Unit–2: Topics of Law

UNIT-2: (A) LAW OF PROPERTY

To Understand the Following Concepts

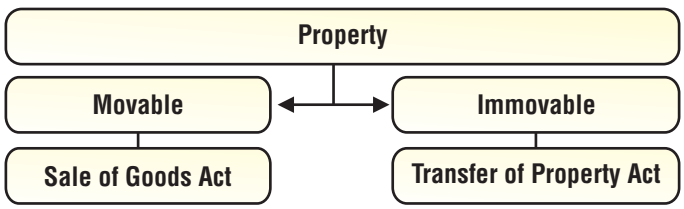
Property, Movable property, Immovable property, Persons competent to transfer, Essentials for a valid transfer, Doctrine of election, Sale, Lease, Exchange, Gift.

A. Introduction to Property Law

Matters relating to property are governed by the Transfer of Property Act, 1882 in India. The object of the Transfer of Property Act (called the "TPA" under the unit of Property Law) is to regulate the transfer of property between living persons. It shall also serve as the code of contract law governing immovable property.

The Transfer of Property Act, 1882 provides clarity on the subject: it is a systematic and uniform law on the transfer of immovable property in India.

B. Types of Property: Movable and Immovable



The term 'Property' or the term 'Transfer of Property' are not defined in the Act. Though not defined, the word 'property' has been used in a broad sense throughout the Act. Every interest or right that has an economic value denotes property. Property is of two kinds - movable and immovable. Movable property is one which can be transferred from one place to another and is governed by the Sale of Goods Act. Immovable property governed by the Transfer of Property Act is not defined in the Act. However, under Section 3, immovable property does not include standing timber, growing crops or grass. Immovable property includes lands, buildings and benefits arising out of land and things attached to the earth. In simple words, any property that is attached to the earth and cannot be transferred from one place to another is called immovable property.

In *Shanta Bai v. State of Bombay* (1958 SC 532), the distinction between movable and immovable property was observed. If the intention is to reap fruits from the trees, then it is regarded as an immovable property. But if the intention is to cut down the tree and use it as timber, it would be regarded as movable property.

In *Marshall v. Green* (33 LT 404), there was sale of trees wherein the trees were cut and taken away. The Court held that the sale was not that of immovable property.

C. Transfer

Who can transfer property?

Any person who is competent to contract (person above 18 years of age, having sound mind and not disqualified by any law in force) and authorized to dispose off property viz., owner of the property or any person authorized to sell the property, can make a transfer. The person who Transfers the property is called the Transferor and the person to whom the transfer is made is called the Transferee.

How can property be transferred?

The mode of transfer of property varies according to the value of the property. If the value of the property is more than ₹ 100/-, then transfer has to be made only by a registered instrument. If the property is tangible and the value of the property is less than ₹ 100/-, irrespective of the value of the property, then transfer has to be made only by delivery; whereas for intangible property, irrespective of the value of the property, transfer has to be made only by registered instrument. (A registered instrument contains the records of the owner of the property- for example: shares, bonds, etc.)

A registered instrument has to be attested at least by two persons who are parties to the transfer. Attestation means affixing the signature in the registered instrument. The witnesses should mark their signature too on the instrument with an intention to attest. Registration of the instrument is an essential legal formality. During registration, the parties to the transfer must be present to affix their signatures in the document and complete the transaction with regard to immovable property. While doing so, the document containing the rights, obligations and liabilities of the parties should be clearly mentioned in the document which is registered. Registration shall take place by affixing a seal of the Registrar office which shall be subsequently included in the official records.

D. Essentials for a Valid Transfer

The following are the essentials for a valid transfer:

- In a transfer of property, the transfer should be between two or more living persons.
- The property that is going to be transferred should be free from encumbrances (hindrances of any form) and be of a transferable nature.
- The transfer should not be:
  - for an unlawful object or an unlawful consideration (*for a detailed understanding, refer the chapter on Contracts*);

- involving a person legally disqualified to be a transferor or transferee.

- The transferor who transfers the property must:
  - be competent to make the transfer;
  - be entitled to the transferable property;
  - be authorized to dispose off the property if the property is not his own property.
- The transfer should be made according to the appropriate mode of transfer. Necessary formalities like registration, attestation, etc. should be complied with.
- In the case of a conditional transfer, where an interest is created on the fulfillment of a condition, the condition should not be illegal, immoral, impossible or opposed to public policy.

E. Doctrine of Election

According to the principle of Doctrine of Election [Section 35 of the TPA], a party to the transfer cannot accept as well as reject in a single transaction. In other words, while claiming advantage of an instrument, the burden of the instrument should also be accepted.

If a person to the transfer gets two selections (a benefit and a burden), then he has to accept both the benefit and the burden or none. He cannot accept the benefit and reject the burden in a single transaction.

Illustration: *A sells his garden as well as his house through one instrument to B. Whereas, B wants to retain only the house and wants to cancel the transfer regarding the garden. According to the Doctrine of Election, B has to retain the garden if he wants to retain the house, or cancel the whole transaction. B cannot retain the house and cancel the transfer regarding the garden.*

In *Cooper v. Cooper* 1874, LR 7 HL 53, the Court held that the doctrine of election applied on every instrument and all types of property.

Activity

Try and locate a property that is owned by someone you know.

List all the elements of a transfer that you can find through that transaction. See if the Doctrine of Election exists within this transaction. If so enumerate its applicability.

F. Doctrine of Lis Pendens

The Doctrine of lis pendens emerged from the Latin maxim '*ut lite pendent nihil innoveteur*' meaning 'nothing new should be introduced in a pending litigation'.

When a suit or litigation is pending on an immovable property, then that immovable property cannot be transferred.

To constitute lis pendens, the following conditions should be satisfied:

- A suit or proceeding involving the immovable property should be pending;
- The right to the immovable property must be in question in the suit or proceeding;
- The property in litigation should be transferred;
- The transferred property should affect the rights of the other person to the transfer.

Illustration: *A has a litigation in determining the title of the property with X. During the period of litigation, A initiates a sale of the property in favour of B. According to the Doctrine of Lis Pendens, the property cannot be sold because the property is involved in litigation.*

G. Sale

Sale means a transfer of ownership (right to possess something) of the property in exchange for a price (money) [Section 54 of the TPA]. Seller is the person who transfers the property and buyer is the person to whom the property is transferred. The consideration in a sale is usually money (*for a detailed understanding, refer the chapter on Contracts*).

Illustration: *A sells his house for Rs. 2 lakhs to B. This is called sale. Here, A is the seller and B is the buyer. Rs. 2 lakhs is the consideration which is money.*

The following are the essentials for a sale to be valid:

- There should be two different parties- the seller and the buyer;
- Both the parties should be competent to transfer;
- The property to be transferred should be in existence;
- Consideration for the transfer should be money;
- The contract should be in accordance with law.

Rights and Liabilities of Buyer and Seller

Liabilities sf Seller:

- Disclose defects of the property which is known to the seller and is not known to the buyer;
- Produce to the buyer all documents of title (documents regarding ownership) relating to the property;

- Answer all the questions put to him by the buyer in relation to the property;
- Take care and preserve the property and the documents of title between the date of the contract of sale and the delivery of the property;
- Bear all public charges and rent with regard to the property up to the date of sale;
- To give the buyer possession of the property.

Rights of Seller:

- Collect the rents and profits of the property till the ownership passes to the buyer;
- When ownership has passed on to the buyer from the seller before payment of money in full, claim the amount from the buyer that is due to him.

Liabilities of Buyer:

- Disclose to the seller any fact with regard to the property that will increase the value of the property that is known to him;
- Pay to the seller purchase money at the time of completing the sale;
- To bear any loss that arises from the destruction, injury or decrease in value of the property after the ownership has passed to the buyer;
- To pay all public charges and rent that becomes payable after the ownership passed to the buyer.

Rights of Buyer:

- After the ownership has passed to the buyer, perform any lawful action to increase the value of property and the rents and profits with regard to the property;
- Where the buyer has paid the purchase money, he can compel the seller for registration of sale.

In *Madam Pillai V. Badar Kali* (45 Mad 612 (FB), the plaintiff being the first wife made a claim for maintenance to her husband. The husband orally transferred his lands of the value of Rs. 100/- to the plaintiff. Later, he executed an instrument of sale in favour of the defendant for the same property. The plaintiff initiated a suit stating that the transfer was initially made in her favour and the subsequent sale to the defendant was not valid. The defendant stated that the transfer in favour of the plaintiff failed for want of a registered instrument. The Court held that - the plaintiff acquired a title by way of oral transfer and she is entitled to the property though the instrument of sale was not registered.

H. Lease

We must have observed some people in our locality give possession of the property to another for some period of time for money but does not constitute sale. It is called lease.

Lease is a transfer of right to enjoy a property for a specific period of time in consideration for a price. Lessor is the person who lets out the property for lease or transferor, and lessee is the person to whom the property is leased or the transferee in a lease. The lessee can also sub-let the lease and the relation between the lessee and the sub-lessee will be that of lessor and lessee.

Illustration: *A for a period of 3 years lets out his property for use to B for a sum of Rs. 50,000/- This is called lease. A is the lessor and B is the lessee. If B sub-lets the property to C, then B will be the lessee and C will be the sub-lessee. The relation between B and C will be of that relation that is between A and B.*

Rights and Liabilities of Lessor and Lessee

Rights and Liabilities of the Lessor

- Disclose defects of the property which is known to him and is not known to the lessee;
- Give possession of the property to the lessee;
- The lessor shall let out the property for lease to the lessee and make sure the lessee enjoys the property without any interruption upon payment of money.

Rights and Liabilities of the Lessee

- If any addition is made to the lease property during the lease period, then the addition can be comprised in the lease;
- If any part of the lease property is destroyed or made unfit by flood, fire, etc., then the lease shall be voidable by the lessee (the lessee gets a right to accept or reject depending on his wish);
- If the lessor fails to make repairs to the leased property, the lessee may make the repairs himself and recover the amount for the repairs from the lessor;
- If the lessor fails to make any payment with respect to the property and is recovered from the lessee, the lessee shall get it reimbursed from the lessor;
- At the time of completion of the lease, the lessee should hand over the property to the lessor in the state in which it was received;
- The lessee may transfer, rent or sub-let the leased property with the consent of the lessor;

- Disclose to the lessor any fact that lies in the property that will increase the value of the property;
- The lessee should pay rent at a proper time and place as specified by the lessor;
- The lessee is bound to keep the leased property in good condition when he is in possession of the property.
- When notice of any defect is given to the lessee, he is bound to rectify it within a period of three months;
- The lessee may use the property and its products and must not do anything that is destructive to the property;
- The lessee should not erect any permanent structure in the property without the consent of the lessor;
- The lessee is bound to put the lessor in possession of the property for determination of lease.

