makes its own decision, should it be considered an agent of the developer and if so, is the developer vicariously liable for the decisions made by the AI that result in negligence?

The most common tort—being the tort of negligence—focuses on whether a party has a duty of care to another, whether the party has breached the standard of care, and whether damages have been caused by that breach. Reasonable foreseeability is a central concept in negligence. Specifically, the test is whether a reasonable person is able to predict or expect the general consequences that would result because of his or her conduct, without the benefit of hindsight. The further that AI systems move away from classical algorithms and coding, then they can display behaviours that are not just unforeseen by their creators but are wholly unforeseeable. When there is a lack of foreseeability, are we placed in a position where no one is liable for a result, which may have a damaging effect on others? One would anticipate that our courts would respond to prevent such a result.

In a scenario where there is a lack foreseeability, the law might replace its analysis based on negligence to one based on strict liability. The doctrine of strict liability also known as the rule in *Rylands v Fletcher* provides that a defendant will still be held legally responsible when neither an intentional nor a negligent act has been found and it is only proven that the defendant's act resulted in injury to the plaintiff.

Should a negligence analysis remain, then the standard of care requirements will need to be redefined in an AI context. Some of the following questions will be central to the court's consideration:

1. Is the decision-making transparent so that the court can determine how the "black box" reached the outcome it did?

2. What steps were taken to monitor outcomes arising from machine learning?

3. Was the integrity and quality of the data appropriate for the purpose for which it was intended?

4. Was the data used representative or does it promote bias and/or discrimination?

5. Was the algorithm appropriately designed to guard against unintended outcomes?

One can envisage a growth industry in negligence actions against software development companies and programmers.

Product liability is another arm of tort law that may take on more significance when looking at liability should AI become defective. Under the common law, product liability focuses on negligent design, negligent manufacture and breach of the duty to warn. It generally addresses the liability of one or more parties involved in the manufacture, sale or distribution of a product. For this doctrine to apply, the AI system in question must qualify as a product, and not a service. Ascertaining where the defect occurred in the supply chain of an AI product may be difficult given the autonomous and evolving nature of machine learning and algorithms. Commentators have noted that product liability will become relevant with respect to issues arising from the use of autonomous vehicles, robots and other mobile AI-enabled systems.

Apportionment of Liability: A major legal quandary that arises upon implementation of AI is the question of apportionment of liability. Legal scholars, public policy organizations, and regulators around the world have attempted to provide definitive answers to this question, which till date remains at the heart of all discussions surrounding AI. We attempt to list down some of these fundamental questions below.

Who should be held liable? In the event of loss or damage, who would be held liable – would it be the technology developer, the retailer, or the end-consumer? Further, would the parties be liable on a joint and several basis or otherwise? For instance, in the context of a mishap concerning autonomous vehicles, would the liability rest on the AI developer, the car manufacturer, or the driver?

What principle should be applied to determine and accord liability? Assuming that the responsible party has been identified, would such party be subject to the 'principle of strict liability' (i.e. the party is held liable for the loss or damage, unless an exception such as an Act of God or Act of a Third Party applies), or the 'principle of absolute liability' (i.e. the party is held liable so long as there is loss or damage, without the availability of an exception). Moreover, what would be the nature of this liability – civil or criminal or both?

Risk mitigation for industry participants: Although AI technology is still in its nascent stages in India, there are plenty of opportunities for private industries to participate and profit from its development. However, considering the regulatory vacuum, contracts between the AI user and the AI developer are vital in determining the liability of parties. In the absence of any legislation, it is imperative that participants outline their respective roles, responsibilities and obligations in the contract. While negotiating a contract, the parties should clearly identify the scope of services being offered, the warranties relating to the AI technology, scope of liability (including limitations and exclusions) at the very least.

Data uses:

Internet of Things Internet of Things (IoT): IoT is about connecting devices over the internet, letting them talk to users, and each other. It entails conversion of 'dumb' devices into 'smart' ones with the help of computer software. IoT is a term used to define the network of connected "smart" devices, i.e., devices embedded with sensors, software, electronics and network connectivity which have the capacity to collect and exchange data. The 'smart' device has a programmed awareness and an ability to make autonomous and automatic decisions from a suite of defined choices through the deployment of algorithms on produced data. It does so with the help information technology.

Recently trend of smart devices using AI has risen and in future all devices may incorporate AI element. IoT is the convergence of Operational Technology (OT) and Information Technology (IT). OT refers to the hardware and software that controls the performance of physical devices. Traditional OT is restricted to the pre-programmed functions embedded in the device. Such as, air conditioner (AC) functions according to the cooling settings already fed in the device. In contrast, OT when coupled with IT acquires ability to interact with other devices. A 'smart' AC is connected to the user's mobile device and can switch on or off according to location of the paired mobile device. The 'smart' device which has been fitted with a sensor constantly records and monitors its surroundings. The device's processors do not usually have the capacity to analyze and process the data. The accumulated data is, therefore, sent to the manufacturer's central database where the necessary analyses are performed.

AI or other kinds of technologies are used for data analysis and developing insights. IoT devices are the source of observed data, while derived and inferred data are produced by the process of analysing the data. 128A decision prompt is then sent back to the smart device. As the new data collected by the smart device is constantly available to be taken into account, the prompt is accordingly altered. The future of IoT looks very promising and it has wide range of applications for both the consumers and businesses. But there remain several technical, legal and ethical challenges. As early as in 2008 a European Commission's Staff Working Document identified policy challenges for IoT, namely, security, privacy, data protection, control of critical global resources, subsidiarity, identity management, naming, interoperability, fostering innovation, spectrum and standardization. These matters still hold challenge for all the stakeholders- governments, businesses and consumers. Some key legal issues that are involved are briefly discussed here.

First major issue is data security. As the smart devices are always connected to the Internet for information and system updates, there is a possibility of the devices being 'hacked'. Hacking is defined as the unauthorized interception of computer-based information. Hacker can steal data or deny access to the smart device or spam the user. Such threats can go beyond being a simple menace to economic safety and can endanger national and international security.

Second, continuous connection to the internet increases the risk of a spontaneous machine malfunction, which, in case of machines such as household heating, can cause physical danger to the user.

Third, without sufficient data protection measures consumer privacy is vulnerable to violation. The devices have access to sensitive information such as present location, preferences and personal information of the user through the connected mobile devices. Moreover, in the case of some manufacturers, the data processing for the equipment is not conducted directly by the manufacturer or a subsidiary. It is instead outsourced to a third party who may not adhere to the privacy policy sworn by the manufacturer. This leads to the risks of third party infiltration, data theft and unauthorized resale. In this aspect, European Commission has explored the right to "silence of the chips" i.e. individuals should be able to disconnect from their networked environment at any time, to limit the threat to privacy.

Fourth, IoT suffers from standardization issues. At present IoT developers are using varied standards. In the IoT sphere, the eXtensible Messaging and Presence Protocol (XMPP), the Constrained Application Protocol (CoAP) and Message Queue Telemetry Transport (MQTT) are major protocols to communicate between the objects. A new organisation called oneM2M is developing specifications to ensure the global functionality of M2M-allowing a range of industries to effectively take advantage of the benefits of this emerging technology.

This exercise is critical because lack of standards for sound data protection directly contributes to data security and privacy susceptibility. It further aggravates the technological interoperability problem. Fifth, spectrum policy of various countries and ITU will have to accommodate IoT. Globally, the trend is to use telecom network of Telecom Service Providers (TSPs) and/ or free wireless bands in non-TSP frequency domains for M2M communications. But with the enhanced use of IoT, the need for additional spectrum will multiply too. Countries have to review their infrastructure-sharing policy and net-neutrality principles with regard to spectrum and Internet infrastructure. The availability of White Space (unused frequency of the wireless spectrum) will have an influence of how M2M/IoT evolves, while there are licensing issues related to the use of alternative technologies such as Low Power Wide Area (LPWA) networks.

3-D Printing: Three dimensional (3D) printing is the process of creating three dimensional objects in which the material is layered in thin coats to form the desired object. This procedure is technically termed Additive Manufacturing because material is added to the object as opposed to conventional production processes which employ subtractive processes such as milling, cutting, drilling and machine to manufacture the final design.

The procedure by which the material is layered classifies the technology. Fused Deposition Modelling, where the material is passed through a melted nozzle that heats it and is then extruded according to a pre-specified software code. Digital Light Processing (DLP), where a platform is submerged into built resin and the light source controlled by the machine maps every layer of the object into the platform and solidifies it. The software CAD (Computer Aided Design) is used with varying degrees of complexity according to the material used in the prototype and the complexity of its design. The most common being a STL (STereoLithography) file format which allows the user to incorporate a "repair" code into the program to allow for revision in case of failure. Some examples of changes in the printers include using lasers and electron beams in place of ultra-violet (UV) or white lighting in the case of DLP.

3D printing has had a substantial rise in commercial use with companies using the printers to produce varied prototypes to finalize the final model that would be approved for mass production. It has also found increased use in medicine, with doctors experimenting with prostheses, living tissue and bone material. At present the units are too sophisticated and expensive for home-users, however, home printers are near future possibility. 3D printing presents exciting prospects for the future; however it also poses many legal puzzles.

Firstly, it has serious security repercussions. It enables individuals, including terrorists, to manufacture any weapon comfortably. In fact, 3D printed guns have been already manufactured in United States, Japan and Australia. *Secondly*, it has significant tax implications. Since product sold (CAD) is in a form of digital file, it will not be subject to custom duties imposed on physical products. In this context, effort towards making WTO moratorium on custom duties on digital products permanent, acquires considerable weight. *Thirdly*, some scholars argue that 3D printing will increase the incidence of patent infringement. Consumer will merely need to procure digital file containing instructions for the 3D printer (CAD) and can make infringing copies at home. *Fourthly*, issue of standards and *interoperability* will come into play here as well.

Entertainment Services: Recently there has been proliferation of online entertainment services which provide online access to movies, documentaries, TV shows for subscription fee or free of charge. Such services can be called Over the Top (OTT) Video Streaming Services. Netflix, Amazon Prime and Hulu Plus are some of the leading players in this market. OTT video streaming services provide unlimited video streaming service i.e. supply of content (movies, TV shows, documentaries etc.) to the subscribers via internet which can viewed on the Internet connected devices such as smart-phones, laptops, tablets and smart televisions. They offer following benefits as compared to traditional cable TV or Direct to Home (DTH) broadcast:

a. Subscribers have option of choosing from wide variety and extensive amount of content.
b. Content can be instantly accessed at any time (24 hours) unlike traditional TV where movies or shows can be watched at pre-specified time slots.
c. Customers pay subscription fee like DTH service, but do not get any advertisement during streaming.
d. Subscribers can access unlimited amount of content i.e. there is no limit on number videos that can be watched during subscription period.
e. Subscribers can watch content at their pace i.e. half an episode, full episode or entire TV show in one go.
f. Content can be viewed on multiple screens at the same time. These services primarily licenses content created (produced) by others, but they also creates their own content which can be exclusively viewed through their website.

They generates revenue through subscription fee charged to users and in return subscribes can access unlimited amount of content during the subscription period. They also collect great quantity of user data through active and passive means. This data is used to create unique user profiles and provide them with personalised experience through content recommendations. User preferences are also used to as a guide for creating, cancelling or continuing the content.

Major legal issues associated with these services are:

First, net neutrality is uniquely associated with OTT video streaming. Physical distance between content provider and user affects the quality and speed of the delivery of the Internet data. OTT video streaming is particularly sensitive to the distance from the subscriber as seamless delivery of videos requires higher bandwidth. Therefore, such service providers enter into agreements with the ISPs for dedicated channel for their content. This induces ISPs to discriminate between the various types of contents delivered by them and many consider it a violation of net neutrality principle. At the same time, many others argue that such practice is reasonable network management and integral to efficient Internet service. Netflix and Comcast were involved in a dispute over this issue. Though, they resolved the dispute, legally it remains unsettled.

Second, data security and privacy are inextricably involved with these services as well due to large amount of data collected by the service providers.

Third, mobile and cable network operators argue that OTT service providers use the telecom infrastructure without paying for it, and they're not subject to the regulatory regimes that apply to operators such as Idea, Airtel & Vodafone. The telecom service providers also bear the additional burden of various tax provisions by local, regional and national authorities.

Fourth, Countries like India amended service tax laws to bring offshore service providers like Netflix providing online services from servers located outside India under the service tax net. Such service providers would be required to obtain registration in India or appoint an agent to undertake all such compliances on his behalf in case the service provider does not have physical presence in India.

Electronic Payment System: Electronic payment (e-payment) system enables consumers to pay for goods and services electronically. It entails exchange of digital financial information such as encrypted credit/debit card numbers, electronic cheque or digital currency. E-payment system in which large amount of money is transferred is called macropayment system and in which small amount of money is transferred is referred to as micropayment system. A 2006 OECD Report on online payment systems categorised various payment systems into account based and electronic currency systems. As per the report, account-based systems allow payment via an existing personalised account (usually a bank account), whereas electronic currency systems allow payment, if the payer has an appropriate amount of electronic currency. Details are as follows:

Account-based Payment System:

a. *Credit cards and debit cards:* Online use of credit and debit cards is similar to their offline use except physical copy of card and signed confirmation by the buyer. Here payment is made directly from the buyer's account with the bank.
b. *Mediating systems*: In this system buyer makes an account with the mediating services and is able to make payment to the sellers who have accounts with the same mediating service. When buyer uses a mediating system to make the online payment, he/she does not need to provide bank account details to the seller. Paypal is an example of such service.

c. *Mobile payment and telephony account systems*: Mobile payments are payments conducted through wireless devices. Telephony payment occurs by phoning a special number the merchant has installed with an operator, by sending a particular code by SMS, by voice contact, or by dialup to access content on a site and the user is charged by the minute for using the site
d. *Payments via online banking:* Here the account holder is redirected to the bank's Web site by the merchant site to effect payment.

Electronic Currency Systems:

a. Smart card-based systems which are most commonly used to pay small amounts within organisations (e.g. vending or copying machines or Metro). They usually rely on specialised hardware and dedicated smartcard readers for authentication; and
b. Online cash systems which are software-only electronic money instruments based on signed (?) money. Electronic cash is broadly defined as electronically stored monetary value. They usually work via prepaid cards (one may not need a physical card, you mention e-tokens below), and arrangements differ although most require merchant subscriptions. Electronic tokens representing a certain value are exchanged in a similar way to cash.

Decreasing technology, operational and processing costs along with increasing online commerce have provided fillip to growth of e-payment systems. However, e-payment systems are not devoid of legal concerns.

First, privacy and security of data remain of utmost importance. Since, e-payment system involves exchange of sensitive information like debit/credit card numbers, banking details, passwords etc., data security is very crucial for the protection of consumer privacy and prevention of any theft or fraud.

Second, authentication is next major concern. In order to ensure secure transaction in a setting where face to face interaction is absent, robust authentication measures are important. However, laws of different countries provide different authentication standards, sometimes specifying a clear technology bias.

Third, determining the relevant law that parties will be governed by in respect of electronic transactions (whether by the contract, or in its absence, by general principles of law). This may create problems, especially when the laws in Country A, where the company is registered permit electronic payment contracts, whereas the laws in Country B, where the consumer is located, do not support electronic payment contracts.

Fourth, legal recognition of digital currencies is a matter of concern too. Currencies like Bitcoin are not recognised in most jurisdictions and any transaction in such currency is risk prone. Transaction in digital currencies is sometimes also used for money laundering. Another recognition related aspect is that e-payment companies do not go through the same rigorous licensing procedure as brick and mortar payment companies. There is an ambiguity as to what should be the extent of regulatory supervision for e-payment companies.

Cloud Computing: Cloud computing services allow linking, storing and processing of massive volumes of data generated across an enterprise, drawing on the computational power

of hundreds of machines, and analysed via utility services. Individuals and companies can thus utilise storage and computing capacity without the need to make large capital investments, as well as being able to avail themselves of such resources from anywhere where there is network access. Exports of cloud computing services were estimated to be worth approximately $1.5bn in 2010 (and this is likely a conservative figure) and the market for cloud computing services is anticipated to grow by up to 600 percent by 2015.