In *Gajadhar v. Rombhaee* 1938 Nag. 439, a theatre was sub-leased and the sub-lessee was prevented from using the theatre by the original lessor on the ground that a notice was served on the lessee for determining the lease. The sub-lessee had to pay an additional amount to the proprietor (the original lessor) and then take the lease. It was held that there is violation on the part of the original lessor and the sub-lessee can sue the original lessor for damages for violation of quiet enjoyment of the property.

I. Exchange

When two persons transfer ownership of one thing for the ownership of another, it is called exchange [Section 118 of the TPA]. Transfer of property by exchange can be made only by way of sale. The rights and liabilities of the parties to exchange shall be that of the rights and liabilities of the buyer to the extent of receiving and that of the seller to the extent of giving.

Illustration: *A offers to sell his cottage to B. B in consideration of the cottage sells his farm to A. Instead of getting money for his cottage, A has received a farm from B. This is an example for Exchange. The rights and liabilities of A will be that of seller towards the sale of the cottage and will be that of buyer towards the sale of the farm. Similarly, the rights and liabilities of B will be that of buyer towards the sale of the cottage and that of seller towards the sale of the farm.*

J) Gift

A transfer of ownership of property that is made voluntarily and without consideration is called Gift [Section 122 of the TPA]. The person making the transfer is called the donor and the person to whom it is made is called the donee. If the donee expires before accepting the gift, it becomes void.

Illustration: *A gives his car to B. B accepts the car. But B does not pay anything in return for the car. This is known as Gift. In this case, A is the donor and B is the donee.*

Sale, Lease, Exchange and Gift

Basis	Sale	Lease	Exchange	Gift
Transfer	Transfer of ownership for price	Transfer of limited owner-ship for rent	Transfer of ownership for some other property	Transfer of ownership without consideration
Consideration	Price	Rent	Another Property	No consideration
Mode	Sale deed should be registered	Lease deed should be registered	Sale deed should be registered	Gift of immovable property should be registered.

Activity

Pretend you are a property owner. Based on the information provided in the lesson, create an agreement in terms of responsibility for the lesse. Now do the same in terms of the lessor or owner. Highlight the applicable terms of lease relationship from the lessees point of view.

K. Intellectual Property

Intellectual property is another kind of property which does not involve movable or immovable property. Any work such as invention, artistic work or literary work, design, symbol, name, image, etc. created by the knowledge or intellectual capacity of a person is called intellectual property. Such intellectual property can be protected by law.

The following are the types of intellectual property:

- Trademarks;
- Patents;
- Copyrights;
- Designs;
- Geographical indications.

Trademarks: Any mark put on the product such as the name of a product or service (Brand name) which helps people to distinguish it from other products and services is called a

Trademark. The names of a products, companies, etc. are Trademarks. (Example: Apollo Pharmacy, Titan watches, etc.)

Patents: The right granted over the invention of a product is called Patent. In other words, when a person makes a new product, he can get a patent for the product. The person who made the invention is called patent owner. The patent owner can decide upon the usage of the product and who should use the product.

Copyrights: Copyright is the right obtained over the creation of any literary or artistic work. Books, music, films, paintings, scriptures, etc. are covered under copyright. Any person who wants to write a book or make a film based on the writing or idea of another person should seek his permission for the idea that he has used.

Designs: Any design invented by a person shall be protected by Designs. Shape, colour, line, pattern, etc. are covered under Designs. (Example: Design of the wrapper of a biscuit or chocolate, Design of a car, Design of the shape of a cold drink bottle, etc.)

Geographical Indications: Certain products or goods have a specific geographical origin and possess characteristics that attribute to the place of origin. Such goods and products bear the name of the geographical origin. This is called geographical indication. (Example: Darjeeling tea, Tirupathi laddu, etc.)

Activity

Pick three products (including books) that are in common use around you. Check their packaging for IPR related notices. If you fail to find such, create an IPR statement on any aspect that you feel requires it. Check for patent marks, design /content copyright and make a comparative list, with a column for remarks filled in by you regarding the functionality of that particular IPR/Patent/Indicator.

L. Exercise

I. Questions

1. Write a short note on property and kinds of property.
2. Short note on Doctrine of election.
3. Write a short note on Exchange.
4. Write a short note on gift.

II. Essay Questions

1. What are the essential elements of a transfer? Who can transfer an immovable property? How can an immovable property be transferred?

2. What is sale? What are the rights and liabilities of seller and buyer?

3. Write a brief note on lease and explain the rights and liabilities of lessor and lessee.

4. What is intellectual property? Explain the types of intellectual property.

III. Activity Based Learning

Activity based learning provides opportunities to students with direct observation and learning about some aspect of the practice of law.

- In this activity, students are required, in groups or individually, to provide answers to the questions below to observe their knowledge on the law of property. This is only a learning activity for class discussion.
  - Give examples for movable and immovable property.
  - 'A' transfers two different properties through the same Instrument. Is it valid?
  - X leases his property to Y. Y having the property in his possession makes some alterations. After the lease period, the property goes back to X. What are the remedies available to X as well as Y?
  - Mr. Kan professes to gift his property at Nainital worth ₹ 10000/- to Ms. Mont and by the same instrument another property at Coimbatore for ₹ 5000/-. As Ms. Mont can stay only at one place among the two, wants to retain the property at Nainital and reject the transfer of property at Coimbatore. Can she do it?
  - The property belonging to X is in litigation. X is expecting to get a judgment in his favour. Can he sell the property to Y or any other person before the judgment is given?

UNIT-2: (B) LAW OF CONTRACTS

To Understand the Following Concepts

Agreement, Contract, Offer, Acceptance, Consideration, Capacity, Major, Consent, Unlawful agreement, Wager, Contingent contract, Discharge, Breach, Damages.

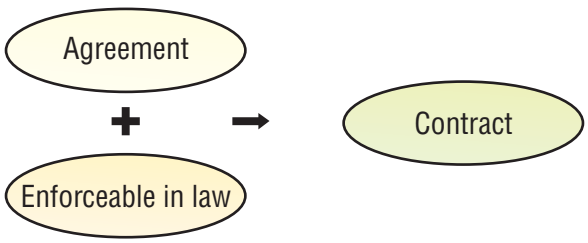
A. Introduction to Contracts

Contracts are an important part of commercial law because all commercial law transactions usually begin with an agreement or a contract.

Business transactions involving sale-purchase or exchange of services have become an integral part in day-to-day activities. In such instances, an agreement or a contract is necessary for determining the rights, obligations and liabilities of parties when they enter into any business transaction. The Indian Contract Act is the law governing contracts in India.

According to the Indian Contract Act, 1872, (referred to as the ICA) an agreement that is enforceable by law is a contract [Section 2(h)]. An agreement, in simple words, is a promise. All agreements are not contracts. Agreements must meet certain criteria - like consideration, parties must be competent, free consent between parties, lawful object, and, not expressly declared void by law, in order to qualify as a contract. It is important that the persons to a contract should also have the intention and mindset to enter into contract.

"All contracts are agreements but all agreements are not contracts"



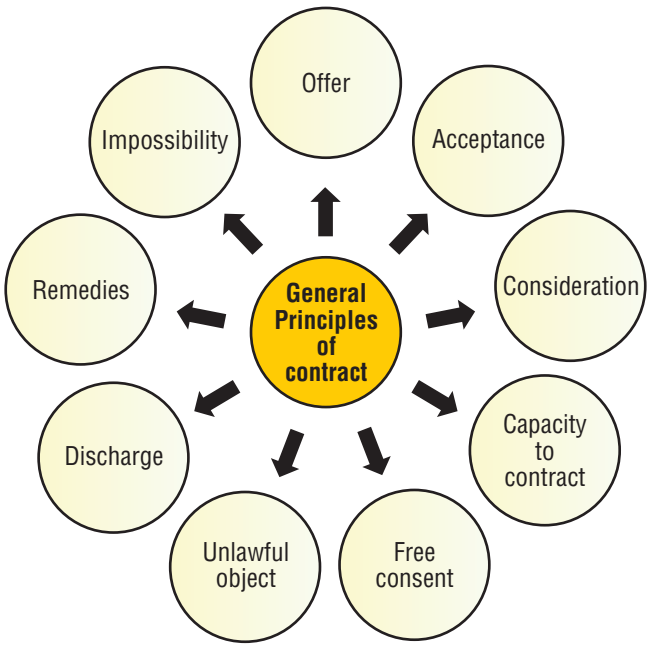
In a leading case *Balfour v. Balfour* (1919, 5 KB 571), the validity of an agreement entered between a husband and wife was in question. The husband and wife went on leave to England and the wife fell ill in England. The doctors who treated the wife advised her to take full bed rest and remain in England in order to continue the treatment. The wife stayed in England. When the leave was over, the husband went to Ceylone where he was employed and promised to send a sum of £30 to the wife every month for her stay in England. He sent the amount for some time and later on due to differences and misunderstanding between them, the husband stopped sending the amount. The wife initiated action to recover the arrears due to her. The Court dismissed it on the ground that the agreement entered into between the husband and

wife was not a contract. The arrangement between the husband and wife was only a moral obligation and the parties never intended to create any legal relationship.

The decision clearly shows that agreements that create a legal obligation are only contracts and those agreements that do not intend to create legal relationship are not contracts.

B. The Making of an Agreement: General Principles

The following chart depicts the essential elements of a contract:



C. Offer/Proposal and Acceptance

The offer or proposal is the first step in the formation of a contract. When one person signifies to another his willingness to do or not to do certain things, it is called an Offer [Section 2(a) of ICA]. The person making the proposal or offer is called the offeror and the person to whom the offer is made is called the offeree. The offer given must be with an intention to create a legal relationship.