The legal questions related to the cloud computing are:

First, Cloud –computing entails storing of massive amount of data and therefore is automatically subject to data privacy and data security concerns;

Second, data ownership is another significant issue. There is a possibility of ownership conflict between the client using the cloud service and host of the cloud service. Generally, contract would resolve such conflict. But, in the absence of clear contract, host can claim ownership over data even after termination of service;

Third, extent of the liability of the host for any data misuse or breach is also contentious topic. Currently, it is governed by the contract between client and host. In the cases where client does not have bargaining power or contract is not negotiable, host can escape liability completely. Many publicly available cloud computing contracts limit liability of hosting provider to a level that is not in line with the potential risk;

Fourth, compliance of regulations and laws related to tax, data protection, damages under contract can be difficult due to absence of onshore facility or legal office.

Trade, Property Rights, Law and Technology

The Law, Property Rights, Incentives, and Trade: In defining property rights, the law creates the conditions that are crucial for the development of technology. Without property rights, the world would be a vast commons in which productive incentives would be absent. Few would labor to create wealth if others were free to take it. Property rights enable people to keep the wealth that they create. Property rights, for example, enable the farmer to keep the crops that he raises. These rights provide him with the incentive to farm. Almost all societies have recognized such basic property rights as the right of a farmer to his crops. But a new and crucial dimension is added to property rights when property becomes transferable.

When property is transferable, then the incentives to be productive increase exponentially. When a farmer possesses the right to keep the crops that he raises, he has an incentive to raise crops to feed himself and his family. When he is able to trade his crops for goods or services provided by others, he acquires an incentive to produce more than for his own needs. Transferability means that I have an incentive not only to create goods and services for myself. It means that I have an incentive to create goods and services for others as well, since I will be able to transfer the benefit of my productive activity to others, and they will be able to compensate me by transferring some of their property to me in payment. As discussed below, transferability provides the basis for specialization and scale economies, and it also underlies the principle of comparative advantage in international trade.

Intellectual Property and its Incentives: Although property rights are essential to productive incentives, traditional property rights fail to generate incentives for creative activities. If I devise a new product or a new, more efficient way to employ inputs to produce wealth, my creativity can be replicated at will in a society that recognizes rights only in traditional property.[57] Modern societies, therefore, create rights in intellectual creations in order to provide incentives to create as yet unknown technologies or improvements in existing technology. A person who creates a new technology qualifying for patent protection, for example, acquires exclusive rights in his invention for a twenty year period.

The laws creating these rights are generally referred to as intellectual property laws. A common way of viewing these laws is to see them as remedying a market failure by filling a pre-existing gap in property protection.[58] Just as tangible property rights transform what would otherwise be an incentive-free commons into a regime that provides productive incentives, intellectual property laws transform parts of a preexisting intellectual commons into a regime that provides incentives for creativity.

The intellectual property laws that are most important to the development of technology are the patent and copyright laws. Their importance has been recognized throughout the history of the Republic. Indeed, the U.S. Constitution specifically authorizes Congress to enact both sets of laws in order "[t]o promote the Progress of Science and useful Arts."[59] This phrasing reflects the understanding of the Framers those creative activities could be stimulated through the economic incentives that the patent and copyright laws provide.

Competition, Monopoly, Technology and the Generation of Wealth:

We know that free and open markets maximize productive incentives and that competition among sellers maximizes societal wealth.[60] So long as markets operate competitively, goods and services are routed to their highest valued uses. A competitive economic system also fosters productive efficiency in the short run by pressuring producers to employ their most cost-effective techniques and in the long run by replacing the less efficient producers with more efficient producers. Thus, at all times, competition pressurizes producers to employ the most efficient technologies available to them.

Although competitive markets force producers to act efficiently, the tendencies of monopolies are otherwise. Monopolies tend to restrict production in order to maintain prices at higher-than-competitive levels. In so doing, they deny society those uses of their products whose values are less than the monopoly price but higher than their cost of production. This output restriction is inconsistent with the allocation of society's assets to their highest valued uses and constitutes a social waste that economists often refer to as a "deadweight social

[57] 35 U.S.C. § 154(a)(2) (2000)
[58] See, e.g., Daniel J. Gifford, Innovation and Creativity in the Fine Arts: The Relevance and Irrelevance of Copyright, 18 CARDOZO ARTS & ENT. L.J. 569, 572-73 (2000)
[59] U.S. CONST. art. I, § 8, cl. 8
[60] See Daniel J. Gifford, Government Policy Towards Innovation in the United States, Canada, and the European Union as Manifested in Patent, Copyright, and Competition Laws, 57 SMU L. REV. 1339, 1340 (2004)

loss."[61] In this respect, monopolies produce allocative inefficiencies. Monopolies, moreover, are also less keyed to productive efficiency, as the incentives to implement new technologies are reduced in monopolistic market structures. While competitive markets are forced by competition to adopt the most efficient technologies as they emerge, monopolies lack that competitive pressure. A monopolist, of course, has an incentive to invest in efficient technology, as that technology will reduce its costs and thereby increase its profits. But because the incentive structure is reduced, the implementation of new technology may be delayed.[62]

Society's embrace of competitive markets as a means of maximizing aggregate wealth exists in a dynamic tension with the use of the exclusive rights over technological developments provided by the intellectual property laws. Because there may be no effective substitutes for some such developments, the exclusive rights provided under the patent law may amount to an economic monopoly. In exercising its monopoly power under the patent, the patentee may, like other monopolists, license the technology at rates that are sufficiently high as to exclude many uses. As a result, society is denied uses of a valuable technology, societal assets are misallocated, and deadweight social loss results.[63]

The tension between intellectual property rights and competition is reflected in the uneasy relationship that has existed, and continues to exist, between the antitrust laws and the intellectual property laws, especially within patent and copyright law. In one view, perceived conflict between the policies of the Sherman Act and patent and copyright laws lacks substance. The competition laws are designed to foster economic welfare and so are the intellectual property laws. The latter employ exclusive rights as a means for generating new technology; and new technology raises societal welfare. The restraints imposed by intellectual property rights holders are in newly created markets that would not have existed had these restraints been barred *ex ante*. In this view, the intellectual property laws do not create restraints that would not exist in their absence. Finally, technology probably is largely responsible for much of our economic welfare, and the intellectual property laws are designed to foster the development of new technology.[64]

There are, however, more sophisticated ways of understanding the relation between the competition laws and the intellectual property laws. It is true that intellectual property laws help to provide the incentives that stimulate the technological innovation that enriches society. But that analysis is overly simple. Intellectual property laws generate both benefits and costs. Their major costs lie in the very exclusivity that they provide rights holders. Those

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[61] See, e.g., ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 348 (5th ed. 2001). The deadweight social loss is the net value of the output that would be produced in a competitive market, but which is not produced by a monopoly. It is the difference between (1) potential buyers' reservation prices that are less than the monopoly price and (2) marginal cost.

[62] See Kenneth Arrow, Economic Welfare and the Allocation of Resources for Invention, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY (R.R. Nelson ed., 1969)

[63] See Daniel J. Gifford, How Do the Social Benefits and Costs of the Patent System Stack Up in Pharmaceuticals?, 12 J. INTELL. PROP. L. 75, 82 (2004).

[64] See, e.g., Joseph F. Brodley, The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress, 62 N.Y.U. L. REV. 1020, 1026 (1987) ("[S]tudies have shown that over the forty-year period from the late 1920s to the late 1960s, at least half of the gain in United States output was due solely to technological and scientific progress.")

laws not only generate new technology, they also restrict its use. This restriction—however justified as necessary to generate incentives—is nonetheless a social waste. Ideally, a society should limit intellectual property rights to a term in which the marginal social costs of the restraints that they facilitate are less than the marginal social benefits that they provide. Louis Kaplow developed such an analysis over twenty years ago.[65]

Observing that the longer the patent term, the greater the incentive to invent, Kaplow assumed that lengthening the patent term would generate additional inventions. But he also pointed out that an increase in the patent term would extend the patent-based restraints on all existing patents—a patent on inventions for which the existing term of protection was adequate. Extending the term would both generate marginal social benefits (i.e., new inventions) and marginal social costs (i.e., adding an additional year of restrictions on all other inventions). Although Kaplow's analysis is ingenious, it cannot be easily applied because no one knows how to quantify either the marginal benefits or the marginal costs of inventions. His analysis does, however, provide a conceptual insight into the policy issues latent in tensions between competition laws and intellectual property laws. Moreover, Kaplow's analysis provides a framework for policy judgments. Under simplified but reasonable assumptions, the existing patent term may well produce positive welfare results at the margins.[66]

The Scope of Intellectual Property Protection: The law defines not only the term of intellectual property rights but also their scope. In defining their scope, the law again enters an area of tension. For decades, the competition laws and the intellectual property laws have wrestled with issues of tying and bundling, which are issues that concern the scope of intellectual-property protection. Does my intellectual property right authorize me to insist that purchasers, lessees or licensees use other products along with the protected one? In the early twentieth century, the courts appeared willing to permit a patentee to control the products that could be used with a patented one.[67] Later, the courts developed a doctrine of patent misuse as part of patent law. During the first half of the last century, the courts treated the tying of a separate product to a patented one as misuse.[68] During the period of misuse, the courts would not enforce the patent. The misuse cases eventually affected the antitrust laws.[69] In the 1960s, the act of tying a product to a patent or copyright became a per se antitrust violation.[70]

In recent years, the courts have sharply curtailed the availability of the doctrine of equivalents. Amendments to a patent application are likely to estop a patentee from later relying upon the doctrine of equivalents, especially when the patentee attempts to use that

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[65] See Louis Kaplow, The Patent-Antitrust Intersection: A Reappraisal, 97 HARV. L. REV. 1813, 1825-26 (1984)

[66] See Gifford, supra note 8, at 106

[67] See, e.g., Henry v. A.B. Dick Co., 224 U.S. 1, 47-49 (1912); Heaton Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 F. 288, 300-01

[68] See cases cited *supra* note 12

[69] Minneapolis-Honeywell Regulator Co., 320 U.S. at 684 ("[T]he effort made here to control competition in this unpatented device plainly violates the anti-trust laws")

[70] United States v. Loew's Inc., 371 U.S. 38, 44-45 (1962)

doctrine against variations that were foreseeable at the time of the amendment.[71] In the biotech area, the patent law's written description requirement limits the doctrine of equivalents in ways that make its ramifications socially problematic. Thus in a leading case, the Federal Circuit ruled that the University of California at Berkeley, which had isolated the DNA coding for rat insulin, could not assert claims to human insulin, even though human and rat insulin are very similar.

Negative Externalities: The negative aspects of the law and technology relationship are illustrated in a leading New York case that applied (and modified) classic nuisance doctrine against a cement plant whose emissions of dust and raw materials were damaging nearby landowners.[72] Although the court ostensibly refused to make use of private litigation as a means of furthering the public interest in cleaner air by closing the offending plant, the court nonetheless recognized that cost externalities underlay the lawsuit. In its ruling, the court ordered the defendant to compensate the plaintiffs, thus forcing the defendant to internalize the pollution costs that theretofore had been borne by the plaintiffs. The problem in this case—as in almost all pollution cases—is that the adverse effects of a business firm's discharges into the air or water do not appear on the firm's books as a cost of its operations nor does the firm bear those costs in any other way. Accordingly, costs that are properly attributable to the firm's operations are borne by others or by society at large. Federal and state anti-pollution legislation is thus directed towards forcing business firms to internalize these costs. Firms internalize these costs when they compensate affected people (as in the New York case cited above) or when they take action to reduce the levels of the emissions from their plants. When all such firms take such action, they pass on those costs to their customers, who bear the final costs of producing the products that they desire.[73]

The task of forcing polluting business firms to internalize their costs was initially carried out through traditional prescriptive regulation. In recent years, however, legislators and policy-makers have concluded that the traditional command-and-control approach to pollution reduction is often not the most effective one. As a result, an array of programs involving incentives, pollution caps, trading permits, and stakeholder negotiations have emerged. Experience appears to show that the basic idea behind these less coercive approaches is a sound one, but that the programs need to be carefully designed and supervised to prevent abuses.

Positive Externalities: To what extent can law be designed to engender enhanced economic growth by, for example, fostering synergistically employed technologies, the creation of compact skilled labor markets, or the development of advanced technology? Both theory and

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[71] Festo Corp., 535 U.S. at 736-40; Warner-Jenkinson Co., Inc., v. Hilton Davis Chemical Co., 520 U.S. 17, 40-41 (1997)

[72] See Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 219-20 (1970). The application of traditional nuisance doctrine would have required the court to abate the nuisance by shutting down the defendant's plant. Because the value of the defendant's operations greatly exceeded the harm imposed on the plaintiffs, the court instead ordered the defendant to compensate the plaintiffs for their harm. The court thus forced the defendant to internalize as costs that part of its operations that were imposing harm upon the plaintiffs. See discussion of this case in Alexandra B. Klass, Common Law and Federalism in the Age of the Regulatory State, 92 IOWA L. REV. 545, 571-72 (2007)

[73] See, e.g., Thomas Lundmark, Systemizing Environmental Law on a German Model, 7 DICK. J. ENVTL. L & POL'Y, 1, 18 (1998) (discussing internalization of social costs of pollution and their transmission to customers)

experience suggest that laws and legal institutions can play significant, but limited, roles in technological development. Law and legal institutions play a significant role in the development of new technology through the intellectual property laws, as noted above. The law and legal institutions play a major role in engendering basic research, for which market incentives are lacking. These legal and governmental interventions are general in nature and help to provide stimulus that the market cannot provide.

Law can be effective in promoting economic objectives when it acts as an adjunct to the market. The genius of the patent system is that it provides a legal structure keyed to the market. The law provides the exclusive rights that act (in conjunction with the market) as the stimulus to invention, but the market is the ultimate determinant of the rewards. The system rewards only those who produce what the market demands. Should government—through law and legal institutions—attempt intervention to foster the growth of particular industrial sectors or business firms, it is likely to fail. An array of proposals for government intervention in particular sectors of the economy were made during the 1980s and early 1990s under the rubric of "industrial policy". In these situations, the success of government and legal intervention would require legislators or officials to possess greater information than the market. Because this is virtually impossible, government interventions on behalf of particular industries or companies are almost certain to decrease rather than increase overall economic well-being. In addition to the government's relative lack of knowledge, its attempts at intervention in the economy would be subject to distortion by interest groups seeking assistance, often from the very industries that were in decline and whose future was in doubt. Yet it would be those industries—because of their close community ties and sometimes large work forces—that would be able to exert substantial political pressure on their behalf. For all of these reasons, government, law, and legal institutions appear incapable of generating positive externalities in particular sectors of the economy.

International Trade and Technology: A key spur to industrial development in the United States has been its large continent-wide market. This large market has enabled manufacturers to employ technology incorporating scale economies. Conversely, during the late nineteenth century and early twentieth century, Europe was divided into nation-sized markets by protectionist legislation. As a result, European manufacturers lacked access to a large market that was conducive to scale economies. Although a tariff barrier also protected U.S. markets during this period, its manufacturers nonetheless had access to the large U.S. domestic market. The negative effects of protection on industrial development that afflicted European manufacturers, accordingly, were muted in this country.

Since the adoption of the General Agreement on Tariffs and Trade after the conclusion of World War II, the nations of the world have been gradually reducing their tariffs, stimulating an ever increasing amount of international trade. This movement towards freer trade culminated in the creation of the World Trade Organization in 1994 and the associated TRIPS agreement. The lowering of tariffs and other barriers to trade subjects U.S. industries to competition from abroad (and subjects foreign producers to competition from U.S. producers), thus intensifying worldwide competition. This new competition increases the pressures on all industry participants to develop and employ the most efficient technologies. This intensifying global competition provides a comparative advantage to labor-intensive technologies in developing nations with relatively low wage rates. As a result, U.S.-based

producers in labor-intensive industries producing tradable goods are in the process of being replaced by producers from developing nations. At the same time, the adoption of the TRIPS agreement means that the U.S. advantages in the production of creative products (such as in the software, pharmaceuticals, and entertainment industries) will be strengthened, as intellectual property protection extends globally.

The pressures of global competition thus are forcing a reallocation of the technologies employed in each nation in ways that reflect each nation's comparative advantage. Although some temporary hardships will occur, the end result will produce an overall increase in the world's wealth, benefiting all nations. And because the new WTO-TRIPS regime widens protection of intellectual property, the incentives for innovation are increased. These increased incentives should generate additional innovation, which over time will produce increases in global welfare.

Legal Failures and Market Failures: The preceding discussion has referenced various places in which laws and market incentives interact to foster the development and employment of technology, generating increases in aggregate welfare. Yet there remain gaps or failures in these law/market interactions. Market failures are often the result of the failures of the legal system to adequately specify property rights. Intellectual property laws, for example, are required to remedy inadequacies in the property rights regime that the legal system developed in simpler times. Thus, market failures can often be understood as the result of legal failures. In the twenty-first century, other failures of the law/market relationship are becoming widely appreciated. These newly appreciated failures differ from the law/market failures previously discussed because they are not identified by welfare analyses that use an index of maximizing aggregate economic welfare for measurement.

The pharmaceutical industry provides an example of how law and technology interact both positively and negatively. The current intellectual property system generates incentives for pharmaceutical companies to develop new drugs for the relief of illnesses experienced by the populations of the developed nations. As observed above, the companies are rewarded for their efforts from sales of successful products at supra-competitive prices. It was noted above that a negative (albeit necessary) effect of this system is the short-term waste that results when these higher prices exceed the reservation prices of potential customers. TRIPs requires that all members of the WTO begin to recognize and enforce intellectual property rights. Most of these rights involving pharmaceuticals belong to companies from the developed world. As a result, the negative effects of intellectual property rights involving pharmaceuticals are magnified. The legal framework established by the WTO and TRIPs have only gradually began to adjust to these problems.

First, the short-term waste imposed by the denial of lifesaving drugs to millions in the under-developed world is immense, dwarfing the dead-weight loss in the developed nations. In the under-developed nations, the lives of millions of people depend upon access to HIV-AIDS drugs. If they cannot receive these drugs because the prices are keyed to the markets of the developed world, then the social loss is staggering. Moreover, in assessing this loss, traditional economic approaches are problematic: it will not do to set the value of a life on the basis of a person's earnings converted into the currency of the developed world, as in euros or dollars. Such an approach would obscure the human tragedy involved. Second, the current international legal system appears to impede any effort by the pharmaceutical

companies to reduce their prices in the poorer underdeveloped world. Those companies might benefit themselves as well as millions of potential customers by offering their products at prices keyed to local market conditions. The danger of potential arbitrageurs purchasing their products at these lower prices and reselling them in Europe and North America, however, discourages such a course. This danger is reinforced by The General Agreement on Tariffs and Trade (GATT) Article XI, incorporated into the World Trade Organization Agreement. GATT Article IX appears to prevent governments from interfering with arbitrage operations.

The provisions of GATT Article XI, however, should be read in conjunction with Article 31 of the TRIPS Agreement53 that permits governments to subject patentees to a compulsory licensing regime in cases of national emergency or other circumstances of extreme urgency. The Doha Declaration of 2001 and the subsequent WTO General Council decision of 2003 contemplate an extension of the literal terms of Article 31 to authorize a government to impose compulsory licensing, allowing foreign producers to supply needed pharmaceuticals. But the Council decision took steps to ensure that the imported pharmaceuticals would not be subject to export by arbitrageurs. This approach towards a broad interpretation of Article 31 may well have implications for the interpretation of GATT Article XI in situations of health emergencies.

Article 31 and its construction in the Doha Declaration and Council decision provide some relief for underdeveloped nations experiencing health emergencies. The effects of the Doha Declaration and Council decision on the interpretation of GATT Article XI and the consequent ability of pharmaceutical companies to offer discount pricing in nations whose governments commit to preventing arbitrage is as yet unclear. Nevertheless, the foregoing matters are broadly suggestive of substantial deficiencies in the way law and pharmaceutical technologies interact in the development and deployment of new products. The intellectual property regime of the developed world appears to generate products needed in that world. But—apart from the limited exemptions available under TRIPS Article 31 and the Doha-generated glosses on its provisions—that regime denies the use of newly-developed pharmaceuticals to the underdeveloped world. In addition, the present system skews research solely toward the needs of the developed world. The western intellectual-property regime provides no incentives for the development of cures for sleeping sickness or other illnesses not found in western nations. Nor does that regime provide incentives for the development of vaccines against tuberculosis, a scourge of underdeveloped nations.

Relationship between Law and Technology in India:

Technology has significantly driven India's growth over the past decade. Be it the rise of well-funded startups and 'unicorns', the imaginative use of technology for governance, or the emergence of India as a hub for R&D activity and a test bed for product innovation, technology is an important driver for growth in India. A 2018 report by the Startup India Initiative states: 'The ecosystem comprises of over 14,600+ Startups, approximately 270 incubation & business acceleration programs, 200 global & domestic VC firms supporting homegrown Startups, and a fast-growing community of 231 angel investors and 8 angel networks. India also boasts of being home to the 3rd largest unicorn community, with over

16 high valued Startups having raised over $17.27 billion funding, with overall valuation of over $58 billion.'[74]

But with this exponential growth comes a set of policy and regulatory challenges. First, government policy and the regulatory framework need to be aligned to enable the growth of a robust technological ecosystem, rather than impede it. The global competition for leadership positions in emerging technology domains, such as artificial intelligence, drones, gene editing and other areas, has become aggressive, with China becoming a lead contender. This global race demands impactful innovation policies that ease up creative and inventive activity, but in a responsible manner.

Second, as various incidents post 2016 demonstrate, the rise of the digital has created new vulnerabilities and new types of harm to individual and group rights. A digitally connected ecosystem is rife with security concerns, which are exacerbated when digital literacy does not keep pace with digital use. Moreover, with personal data becoming a critical tool for monetization and profiling, the incentive for both industry actors and the state to secure such data and respect individual privacy is quite low. Both the Facebook–Cambridge Analytica controversy and the unrestricted seeding of Aadhaar data in multiple databases to build a 360-degree view of citizens indicate distinctive kinds of threats to individual and community rights. Therefore, respect for privacy and individual/community rights must be externally imposed, with regulations playing a part in this process.[75] In short, developing an indigenous regulatory framework for new technologies is a pressing need for India. Three central principles are integral to this transition.

Three Central Principles: The first principle for regulators and policymakers to bear in mind is ***clear identification of the problem that regulation must address***. While this is not unique to the technology context, there are a few specificities in this field that make this principle worth emphasizing. Often, technological change affects sectors that are under an existing regulatory apparatus, as seen in the case of online cab aggregators or food delivery services. When regulators attempt to transplant this apparatus to a new factual reality, a common mistake is to assume that regulations must address the same set of problems as witnessed in the earlier non-tech scenario. But in doing so, the regulatory response addresses more problems than required, because technology-enabled models are likely to sort out at least some concerns.[76] This response also presents the danger of under-inclusion as new challenges raised by technology-based models may be missed in the process. Therefore, it is imperative to clearly identify surviving and new problems caused by technology, separate those that demand immediate regulatory attention from others that may only require a wait-

[74] States' Startup Ranking 2018' (New Delhi: Department of Industrial Policy & Promotion, 2018), 7-8, *https://www.startupindia.gov.in/content/dam/invest-india/compendium/Star...*.

[75]Alvin Chang, 'The Facebook and Cambridge Analytica Scandal, explained with a simple diagram', *Vox*, 2 May 2018, *https://www.vox.com/policy-and-politics/2018/3/23/17151916/facebook-camb...* Rachna Khaira et al., 'UIDAI's Aadhaar software hacked, ID database compromised, experts confirm', *Huffington Post* (11 September 2018), *https://www.huffingtonpost.in/2018/09/11/uidai-s-aadhaar-software-hacked...*.

[76] Ryan Hagemann, 'A regulatory framework for emerging technologies', 1776, 16 March 2016, at*https://www.1776.vc/insights/regulation-emerging-technology-government-d...*.

and-see approach, and then develop targeted regulatory and monitoring strategies for each of these concerns.

For instance, the draft e-commerce policy released for discussion in 2019 defines 'e-commerce' as including 'buying, selling, marketing or distribution of (i) goods, including digital products and (ii) services; through electronic network'. Evidently, this is an extremely wide definition that brings within regulatory control a wide range of activities from online retail to app-based health delivery. The document also attempts to outline policy for a host of different problems: data; infrastructure development; e-commerce marketplace regulations such as anti-counterfeiting, anti-piracy and foreign direct investment; consumer protection; payment related issues; export promotion; and content liability exemption, among others. The concerns of social media are far removed from fashion retail, and consumer woes pertaining to online travel booking differ vastly from digital health solutions.[77] The unfortunate result is a heavily diluted effort that portends regulatory overreach. To avoid this in the future, regulatory approach must shift course from deciding in advance the range of business activities that need regulation to identifying the specific problems that proposed regulations must address, under the first principle discussed above. Inability to do so would only cause apprehension and uncertainty for businesses, and extremely ineffective and diluted protection for citizens.

The second principle is to ***prioritize a risk-based and responsive regulatory approach***. When regulating unfamiliar territory, as is mostly the case with new technologies, proclivities to entirely ban an activity or create restrictive pre-activity licensing models are high. The bureaucratic instinct to play safe and apply a 'precautionary principle' comes at the cost of innovation and entrepreneurship.[78] Moreover, because many new technologies have cross-cutting impact, even these decisions are taken in silos with one agency or regulator taking a more pro-technology view while another acts more restrictively.

The changing stance on data localization in India suffers from failure to adopt such a risk-based approach. At the heart of this debate is whether private entities must be compelled to store the data of Indian citizens in servers located within India. A compelling rationale offered in support of this measure is that law enforcement officials find it difficult to investigate criminal misconduct when data resides in servers located elsewhere. Another rationale offered is the threat to national security because of the possibility that foreign governments can spy on Indian citizens, taking advantage of the fact that their data resides in servers within their jurisdictions. A third rationale argues that localization can help advance a domestic artificial intelligence and data ecosystem, as done by China previously.[79] But amidst these multiple narratives, there is no clear study from the Government of India or any

[77] See Ananth Padmanabhan and Arjun Sinha, '*White Paper on Regulating E-Commerce in India: Need for a Principles-based Approach'* (New Delhi: Centre for Policy Research, 2019), *http://www.cprindia.org/research/reports/white-paper-regulating-e-commer....*

[78] Darcy Allen and Chris Berg, 'Regulation and Technological Change', in *Australia's Red Tape Crisis*, edited by Darcy Allen and Chris Berg, 218, 226-227 (Queensland, AU: Connor Court Publishing, 2018

[79] Compare, in this regard, the Reserve Bank of India Directive RBI/2017-18/153 dated 6 April 2018 with the draft National E-Commerce Policy.

of the regulators about the extent of harm caused because of servers residing outside India, the less restrictive measures that could equally address any of these concerns.

To address these concerns, the regulation of emerging technologies should be risk-based and responsive. This new approach involves detecting undesirable or non-compliant behaviour, responding to that behaviour by developing tools and strategies, enforcing those tools and strategies on the ground, assessing their success or failure, and modifying approaches accordingly.[80] By valuing these processes, the overall approach towards regulation changes in an organic manner. Risk assessment involves multi-stakeholder conversations and an engagement with data that goes beyond projected fears and growth narratives. It entails creating a mechanism meant to gather the requisite information, including engagement with technical bodies. Finally, it also brings about some consensus among different regulatory bodies regarding the kind of enquiry involved, if not the answers to such enquiry. A healthy debate on the risks surrounding a new technology is essential for the creation of a proportionate regulatory framework that balances innovation and protection effectively.

The third principle is to ***value democratic principles and fundamental rights***. The rise of the Internet and digital technologies has resulted in a loss of traditional state power and authority, leading to reassertion of control on the part of the bureaucracy. This reassertion now presents itself in the form of various regulatory controls such as demands to keep the privacy baseline low so that the state can easily access private communications, attempts to monitor online speech and to impose criminal and civil liabilities upon those expressing unpopular or undesirable views, and restrictive business requirements on private actors such as data localization. These controls, increasingly justified on the basis that China has relied on similar interventions to successfully build its innovation ecosystem, carry extremely harmful consequences for the future of democracy in India.

While many of governmental interventions do not come from a place of mala fide intent, it is important to be reminded often, as a polity, and especially so for policymakers and regulators, that India is built on a foundation of democratic values and crucial constitutional safeguards. As our experience with Section 66A of the Information Technology Act, 2000 – subsequently struck down by the Supreme Court in *Shreya Singhal v. Union of India*[81] demonstrates, the impetus to regulate online behaviour or technological innovation should not emanate from a deep-seated desire to command and control. Such a desire is likely to result in unconstitutional behaviour and impermissible inroads into the fundamental rights of citizens, including free speech and expression and the freedom to do business. While realities such as the virality of fake news in the age of social media raise serious concerns, responses cannot be built on the assumption that a strong state (like China) can put a stop to these concerns. Moreover, often responses of this kind change the very dynamic of citizen-state engagement in a democracy, leading to possible misuse and a surveillance architecture that evokes fear.

Privacy Concern in India: Half a century has passed since India framed its Constitution and still the Indian Constitution still does not recognise privacy as an inherent fundamental right.

[80] Julia Black and Robert Baldwin, 'Really Responsive Risk-based Regulation', *Law & Policy* 32(2) (2010): 181

[81] (2015) 5 SCC 1

The concept of privacy as a fundamental right first evolved in the sixties in the case of ***Kharak Singh v State of Uttar Pradesh, (1964) 1 SCR 332***. The Court held that the Right to Privacy is an integral part of the Right to Life. But with no clear cut laws, it remains in the grey area.

Thus, under Article 21 of the Constitution of India, an encroachment upon one's privacy can be only shielded if the transgressor is the state and not a private entity. If the offender is a private individual then there is no effective remedy except in tort where one can claim damages for intruding in his privacy and no more. Tort itself falls in the grey area. An example of this being, when Maneka Gandhi moved the Delhi High Court against Khushwant Singh's autobiography *Truth, love and a little malice* claiming it had violated her privacy. The judgment went in favor of Khushwant Singh. The two judge bench observed that the right to privacy enshrined in article 21 could be invoked only against the state action and not against private entities.

Another landmark judgment which addressed the issue of privacy was the telephone tapping case—***People's Union for Civil Liberties v Union of India, (1997) 1 SCC 301***. In this case the Supreme Court observed, "The Right to Privacy by itself, has not been identified under the Constitution. As a concept it may be too wide and moralistic to define it judicially. Whether *Right to Privacy* can be claimed or has been infringed in a given case would depend on the facts of the said case.

The problem gets serious when one is virtually defenseless in cyberspace. The Information Technology Act, 2000 (ITA) has recognized various crimes like cyber- stalking, cyber snooping, spam mail and such others. An individual can do very little about these offences. But even the ITA touches the issue of privacy only under Section 72 which talks about breach of confidentiality and privacy. Thus, if a Government official passes on electronic information or data that he has received about an individual in his official capacity, he can be punished.

With the advancement of technology, with every passing moment, even the new ITA seems obsolete. In a recent article by Satyantan Chakrawarty on the need for use of new hi-tech devices for the purpose of investigating, the author stated that sometimes the officials transgress their authority and enter the private domain of the people thus infringing their privacy. The Research and Analysis Wing (RAW) had access to bugging, surveillance and counter surveillance equipment. A variety of devices can be used by an investigating agency, like, e-logger, GSM monitor, laser ear, e-mail interceptor, spy cavities.