An assent or consent given to an offer by the offeree is known as Acceptance [Section 2(b) of ICA]. By saying 'yes', 'ok' or clicking on 'I agree' on an offer on a website also amounts to acceptance. An offer when accepted becomes an agreement. An agreement is also called as promise.

Illustration: Offer + Acceptance = Agreement

A expresses his willingness to sell his cottage to B for Rs. 5 lakhs. Here, A's willingness is called offer. A is the offeror and B is the offeree. B accepts the offer to purchase the cottage. This is called Acceptance. A's offer when accepted by B becomes an Agreement.

An offer and acceptance must be definite and certain. If the offer or acceptance is not clear enough to conclude a contract, it is considered invalid. Also, an offer and acceptance must be communicated to the other person in order to be valid. A communication in electronic form or over emails also amount to communication of offer and acceptance. An offer lapses by revocation or withdrawal. Any offer can be revoked before acceptance.

In an English case *Carlill v. Carbolic Smoke Ball Co.* (1893, 1 QB 256), the company was the manufacturer of a medicine called smoke ball which was used for the treatment of influenza. The company believed that the medicine completely cured influenza. An advertisement was put up offering a reward of £100 to anyone who got influenza again after using the smoke ball medicine continuously for fifteen days. In the advertisement, it was also stated that £1000 was deposited in a Bank, namely, Alliance Bank for paying the reward if such situation arose. Seeing the advertisement, Mrs. Carlill bought the smoke ball medicine and used it as per the directions provided. Mrs. Carlill got a fresh episode of influenza. Mrs. Carlill sued the company for the reward of £100. The manufacturing company stated that: (1) there was no intention to enter into a legal relationship with anyone through the advertisement, and the advertisement was put up only to boost the marketing of the smoke ball medicine; (2) the advertisement was not an offer as it was not made to any particular person and an offer cannot be made to the public at large or to the whole world; (3) acceptance by the offeree had not been communicated, and so there was no binding contract. The Court rejected these contentions of the company and allowed Mrs. Carlill's claim for £100. The Court also stated that deposit of £1000 in the Alliance Bank by the smoke ball company was evidence that the company had real intention to enter into a legal relationship with anyone who accepted the offer. An offer can also be made to the world at large. It is called a general offer and it is valid. In the case of general offer, there is no need for communicating acceptance to the offeror. Merely fulfilling the conditions of the offer itself is treated as acceptance to create a contract.

D. Consideration

Consideration is an important element in a contract. A contract without consideration is not valid. Consideration means 'something in return' for the offer. Consideration can be in the nature of an act or forbearance. The general rule is that, an agreement without consideration is void and not enforceable by law because in such cases, one party is getting something from the other without giving anything to the other. There should always be a mutual consideration. In other words, each party must give and also take. There are exceptions to this general rule in certain situations such as a written and registered agreement out of natural love is not void, even if it is without consideration. Consideration need not be adequate, but should be real.

Consideration may be past, present or future and should not be illegal, immoral or opposed to public policy.

Illustration: *A offers to sell his car for ₹ 50,000/- to B. B accepts the offer. In this case, the consideration of A is his car and the consideration of B is ₹ 50,000/-.*

Illustration: *A, for natural love and affection, promises to give his son, B, ₹ 1,000/-. A puts his promise to Bin writing and registers it. This is a contract and absence of consideration does not make it void.*

In an Indian case - *Durga Prasad V. Baldeo* (1880, 3All 221), the plaintiff constructed some shops at the request of the District Collector in a town. The constructed shops were given for rent for doing business to the defendant. The defendant, apart from the rent, promised to give 5% commission to the plaintiff on all articles sold through the shop in consideration of the huge amount spent by the plaintiff in the construction of the building. The defendant failed to pay the commission and the plaintiff initiated action to recover the commission. The Court rejected the action of the plaintiff on the ground that the construction of shop was done at the desire of the District Collector and not on the desire of the defendant and hence there was no consideration to give commission. Accordingly, there is no valid contract to pay commission to the plaintiff.

E. Capacity to Contract

Any person who is a major, i.e., above 18 years of age, is competent to enter into a contract and minors are not competent to enter into a contract. The exception to this rule is that, if a minor enters into a contract and the enforcement of such contract is beneficial for the minor then it will not be held to be void. Furthermore, a person should also have a sound mind and should not be disqualified by any law in force. At the time of making the contract, if the person is capable of understanding the contract and making a rational judgment, he is said to have a sound mind. The following persons are not competent to enter into a contract:

- Minor - Persons who are less than 18 years of age;
- Persons with unsound mind - (a) Idiots, (b) Lunatics, (c) Drunkards;
- Persons disqualified by law - (a) Alien enemies, (b) Foreign sovereign, (c) Insolvents, (d) Convicts, (e) Corporation, (f) Barristers.

Illustration: *A (major) offers to sell his coat for ₹ 3000/- to B (minor). B accepts the offer and pays ₹ 3000/-. A states that the contract is entered into with a minor and hence void. In this case, even if the contract is entered into with a minor, it is enforceable because it is beneficial to the minor and the minor has performed his part of the obligation in the contract.*

F. Consent

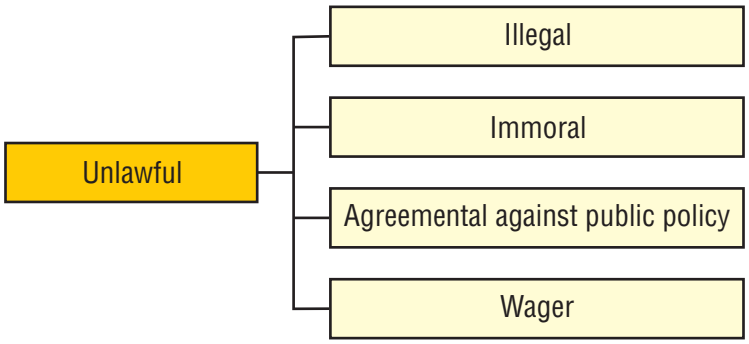
Consent is an important criterion while entering into a contract. When two persons agree on the same thing in the same sense, it is termed as consent [Section 13]. Consent should be free and not caused by coercion, undue influence, misrepresentation, fraud or mistake. If consent is obtained by the influence of any one of the above said, then the consent so obtained is not free. It becomes voidable (avoid enforcement of contact) for the person whose consent is not free.

Illustration: A threatened to kill B if he does not sell his house to A. B out of fear signs the contract for selling his house to A. Here, the consent of B is not free. B can later avoid the sale on the ground that he was compelled to agree to the sale and the consent given was not free consent.

Activity

We live in a world where we constantly engage in contractual offers and agreements. From your own interactions with family, friends, teachers, neighbours, traders and general public, identify and tabulate ten instances, clearly indicating the incidence of *offer, acceptance, consideration, contract and consent*.

G. Unlawful Agreements



If the object of the agreement is to perform an unlawful act, then the contract is unenforceable. The object of the agreement should not be illegal, immoral or opposed to public policy.

Illustration: *A enters into an agreement with B to share the profits by giving false assurance to the public to get them a job in Singapore. The agreement involves cheating which is a fraudulent act. The agreement is unlawful and hence it is void.*

As per the Indian Contract Act, agreements entered into which are against public policy of the State are said to have an unlawful object and hence are unlawful agreements making them unenforceable.

Illustration: *A agrees to give ₹ 1000/- to B as penalty if minor daughter is not given to A in marriage. This agreement is opposed to public policy and not enforceable.*

As per the Indian Contract Act, agreements entered into by way of wager are not enforceable. Wager is a contract where one person promises to pay the other money on the happening of an uncertain future event and the other person promises to pay on the non-happening of the event. There is a reciprocal promise involved in a wager. Wager is like a bet where the happening of an uncertain event is the condition on which the promise depends.

Illustration: *A agrees to give Rs. 1000/- to B if India wins the match on 24th August. B agrees to pay A the same amount if India does not win the match. The agreement is a wager and it is void.*

H. Contingent Contract

Contingent contract, also called as Conditional contract, is a contract to do something or not to do something on the happening or non-happening of an event, which is collateral to the contract. Contingent contracts cannot be enforced until the uncertain future event happens. If the uncertain future event becomes impossible, contingent contracts become void.

Illustration: *A agrees to sell his farm land to B if he wins the case involving his farm land. This is a case of contingent contract because the performance of the contract is based on the happening of an uncertain event. The uncertain future event is winning the case.*

Differences Between Wager and Contingent Contract:

Wager	Contingent Contract
Wager is an invalid contract.	Contingent contracts are valid.
In wager, there is always a reciprocal promise.	In contingent contract, there is no reciprocal promise.
Third parties do not have interest in wager.	Third parties may have an interest in contingent contract.
Wager is contingent in nature.	Contingent contracts are never wagering.

Activity

All contracts, no matter whom they are contracted between, are admissible for jurisdiction. Identify three instances from within your own experience of *conditional contract* that is a part of normal interactions between you and your parents, your friends and your teachers. Identify also the validity of the contract (even if it is not clearly stated) and present your case for any *one* of them in class.

I. Discharge of Contract

Mutual obligations of parties are created in a contract. When the mutual obligations of the parties are fulfilled, the contract comes to an end. When the contract is ended, it is said to be discharged. In other words, Discharge means termination of the contractual relations of the parties to the contract.

Discharge of a contract may be done by the following ways:

- Discharge by Performance;
- Discharge by Agreement or Consent;
- Discharge by Impossibility of Performance;
- Discharge by Lapse of time;
- Discharge by Operation of law;
- Discharge by Breach of contract.

⇒ Discharge by Performance

When parties to a contract perform their obligations and fulfil their promises, the contract gets discharged by performance.

Illustration: *An offer to sell his dining set to B for Rs. 10,000/-. B pays Rs. 10,000/- to A and A delivers his dining set to B. Here the contract gets discharged by performance as both the parties fulfilled their promises.*

⇒ Discharge by Agreement or Consent

(a) Novation - A new contract is substituted for an old contract.

(b) Rescission - Certain terms or all terms of a contract are cancelled.

(c) Alteration - When certain terms of a contract are altered or modified with the mutual consent of the parties.

(d) Remission - Acceptance is made to a promise but not on the complete terms of the promise but to a lesser fulfilment of the promise.