However, the increased use of these devices has definitely increased the vulnerability of a person, and the only check on this is the controller appointed by the Government of India under the ITA. If the controller is convinced himself that the interception is required then he may grant the permission for the same. The ITA also provides for a list of reasons, which are not exhaustive, under which the controller can grant such permission. The reasons in the list are, in the interest of maintaining the sovereignty and integrity of India, security of the state, in the interest of pursuing friendly relations with foreign states, public order and preventing a cognizable offence.

The fact that cannot be ignored here is that while in a case of privacy infringement by a state or an instrumentality of the state, as discussed above, an infringement action can be brought under Article 21 of the Constitution, there is no remedy available if such an infringement is committed at the hands of a private individual. For such an infringement no expensive devices and equipments are required.

Mobiles

As digital photo components have plummeted in price and their size has shrunk, the privacy implications of cameras on phones have raised concerns beyond the fears of stalked celebrities and cheating spouses. Even the makers of camera phones do not seem keen on the technology when it is turned on them. Samsung Corporation and LG Electronics Inc, the South Korean handset makers, caused a chuckle in the industry when they banned the use of their own phones (with camera) in their own facilities this year.

Computers

As regards the friendly computers, our very own PCs can infringe our privacy by sending out a a lot of information about us to third parties. A software programme by the name of Spybot.gen downloaded on a computer's hard drive has the power to read MS Word documents and send contents back to its originator, or to an accomplice.(8)

Also, hacking and spoofing are words not unknown to us. Section 66 of the ITA has defined hacking and the impact of such hacking can be best understood when a website is defaced. Section 66(1) states, "Whoever with the intent to cause or knowing that he is likely to cause wrongful loss or damage to the public or any person destroys or deletes or alters any information residing in a computer resource or diminishes its value or utility or affects it injuriously by any means, commits hacking." Thus, hacking can be committed only if the person has the intent or knowledge of committing the same.

Though steps have been taken by the Ministry of Information and Broadcasting to combat this crime a lot has yet to be done. Setting up a cyber-crime cell is not the only step that we need to take. More importantly, we need to educate the investigators in this specialised field. There should be many training programmes for the police and investigating officers on cyber- crimes, as awareness levels of such executive functionaries are often quite poor.

Further, reporting the matter to the police means inviting negative media publicity. It also leads to a media trial about the security capabilities of the said company or its network, often even without giving the company an opportunity to express its side of the story. The hassles of going to court and producing evidence are other strong deterrents. Unfortunately, this scenario prevails not only in India but also worldwide.

However, as a result, cyber-crimes like hacking go unreported. The government basks under a false sense of security that their companies and networks are free from cyber-crime. Very few cases are reported to the police and consequently there are very few convictions. Either one should have all the latest state-of-the-art security systems in place or you are totally insecure. There is a need to standardise the cyber laws as only 12 countries, including India, have authenticated digital signatures. Further the countries without cyber legislation need to be convinced to assist in checking IT crimes.

Recommendations: The regulatory interventions coinciding with India's period of technology-led growth have been a mixed bag. Privacy may have found its ally in the Indian Supreme Court, but the data protection bill has long been in the works without much-needed push from the government to formalize it as a legislation.[82] Moreover, many of the safeguards against misuse of Aadhaar data, emphasized by the Supreme Court when upholding the validity of the Aadhaar Act, have been watered down through a recent ordinance that bypassed legislative scrutiny.[83] The data localization debates reveal uncoordinated action between different power centres within the government, resulting in both business unpredictability and the fear of censorship through architectural changes to the Internet. Recent proposals in the realms of e-commerce and intermediary liabilities do not indicate well-thought-out measures of regulation that factor in the capacity for enforcement, the impact on fundamental freedoms including speech and business autonomy, or the proportionality of state action.[84]

Yet, there have been some green shoots as well. The drone policy is one such, coming as it did from a place of outright ban on the technology in 2014 to a state-of-the-art reg-tech solutions like Digital Sky and Regulations 1.0, in 2018, that leave room for further iterations that match the pace of technological advances in this sector.[85] The Telecom Regulatory Authority of India's position on net neutrality has been largely well received across the range of different stakeholders. On digital payments, the government has displayed considerable sensitivity towards various concerns ranging from innovation in the sector to consumer dispute redressal mechanisms and competition concerns. In all these cases, what comes through is some degree of mindfulness to the central principles outlined here. The government should now build on these early successes to develop appropriate regulatory toolkits.

Any regulatory intervention in the field of technology policy must begin with an insistence on a clear outlining of the harms involved and a mapping of the various alternate policy measures that could be potentially taken to address these harms. This is a good starting point for citizens and other stakeholders to develop awareness of the challenges that the state wishes to address, and the fit between these challenges and the proposed regulatory measures. The European Union has insisted on similar measures as part of its 'Better

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[82] *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1; Surabhi Agarwal, 'Personal Data Protection Bill only after new government takes over', *Economic Times*, 4 January 2019, *https://economictimes.indiatimes.com/tech/internet/personal-data-protect...*

[83] *K.S. Puttaswamy v. Union of India* (2019) 1 SCC 1; Zaheer Merchant, 'Supreme Court refuses to entertain challenge to Aadhaar ordinance, tells petitioners to approach High Court', *Medianama*, 8 April 2019, *https://www.medianama.com/2019/04/223-supreme-court-refuses-to-entertain...*.

[84] See 'Draft National E-Commerce Policy: India's Data for India's Development' (New Delhi: Department of Industrial Policy and Promotion, 2019), *https://dipp.gov.in/sites/default/files/DraftNational_e-commerce_Policy_...* 'Draft Information Technology [Intermediaries Guidelines (Amendment) Rules], 2018' (New Delhi: Ministry of Electronics and Information Technology, 2018), *https://meity.gov.in/writereaddata/files/Draft_Intermediary_Amendment_24...*.

[85] Civil Aviation Requirements', Series X, Part I, Issue I: Requirements for Operation of Civil Remotely Piloted Aircraft System (RPAS), F. No. 05-13/2014-AED Vol. IV (New Delhi: Directorate General of Civil Aviation, 2018), *http://dgca.nic.in/cars/d3x-x1.pdf*.

Regulation' principles.[86] The responsibility cast on the regulator to explain why it is regulating in the manner it proposes can make a significant contribution towards providing certainty, accountability and curbs on arbitrary intervention.

Regulation of new technologies should also enable experimentation with bespoke regulatory approaches and tools, as well as with innovative market solutions, both in a contained low-risk environment. 'Experimental regulation' seeks to achieve this objective by providing exceptions to, or exemptions from, existing regulation in a ring-fenced environment.[14] In many countries, experimental regulation has taken the form of sandboxing schemes. The UK Financial Conduct Authority's Project Innovate is a live example of regulatory sandboxing for financial technologies. Other jurisdictions such as Australia, Singapore, Switzerland, Hong Kong, Thailand, Abu Dhabi and Malaysia have also been experimenting with similar initiatives.[15] India needs to create more comprehensive thinking across multiple regulators about the efficacy and modalities of such regulatory sandboxes.

As many of the new technologies cannot be confined in clear terms to the regulatory jurisdiction of any one regulator, India also needs to develop strategies for better inter-agency coordination. The data localization controversy revealed how different regulatory and recommendatory bodies were at odds with each other on how to address this issue. Because data is a cross-cutting asset across multiple sectors, it is imperative to build better coordination and some uniformity in decision-making on matters of data governance. In the US, the Obama administration had created an Emerging Technologies Interagency Policy Coordination Committee to tackle the problem of siloed decision-making. Israel has established an inter-agency team to coordinate regulation of virtual assets. India must learn from these exercises and build a more coordinated regulatory strategy for data governance as well as other realms of new technology.

Finally, important regulatory interventions should also carry the mandatory requirement of a rights impact assessment. The current relationship between regulators and civil society is mostly one of direct acrimony and distrust, especially when it comes to regulating the Internet and digital technologies. The only way to usher in a structured change is to mandate a clear rights impact assessment, where the regulator must necessarily gauge the implications of the proposed regulatory approach on fundamental and human rights. Many instances of excessive and harsh regulations can be pre-empted at an early stage if this mechanism is built into the regulatory process.

Conclusion:

In order to address the dual challenges of rapidly changing technology and pursuant inequality, mentioned in the Introductory Section, legal efforts have to be made at two levels. First, law has to ensure level-playing field for infrastructure development for the Internet, and for its use. At domestic level, this can be done through combination of competition policy and telecom/Internet sector-specific regulations. Second, level-playing field is also required for the operation of ecommerce companies. At this level, market naturally favours companies with large data collection and processing capacity. Such companies take benefit

[86]Better Regulation Toolbox' (European Commission, 2017), available at *http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf*.

of virtuous cycle where data analytics enables them to capture more customers, which in turn increases their data analytics capabilities. At present Google, Apple, Facebook and Amazon (GAFA) along with Uber, Twitter, Alibaba and a few others rule the global digital landscape. Billions of people provide data about their personal lives and business activities to these companies, which are using that data as leverage to track and influence human behaviour to their economic advantage. These companies control key technological and economic resources. This control shields them from any future competition too. Breaking the virtuous cycle of data collection may not be practically possible or desirable, but appropriate laws and rules can ensure that such companies do not abuse their market position and entry barriers for new and small entrants are minimized.

It is worth noting that taking the legal route is not an answer for all the complications resulting from omnipresent e-commerce. Law has to take into account purely technical and economic issues along with the international regime. In addition, there may not be possible to have a uniform legal approach for all the issues. While some issues need extensive legal intervention, other issues are better resolved through alternate approaches. So far, globally, three types of regulatory approach can be observed- complete freedom, no freedom and limited freedom for digital business.

The United States has exercised minimal regulation to allow online giants to develop and for the government to use them as tool of national security and intelligence resource; Countries like China and Russia have adopted an approach of extensive intervention and regulation by encouraging and supporting domestic search engines and social media structures to secure domestic private companies interests; and European Union has taken the path of limited regulation where it allows these companies to function freely subject to competition and data protection laws. Any country before adopting either of these approaches, must keep in mind the current economic and technological structure and its rapidly changing nature. Overall, lawmakers must keep their minds and options open.

MODULE - VI

LEGAL RESEARCH METHODOLOGY AND PROJECT WRITING TECHNIQUES

MODULE VI- LEGAL RESEARCH METHODOLOGY AND PROJECT WRITING TECHNIQUES

A term can be best understood with reference to the purpose it seeks to achieve. The purpose of research is either to know about or to contribute something new to the existing state of knowledge. The former can be described as the 'disinterested search for knowledge and understanding for its own sake', while the latter is an application based approach to the problems in the real world. The prefix re before research signifies a continuum which verifies or supplements existing knowledge. It involves a systematic, careful, diligent and thorough investigation into a specific issue with a primary objective of contributing to the existing knowledge. A directionless, unspecific, unsystematic and mere surface brushing would give us results that cannot reveal realistic outcomes.

Purpose of Research

Very often the researcher wonders how does, and whom does the research help. This is of course a mundane question or self-doubt. The normative (philosophical) justification is raise questions (doubts) about an existing phenomenon (subject/law/) and offer new interpretations/suggestions through critical investigation. On the other hand the pragmatic purpose of research is to obtain a formal degree/certificate to advance one's career.

Following are the primary reasons justifying a research study.

- **To contribute to existing knowledge in a discipline (for example, law).**
  Research can offer new and fresh perspectives by examining a law or social condition. For example, past legal or social histories may demand review in view of current social changes. History is a mirror of society and depending on the dynamic of social changes past facts and their legal interpretations demand new meanings. One is tempted to quote Justice Krishna Iyer's well known statement: "A Constitution is a *living* document." His message is constitutional interpretation or understanding of a subject say, 'property' 'justice' 'crime' 'sedition' 'contempt' 'freedom of religion' need new meanings in the context of new social situations and values (morals). Constitution therefore should not be a *static* document to guide changing generations of people.
  Viewed from such progressive perspectives or lens different lens, legal research makes positive contribution to existing state of knowledge on a particular subject/issue/concept and thereby expands the horizons of the discipline of Law.
- **To inform and offer new directions to making of a Law or its amendment (for example, capital punishment, right to food or education).**
  Good research studies therefore guide policy formulations and decision makers. For example, research can be used to address socio-economic issues say education as to how it can be given a direction as to ensure economic growth of a nation. Or how best to avoid food wastage and finding a space for law to regulate such value.

- **To address a specific issue or question (for example, substance abuse in campus).**
  Research findings are also used to answer a specific issue at hand. It stemmed from the concerns that the conventional researches were not having much impact and, thereby, new approaches that were seen as being more relevant and practical in the real world settings were developed. It can be action research which is both diagnose a specific issue and attempt to solve it, thereby, to improve practice in some way. Also it may be evaluation which assesses the existing state of affairs in an era wherein the accountability has increased. That requires a constant reassessment about the worth or usefulness of a particular service, policy or other intervention.

Legal Research: Taking a cue from the discussion above legal research can be understood as a systematic examination of a legal topic and conclude with new findings or recommendations. This is not an easy task to find the law in a vast mass of statutes which are constantly amended and supplemented by rules regulations, orders, directives, ordinances, judgment of courts, and bye-laws. Also for making advancement in the science of law requires a systematic probe into the underlying principles of and reasons for law. Thus, legal research has a broad ambit to it. It has to be continuously done by legislators, a judge, a lawyer, a law student and a law teacher.

Purpose of Legal Research: Law does not sit in a vacuum instead it operates in a complex social context. It reflects attitudes and behavioral norms, and also control and mould them. However as these norms are also temporo-spatial, that is changing with time and space, it is desirous that law has to adapt and be dynamic in order to cope with the changes. Thereby, legal research becomes essential for ascertainment of law, to point out ambiguities and weaknesses of law, to critically examine the laws in order to ensure coherence, consistency and stability of law and its underlying policy, to conduct a social audit of the law, and to suggest reforms in the law. Taking them one by one:

- **Ascertaining the law**
  In a complex mass of legal statues and coupled with allied legal material it is not always easy to find the law on a particular point. They are scattered and a single issue may involve application of various laws. Judicial pronouncements add to the complexity. A researcher needs to locate, analyze and understand these pronouncements. So the process involves an intensive analysis of legal instruments and judicial pronouncements.
- **Highlighting ambiguities and gaps**
  A law is not designed to address every contingency that might arise in future. Because it's the nature of law that it is reactive it answers to problems which had arisen and seldom is it that it is proactive. Secondly even the phraseology of a provision may not fit with the legislative intent or may not match with other provisions of the Act. Research highlights these gaps and inbuilt ambiguities.
- **Determining coherence, stability and consistency**
  Via a process of critical evaluation of the law a researcher can exhibit the consistency, coherence and stability in the law. This helps in future designing and development of law, legal provision or doctrine, as the case may be.

- **Social auditing of law**
  It's a pre-legislative step done in order to understand and appreciate the social factors that had an impact on the making of the law. It enables one to know the stakes the law intends to protect or change and reasons for the same. Such an audit helps to identify gap, if any between the legal ideal and the social reality and to know the reasons responsible thereof. It also enables us to predict the future of law.
- Suggesting reforms In the light of the research reforms can be proposed in precise terms. These outcomes can be on the basis of an analytical, historical and comparative research.

TYPES OF RESEARCH

The basic types of research are as follows:

(i) **Descriptive vs. Analytical:** Descriptive research includes surveys and fact-finding enquiries of different kinds. The major purpose of descriptive research is description of the state of affairs as it exists at present. In social science and business research we quite often use the term Ex post facto research for descriptive research studies. The main characteristic of this method is that the researcher has no control over the variables; he can only report what has happened or what is happening. Most ex post facto research projects are used for descriptive studies in which the researcher seeks to measure such items as, for example, frequency of shopping, preferences of people, or similar data. Ex post facto studies also include attempts by researchers to discover causes even when they cannot control the variables. The methods of research utilized in descriptive research are survey methods of all kinds, including comparative and correlational methods. In analytical research, on the other hand, the researcher has to use facts or information already available, and analyze these to make a critical evaluation of the material.