(e) Waiver - Parties to a contract abandon their mutual rights.

(f) Merger - Certain terms of a contract or all the terms of a contract are merged into another contract with the consent of the parties.

Illustration: A enters into an agreement with B for buying certain machine parts for their project. Before the agreement ends, A and B change certain terms of the

agreement and include those terms in the agreement. This is a case of Discharge by agreement.

⇒ Discharge by Impossibility of Performance

Performance of a contract can become impossible with or without the knowledge of the parties to the contract. It can also become impossible subsequently after the parties have entered into a contract. It can also happen by Supervening impossibility [Section 56]. Supervening impossibility takes place by the following:

- Destruction of the subject matter;
- Death or incapacity;
- Non-existence of state of things having an effect directly or indirectly on the contract;
- Outbreak of war;
- Change or amendments in law.

Illustration: *X agreed to sell his car to Y for Rs. 1 lakh and deliver it after two months. After a week, X met with an accident and car got completely destroyed. The contract gets discharged by impossibility of performance as the car was completely destroyed.*

⇒ Discharge by Lapse of Time

Time is very significant while entering into a contract. According to the Limitation Act, a contract should be performed within a specified time called period of limitation. If the contract is not performed within the specified time and the other party does not resort to any action within the limitation period, then he is deprived of his remedy and the contract gets discharged by lapse of time.

⇒ Discharge by Operation of Law

The following are instances where a contract gets discharged by operation of law:

- Death of either of the parties;
- Insolvency;
- Merger;
- Unauthorized alteration of the terms of the agreement.

⇒ Discharge by Breach of Contract

Breach means failure to perform the obligation by a party. When a party to a contract does not perform his part of the obligation due to which the contract becomes broken, the person who suffers because of the breach is entitled to receive compensation or damages from the party who has breached the contract [Section 73].

Illustration: *A agrees to supply 20 litres of oil to B on 1st June 2014. On 1st June 2014, A does not supply the oil. Then A has breached the contract. Suppose A has supplied the oil but B does not accept the oil, then B has breached the contract. In the first instance, B is entitled to receive compensation from A. In the latter instance, A is entitled to receive compensation from B.*

J. Damages

Remedy is a means given by law for the enforcement of the right of a person. A common remedy for breach of contract is awarding damages to the affected party. Monetary compensation given to the affected party for the loss or injury caused to him due to the breach is called damages. The objective of awarding damages by the court is to put the injured party in the same position as he would have been if the contract had not been breached. This, under the contract law, is called the Doctrine of Restitution. The basis of this Doctrine is awarding damages for the pecuniary loss incurred by the party to the contract.

Illustration: *A agrees to deliver 40 bags of rice to B for Rs. 20,000/- on 15th July 2014. On 15th July 2014, A delivers only 20 bags of rice to B. B is entitled for damages from A for the loss that he suffered because of A (non-delivery of 20 bags of rice).*

Activity

Do a roleplay in class in five groups and work out arguments from both parties in all instances of discharge of contract (Other than discharge by lapse of time). Create elaborate scenarios to explore the aspects. Evaluate each group's performance.

K. Exercise

I. Questions

1. What is a contract and what are the components that a contract should have?
2. Elaborate on the statement 'All contracts are agreements but all agreements are not contracts'.
3. Short note on Consideration.

4. Short note on capacity to contract.
5. What is Consent? What are the elements that consent should be free from?
6. Give a brief note on Unlawful Agreements.
7. Short note on Wager.
8. Short note on Contingent contract.
9. What are the differences between Wager and Contingent contract?
10. Short note on Discharge by Agreement or Consent.
11. Write notes on Discharge by Impossibility.
12. Write a brief note on Damages.

II. Essay Questions

1. Write an essay on Offer and Acceptance along with case law.
2. Discuss in detail how Discharge of Contract takes place.

III. Activity Based Learning

Activity based learning provides opportunities to students with direct observation and learning about some aspect of the practice of law.

⇒ In this activity, students are required, in groups or individually, to provide answers to the questions below to observe their knowledge on the law of contracts. This is only a learning activity for class discussion.

- A sells his dog to B for Rs. 4,000/-. Unfortunately, the dog died after a few hours. Discuss the rights and liabilities of A and B - (a) if the dog died before the transaction took place; (b) if the dog was seriously ill during the transaction and died subsequently after the transaction.
- M tells N to retire from service and pave way for the appointment of M for the post that N was serving. In return of that, M promises to pay Rs. 10,000/- Is this a valid agreement?
- X promises to supply 20 bags of sugar to Y, a sweet shop proprietor, for making ladoos for a marriage on 15th September 2014. X does not supply sugar on 15th September 2014 but supplies it on 20th September 2014. What remedy does Y have against X?
- X promises to supply 10 kgs of wheat and 3 packets of heroin to Y for a sum of Rs. 10,000/-. Y pays Rs. 10,000/-. Is this agreement enforceable?
- A sells his jeep to B for a consideration of Rs. 7,000/- whereas the price of the jeep is Rs. 10,000/-. Is this a valid consideration?

UNIT–2: (C) LAW OF TORTS

A. Introduction

⇒ Functional Definition

'Tort' essentially means a 'wrong' and originates from the Latin word 'tortum', which means 'twisted' or 'crooked'. In law, tort is defined as a civil wrong or a wrongful act, of one, either intentional or accidental, that results in the injury or harm to another who in turn has recourse to civil remedies for damages or a court order or injunction. The definitional features of tort are that it is a civil wrong as distinguished from criminal wrong; both the procedures and remedies are different in civil law and criminal law. In a criminal case, the state initiates legal proceedings in a criminal court on behalf of the victim and is punished when found guilty by the court. A civil action, like the tort suit, is pursued in a civil court where the victim or victim's representatives or survivors prosecute the wrong-doer usually for compensation in the form of money payment and also at times for other liability or injunction. Generally, tort cases result in compensating the victim and criminal lawsuits are about punishments. Injunctions are court orders that, for example, may prohibit the wrong-doer from harming the victim or prevent the former from trespassing the latter's property. Occasionally, courts may also grant punitive damages, which are costs or damages in excess of the compensation. Tort can be intentional or accidental and include wrongful acts of the kinds of battery and assault (physical or mental injury to the claimant), nuisance (intrusion with one's enjoyment), defamation (where claimant's reputation is injured), property damage, trespass (to claimant's land or property), negligence (careless behavior), and others; some of these are discussed in the paras below. These wrongs may also have aspects and overlaps with other areas of law like the criminal law and the contract law, examples of which may be found in the chapters on criminal law and contract law elsewhere; here, we are concerned only with the some of the basic features of tort law in relation to these wrongs. Also, as is the case with the CBSE legal studies course generally, law is a complex field of study but our aim with this course is to provide only the basic understanding of the language of law without getting into the comprehensive complexities of rules and exceptions.

⇒ Sources of Tort Law - common law versus statute law

Torts are mostly a common law subject; it is common law in the sense that tort law or the rules of tort law developed not from a statute or an act passed by the

Parliament, but from centuries of judicial decisions - case by case in English courts as well as in courts of other countries following common law system like India and the United States of America. In other words, for example, in India, both criminal law and contract law are based on statute laws like the Indian Penal Code and the Indian Contract Act respectively; however, there are no statutes that comprehensively deal with tort law as a separate area of law. A contract lawyer would look up the Contract Act to look for rules to be applicable in a given fact situation. A tort lawyer would look for rules as developed by courts in similar cases.

However, there are couples of areas of tort law where countries have enacted statute laws. In India for instance, automobile accidents as well as harms caused to consumers of goods and services are covered by the Motor Vehicle Act of 1988 and the Consumer Protection Act of 1986 respectively. What this means is that if a case involves a car accident or injury due to defective products or deficiency in services the set of rules of the respective statutes apply.

B. Kinds of Wrongful Acts

In tort cases, the victim or the claimant claims that the defendant or the wrong-doer has conducted the wrongful act or is liable for injury incurred by the claimant. Primarily, there are three kinds of wrongs in tort law - the wrongful acts can occur either **intentionally** or **negligently** on part of the wrong-doer, or the defendant is **strictly liable** for the wrongful act. These three are considered here.

1. Intentional Tort

An intentional tort requires the claimant to show that defendant caused the injury on purpose. Furthermore, the claimant must show that he or she suffered a particular consequence or injury, and that the defendant's actions caused the consequence or injury. Different intentional torts deal in different consequences and intents. So depending on the contexts and situations, there are various kinds of intentional torts; they include assault, battery, false imprisonment, unlawful harassment, invasion of privacy and so on. These may also have aspects of criminal law, but treating them also as torts increases the possibility of higher compensation. The kinds of intentional torts are explained below.

- **Battery and Assault**

  The intentional tort of battery occurs when the defendant causes the touching of the claimant with the intent to cause harm or offense. Both

'intent' and 'causation' are required for the tort of battery to occur. For example, if the defendant intends to commit battery by hitting the claimant in the head but ends up killing him, this amounts to battery as his intentional act (intention to commit harm) caused the death. The act of touching doesn't necessarily have to be done with defendant's fist always, it could be anything touching plaintiff like throwing hot water at someone.

The intentional tort of assault occurs when the defendant intends to cause in the claimant a reasonable apprehension (feeling of anxiety or fear) of an imminent harmful or offensive touching to the claimant; and when this causes the claimant to suffer a reasonable apprehension of an imminent harmful or offensive. In other words, assault is when the defendant intends to make claimant think that he is about to suffer a battery and as a result the claimant does think that he is about to suffer a battery. Imminent means imminent and "in your face"- assault is about thinking that you are about to be touched. For example, if the defendant throws an iron ball at the claimant and misses his head as the claimant moves his head away from the direction of the iron ball, this amounts to assault. The perception of the claimant is important. So if the defendant points an unloaded gun at the claimant who does not know that it is unloaded and he thinks he is about to get shot, this amount to assault, which can take place without battery. Likewise, battery can take place without assault; for example, someone may hit another person from behind.

- **False Imprisonment**

The intentional tort of false imprisonment is satisfied whenever there is intent to unlawfully confine or restrain the claimant in a bounded area and when this actually causes the claimant to be knowingly confined or restrained in a bounded area unlawfully. For example, the defendant intentionally locks the claimant in the classroom without having the legal authority to do so, and the claimant knows he is trapped. Sometimes courts allow the actual harm to substitute for the awareness of the imprisonment - so even if the claimant is unaware that he is trapped but suffers injury, the tort of false imprisonment is satisfied. However, the claimant should not be trapped willingly and consensually.