(ii) **Applied vs. Fundamental:** Research can either be applied (or action) research or fundamental (to basic or pure) research. Applied research aims at finding a solution for an immediate problem facing a society or an industrial/business organisation, whereas fundamental research is mainly concerned with generalisations and with the formulation of a theory. "Gathering knowledge for knowledge's sake is termed 'pure' or 'basic' research." Research concerning some natural phenomenon or relating to pure mathematics are examples of fundamental research. Similarly, research studies, concerning human behaviour carried on with a view to make generalisations about human behaviour, are also examples of fundamental research, but research aimed at certain conclusions (say, a solution) facing a concrete social or business problem is an example of applied research. Research to identify social, economic or political trends that may affect a particular institution or the copy research (research to find out whether certain communications will be read and understood) or the marketing research or evaluation research are examples of applied research. Thus, the central aim of applied research is to discover a solution for some pressing practical problem, whereas basic research is directed towards finding information that has a broad

base of applications and thus, adds to the already existing organized body of scientific knowledge.

(iii) **Quantitative vs. Qualitative:** Quantitative research is based on the measurement of quantity or amount. It is applicable to phenomena that can be expressed in terms of quantity. Qualitative research, on the other hand, is concerned with qualitative phenomenon, i.e., phenomena relating to or involving quality or kind. For instance, when we are interested in investigating the reasons for human behaviour (i.e., why people think or do certain things), we quite often talk of 'Motivation Research', an important type of qualitative research. This type of research aims at discovering the underlying motives and desires, using in depth interviews for the purpose. Other techniques of such research are word association tests, sentence completion tests, story completion tests and similar other projective techniques. Attitude or opinion research i.e., research designed to find out how people feel or what they think about a particular subject or institution is also qualitative research. Qualitative research is specially important in the behavioural sciences where the aim is to discover the underlying motives of human behaviour. Through such research we can analyse the various factors which motivate people to behave in a particular manner or which make people like or dislike a particular thing. It may be stated, however, that to apply qualitative research in practice is relatively a difficult job and therefore, while doing such research, one should seek guidance from experimental psychologists.

(iv) **Conceptual vs. Empirical:** Conceptual research is that related to some abstract idea(s) or theory. It is generally used by philosophers and thinkers to develop new concepts or to reinterpret existing ones. On the other hand, empirical research relies on experience or observation alone, often without due regard for system and theory. It is data-based research, coming up with conclusions which are capable of being verified by observation or experiment. We can also call it as experimental type of research. In such a research it is necessary to get at facts first hand, at their source, and actively to go about doing certain things to stimulate the production of desired information. In such a research, the researcher must first provide himself with a working hypothesis or guess as to the probable results. He then works to get enough facts (data) to prove or disprove his hypothesis. He then sets up experimental designs which he thinks will manipulate the persons or the materials concerned so as to bring forth the desired information. Such research is thus characterised by the experimenter's control over the variables under study and his deliberate manipulation of one of them to study its effects. Empirical research is appropriate when proof is sought that certain variables affect other variables in some way. Evidence gathered through experiments or empirical studies is today considered to be the most powerful support possible for a given hypothesis.

(v) **Some Other Types of Research:** All other types of research are variations of one or more of the above stated approaches, based on either the purpose of research, or the time required to accomplish research, on the environment in which research is done, or on the basis of some other similar factor. Form the point of view of time, we can think of research either as one-time research or longitudinal research. In the former case the research is confined to a single time-period, whereas in the latter case the research is carried on over several time-periods.

Research can be field-setting research or laboratory research or simulation research, depending upon the environment in which it is to be carried out. Research can as well be understood as clinical or diagnostic research. Such research follow case-study methods or indepth approaches to reach the basic causal relations. Such studies usually go deep into the causes of things or events that interest us, using very small samples and very deep probing data gathering devices. The research may be exploratory or it may be formalized. The objective of exploratory research is the development of hypotheses rather than their testing, whereas formalized research studies are those with substantial structure and with specific hypotheses to be tested. Historical research is that which utilizes historical sources like documents, remains, etc. to study events or ideas of the past, including the philosophy of persons and groups at any remote point of time. Research can also be classified as conclusion-oriented and decision-oriented. While doing conclusion-oriented research, a researcher is free to pick up a problem, redesign the enquiry as he proceeds and is prepared to conceptualize as he wishes. Decision-oriented research is always for the need of a decision maker and the researcher in this case is not free to embark upon research according to his own inclination. Operations research is an example of decision oriented research since it is a scientific method of providing executive departments with a quantitative basis for decisions regarding operations under their control.

Research Method and Research Methodology: Research Methods and Research Methodology are two terms that are often confused as one and the same. Strictly speaking they are not so and they show differences between them. One of the primary differences between them is that research methods are the methods by which you conduct research into a subject or a topic. On the other hand research methodology explains the methods by which you may proceed with your research. Research methods involve conduct of experiments, tests, surveys and the like. On the other hand research methodology involves the learning of the various techniques that can be used in the conduct of research and in the conduct of tests, experiments, surveys and critical studies. This is the technical difference between the two terms, namely, research methods and research methodology.

Research methodology is a systematic way to solve a problem. It is a science of studying how research is to be carried out. Essentially, the procedures by which researchers go about their work of describing, explaining and predicting phenomena are called research methodology. It is also defined as the study of methods by which knowledge is gained. Its aim is to give the work plan of research.

Research methods are the various procedures, schemes, algorithms, etc. used in research. All the methods used by a researcher during a research study are termed as research methods. They are essentially planned, scientific and value-neutral. They include theoretical procedures, experimental studies, numerical schemes, statistical approaches, etc. Research methods help us collect samples, data and find a solution to a problem. Particularly, scientific research methods call for explanations based on collected facts, measurements and observations and not on reasoning alone. They accept only those explanations which can be verified by experiments.

In short it can be said that research methods aim at finding solutions to research problems. On the other hand research methodology aims at the employment of the correct procedures to find out solutions. It is thus interesting to note that research methodology paves the way for research methods to be conducted properly. Research methodology is the beginning whereas research methods are the end of any scientific or non-scientific research.

Let us take for example a subject or a topic, namely, 'employment of figures of speech in English literature'. In this topic if we are to conduct research, then the research methods that are involved are study of various works of the different poets and the understanding of the employment of figures of speech in their works. On the other hand research methodology pertaining to the topic mentioned above involves the study about the tools of research, collation of various manuscripts related to the topic, techniques involved in the critical edition of these manuscripts and the like.

If the subject into which you conduct a research is a scientific subject or topic then the research methods include experiments, tests, study of various other results of different experiments performed earlier in relation to the topic or the subject and the like. On the other hand research methodology pertaining to the scientific topic involves the techniques regarding how to go about conducting the research, the tools of research, advanced techniques that can be used in the conduct of the experiments and the like. Any student or research candidate is supposed to be good at both research methods and research methodology if he or she is to succeed in his or her attempt at conducting research into a subject.

Research methods may be understood as all those methods/techniques that are used for conduction of research. Research methods or techniques, thus, refer to the methods the researchers use in performing research operations. In other words, all those methods which are used by the researcher during the course of studying his research problem are termed as research methods. Since the object of research, particularly the applied research, is to arrive at a solution for a given problem, the available data and the unknown aspects of the problem have to be related to each other to make a solution possible. Keeping this in view, research methods can be put into the following three groups:

1. In the first group we include those methods which are concerned with the collection of data. These methods will be used where the data already available are not sufficient to arrive at the required solution;
2. The second group consists of those statistical techniques which are used for establishing relationships between the data and the unknowns;
3. The third group consists of those methods which are used to evaluate the accuracy of the results obtained.

Research methods falling in the above stated last two groups are generally taken as the analytical tools of research.

Research methodology is a way to systematically solve the research problem. It may be understood as a science of studying how research is done scientifically. In it we study the various steps that are generally adopted by a researcher in studying his research problem along with the logic behind them. It is necessary for the researcher to know not only the

research methods/techniques but also the methodology. Researchers not only need to know how to develop certain indices or tests, how to calculate the mean, the mode, the median or the standard deviation or chi-square, how to apply particular research techniques, but they also need to know which of these methods or techniques, are relevant and which are not, and what would they mean and indicate and why. Researchers also need to understand the assumptions underlying various techniques and they need to know the criteria by which they can decide that certain techniques and procedures will be applicable to certain problems and others will not. All this means that it is necessary for the researcher to design his methodology for his problem as the same may differ from problem to problem. For example, an architect, who designs a building, has to consciously evaluate the basis of his decisions, i.e., he has to evaluate why and on what basis he selects particular size, number and location of doors, windows and ventilators, uses particular materials and not others and the like. Similarly, in research the scientist has to expose the research decisions to evaluation before they are implemented. He has to specify very clearly and precisely what decisions he selects and why he selects them so that they can be evaluated by others also.

From what has been stated above, we can say that research methodology has many dimensions and research methods do constitute a part of the research methodology. The scope of research methodology is wider than that of research methods. Thus, when we talk of research methodology we not only talk of the research methods but also consider the logic behind the methods we use in the context of our research study and explain why we are using a particular method or technique and why we are not using others so that research results are capable of being evaluated either by the researcher himself or by others.

Doctrinal Legal Research: Doctrinal legal research, as conceived in the legal research domain, is research 'about' what the prevailing state of legal doctrine, legal rule, or legal principle is. A legal scholar undertaking doctrinal legal research, therefore, takes one or more legal propositions, principles, rules or doctrines as a starting point and focus of his study. He 'locates' such a principle, rule or doctrine in statutory instrument(s), judicial opinions thereon, discussions thereof in legal treatises, commentaries, textbooks, encyclopedias, legal periodicals, and debates, if any, that took place at the formative stage of such a rule, doctrine or proposition. Thereafter, he 'reads' them in a holistic manner and makes an 'analysis' of the material as well as of the rules, doctrines and formulates his 'conclusions' and writes up his study.

For example, a legal researcher interested in criminal law might start with proposition dealing with right against self-incrimination. Research then takes place in the law library, where he will 'locate' the proposition (along with its different contours) and its discussions in treatises and textbooks on criminal law, criminal procedure, and constitutional law, encyclopedia and leading legal periodicals. He will also try to locate all relevant judicial pronouncements of the higher judicial institutions delved into the right against self-incrimination. He will then 'read' these materials and 'analyze' them by applying his power of reasoning and will, premised on analytical perspective and the material used, draw some conclusions about the proposition. He then will write up his study.

Researcher may, in his study advance a set of formulations, supportive or otherwise, with convincing 'reasoning' about the proposition-the right against self-incrimination. He, in his research report, may offer an alternative comprehensive paradigm of the doctrine. With a

view to drawing parallels between the doctrine or rule under inquiry, he may also find a comparable doctrine or rule from other jurisdictions. He may, depending upon 'objectives' of his research, also propose a new formulation of the rule or doctrine, a model statute or a statutory provision. He may also highlight the purpose and policy of law that exist and may propose what it ought to be.

Doctrinal legal research, thus, involves: (i) systematic analysis of statutory provisions and of legal principles involved therein, or derived therefrom, and (ii) logical and rational ordering of the legal propositions and principles. The researcher gives emphasis on substantive law rules, doctrines, concepts and judicial pronouncements. He organizes his study around legal propositions and judicial pronouncements on the legal propositions of the appellate courts, and other conventional legal materials, such as parliamentary debates, revealing the legislative intent, policy and history of the rule or doctrine. Classic works of legal scholars on the law of torts and administrative law do furnish outstanding examples of doctrinal legal research.

Doctrinal legal research, in addition to analytical one, may be historical or comparative. Historical legal research, unlike analytical one, deals with the past. It throws light on the past to understand the present. It explores the circumstances that led to the adoption of the existing law. It gives a clue to the reasons why a particular provision of law or law was framed in the form in which now it appears. It also often reveals that a particular existing provision/law, fully justifiable at the time when it was introduced, is no longer justifiable because the reasons/circumstances that justified the original inclusion of that provision/law are no longer valid. While comparative legal research, as evident from its title, involves comparative study of comparable laws or legal institutions from different jurisdictions. It exhibits the lessons that can be learnt from each other's failures and achievements.

Aims

Doctrinal legal research, as stressed earlier, involves rigorous analysis of statutory provisions and judicial pronouncements thereon. The researcher organizes his study around legal provisions, principles, concepts or doctrines and judicial statements relating thereto, and/or reflecting thereon. He not only makes analysis of statutory provisions and of case law, but also logically and systematically arranges the statutory provisions and judicial pronouncements to deduce, on legal reasoning and rationale, some legal propositions. Doctrinal legal research, thus, (i) aims to study case law and statutory law, with a view to find law, (ii) aims at consistency and certainty of law, (iii) (to some extent) looks into the purpose and policy of law that exists, and (iv) aims to study legal institutions.

Therefore, doctrinal legal research should not be undermined merely because it revolves around statutes and judicial decisions. It immensely contributes to the continuity, consistency and certainty of law. It also initiates further development of legal principles and doctrines.

Doctrinal legal research mandates the legal researcher to 'locate' the required apt statutory provisions and judicial reflections thereon that have bearing on the legal doctrine, concept or rule under inquiry. Such legislative provisions and judicial decisions constitute the basic data for a doctrinal legal researcher.

Basic tools

Where can a legal researcher find the required statutes and judicial decisions? He can 'locate' the requisite data in the apt statutory materials and case reports. The former refers to, and includes in it, the relevant Acts of Parliament (along with the amendments made thereto from time to time); secondary or subordinate legislations (in the form of rules, regulations, orders, notifications, byelaws, and statutory orders) made thereunder. While the latter, refers to case-reports that verbatim reproduce cases decided by courts. Statutory material and case reports constitute primary research tools for doctrinal legal research. However, in addition to these original sources of data, the researcher may have to look into secondary source materials such as research articles published in leading legal periodicals, text and reference books on the subject. He may have also to refer to parliamentary debates and other Government records and reports for getting further 'insight' into the legal principle, doctrine or concept under inquiry.

The basis tools of a doctrinal legal researcher, thus, are: (i) statutory materials, (ii) case reports, (iii) standard textbooks and reference books, (iv) legal periodicals, (v) Parliamentary Debates and Government Reports, and (vi) Micro films and CD-ROM. These tools, depending upon the nature of information they contain, may be re-categorized into primary and secondary sources of information. National Gazette and Case Reports fall in the first category, while the rest fall in the latter.

(i) Statutory materials

Legislative Acts constitute one of the basic tools of doctrinal legal research. However, a plethora of subsidiary or secondary legislation in the form of rules, regulations, byelaws, notifications, statutory orders or directives is found in the modern national legal system. In fact, in a contemporary legal system the quantum of executive legislative instruments overweighs the primary ones. Further, Acts of Legislature, with a view to coping up with the changed circumstances and/or social or political perceptions, undergo frequent changes through amendments. Sometimes, an Act of Parliament, when it, in the opinion of Legislature, becomes obsolete or redundant, is replaced by another one.

Acts of Legislature as well as amendments thereto are required to publish in (National) Gazette before they become operative. Instruments of executive legislation are also published in the Gazette. National Gazette, therefore, constitutes an authentic primary source of statutes and statutory provisions.

Sometimes, some law publishers publish, with short notes and requisite disclaimer, leading and frequently referred to statutes. In some jurisdictions, almost all the statutes, with comprehensive comments, are published in a series of volumes.

Reference to statutes and statutory provisions, invariably with analytical comments, can also be found in standard textbooks and reference books, including 'cases and materials', on the subject. However, most of the times, these publications, for obvious reasons, do not include the latest amendments to the statutes and judicial statements thereon. Hence, the researcher has to look for subsequent legislative changes and latest cases on the matter under inquiry. The sole reliance on these books may lead to an incomplete and misleading research. Further,

textbooks as well as reference books, owing limitation of space, cover a broad area in the compressed form. Therefore, some ideas may be left with some cursory remarks by the authors.

Nevertheless, a researcher working on a relatively new theme is advisable to start with the textbooks, reference books, and 'cases and materials' on the subject. It will also enable him to acquaint himself with and understand the basic principles and dimensions of the theme or the subject under investigation. It will also help him to find several other pertinent sources of study and decided cases, with comments, on the subject.

Sometimes, the researcher may have also to look into the debates that took place on floor of the House on the draft statute when it was in the making. Reading of Parliamentary Debates will enable him to get acquainted with the underlying legislative policy of the statute. It will also reveal the different alternatives suggested on the floor of the House and the reasons for their acceptance or rejection in the final version of the statute. Such an acquaintance will undoubtedly lead to a well-reasoned in-depth analysis of the statute. It may also be of worth exercise for a doctrinal legal researcher to look for (and to have peep therein) a pre-& post-legislative Reports on the statutes under inquiry. A peep into these reports will divulge different underlying legislative currents and paradigms and thereby will enable him to have deeper insight into the legislative and operational facets of the statute(s)/statutory provision(s) under consideration. Further, a look into Parliamentary Debates and Government Records may exhibit some hidden or new dimensions of the doctrine or legal principle under investigation.

(ii) Case reports

In almost all the common law legal systems, judicial decisions of higher courts are published in Case Reports. A doctrinal legal researcher, therefore, has to look for the apt Case Reports for laying his hands on the required judicial pronouncements for his analysis. In addition, in these jurisdictions one finds a number of well-articulated case digests. Case Digests, which refer to all the reported cases, play a significant role in collecting cases on a particular subject/topic. They undeniably assist the researcher in 'locating' relevant judicial decisions and grasping quickly the legal principles laid down therein. As mentioned earlier, textbooks and reference books on the subject contain cases on the statute(s) and statutory provision(s) under inquiry. But the case law dealt under these books may not be comprehensive and up-to-date. Authors of the textbooks and reference books may omit cases not considered relevant by them.

Almost all the legal periodicals published from common law countries invariably devote some of their pages for 'Case Comments' wherein comments by experts on leading cases are published. Some periodicals also contain a segment on 'Notes on Cases' wherein brief but pertinent comments on, and/or summary of, contemporary leading judicial decisions are published. A careful look at these pages will help the researcher in identifying apt cases that deserve his serious attention and analysis in his research.

Further, Annual Survey, publishing a summary of the most important cases and outlining the consequential development in different branches of law, may also be a significant tool for finding cases on the identified statutes or statutory provisions. In such a survey, an expert of

repute in the field, not only identifies significant judicial decisions rendered in the field during the year under survey but also makes their analysis with a view to finding the way in which they have followed or deviated from the past judicial dicta and judicial reasons given therefor. Based on such analysis, he also sketches the development, progressive or otherwise, of the law in the field during the year under survey and predicts future course of development.

(iii) Legal periodicals

It may also be necessary for a doctrinal legal researcher to know what others have said and found in the area of his research. Therefore, he is required to look into research articles published in legal periodicals of repute. Research articles published on the topic/theme of inquiry are of immense help for a doctrinal legal researcher. A reading of these articles not only unconsciously inspires him to pursue his inquiry with vigor but also helps him in crystallizing his ideas that are still imprecise. These articles may expose him to some new dimensions or aspects of the problem, which he has not been so far able to conceive. It may also help him in assuring himself that he has not missed anything pertinent from original sources. Further, he may unconsciously learn the ways of effective persuasion and presentation of his inquiry. To put simply, it becomes necessary for a legal scholar to know what other researchers have said on the topic to: (i) seek inspiration, (ii) crystallize his ideas, (iii) organize his thoughts, and (iv) ensure that he has not missed any original sources. Hence, legal periodicals become indispensable tools of doctrinal legal research.

However, he may come across a number of legal periodicals with an umpteen number of research articles written by scholars of repute in the field. Some times, he may feel, rightly so, that it is impossible for him to go even through the Table of Contents of these legal periodicals (with numerous issues thereof) to 'locate' research articles that are 'relevant'. He may carry a feeling of reluctantly sinking, forever, in these voluminous legal periodicals.

However, there are a good number of indexes published by commercial organizations and academic and professional bodies that help him in 'locating' research articles with comparatively lesser efforts and time. Some of the acclaimed and widely used indexes for locating articles are:

1. *Index to Legal Periodicals*- The Index is prepared and published since 1908 by the American Association of Law Libraries, New York. It indexes various legal periodicals published in the United States, Canada, Great Britain, Northern Ireland, Australia and New Zealand. Articles are indexed 'subject-wise' as well as 'author-wise'.
2. *Index to Foreign Legal Periodicals*- The index is prepared and published since 1960 by the Institute of Advanced Legal Studies of the University of London, London, in co-operation with the American Association of Law Libraries, New York. It is published in three quarterly parts covering the contents of legal literature received over the period October to June and it is followed by an annual volume cumulating the first three parts. It indexes articles published in legal periodicals published from the countries other than the United States, Great Britain, and the countries of the British Commonwealth whose systems of law have a common law basis. It thus complements and, to a limited extent, duplicates the Index to Legal Periodicals. It

gives ‘subject index’, ‘author index’ and ‘book reviews’. It also gives ‘geographical index’ giving by country, subject and headings used for article mainly concerned with laws of a country or countries.

3. *Index to Periodical Articles Related to Law*- This index commenced in 1958. It is compiled by the librarians of the Yale and Columbia Law Schools. It has coverage of selective articles published in English throughout the world, which were not covered by Index to Legal Periodicals and Index to Foreign Legal Periodicals.
4. *Index to Indian Legal Periodicals*- It is a half-yearly publication of the Indian Law Institute, New Delhi. Its publication started in 1963. It indexes articles (subject-wise and author-wise) published in leading legal periodicals published in India including Yearbooks and other annual publication pertaining to law. It also indexes case comments and book reviews published in these periodicals.
5. *Legal Journals Index*- The publication started in 1986 from the UK. It indexes research articles published in legal periodicals published from almost all the common law countries.

In addition to these Indexes, a few legal periodicals bring out their own Cumulative Index (of a certain period). Such a Cumulative Index lists articles, author-wise as well as subject-wise, published in different issues of the periodical. It also gives index of cases refereed to, and books reviewed therein. It helps a legal scholar to locate relevant articles published over the years in the legal periodical.

Bibliographies on certain subjects are also available to a legal researcher. Such bibliographies also help him in locating research articles, books, and reports on the subject of his inquiry.

However, a researcher may find an umpteen number of articles published in different periodicals that deal with or touch upon same, similar or identical themes expositing him, in a way, to repetitive ideas pertaining to, and explanations of an identical theme, concept or doctrine. In such a situation, he, with a view to saving his time and energy without compromising with the need to know ‘comments’ or ‘view points’ of others on the subject of his inquiry, will have to opt for a few leading articles written by authors of eminence in the field. A fairly trained researcher will be able to easily identify such articles by merely looking at the title or reading abstract or conclusion of the research papers and professional standing of the journal carrying them.

A legal researcher may also gather comments on the statutes/statutory provisions and cases thereon from standard textbooks and reference books on the subject. However, there is basic advantage of an article over a textbook and reference book. A research paper, unlike a textbook or reference book, deals with a specific issue(s) in depth.

Advantages

Doctrinal legal research has a number of advantages to its credit. A few pertinent among them are outlined here below. First, doctrinal legal research, which basically involves analysis of legal principles, concepts or doctrines, their logical ordering and systematizing of legal propositions emerging therefrom, has some practical utility. It provides quick answers to the problem as the researcher is continuously engaged in the exposition and analysis of

legislation and case-law and the integration of statutory provisions and judicial pronouncements into a coherent and workable body of doctrine. It provides lawyers, judges and others with the tools needed to reach decisions on an immense variety of problems, usually with very limited time at disposal. Empirical research, unlike doctrinal legal research, takes much more time to draw conclusions. In this connection, the following observation of Kenneth Culp Davis deserves our attention. He observed:

> --- *[I]t may be a hundred or several hundred years before we get truly scientific answers to some of the questions I am trying to explore, and we need to make some judgments in the meantime. Some of the most useful thinking can be unscientific, impressionistic, intuitive based on inadequate observation or insufficient data or wild guesses or imagination. Scientific findings are obviously the long term objective, but a good many judgments which fall far short of scientific findings are valuable, respectable and urgently needed.*

Secondly, a doctrinal legal researcher, through his analysis, attempts to test the logical coherence, consistency and technical soundness of a legal proposition or doctrine. His knitting of legal principles or doctrines, with sound reasoning, may lead to a well-developed law. In this context, evolution and development of law of torts and of administrative law, for example, stand as classic testimony of doctrinal legal research.

Thirdly, doctrinal legal research contributes in our 'understanding' of 'law', legal concept or doctrine, and legal processes in a better way as it offers logical exposition and analysis of such a law or a doctrine or legal system. Such an analysis also reveals (in)consistency in, and (un)certainty of, the law, legal principles or doctrines.

Fourthly, a scholar of law indulged in doctrinal legal research, in a systematic way and with convincing reasoning, exhibits 'inbuilt' 'loopholes', 'gaps', 'ambiguities' or 'inconsistencies' in the substantive law inquired into as well as in some of principles or doctrines embodied therein. He thereby invites the Legislature to plug them through amendments (or to repeal it or substitute it by another piece of legislation if it is with full of defects or a proved 'failure') so that the law can be more purposive and effective. Such a legislative move, either leading to amending the law or replacing it by another one, results in the development or improvement of the law. Further, a comparative analysis of identical legal rules, concepts or doctrines from different systems of law by a scholar of law gives a further impetus to improvement of the law, legal concept or doctrine, as the case may be.

Fifthly, a doctrinal legal researcher, through logical ordering and systematizing of legal propositions that emerged from his analysis and reasoning may initiate a theory in the concerned field of law. Such a theoretical proposition, in due course of time, may gain further support from the researcher himself or other researchers working in the field. In other words, doctrinal legal research helps in theory building.

Sixthly, a doctrinal legal researcher, through his systematic analysis of legal principles, concepts or doctrines, in the light of judicial statements, may predict 'future' of the principle, concept or doctrine, its probable 'contents' and 'directions' in which it is likely proceed in future.

Seventhly, doctrinal legal research provides a sound basis for non-doctrinal legal research. Socio-legal research requires a strong base of doctrinal legal research. Before a scholar of law embarks upon non-doctrinal research, it is necessary for him to acquire sufficient grounding and experience in doctrinal legal research. Unless he understands the legal doctrines, case law and legal institutions, he can hardly venture into socio-legal research. In the absence of strong base in doctrinal legal research, non-doctrinal research is bound to be a futile and infructuous exercise. The utility of non-doctrinal research very much depends upon the ability of the legal scholar to translate his findings and data into legal doctrines and concepts. Upendra Baxi, in his monograph captioned 'Socio-Legal Research in India: A Programschrift, observes, and rightly so, that 'law-society research cannot thrive on a weak infra-structure base of doctrinal type analyses of the authoritative legal materials'. 'Legal and policy studies of the state of law', he further observes, 'provide not merely an assurance of sound understanding, but may also hold promise of needed starting-points for sociological research.' The reason is obvious. It will be difficult for a legal researcher to venture into highlighting, through empirical research, operational dimensions of law and legal institutions, the bottlenecks in their implementation and suggesting solutions to overcome these defects without having in-depth knowledge of the legal doctrines, case law and legal institutions. Further, such knowledge is essential for identifying 'issues', 'delimiting areas' of his inquiry, formulating apt 'hypothesis' for inquiry, and devising appropriate strategies and tools for collecting relevant data. In the absence of these, the sociological research will be like a boat without a rudder and a compass, left in the open sea. The whole exercise of the researcher will be fruitless.

Limitations

Doctrinal legal research, in spite of the above-mentioned strengths, suffers from certain limitations of worth noting. They are:

First, analysis of the legal principle, doctrine under inquiry, in particular, and of 'law' in general, and the consequential projections of the doctrinal researcher, ultimately, become 'subjective' and exhibit his 'perception' about the inquired subject-matter. A different perception of the same legal principle, concept, doctrine or law by another scholar(s) of law, therefore, cannot be ruled out. In other words, doctrinal legal research, depending upon the reasoning power and analytical skills of the researcher, may lead to different 'perceptions' and 'projections' of the same legal fact, concept or doctrine when different scholars of law analyze it. Thus, different scholars may perceive a legal fact or doctrine differently with equally convincing logical reasoning. Secondly, a doctrinal legal researcher gathers the policy from his own experience, authoritative statutory materials, case reports, and his reflections thereon. His 'inquiry' into a legal principle or concept or law, therefore, does not get any support from social facts or values. His research, undeniably, becomes merely theoretical and devoid of any social facts. Consequently, his 'projections' of law and 'predictions' regarding changes in the law are bound to be far from social reality and inadequate.

When law is viewed as an effective instrument of socio-economic transformation, it becomes necessary to see it (law) in the light of social facts and values. It also needs to be studied and analyzed in terms of its actual working and consequences and not as it stands in the book. Obviously, doctrinal legal research, in this context, becomes inadequate and inapt. Further,

contemporary social-goal-oriented law requires pre-legislative study to know and appreciate the extra-legal factors that have played significant role, positive or negative, in shaping the legal rule or doctrine in the present form. Doctrinal legal research, by its nature, does not bring such pre-legislative issues in its ambit. It is also not fully equipped for such a study.

Thirdly, doctrinal legal research does not involve a study of the factors that lie outside law or legal system but have directly or indirectly influenced the operation of the law, a legal rule, concept or doctrine. Sometimes the prevailing stakes and prejudices of a dominant social group may hamper the law's operation and success. A study of such extra-legal factors, interests and prejudices, therefore, becomes necessary for understanding their role and contribution in making the law or doctrine effective, less effective or ineffective in its operation. Such a study also becomes desirable, rather inevitable, to devise appropriate legislative or policy-oriented measures to do away with the factors that are desisting/have desisted the law to be effective or to minimize their adverse effects on the law's performance. Doctrinal legal research practically overlooks the need to study these factors.

Fourthly, a doctrinal legal researcher puts his sole reliance on, and gives prominence to, traditional sources of law and judicial pronouncements of appellate courts. The actual practice and attitude of lower courts and of administrative agencies with quasi-judicial powers, whose judgments remain unreported, are left unexplored in doctrinal legal research.

A comparative look at the advantages and limitations of doctrinal legal research outlined in the preceding paragraphs may create a serious doubt about utility and relevance of doctrinal legal research. However, doctrinal legal research should not be undermined simply because it, through analysis of statutory provisions and cases, revolves around legal principles and doctrines, and it is, therefore, devoid of 'social facts' or is far away from 'social reality'. Doctrinal legal research, contrary to this general belief, is in fact involves consideration of social value, social policy and the social utility of law. A scholar of law observed:

> *It is naive to think that the task of a doctrinal researcher is merely mechanical - a simple application of a clear precedent or statutory provision to the problem in hand, or dry deductive logic to solve a new problem. He may look for his value premises in the statutory provisions, cases, history in his own rationality and meaning of justice. He knows that there are several alternative solutions to a problem (even this applies to a lawyer who is arguing a case before a court or an administrative authority) and that he has to adopt one which achieves the best interests of the society. The judges always unconsciously or without admitting think of the social utility of their decisions,* ---.

Conventional legal materials contain a lot of data with which a doctrinal legal researcher may make a significant contribution to our understanding of legal processes. The basic need is for a conception of research that, even if it is confined to traditional legal materials, ask the most meaningful questions that such materials may help answer. A doctrinal legal researcher, through careful content analysis, qualitative and quantitative, of case reports and other conventional legal source materials, can, inter alia, identify the processes through which a doctrine is formed, the values preferred and articulated thereunder, and its underlying policy and goal. Conventional legal materials are also of some help in tracing the actual consequences adopting a doctrine.