- **Trespass to Land**

  The tort of trespass to land occurs when the defendant has the intent to physically invade real property of the claimant and does invade physically without the claimant's approval or consent. The invasion can happen with objects or by people and includes invasion of some area of air above the land and some area below the land. For example, the defendant may litter the claimant's land, or may create a drainage outlet below the land of the claimant.

- **Trespass to Chattels**

  When the defendant has the intent to use or intermeddle with a chattel (moveable personal property), which was in the possession of the claimant and when this actually happens and causes significant or perpetual dispossession, deprivation of use, or damage as to condition, quality, or value of the chattel, or causes some other harm to claimant's legally secured interest, it amounts to the trespass to chattels. For example, if the defendant paints the car of claimant that was parked on the side of the street, without the consent of the claimant while the claimant was away, this amounts to trespass to chattels.

- **Conversion**

  The tort of conversion is somewhat related with the tort of trespass to chattels. Conversion occurs when the defendant intentionally uses or intermeddles with the chattel of the claimant in such a serious way that it becomes fair to ask for compensation or money payment for the total prior value of the chattel. In other words, the defendant is forced to buy the chattel for a purchase price based on the original value. So the remedy in conversion is forced sale. Conversion is applicable in many situations including where the chattel is taken, transferred to someone else, changed, misused or damaged.

- **Unlawful harassment**

  Defendant may be held liable for any act of deliberate physical harm to the victim even where no battery or assault is involved. For example, if the defendant lies to the claimant that the latter's son met with a road accident, which causes nervous shock to the claimant resulting in illness, this

constitutes tort of unlawful harassment. Sexual harassment may also amount to tort of unlawful harassment. For example, if one follows another person, sends unwanted messages or phone calls; although there is no violence or threat of violence involved, this act amounts to a tort of harassment.

- **Invasion of privacy**

  Tort law with respect to invasion of privacy as a distinct entity is still underdeveloped. However, as many academics hold the view, there is potential for the development of tort of invasion of privacy. For example, one's right to personal life and family may fall under this category of tort law and may attract any deliberate invasion of privacy like, photographing the personal lives of the claimant without the latter's consent.

2. Negligence

The basic understanding of negligence is that wrong-doer or the defendant has been careless in a way that harms the interest of the victim or the claimant. For example, when the defendant carries out an act of constructing something on her premises, she owes a duty of care towards the claimant and that the standard of duty of care depends on whether the claimant was on the site or in the neighborhood as well as whether the claimant was a lawful visitor or a trespasser. Generally, in order to argue successfully that the defendant has been negligent, the victim or the claimant must establish three elements against the defendant in a tort of negligence case - 1) the defendant owes a duty of care to the victim; 2) there has been a breach of duty of care on part of the defendant; and 3) the breach of the duty to care resulted in the harm suffered by the claimant. Let's consider these elements here.

- **Duty of Care**

  The duty of care principle can be explained by citing an actual case law. In a 1932 English case of *Donoghue v Stevenson*, the claimant Donoghue drank a soft drink manufactured by the defendant Stevenson. The drink had a decomposed snail in the bottle that made the claimant ill. The court held that the manufacturer owed duty of care to those who are 'reasonably foreseeable' to be affected by the product. So the duty of care is owed to those whom one can reasonably foresee as being potentially harmed. This

principle is applicable to numerous fact situations; as another example, a landlord owes a duty of care with reasonable foresight to his tenants and should ensure that no hazardous substance like petrol is stored by him in the basement of the apartment being dwelt by the tenants.

- **Breach of Duty of Care**

  Once the duty of care is proven the claimant then must establish that the duty of care was broken; i.e., the defendant was unsuccessful in fulfilling the duty of care in accordance with the standard of 'reasonableness'. The standard is that of 'reasonable conduct' or 'reasonable foresight', however, the act need not be flawless. In the case of *Donoghue v Stevenson* above, the court held that the manufacturers of products owe a duty of reasonable care to the consumers who use the products. Similarly, the standard of duty of reasonable care will vary based on the peculiar fact situation of every case.

- **Harm to the Claimant**

  In the case of *Donoghue v Stevenson*, the negligence on part of the manufacturer of the soft drink resulted in the illness or injury to the claimant. Or, in the second example, the apartment catches fire because of petrol being stored in the basement causing damage to the tenants.

3. Strict Liability

Strict liability torts do not care about the intention or carelessness of the defendant when the defendant caused the injury. The claimant does not have to establish any sort of or level of blame attributable to the defendant based on the intention or the degree of carelessness. Strict liability is available in a very limited context. For example, where the defendant's animals may cause an injury to the claimant or where the defendant is involved in an unusually hazardous activity like blasting dynamite. Let's elaborate these two examples. If the defendant possesses an animal with a known and unusual dangerous tendency, say a dog that bites, the defendant is strictly liable for the harm resulting from the dangerous tendency of the dog. But in the case of the defendant possessing a bull that harms the claimant is not strictly liable as the act of the bull is considered as, not unusual, rather a normal dangerous tendency.

The general rule with respect to ultra-hazardous activity is that when the defendant carries out or keeps an unusually hazardous situation or activity on

his or her building or involves in an activity that offers an inevitable danger of injury to the claimant or his or her property, the defendant could be responsible for the damage caused even if the defendant has exercised reasonable care to prevent the harm.

In India, a related principle of **Absolute Liability** was introduced by the Supreme Court in the aftermath of the two instances of gas leaks from factories injuring many. The first case was about the infamous Bhopal gas leak disaster of 1984 where a factory of the Union Carbide Corporation located in Bhopal had a major leakage of the gas mythyl isocynate that killed 2260 and injured around 600,000 people. In the second incident of 1985 in Delhi, a factory of the Shri Ram Foods and Fertilizer Industries leaked oleum gas that killed one person that had few others hospitalized and created huge panic among the residents. The then Chief Justice of India P.N Bhagwati, in the famous 1987 case of M.C. Mehta v. Shri Ram Foods and Fertilizer Industries, held: "We are of the view that an enterprise, which is engaged in a hazardous or inherently dangerous industry, which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and non-delegable duty to the community to ensure that no harm results to any one on account of hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm is done on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part."

C. Summary of the Kinds of Harms

Here is the summary of the examples of the many ways in which the claimant may suffer injuries that have been discussed in this chapter.

⇒ Property interests in land

The law of tort protects the claimant's interests in her landed property by preventing intentional intrusions or trespass of the property by the defendant or the wrong-doer. The claimant may also suffer harm by the damage caused due to careless or negligence of the defendant. When the defendant interferes with the claimant's right to enjoy his/her land, the defendant commits the tort of nuisance.

⇒ Other types of Property

Tort law prohibits taking away of tangible property deliberately, which amounts to the tort of 'conversion'. The damage to the property may also occur due to carelessness or negligence.

⇒ Bodily Injury

Tort law protects the claimant against any harm to his/her interests of bodily integrity. Tort of battery and assault applies to any intentional harm caused to the body. Harm may also be caused by negligence as well as any breach of statutory duty like, traffic laws, health laws and so on. Mental distress is an element in bodily injury which raises any compensation to the victim.

⇒ Economic Interests

To a lesser extent, the economic interests are also protected by the law of tort. Injury caused by both intentional as well as negligence can cause economic harm to the claimant.

D. Purpose of Tort Law

Three important objects of tort law are - deterrence, fair and just response, and loss-spreading.

Purpose of Tort Law	Explanation
1. Deterrence	Tort law ensures that the defendant compensates the victim for a wrongful act. This deters one from injuring others as it encourages defendants to be mindful and careful.
2. Fair and just response	Tort law ensures that the victim is compensated by the defendant to satisfy the demands of justice. The defendants are made liable for their wrongful act.
3. Loss-spreading	Tort law can be used as a tool to spread loss to a wider community. For example, where the manufacturer of a product has to pay compensation, the manufacturer may recover the costs by transferring this to the consumers by increasing the price of the product. In another example of automobile insurance, all drivers are

	required to pay auto insurance premiums, which are then used by the insurance companies to compensate the victims.

Activity

Read the newspaper every day for the period of two weeks and identify five cases of tort, tabulate them by action, rationalization and type. Put up a chart in the class and mark areas of commonality of assessment. Discuss corrective measures/punishment.

E. Exercise

Questions

1. Define what is law of tort? What is the difference between tort law and criminal law?
2. What are the sources of tort law?
3. What is intentional tort? Explain at least three different kinds of intentional tort?
4. What is tort of negligence and how do duty of care relate with negligence?
5. What is strict liability principle? Give one example.
6. What are the objectives behind having tort law?

UNIT–2: (D) INTRODUCTION TO CRIMINAL LAWS IN INDIA

A. What do we understand by Crime?

The term 'Crime' denotes an unlawful act and this unlawful act is punishable by a state. Crime as a concept is so broad that there is no single, universally accepted definition to it. But, for the sake of convenience, several countries provide statuary definitions of various kinds of unlawful activities, which can be identified as crimes.

A common principle about Criminal Law is that, unless an activity is prohibited by law, it does not qualify as a crime. Incidents of crime hurt not only the individual, but also the state. Therefore, such acts are forbidden and punishable by law. The body of laws which deals with imposing punishments on crimes is known as Criminal Law.

Broadly, crimes can be segregated under the following categories:

Categories of Crime:

Crimes against Persons: Crimes against persons (also called personal crimes) include murder, aggravated assault, rape, and robbery.

Crimes against Property: Property crimes involve theft of property without bodily harm, such as burglary, larceny, auto theft and arson.

Crimes against Morality: There are several crimes where there is no bodily harm or any kind of harm to the property as well. Yet, these Crimes are deemed as immoral activities and hence are unacceptable. Prostitution, illegal gambling, and illegal drug use are all examples of such crimes. Also, Crimes against morality are also called victimless crimes because more than often there is no complainant or victim and it is generally the State which takes suo motu cognizance of these offences.