Non-Doctrinal Legal Research

However, in the recent past, doctrinal legal research has received a severe jolt due to change in the political philosophy of law from the laissez faire to the welfare state envisaging socio-economic transformation through law and legal institutions, the consequential new substantive and functional facets of law, and certain compelling pragmatic considerations arising from this metamorphosis.

Prominent reasons and arguments stressing the need for inquiry into social facets of law are: First, the emergence of sociological jurisprudence and its underlying philosophy assigned 'law' the task of 'social engineering'. Almost every modern civilized State perceives 'law' as an active instrument of socio-economic justice and thereby a vehicle of social engineering. This new operational facet of law has inevitably led to enactment of enormous statutes with specified socio-economic drives. In fact, we have come to live in an age is of social welfare laws. Secondly, in the light of such a role assigned to law, it is argued, it becomes necessary to look into the 'factors' or 'interests' of the Legislature that play significant role in setting the legislative process in motion and in identifying the beneficiaries thereof and the reasons therefor. These 'factors' and 'interests' (for putting law in motion for the desired planned socio-economic change), indicate, rather dictate, 'framework' of the law as well reveal the choices opted by the Legislature when it faced with alternative 'paths' towards, or 'strategies' for, the intended legislative goal. Thirdly, it becomes necessary to carry out frequent attitudinal studies of those whose legal position is sought to be modified by a given law as well as of those who are vested with the power of interpreting and implementing it so that the Legislature, armed with this feedback, can fulfil its job in a more satisfactory manner. Fourthly, a number of facts or factors that lie outside a legal system may be responsible for non-implementation or poor implementation of a given piece of social legislation. A systematic probe into these factors and their influence on the operation of law, therefore, becomes necessary to identify these bottlenecks and to design appropriate strategy to remove them or to minimize their influence on the law so that the law can be made an effective instrument of socio-economic transformation. Fifthly, there is nearly always a certain 'gap' between actual social behavior and the behavior demanded by the legal norm and certain 'tension' between actual behavior and legally desired behavior. Identification of the 'gap' and 'tension' as well as factors responsible therefore becomes necessary for strengthening potentials of law as a vehicle for socio-economic justice.

This type of research is also known as Behavioural or Empirical Research**.** t is, thus, stressed that an investigation into, through empirical data, the operational facets of law intending to change or mould human attitudes and to bring some socioeconomic transformation in the society is more important than analyzing law as it exists in the book. Such an inquiry ostensibly involves research into link between law and other behavioral sciences. Here, emphasis is not on legal concepts or doctrines but on people, social values and social institutions. It gives importance to economic and social data rather than legal facts. It concerns with the impact of the legal process upon people, their values and institutions. Such a research prominently involves an inquiry into dynamics of law, its social contents, role and impact of law in the social system.

Aims

In a non-doctrinal legal research, the researcher tries to investigate through empirical data how law and legal institutions affect or mould human attitudes and what impact on society they create. He endeavors to look into 'social face or dimension' of law and 'gap', if any, between 'legal idealism' and 'social reality'. Non-doctrinal legal research, thus, involves study of 'social impact' of law (existing or proposed) or of 'social-auditing of law'. The researcher tries primarily to seek, among other things, answers to: (i) Are laws and legal institutions serving the needs of society? (ii) Are they suited to the society in which they are operating? (iii) What forces in society have influenced shaping or re-shaping a particular set of laws or legal norms? (iv) Are laws properly administered and enforced or do they exist only in statute books? (v) What are the factors, if any, responsible for poor or non-implementation of the laws? (vi) What are the factors that influenced the adjudicators (courts or administrative agencies) in interpreting and administrating the laws? (vii) For whose benefit a law is enacted, and are they using it? Have the intended 'legislative targets' benefited from the law? If not, for what reasons? Where do 'bottlenecks' lie? (viii) What has been impact of the law or legal institutions in changing attitude of the people or molding their behavior? and what are the social obstacles in realization of the expected behavior or change?

The inquiry, in ultimate analysis, relates to: (i) the legislative processes (inquiring into the initiation and formalization of law, and the forces, factors or pressure groups that played significant role in its making and with what objectives), (ii) its social assimilation (involving an inquiry into its operational facets and the factors that are responsible for making it dysfunctional), and (iii) its impact on the intended beneficiaries (involving a post-natal study of the law). Most of non-doctrinal legal research, thus, seeks: (i) to assess the impact of non-legal factors or events upon legal processes or decisions, or (ii) to find the 'gap' between legal idealism and social reality, or (iii) to identify and appraise the magnitude of the variable factors influencing the outcome of legal processes and decisions-making, or (iv) to trace the consequences of the outcome of legal decision making in terms of value gains and deprivations for litigants, non-litigants, non-legal institutions.

A legal researcher undertaking non-doctrinal legal research takes either some aspects of law or the people and institutions supposedly regulated by law as the focus of his study. Such a research undertaking, compared to doctrinal legal research, is much broader and the questions involved therein for further inquiry are more numerous, the answers of which are not ordinarily available in conventional legal sources-statutory materials, case reports and legal periodicals. The researcher is usually required to undertake fieldwork to collect data for seeking answers to these questions.

However, legal doctrines do not altogether become irrelevant in a non-doctrinal legal research. They may be included in a non-doctrinal legal study, but if so, they are treated simply as one of the many variables that may influence decisions, or affect the practices and attitudes of people, or affect the operation of institutions. In a non-doctrinal legal research intending to assess the impact of non-legal factors or events upon legal processes or decisions, legal doctrines may appear either as a response to non-legal events or as a factor conditioning the impact of non-legal events. If research is aimed at identifying and appraising factors influencing outcomes, legal doctrine becomes relevant, if at all, simple as one of such factors.

The distinguishing characteristics of a non-doctrinal legal research, thus, are: (i) it lays down a different and lesser emphasis upon legal doctrines and concepts, (ii) it seeks answers to a variety of broader questions, (iii) it is not anchored exclusively to appellate case reports and other traditional legal sources for its data, and (iv) it invariably involves the use of research perspectives, research designs, conceptual frameworks, skills, and training not peculiar to law trained personnel.

To put it differently, non-doctrinal legal research aims at highlighting the 'gaps' that exist between the 'law-in-the statute book' (that is, the image of law projected in the books) and 'law-in-action' (that is, the perception it exhibits in reality), and impact of law on the social behavior. The former discloses the gap between legal idealism and social reality and thereby it highlights the disjunction that exists between the law-in the books and the law-in-action. While the latter, highlights the factors that are thwarting the operation of law and thereby diminishing the attainment of its goal. It helps us to find out the deficiencies in an enactment and the problem of its implementation. And its impact on the society.

Basic tools

There are several ways of collecting empirical data for social-legal research. The required information can be collected from the identified respondents in a face-to-face interaction by administrating them a set pre-determined questions or through sketchy questions prepared by the respondent. These methods of data collection are known as 'interview' and 'schedule' respectively. The pre-determined questions can also be administered to the respondents indirectly through post, fax, emails or any other appropriate methods of communication. This method of data collection is known as 'questionnaire'. A socio-legal researcher can also collect the required information by systematic 'observation' of a phenomenon, behavior of his respondents or institutions that constitute focus of his study or by studying other existing records that reflect the phenomenon under his inquiry.

The basic tools of data collection for a socio-legal research, thus, are: (i) interview, (ii) questionnaire, (iii) schedule, (iv) interview guide, (v) observation, participant or non-participant, and (vi) published or unpublished materials (such as Census Reports, Reports of Governmental and/or Non-Governmental Agencies, and appropriate literature on sociology of law). The first four methods of data collection are 'primary sources' of empirical data as they are used in getting the required information 'directly' from the respondents. While the last one is 'secondary source' of information as the researcher collects the necessary information 'indirectly' from published and/or unpublished documents. Further, 'interview' and 'schedule' involve direct 'oral communication' between the information-giver (respondent) and the information-seeker (investigator), while 'questionnaire' involves 'written communication' between the researcher and his respondents. In 'observation', unlike in interview, schedule and questionnaire, the researcher uses his 'eyes', rather than ears, for collecting data. Hence, it is a 'visual method' of data collection.

These tools of data collection are discussed extensively elsewhere in the current volume. Nevertheless, it will not be out of context and thematically inappropriate to mention them here, in brief, to put them in the right perspective. Interview, a verbal technique of data collection, may be structured or unstructured. The former involves the use of a set of pre-determined questions and highly standardized technique of recording responses thereto. The

latter, as opposed to the former, is characterized with flexibility of approach to questioning the respondents and lesser-standardized way of recording the responses.

Advantages

Non-doctrinal legal research, as mentioned earlier, seeks answers to a variety of questions that have bearing on the social-dimension or social-performance of law and its 'impact' on the social behavior. In fact, it concerns with 'social-auditing of law'. Hence, socio-legal research has a number of advantages. A few prominent among them are:

First, social-legal research highlights the 'gaps' between 'legislative goals' and 'social reality' and thereby 'depicts' a 'true picture' of 'law-in-action'. It particularly highlights the 'gap' in relation to (a) the practice of law enforcers, regulators and adjudicators and (b) the use or under-use of the law by intended beneficiaries of the law. The regulatory body, existing or created under the law, vested with the power to monitor and enforce the law, may, due to some prejudices or apathy towards the 'beneficiaries' or sympathy towards their adversaries, be professionally 'inactive' in enforcing the law. It may, for certain reasons, purposefully fail to enforce it effectively. Non-doctrinal legal research, in this context, highlights the 'reasons' behind making the law 'symbolic', less-effective or ineffective. It also reveals the extent to which the beneficiaries have been (or have not been) able to 'use' the law and the 'reasons' or 'factors' that have desisted/are desisting them from using it. Through empiricism, non-doctrinal legal research highlights the underlying currents or factors (like unawareness on part of the beneficiaries, unaffordable cost in seeking the legal redress, or the fear of further victimization if the legal redress is pursued, and the like) that have been desisting them from seeking the benefits that the law intended to bestow on them and to seek legal redress against those who prevent them from doing so. It, thus, exposes the 'bottlenecks' in operation of law.

Secondly, non-doctrinal legal research carries significance in the modern welfare state, which envisages socio-economic transformation through law and thereby perceives law as a means of achieving socio-economic justice and parity. Through empiricism, socio-legal research assesses 'role and contribution of law' in bringing the intended social consequences. It also helps us in assessing 'impact of law' on the social values, outlook, and attitude towards the 'change(s)' contemplated by law under inquiry. It highlights the 'factors' that have been creating 'impediments' or posing 'problems' for the law in attaining its 'goal(s)'.

Thirdly, in continuity of what has been said in firstly and secondly above, non-doctrinal legal research provides an 'expert advice' and gives significant feedback to the policy-makers, Legislature, and Judges for better formulation, enforcement and interpretation of the law.

Fourthly, socio-legal research renders an invaluable help in 'shaping' social legislations in tune with the 'social engineering' philosophy of the modern state and in 'making' them more effective instruments of the planned socio-economic transformation.

Limitations

Though socio-legal research has great potentials, yet a few limitations thereof need to mention here to put its role in the right perspective. A few significant are outlined below. First, non-doctrinal legal research is extremely time consuming and costly as it requires a lot

of time for collecting the required information from field. Further, it calls for additional training in designing and employing tools of data collection and entails greater commitments of time and energy to produce meaningful results, either for policy-makers or theory-builders.

Secondly, socio-legal research, as explained earlier, needs a strong base of doctrinal legal research. A legal scholar who is weak in doctrinal legal research cannot handle non-doctrinal legal research in a meaningful way. It may turn out to be a futile exercise leading to no significant results.

Thirdly, the basic tools of data collection, namely interview, questionnaire, schedule and observation, are not simple to employ. They require specialized knowledge and skill from the stage of planning to execution. Each one of them is bridled with a number of difficulties. A researcher has to have a sound skill-oriented training in social science research techniques. A cumulative effect of this limitation of nondoctrinal legal research and of the one mentioned in secondly is that a well-trained social scientist cannot undertake socio-legal research without having a strong base in doctrinal legal research. Similarly, a scholar of law, though having a strong base in legal principles, concepts or doctrines as well as in doctrinal legal research, cannot venture into non-doctrinal legal research unless he has adequate training in social science research techniques. In either case, non-doctrinal legal research becomes a mere nightmare for both of them. A way out, therefore, seems to be an interdisciplinary approach in investigating legal problems. However, inter-disciplinary legal research has its own difficulties and limitations.

Fourthly, invariably public opinion, as mentioned earlier, influences contents and framework of law. Law, most of the times, also seeks to mould and/or change the public opinion, social value and attitude. In such a situation, sometimes it becomes difficult for a non-doctrinal legal researcher to, on the basis of sociological data, predict with certainty the ‘course’ or ‘direction’ the law needs to take or follow. Such a prediction involves the maturity of judgment, intuition, and experience of the researcher. He may fall back to doctrinal legal research. Nevertheless, sociological research may be of some informal value to the decision-makers.

Fifthly, sometimes, because of complicated social, political and economic settings and varied multiple factors a socio-legal researcher may again be thrown back to his own ideas, prejudices and feelings in furnishing solutions to certain problems.

Sixthly, Socio-legal research becomes inadequate and inapt where the problems are to be solved and the law is to be developed from case to case (like in administrative law and law of torts).

May be due to some of these limitations of socio-legal research, coupled with some other non-conducive situations for non-doctrinal legal research, scholars of law and legal academia, in the past, have not contributed significantly to non-doctrinal legal research. In fact, they have, due to different professional priorities, not ventured into socio-legal research. Future trend seems to be equally bleak. They are not well-trained in the techniques and nuances of socio-legal research. This lack of training has made them to be away from non-doctrinal legal research and developed a somewhat professionally unfavorable climate for

socio-legal research. Further, law schools and legal academia lack the aptitude for, and tradition of, sustaining non-doctrinal legal research. However, in the recent past, most of the law schools in Asia and Africa have introduced a course on research methodology at both under-graduate and postgraduate studies of law to induce and train their inmates for undertaking doctrinal as well as non-doctrinal legal research with vigor.

Doctrinal legal research, for a variety of reasons, plausibly including the inability and inaptitude of legal scholars to undertake socio-legal research, has been (and is still) prominent in the field of law. Since its evolution, law has been viewed as a science of norms and a 'closed discipline'. Hence, scholars of law have been endeavoring to look into normative character of 'law' and the 'principles' involved therein through analysis of 'statutory' law. Most of the conventional Law Schools have been (and are) engaged in training their inmates about the techniques of 'finding law' and of 'reading principles' involved therein. Hence, scholars of law have been engaging themselves in writing classic treatises by carefully looking into 'law' and 'legal principles' and organizing them in a systematic manner. They have been producing works that are designed for practitioners'- lawyers and judges- reference. One finds classic treatises that have carefully organized and analyzed the doctrinal contents of a field of law in abundance. Another equally significant reason for making doctrinal legal research more prominent in the field of law is the historical and traditional influence of analytical positivism on law and lasting influence of overseas (American and British) legal training of academia, lawyers and judges. Analytical positivism has obsessed the thinking of Bar, Bench and academicians to such an extent that no other approach (other than doctrinal one) to the understanding of the nature and purpose of law could really have thrived. This kind of concern tended to identify 'law' and 'a legal order' only with those elements which are statable in the form of legal propositions.

Further, modern legal systems, particularly from common law system, provide ample scope for judicial creativity. As our experience tells, statutory language can never be perfect. Certain ambiguities, gaps and inconsistencies, advertent or inadvertent, are bound to exist in legal phraseology. A word used in a statute, which may appear to be fairly clear at the time of enactment of the statute, may acquire vagueness when the occasion of its application to a case by the court arises. Similarly, the plain statutory language may lose its plainness at the time of actual controversy because of the human limitation to foresee all the difficulties and nuances of the problem. Therefore, Legislature, most of the times, deliberately vests judiciary with certain judicial discretion to meet the ends of 'justice'. Judiciary, as and when called upon, to interpret statutes has through judicial process evolved certain standards, legal 'principles', 'doctrines' and 'concepts' that attracted attention of scholars of law and of law teachers trained 'overseas' to make analysis of these principles, concepts and doctrines.