White-Collar Crime: White-collar crimes are generally economic offences that are committed by people of high social status. They commit these crimes in their respective occupations. Examples are embezzling (stealing money from one's employer), insider trading, and tax evasion and other violations of income tax laws. Instance of corruption, bribery and large-scale scams fall in the category of white collar crimes.

Organized Crime: Organized crime is crime committed by structured groups typically involving the distribution of illegal goods and services to others.

Organized crime is just not restricted to Mafias, as is shown in various movies and television series, but the term can refer to any group that exercises control over large illegal enterprises (such as the drug trade, illegal gambling, prostitution, weapons smuggling, or money laundering). Betting on sports, illegal sale of firearms and *Hawala* transactions are all examples of Organized Crime.

1. Stages of Crime

- Intention
- Preparation
- Attempt
- Commission

Any Crime has a few key stages to it, as indicated in the box alongside. Ordinarily, the first two stages (intention and preparation) do not give rise to any form of criminal liability. This implies that merely having an intention to commit a criminal act is not punishable, nor is making preparation for the same. Liability in criminal law arises when one goes beyond the stage of preparation and attempts to do the forbidden act.

What constitutes attempt is again a tricky and complicated question which is an area of intense study. However, it can be stated that save in some exceptional circumstances, criminal liability arises only when the crime has reached the stage which is gone beyond preparation and has entered into the domain of attempt.

2. Elements of Crime: Guilty Act and Guilty Mind

To be classified as a crime, the act of doing something bad (*actus reus*) must be usually accompanied by the intention to do something bad (*mens rea*). A crime is said to exist usually when both these elements are present. The principle of *actus reus and mens rea* are embedded in a Latin maxim, which is:

"actus non facit reum, nisi mens sit rea"

This latin maxim means that an act does not make one guilty unless the mind is also legally blameworthy.

In other words, for a physical act to be termed a crime, it must be accompanied by the necessary mental element. Unless this mental element is present, no act is usually criminal in nature. So, all crimes have a physical element and a mental element, usually called ***actus reus*** and ***mens rea*** respectively.

What is actus reus?

- the word ***actus*** connotes a 'deed' which is a physical result of human conduct.
- the word ***reus*** means 'forbidden by law.

actus reus in common parlance means a 'guilty act'. It is made up of three constituent parts, namely: -

1. An action or a conduct
2. The result of that action or conduct
3. Such act/conduct being prohibited by law

Therefore, one can say that ***actus reus*** is an act which is bad or prohibited, blameworthy or culpable. Now, there are certain unique situations when the act in itself may appear to be a criminal act, yet it cannot be termed as '***actus reus***'.

Illustrations:

An executioner's job is to hang (no actus reus)

An army man kills as a part of his duty (no actus reus)

Does an act in actus reus include omissions?

An omission is nothing but inaction or not doing something. Section 32 of the Indian Penal Code (IPC) clarifies that acts which may be considered as Crime include "illegal omissions". But mere moral omissions of not doing something would not complete the requirement of *actus reus*.

Illustration : A man is sinking in the swimming pool of a resort. A boy who is beside the pool does not make any attempt to save this man. This is a moral omission of not saving someone's life. The boy cannot be held criminally liable for such an omission.

But in the same scenario, if there is a lifeguard on duty at this resort, and if he does not make any attempt to save the man sinking in the pool, then he can be held criminally liable for such omission.

Mens Rea: guilty mind/ intent

mens rea generally means 'ill intention'.

The constituents of ***mens re***a are:

1. There must be a mind at fault/intention to constitute a crime.
2. The act becomes criminal when the actor does it with a guilty mind.

Note: causing injury to an assailant in self-defense is not a crime, but the moment injury is caused with intent to take revenge, the act becomes criminal.

Therefore for any crime to exist, the physical element of crime needs to be complemented by the mental element. The concept of *mens rea evolved* in England during the 17th Century. During this period, the judges began to hold that an act alone could not create criminal liability unless it was accompanied by a guilty state of mind.

In India, the word *mens rea*, as such, is not defined in the IPC, but its essence is reflected in almost all the provisions of the Code. For framing a charge for an offence under the IPC, the traditional rule of existence of *mens rea* is to be followed. This rule

has been reiterated by the Supreme Court of India in *State of Maharashtra v. Mayor Hans George, AIR 1965 SC 722*. It was held in this case that, "Mens rea by necessary implication can be excluded from a statute only where it is absolutely clear that the implementation of the object of a statute would otherwise be defeated and its exclusion enables those put under strict liability by their act or omission to assist the promotion of the law."

Further, in *Kartar Singh v. State of Punjab, 1994 (3) SCC 569*, the Supreme Court held that the element of *mens rea* must be read into a statutory penal provision unless a statute either expressly or by necessary implication rules it out.

Strict Liability

There are some exceptions to the thumb rule of *mens rea* to be present for an act to be considered as crime. These are generally the offences which arise due toa '*strict liability*'. These offences are also termed vicarious or deemed liability offences. Examples of such offences can be found in Special Acts such as the Negotiable Instruments Act, 1881, the Customs Act, 1962, and the Information Technology Act, 2000, which provide for deemed offences by directors / responsible officers of a company, if a company has committed a contravention / offence. Such deemed liability disregards whether there was actually any *mens rea* or not on the part of the person concerned.

3. Distinction between Intention and Motive

As we have seen, intention or mental element is one of the foremost requirements in order to make someone liable for a crime. But a common misconception is that motive and intention are the same concepts when it comes to Crime. Thus, it is important to understand the fine distinction between these two terms.

> In Re Sreerangayee case (1973) 1 MLJ 231, the woman in sheer destitution and impoverishment attempted to kill herself after failing in all the ways to arrange for food for her starving children, but since she knowingly (mens rea) did a prohibitive act of attempting suicide(actusreus), she was held guilty by the court.

The meaning of doing an act *intentionally* in criminal law means something that is done wilfully and not accidentally or mistakenly. The person doing the act is well aware of the consequences or the outcomes of his action or omission. That is all what is required for affixing criminal liability. It does not matter, as we say in ordinary language, whether an act was done with good intent or bad intent. If the act which is

prohibited (*actus reus*) is done wilfully, knowingly or with awareness of the resulting consequences then the same will cause liability in criminal law.

Motive, on the other hand, is the ulterior objective behind doing an act. It is the driving force behind intention or commission of an act. The criminal law does not take into account motive in affixing criminal liability or in determining criminal culpability. This is the reason why the criminal law does not care whether one has stolen a loaf of bread to fed a starving person or stolen medicine to save someone's life, as long as it is a prohibited act, done knowingly.

B. Criminal Law in India

1. Objectives of Criminal law:

Five objectives are widely accepted for enforcement of the criminal law by punishments: *retribution, deterrence, incapacitation, rehabilitation and restoration*. These objective vary across jurisdictions.

Retribution - This theory basically deals with 'righting of balance'. If a criminal has done a wrong towards a person or property he needs to be given a penalty in a manner which balances out the wrong done. For example, if a person has committed murder, he can be delivered capital punishment to balance out the suffering caused to the victim and his or her family.

Deterrence - Deterrence serves as a major tool in maintaining the general law and order in the society, especially from the perspective of Crime. Criminal acts are penalized so as to deter individuals from repeating it or even entering into it in the first place.

Incapacitation - The objective of this theory is to segregate the criminals from the rest of the society. For the crimes committed, they suffer a kind of banishment by staying in prisons and in some cases they are also subject to capital punishment.

Rehabilitation - Aims at transforming an offender into a valuable member of society. Its primary goal is to prevent further offense by convincing the offender that their conduct was wrong.

Restoration - This is a victim-oriented theory of punishment. The goal is to repair, through state authority, any injury inflicted upon the victim by the offender. For example, one who embezzles will be required to repay the amount improperly acquired. Restoration is commonly combined with other main goals of criminal

justice and is closely related to concepts in the civil law, i.e., returning the victim to his or her original position before the injury.

2. What is Criminal Law?

The purpose of Criminal Law in India is

First, to define a variety of crimes e.g. theft, cheating, murder, etc.

Second, to prescribe appropriate punishment for each crime e.g. imprisonment or fine, and

Third, to lay down suitable investigation and trial procedures.

3. Sources of Criminal Law

There are several legislations dealing with Criminal Law. However, two important sources are:

- The Indian Penal Code, 1860, which defines various crimes such as murder, theft, etc.
- Code of Criminal Procedure, 1973, which lays down the procedure for both the police to investigate crimes and for trial of offences.

In addition the following legislations are important:

- The Indian Evidence Act, 1872, which stipulates the kind of evidence admissible in court.
- Special Criminal Laws passed by the Parliament or State Legislatures such as the Prevention of Corruption Act, Food Adulteration Act, Dowry Prevention Act, Commission of Sati Act etc. Each of these laws defines crimes that are in addition to those defined under the IPC.

We will now take a closer look at each of these sources:

4. Indian Penal Code, 1860

The Indian Penal Code was passed in 1860 and came into force in 1862. It is the main criminal code in India. It was drafted after consulting various existent criminal codes in the world such as the French Penal Code as well as the Code of Louisiana in the US. It is uniformly applicable in all the states of the country except Jammu and Kashmir where, due to the special constitutional status of that state, a separate Penal Code called is in operation.

The Indian Penal Code is divided into twenty three chapters, comprising over 500 sections. The Code starts with an Introduction, provides explanations and exceptions used in it, and then lists a wide range of offences. Given below is a broad classification of crimes defined under the IPC.

Broad classification of crimes under the Indian Penal Code (IPC)

Crimes Against Body	Murder, Culpable Homicide not amounting to Murder, Kidnapping & Abduction, Assault etc.
Crimes Against Property	Dacoity, Robbery, Burglary, Theft
Crimes Against Public order	Riots, Arson
Economic Crimes	Cheating, Counterfeiting
Crimes Against Women	Rape, Dowry Death, Cruelty by Husband and Relatives, Molestation, Sexual harassment and Importation of Girls
Crimes Against Children	Child Rape, Kidnapping & Abduction of Children, Selling/Buying of girls for Prostitution, Abetment to Suicide, Infanticide, Foeticide;
Other IPC crimes	

As mentioned above, the Indian Penal Code (IPC) covers the *substantial* part of criminal law in India. It defines various common criminal offences. For example, it defines murder, theft, assault and a number of other offences and also stipulates appropriate punishments for each offence. For instance, the offence of "theft" is defined in the following language in Section 378 of the IPC:

Whoever, dishonestly [intends to take] any movable property out of the possession of any person without that person's consent, [and with that intention] moves that property in order to [commit] such taking, is said to commit theft.