Inter-Relation between Doctrinal and Non-Doctrinal Legal Research: These two broad types of legal research- doctrinal legal research and non-doctrinal legal research- are overlapping rather than mutually exclusive. It is difficult to draw a sharp theoretical or pragmatic line of differentiation between the two.

The distinction between doctrinal and non-doctrinal legal research, if there be one, is one of emphasis. In doctrinal legal research the main objective is to clarify the law, to take a position, to give reasons when the law is in conflict, and, perhaps, to suggest methods for improving the law. It involves the identification of 'fact', its underlying policy, and

'measures' for improvement. While non-doctrinal legal research gives emphasis on understanding 'social dimension' or 'social facet' of law and its 'impact' on the 'social attitude'. It gives emphasis on 'social auditing of law'. In doctrinal legal research legal materials, such as statutes, regulations, and cases, are used, whereas in non-doctrinal legal research, materials from other fields, like sociology, are sought and used.

Doctrinal legal research and non-doctrinal legal research, thus, are not mutually exclusive. They compliment each other. Non-doctrinal legal research cannot supplant doctrinal legal research. It can be a valuable supplement or adjunct to doctrinal legal research. It is now accepted that theoretical research without any empirical content is hollow and that empirical work without supporting theory is shallow.

Purpose of Project Work Writing:

- Writing a Project Work report on a specific topic enables the student to improve the language skills, intellectual enquiry, organizing the matter and analysis.
- "Writing makes an exact man' (Francis Bacon). In searching and collecting sources for the topic, choosing relevant information and discording the irrelevant, understanding and analyzing the subject matter and organizing the same into a final report, the author passes through a rigorous process of intellectual challenge and learning.
- The student is expected to move away from total dependence on formal/class room teaching to elevate oneself to higher learning through self-discipline and critical intellectual enquiry. Project Work is the best opportunity to channelize one"s intellectual energies and enhance research abilities.

Guidelines for Project Work:

1. Each student has to submit one Project Work.
2. The Project work should be a complete original work of the student.
3. One student should work individually on one Project Work. Co-authored or multiple authored Project Work will not be accepted.
4. Each student has to submit a Project Proposal to the Centre for the purposes for verification..
5. Each Project Work carries 30 Marks.
6. Format of the Final Project Work:

   The research paper should mandatorily contain the following components which will precede the content / chapters of the research paper / Project Work :

   - Cover Page
   - Table of Contents / Index
   - Table of Cases(if any)

- Table of Statutes(if any)

7. Draft Project Work Proposal: Draft Project Work Proposal should contain the following components:

   a. *Introduction:* The researcher is required to introduce the subject and the issue involved in brief.

   b. *Statement of Problem:* The researcher is required to explain the debatable issue involved in a research topic. Such issues could be single or multiple. A Statement of Problem is basically a statement that illustrates a clear vision and the overall method that will be used to solve the problem at hand. Usually used when doing research, a problem statement discusses any foreseeable tangible or intangible problems that the researcher may face throughout the course of the Project Work .

   c. *Research Questions:* A research question is an answerable inquiry into a specific concern or issue. It is the initial step in a Project Work . The 'initial step' means after you have an idea of what you want to study, the research question is the first active step in the Project Work .

   d. *Hypothesis*: A research hypothesis is the statement created by researchers when they speculate upon the outcome of a research or experiment. It is an assumption with which the researcher begins its research and throughout the Project Work , the researcher should seek to prove or disprove the hypothesis.

   e. *Research Methodology:* The method that the researcher adopts to conduct a research i.e. doctrinal or non-doctrinal or empirical. The researcher has to state along with the method the justification of using the method in a Project Work . Please note that the researcher can use a combination of both the methods as long as the researcher is able to justify the usage of the combined method.

   f. *Research Plan / Tentative Chapterization:* The researcher is required to briefly state how the researcher intends to go about the research. The researcher is required to categorize the Project Work into broad chapter and provide a gist of contents that the researcher intends to include in each chapter.

8. Content of the Final Project Work:
   - Chapter I : Final Project Work Proposal (the proposal revised after the suggestions, if any.)
   - Chapter II: Historical Background / Evolution of the issue behind the Project Work topic
   - Chapter III: Nature and Scope of the Project Work Topic. The researcher is required to elaborately discuss the Project Work topic.
   - Chapter IV: Critical Analysis of the Issue involved. The researcher is required to apply the existing laws to the issue behind the Project Work topic and identify the regulatory gaps.
   - Chapter V: Impact of the regulatory gaps or grey areas so developed and examine the future prospects of the issue.

- Chapter VI: Conclusion and Suggestion: Conclusion should summarize your main arguments and please do not open any new arguments in the conclusion. Suggestion should be supported with feasible reasons and justifications

Please note that these chapters are a tentative outline in order to give the researcher an idea. Barring the first and the last chapter, the researcher is free to change the above mentioned chapterization depending upon the requirement of the research topic.

9. Table of Contents / Index (in case of case study):
   - Chapter I – Introduction
   - Chapter II - Facts of the Case
   - Chapter III – Issues
   - Chapter IV – Judgment
   - Chapter V - Reasoning or Analysis
   - Chapter VI - Contribution of the Case to Aviation Law/ Maritime Law/ Defence Law
   - Chapter VII – Conclusion

   Please Note that Depending on the case, the inclusion of additional elements like comparative analysis with laws of other state may be useful.
10. Footnotes and Bibliography:
    - Footnotes should be placed at the end of the page.
    - Bibliography should come at the end of the Project Works.
11. Main Text & Chapter Heading:
    - **Main Text**: Font: Times New Roman, Size: 12, Spacing: 1.5, Alignment: Justified.
    - **Chapter Heading:** Times New Roman, Size: 12, Spacing 1.15, Alignment: Justified.
12. Word Limit of Final Project Work: Around 3500-5000 words (12-15 pages)
13. Please provide your own interpretation and analysis of the topics that have been allotted to you, for your research Project Work.
14. Foreign Words should be italicized. Eg: *Sui generis*, *ipso facto*, *de facto.*
15. Direct Quotations should be used in double quotes (“ ”)
16. Please do not number paragraphs
17. Please do not have additional decorative cover pages pictures or borders.
18. Please do not get emotional in the research papers / Project Work. Your arguments and opinions should be supported by reasons and justifications.

FORMAT OF FINAL PROJECT

NAME OF THE COURSE

NAME OF THE PROJECT TITLE

By

Name of the Author

Roll No. or ID No.

Year:… Semester:…

NAME OF THE SUBJECT

Date of Submission

NALSAR UNIVERSITY OF LAW
HYDERABAD

TABLE OF CONTENTS

TABLE OF CASES CITED

(In Alphabetical Order)
Eg.

LIST OF STATUTES

(Hierarchy as per the Year, i.e. from old to recent)
Eg.

1. The Indian Aircraft Act 1934
2. The Carriage by Air Act 1972

LIST OF ABBREVIATIONS USED

(In Alphabetical Order) – Formal not cyber abbreviations

AIR	All India Reporter
All.	Allahabad
All.L.J.	Allahabad Law Journal
ALT	Andhra Law Times
Bom.	Bombay
C.L.J.	Calcutta Law Journal
DLT	Delhi Law Times

LIST OF TABLES USED

(In Alphabetical Order)
Eg: Statistics, Graphs, etc.

SAMPLE PROJECT PROPOSAL

Relevance of Competition Law to Aviation Law

Introduction

Competition is a process of economic rivalry between market players to attract customers. Competition also refers to a situation in a business environment where businesses independently strive for the patronage of customers in order to achieve their business objective. Free and fair competition is one of the pillars of an efficient business environment.

In the interest of consumers, and the economy as whole, it is necessary to promote an environment that facilitates fair competition outcomes in the market, restrain anti-competitive behaviour and discourage market players from adopting unfair trade practices. Therefore, competition has become a driving force in the global economy.

Statement of problem

There should be a deep and through study of various factors include extent of barriers to entry, market share of enterprises individually and as a combination, competition through imports, level of concentration in the market, degree of countervailing power, availability of substitutes, likelihood of significant and sustainable increase in prices and profit margins after merger, likelihood of removal of a vigorous and effective competitor, likelihood of sustainability of effective competition, nature and extent of vertical integration, possibility of a failing business, nature and extent of innovation, relative advantage by way of the contribution to the economic development and whether the benefits of combination or merger outweigh the adverse impact of the combination.

Research questions

The aviation sector is still a small part of the travel and transportation services sector in India. The industry has already facing several challenges like inadequate infrastructure which is most crucial. The high cost of operations, intense competition, and unsustainably low fares are some reasons behind loses to the industry.

In order to maintain the high growth trajectory of aviation industry in India, it is very important that competitive forces must continue to operate with in this sector. There are some characteristics inherent to this sector that is anti-competitive in nature. The Indian aviation sector has its own competition related issues that need to address.

The Competition Commission of India is therefore another important regulator in the sphere of the aviation industry and is empowered by the Competition Act, 2002 to ensure that participants do not indulge in anti-competitive practice.

Research Hypothesis

In order to maintain the high growth trajectory of aviation industry in India, it is very important that competitive forces must continue to operate with in this sector. There are some characteristics inherent to this sector that is anti-competitive in nature. The Indian aviation sector has its own competition related issues that need to address. In India, regulations

governing minimum fleet size; minimum equity requirements; route dispersal guidelines; minimum fleet & experience requirement of 5 years for International Operations; exclusive right to National carriers to fly to Gulf Routes etc. are constraining new entry & strengthening incumbent‘s position. Some need to be addressed by the ministry where as some must be evaluated by the competition authorities.

For competition authorities across the world, mergers pose a different kind of challenge altogether. Unlike regular cases of abuse of dominance or anti-competitive agreements which require an ex-post analysis, merger review is an ex-ante exercise. The question is to find out whether the combination of such merging parties will ultimately result in the creation of market power that is likely to be abused either unilaterally or in collusion. This issue needs to be focused as it directly effects on the growth and development of the aviation industry

Research methodology:

In my assignment I will be combining both the doctrine and non-doctrine methodology. The research will then extend beyond historical perspectives and incorporate the origins of the amendments and show the effects on the concerned sector. This will also be used to address the effects of prior court decisions and how they have applied to amendments made later. Furthermore, I will examine the role of public opinion and interest groups in influencing legislation, I will also approach the issue through a jurisdictional perspective and how the case compares to past precedent and questions of selective incorporation.

Research plan

Introduction

Chapter I: historical background of competition law as well as aviation law.

Chapter II: nature and scope of the law in both the fields i.e., competition law as well as aviation law.

Chapter III: critical analysis of the problem and research question as well as the required observation to justify the argument.

Chapter IV: impact of the regulatory gaps or grey areas, developments in the referred sector and new ideologies.

Chapter V: Conclusion and Suggestion.

BLUEBOOK (19th ed.)

CITATION FORMAT EXAMPLES (FOR FOOTNOTES)

GENERAL RULES

- Times New Roman, Size 10, 1 line spacing, Justified.
- Add full stop after every footnote.
- Months should be written in abbreviated forms: Jan., Feb., Mar., Apr., May, June, July, Aug., Sept., Oct., Nov., Dec.
- Tables given at the end of the Bluebook should be referred to for abbreviated forms. Eg. Abbreviations of geographical terms, periodicals, publishing terms etc.

I. BOOKS

Volume No. (if any) NAME OF AUTHOR, TITLE OF THE BOOK pg. cited (Editors/Translators Name, edition cited year).

Eg:

- 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 205-06 (2d ed. 1911).
- CHARLES DICKENS, BLEAK HOUSE 49-55 (Norman Page ed., Penguin Books 1971) (1853).

Rules & Exceptions

- Follow the font format as has been illustrated above, for e.g. name of author must be in SMALL CAPS.
- The first name must always be written before the surname.
- For two authors, write both their names separated by '&'.
- In case of citing a book that has been edited, write „ed. or „eds. after the name of the editor. If translated, write trans. after name of translator. If both, then first write editor's name and then translator's name.
- For more than two authors, editors or translators write the name of the author, editor or translator that appears first followed by "et al."
- Do not add „p‟ or „pp‟ before the page number. Just write the numerical.
- In case the book is being published by more than one publishing house, write the name of the publisher cited after the name of the editor in sentence case.

II. JOURNAL ARTICLE

a) **For consecutively paginated journals** (Where the periodical is organised by volume and page numbers continue throughout the volume, it is a consecutively paginated periodical)

Name of Author, Title of Article, Journal volume no. ABBREVIATION OF JOURNAL Page on which Article Begins, Page Cited (Year).

Eg.

- Charles A. Reich, The New Property, 73 YALE L.J. 733, 737-38 (1964).

Rules & Exceptions

- For two authors, write both their names separated by '&'.
- For more than two authors write the name of the author that appears first followed by "et al."

b) **For non-consecutively paginated journals** (works appearing in periodicals that are separately paginated within each issue)

Name of Author, Title of Article, ABBREVIATION OF JOURNAL, date of issue as appears in the cover, at first page of work, page cited.

Eg:

- Barbara Ward, Progress for a Small Planet, HARV. BUS. REV., Sept.-Oct. 1979, at 89, 90.

III. MEDIA SOURCES/ARTICLES

Author's name, Name of Article/ news report, ABBRV. OF NAME OF NEWSPAPER, Month Date, Year, at pg. no.

Eg.

- Ari L. Goldman, O'Connor Warns Politicians Risk Excommunication over Abortion, N.Y. TIMES, June 15, 1990, at A1.

IV. WEB SOURCES

(When an authenticated official or exact copy of source is available online, citation can be made as if to the original print source without any URL info appended.)

Name of the Author, Name of article, INSTITUTIONAL OWNER OF DOMAIN (Month date, year, time), URL.

Eg:

- Eric Posner, More on Section 7 of the Torture Convention, THE VOLOKH CONSPIRACY (Jan. 29, 2009, 10:04 AM), http://www.volokh.com/posts/1233241458.html.

Rules & Exceptions

- Format for time as illustrated.
- Don‟t write available at or at before the URL.
- Write the entire URL as appears in the address bar of the browser, remove hyperlink.

V. CASES

a) U.S. cases:

First Party v. Second Party, Reporter Vol. No., Reporter Abbrv., First Page of Case, Specific Page Reference (Year).

Eg:

- Meritor Sav. Bank v. Vinson, 477 U.S. 57, 60 (1986).

b) Indian cases:

Case name, (year of reporter) Vol No. Reporter Abbreviation, First page (year of decision if different from year of reporter (India, if not evident from context)

Eg:

- Charan Lal Sahu v Union Carbide, (1989) 1 S.C.C. 674 (India).

Reporters that depart from this format shall be written in their own format.

Eg:

- Jabalpur v. Shukla, A.I.R. 1976 S.C. 1207 (India).

Rules & Exceptions:

- Do not italicise the case name.
- If there are more than one parties, list only the first party.
- Italicise the procedural phrases, for e.g., In re, Ex parte etc.

VI. STATUTES

a) U.S. Law

Official name of act, U.S.C. title number Abbreviation of Code cited, sections symbols and span of sections containing statute (Date of Code edition cited).

Eg:

- Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2006).

b) U.S. Constitution

Abbreviation of Constitution cited Abbreviation for Amendment No of amendment cited, section symbol and no. of section cited.

Eg.

- U.S. CONST. amend. XIV, § 2.
- LA. CONST. art. X, pt. IV.

c) Indian Law

Act name, Act No., Acts of Parliament, Year of Volume (India, if not evident from context).

Eg:

- The Copyright (Amendment) Act, 1992, No. 13, Acts of Parliament, 1992 (India).

d) Indian Constitution

Eg:

- INDIA CONST. art. 1, cl. 2.

VII. SHORT FORMS

- DICKENS, supra note 2.
- Reich, supra note 3, at 739.
- Id. at 740.

SOURCE: The Bluebook, A Uniform System of Citation, Nineteenth Edition