In other words, a crime of theft is committed if someone intends to take someone else's property and indeed takes that property without the other person's consent. Merely intending to take somebody's property, without actually going ahead with the act, does not amount to theft.

The Punishment for theft is stipulated in the following Section 379 which states:

Whoever commits theft shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Different crimes carry different punishments according to the severity of the offence. For instance the punishment for murder is either death or life imprisonment.

This is the way that most of the IPC is organized: first, a definition of an offence is provided, and next the punishment for that offence is stipulated.

In addition to the IPC, other special legislations such as the Information Technology Act, the Prevention of Corruption Act, etc. also help in classifying and punishing criminal acts.

Note, however, that this definition only tells us what the offence is. It does not tell us about what we should do if someone has stolen our property, or to whom should we complain to? What can the police do? In other words, the IPC deals only with *substantive criminal law* and not with *procedural criminal law*. These procedures are set forth in detail in the Criminal Procedure Code. Let's look briefly at what this code deals with?

5. Criminal Procedure Code, 1973 (CrPC)

The object of the Criminal Procedure Code is to provide a mechanism for the investigation and trial of offenders.

It lays down the rules for conduct of investigation into offences by the police proceedings in court against any person who has committed an offence under any Criminal law, whether it is IPC or a 'Crime' classified under any other law.

Types of Offences Covered:

All such offences are covered by CrPC which are mentioned in Indian Penal Code. As already seen, the legal meaning and whether an act will constitute a criminal offence or not is provided in the IPC. The procedure of initiating proceeding/prosecution for a criminal offence is provided in Criminal Procedure Code (CrPC). CrPC provides the manner and place, where investigation inquiry and trial of an offence shall take place.

Classification of Offences

Depending on the nature and gravity of an offence's the CrPC classifies them under the following heads:

1. **Bailable and non-bailable offences:** In certain minor offences, it is the right of the accused to obtain bail while the trial is pending. These are bailable offences. On the other hand there are more serious offences where the accused do not have a right to obtain bail; in such cases, bail can be granted only on the court's discretion. These are *non-bailable* offences.

2. **Cognizable and non-cognizable offences:** Certain offences are so serious that any police officer can investigate and arrest an accused person without obtaining a warrant from a court. For example, murder. These are *cognizable* offences. In other cases, such as criminal defamation, the police must wait for the order of a magistrate before investigating and arresting the accused. These are *non-cognizable* offences.

3. **Compoundable and non-compoundable offences:** In certain offences, the State which conducts the prosecution and the accused can come to an arrangement where, instead of being imprisoned, the accused can pay a fine. These are *compoundable* offences. The most common example of this is where you get caught without a ticket on a bus or a train and have to pay a fine. In this case, the officer fining you is in fact compounding your offence. Of course not all offences are compoundable; it would not be desirable that murderers should be able to compound their offences.

The CrPC lists various offences under the Indian Penal Code which are compoundable. Of these 21 offences may be compounded by the specified aggrieved party (victim) without the permission of the court and 36 can be compounded only after securing the permission of the court.

Stages in the prosecution of an offence: Prosecution of an offence is usually a two-step process. Firstly, the police investigates into a complaint made usually by a victim. Secondly, based on the report of the police, the state prosecutes the accused at a criminal trial where the accused may either be convicted (found guilty), or acquitted (found not-guilty). We will briefly examine both the Investigation and the Trial in the paragraphs that follow.

Investigation of offences: Investigation is a preliminary stage conducted by the police and usually starts after the recording of a First Information Report (FIR) in the police station. Anyone - not only the victim - can notify the police about the commission of an offence by recording an FIR.

If, from the FIR, the officer-in-charge of a police station suspects that an offence has been committed he/she is duty-bound to investigate the facts and circumstances of the case and if necessary, takes measures for the arrest of the offender.

> The CrPC contains elaborate details about the procedure to be followed in every investigation, inquiry and trial, for every offence under the Indian Penal Code or under any other law. It divides the procedure to be followed for administration of criminal justice into three stages: investigation, inquiry and trial.

Investigation primarily consists of ascertaining facts and circumstances of the case. It includes all the efforts of a police officer for collection of evidence:

- Proceeding to the spot;
- Ascertaining facts and circumstances;
- Discovery and arrest of the suspected offender;
- Collection of evidence relating to the commission of offence, which may consist of the examination of various persons including the accused and taking of their statements in writing and the search of places or seizure of things considered necessary for the investigation and to be produced at the trial;
- Formation of opinion as to whether on the basis of the material collected there is a case to place the accused before a magistrate for trial and if so, taking the necessary steps for filing the charge-sheet.
- Investigation ends in a police report to the magistrate.

What happens if the police refuse to investigate an offence? In all cases a person can proceed directly to file a complaint with the Magistrate who may either proceed to try the case or order the police to investigate the offence and file a police report.

Trial of an offence: Trial is the judicial adjudication of a person's guilt or innocence. Under the CrPC, criminal trials have been categorized into three divisions each having distinct procedures, called warrant, summons and summary trials.

A **warrant case** relates to offences punishable with death or imprisonment for a term greater than two years.

The CrPC provides for two types of procedure for the trial of warrant cases by a magistrate viz.

- those instituted upon a police report
- those instituted upon complaint.

In respect of cases instituted on police report, the magistrate may "discharge" the accused upon consideration of the police report and documents sent with it. The Magistrate need not hear the prosecution or record further evidence.

In respect of the cases instituted otherwise than on police report, however, the magistrate is bound to hear the prosecution and record evidence. If there is no case made out, the accused is discharged.

In both cases, if the accused is not discharged, the magistrate holds a regular trial after "*framing the charge*".

In respect of offences punishable with death, life imprisonment or imprisonment for a term exceeding seven years, the trial is conducted in a Sessions Court after being committed or forwarded to the court by a magistrate.

A **summons case** means a case relating to an offence that is not a warrant case, i.e. cases relating to offences punishable with imprisonment of less than two years. In respect of summons cases, there is no need to frame a charge. The court gives the substance of the accusation, which is called "notice", to the accused when the person appears before the court. The court has the power to convert a summons case into a warrant case, if the magistrate thinks that it is in the interest of justice.

The CrPC also provides that certain petty offences may be tried in a **summary** way. In a summary trial, no sentence of imprisonment for a term exceeding three months can be passed in any conviction. Usually in such cases, a special summons is sent to the offender requiring him to either attend court and defend himself or admit guilt and pay a fine by post. If a fine of Rs. 200 or less is imposed in such trials, then the accused has no right of appeal.

The common features in all three of the aforementioned trials may be roughly broken into the following distinct stages:

- **Framing of charge or giving of notice** This is the beginning of a trial. At this stage, the judge is required to weigh the evidence gathered by the police during investigation to ascertain whether or not a prima facie (on the face of the record) case against the accused has been made out.

  In case the material placed before the court is sufficient, the court **frames the charge** and proceeds with the trial.

  If, on the contrary, the judge considers the materials insufficient for proceeding

against the accused, the judge discharges the accused and records reasons for doing so. The charge is read over and explained to the accused who may plead guilty or not-guilty. If the accused pleads guilty, the judge shall record the plea and may convict him. If the accused pleads not guilty and claims trial, then trial begins.

You may note that the actual trial starts only after the charge has been framed and the stage preceding the trial is called inquiry. After the inquiry, the charge is prepared and after the formulation of the charge, trial of the accused starts. A charge is nothing but formulation of the accusation made against a person who is to face trial for a specified offence. It sets out the offence that was allegedly committed.

- **Recording of prosecution evidence**

After the charge is framed, the prosecution is asked to examine its witnesses before the court. This is called examination-in-chief. The accused has a right to cross-examine all the witnesses presented by the prosecution. The CrPC provides that when the examination of witnesses has once begun, it shall be continued day-to-day until all the witnesses in attendance have been examined.

Plea Bargaining

It refers to the negotiations between the prosecution and defendant in which defendant agrees to plead guilty in return of less harsh punishment than what is to be delivered normally.

- **Statement of accused**

The court has powers to examine the accused at any stage of inquiry or trial for the purpose of eliciting any explanation against incriminating circumstances appearing before it. However, it is mandatory for the court to question the accused after examining the evidence of the prosecution if it incriminates the accused. This examination is without oath and before the accused enters a defence. The purpose of this examination is to give the accused a reasonable opportunity to explain incriminating facts and circumstances in the case.

- **Defence evidence**

  If after taking the evidence for the prosecution, examining the accused and hearing the prosecution and defence, the judge considers that there is no evidence that the accused has committed the offence, the judge is required to record the order of acquittal.

  However, when the accused is not acquitted for absence of evidence, a defence must be entered and evidence adduced in its support. For this purpose, the defence may examine witnesses including the accused. The witnesses produced by the defence are cross-examined by the prosecution.

  Most accused persons do not lead defence evidence in India. One of the major reasons for this is that in India, the burden is cast on the prosecution to prove the offence and the degree of proof required in a criminal trial is "proof beyond reasonable doubt". This is quite a high standard that the prosecution must meet. It is not enough for the prosecution to assert that the accused has committed the offence. The judge must be convinced beyond reasonable doubt that it was in fact the accused who committed the offence.

- **Final arguments**

  This is the final stage of the trial. The provisions of the CrPC provide that when examination of the witnesses for the defence (if any) is complete, the prosecutor shall sum up the prosecution case and the accused is entitled to reply. These are the final arguments.

- **Judgment**

  After the final arguments by the prosecutor and defence, the judge pronounces his judgment in the trial.

  Under the CrPC, an accused can be withdrawn from prosecution at any stage of trial with the permission of the court. If the accused is allowed to be withdrawn from prosecution prior to framing of charge, this is a discharge, while in cases where such withdrawal is allowed after framing of charge, it is acquittal.

6. Indian Evidence Act 1872

The Indian Evidence Act stipulates how facts can be proved through evidence.

The Evidence Act helps the judges to separate the 'wheat from the chaff' and plays a crucial role in the establishment of facts during the court proceedings. What evidence can be admitted, how it can admitted, how the burden of proof has to be discharged, etc, are matters governed by the Evidence Act.

- The main principles which form the foundation of Law of Evidence are-
- evidence must be confined to the matter at hand
- hearsay evidence must not be admitted
- best evidence must be given in all cases.

One of the main objectives of the Evidence Act is to prevent the inaccuracy in the admissibility of evidence and to introduce a more correct and uniform rule of practice.

The Act is divided into three parts:

- **Part I -** Relevancy of facts or what facts may or may not be proved. These are dealt with in detail in **(Sections 5 to 55)**.
- **Part II -** How the relevant facts are to be proved? The part deals with matters, which need not be prove under law and also how facts-in-issue or relevant facts are proved through oral and documentary evidence **(Sections 56 to 100)**.
- **Part III -** By whom and in what manner must the evidence be produced. It deals with the procedure for production of evidence and the effects of evidence **(Sections 101 to 167)**.

Confession: The word "*confession*" *appears for the first time in Section 24 of the Indian Evidence Act. This section comes under the heading of Admission so it is clear that the confessions are merely one species of admission. Confession is not defined in the Act. Justice Stephen in his Digest of the law of Evidence states, "confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime."*

Admission and confession: *Sections 17 to 31 deals with admission generally and include Sections 24 to 30 which deal with confession as distinguished from admission.*

Difference between Confession and Admission

Confession	Admission
1. Confession is a statement made by an accused person which is sought to be proved against him in criminal proceeding to establish the commission of an offence by him.	1. Admission usually relates to civil transaction and comprises all statements amounting to admission defined under section 17 and made by person mentioned under section 18, 19 and 20.
2. Confession if deliberately and voluntarily made may be accepted as conclusive of the matters confessed.	2. Admissions are not conclusive as to the matters admitted it may operate as an estoppel.
3. Confessions always go against the person making it	3. Admissions may be used on behalf of the person making it under the exception of section 21 of evidence act.
4. Confessions made by one or two or more accused jointly tried for the same offence can be taken into consideration against the co-accused (section 30)	4. Admission by one of the several defendants in suit is no evidence against other defendants.
5. Confession is statement written or oral which is direct admission of suit.	5. Admission is statement oral or written which gives inference about the liability of person making admission.

If the conviction can be based on the statement alone, it is confession and where some supplementary evidence is needed to authorize a conviction, then it is an admission.

Forms of confession: A confession may occur in many forms. When it is made to the court itself then it will be called judicial confession, and when it is made to anybody outside the court, it will be called extra-judicial confession. It may even consist of conversation to oneself, which may be produced in evidence if overheard by another. For example, in *Sahoo v. State of U.P.* the accused who was charged with the murder of

his daughter-in-law with whom he was always quarreling was seen on the day of the murder going out of the house, saying words to the effect, "I have finished her and with her the daily quarrels." The statement was held to be a confession relevant in evidence, for it is not necessary for the relevancy of a confession that it should be communicated to some other person.

Judicial confessions are made before a magistrate or in court in the due course of legal proceedings. A judicial confession has been defined to mean "plea of guilty on arrangement (made before a court) if made freely by a person in a fit state of mind.

Extra-judicial confessions are made by the accused elsewhere than before a magistrate or in court. It is not necessary that the statements should have been addressed to any definite individual. It may have taken place in the form of a prayer. It may be a confession to a private person. An extra-judicial confession has been defined to mean "a free and voluntary confession of guilt by a person accused of a crime in the course of conversation with persons other than judge or magistrate seized of the charge against himself".

For example, a man after the commission of a crime may write a letter to his relative or friend expressing his grief over the matter. This may amount to confession.

Extra-judicial confession can be accepted and can be the basis of a conviction only if it passes the tests of credibility as laid down in the procedural laws.

7. Crimes under the Special and Local Laws

Certain acts are to be considered criminal acts even when they are not to be found in IPC. This is because they have been identified as crimes in Special and Local Laws. An illustrative list of such statues is in the table below.

I.	Arms Act, 1959;
II.	Narcotic Drugs & Psychotropic Substances Act, 1985;
III.	Gambling Act, 1867;
IV.	Excise Act, 1944;
V.	Prohibition Act;
VI.	Explosives & Explosive substances Act, 1884 &1908.
VII.	Immoral Traffic (Prevention) Act, 1956;
VIII.	Railways Act, 1989;
IX.	Registration of Foreigners Act, 1930;
X.	Protection of Civil Rights Act, 1955;
XI.	Indian Passport Act, 1967;

XII.	Essential Commodities Act, 1955;
XIII.	Terrorist & Disruptive Activities Act;
XIV.	Antiquities & Art Treasures Act, 1972
XV.	Dowry Prohibition Act, 1961;
XVI.	Child Marriage Restraint Act, 1929;
XVII.	Indecent Representation of women (Prohibition Act, 1986;
XVIII.	Copyright Act, 1957;
XIX.	Sati Prevention Act,1987;
XX.	SC/ST (Prevention of Atrocities) Act,1989;
XXI.	Forest Act, 1927;
XXII.	Other crimes (not specified above) under Special and Local Laws including Cyber Laws under Information Technology Act (IT), 2000.

Activities

- Write a note on White Collar crimes and Juvenile under Criminal Law in India.
- Read on the concept of Capital Punishment with respect to India, US, UK and the Middle East. Share the findings with the class.
- Attend a court proceeding in a city or town close to your school and prepare a short report.
- Take any of the most spoken of criminal cases in the country in the past year and create a tabular representation of the category, stages and elements of the case.

C. Exercise

Questions

1. What are the various kinds of crime under the IPC?
2. Is defamation a crime? If so, under which body of law?
3. How is a summons case different from a warrant case?
4. What is the concept of plea bargaining?
5. What does compounding stand for?

UNIT–2: (E) ADMINISTRATIVE LAW

A. Background

History tells us that societies and civilizations can survive without science and technology but not without administration. Administrative Law aims to ensure that the *policies, rules, regulation and legislation formulated for public good are not misused*.

B. Administrative Law and Constitutional Law: Key Differences

Before the 21st century, administrative law was considered a part of Constitutional Law. However, there has been a clear distinction in the subject matter of their respective studies in recent times. **Administrative law** aims to keep a **check on the actions of the Government when dealing with the procedures affecting the rights of citizens**. On the other hand, Constitution law clarifies the scope of ***rights and duties of citizens and the Government***.

> For example, how elections are held, Parliament is formed, the powers of the Parliament and of the different branches of the State -these are essentially the key questions in the scheme of any democratic constitution. Whereas, when a Minister is finally appointed and his actions affect the general public good, then we can categorize the study of these actions as a core constituent of Administrative Law.

C. Objections to the Growth of Administrative Law

Throughout the growth of the human civilization post 16th century, in the times when the laissez faire *(French term, meaning "allow to do"), policy of minimum governmental interference in the economic affairs of individuals and society)* economy had just entered and in the golden Victorian era, the scope of the Government intervention has always been in question.

One line of argument was that the Government should not merely watch the plight of its citizens and instead come forward and **protect** the less privileged. This was the era of **paternalism**.

Another line of thought was that it is not just protection which is the dharma of the Government. As the mother takes care of her child, the State must take care of its citizens and with this evolved the era of **maternalism**.

In the 21st century, another shade of opinion evolved, which suggested that the people must be left free as the importance was given to 'individual freedom'. It was expected that the Governmental administration will recede. While the State's function as a

businessman/entrepreneur has decreased but the State's function as a provider, facilitator, regulator still occupies a very high position in public order especially in the context of developing and least developed countries. A two-fold criticism with the aid of philosophical concepts was directed against the growth of administrative law. In England, while rule of law was the weapon used, in the United States, the doctrine propounded to check the growth of Administrative Law was separation of powers.

D. Reasons for Growth, Development and Study of Administrative Law

In the 21st century, developing countries like India expect a very proactive State for their own welfare. The welfare quotient in the administration cannot solely be vested in the legislature. This is impossible in practical terms as Governance as a whole will be cease to function if for all kinds of administrative action, the sanction of the legislature is compulsorily required.

This need for delegation is often pointed out as the single most important factor which has led to the growth of Administrative Law. Moreover, if we were to examine the scheme of our Constitution, while defining 'State', Article 12 of the Constitution of India mentions "any other authority". Hence, authorities created by law, authorities which are agencies and instrumentalities of the State or authorities which are essentially discharging public functions which have an impact on the common people are all part of the State.

> For example, an NGO: - being funded by the Government- whose control vests with the Government- its functions are akin to the Government's functions; in all of these cases such an NGO would be considered as "State" for the purposes of Article 12 of the Constitution.

E. Types of Administrative Action

Administrative action can be of four types:

Administrative Legislative Action

Wherein the administration puts on the hat of the legislature simply because it is not practically possible for any legislature in the world to legislate so perfectly that their laws are able to cover the possibility of all kinds of conflicts which can arise out of a decision even if the Members of Parliament sit for all days in a year. Administrative legislative action includes rule-making action as well as delegated legislation. As explained in the section above many decisions can be taken only by the grass root

authorities and there are practical limitations on every legislative organ, making it impossible to legislate on all kinds of possibilities.

Quasi-judicial action or administrative adjudicatory action

In these cases, the administration performs functions which can be put under the judicial domain as there is some adjudication on legal rights of the individuals involved in the matter.

Simply Administrative Action

Of all the actions undertaken by administrative authorities, other than the two types of actions mentioned before, the rest are called 'Administrative Actions' which essentially deal with execution of crucial administrative decisions.

Ministerial Action

In administrative action, there is discretion to the administrative authority (that is, the authority has the right to exercise his/her own understanding and discretion in dealing with the matter) but in those actions which are copybook action and no discretion is vested with the authority (that is there is only one way of performing that action), such action will be called purely administrative action or ministerial action.

> For example, the statute which created a University mandates that the University open a bank account with a given Bank Y. This is a purely administrative action or a ministerial action as there is no scope of any discretion in its performance.

Hence, as is clear from the aforesaid classification, *it would be wrong to say that Administrative Law deals only with the execution of policies or that it is only procedural in nature*. In contemporary times, it can be called **a full-fledged discipline which is very substantive in nature**.

> For example, suppose there is a dispute regarding the grant of scholarship to a person A over B. B thinks he deserved the scholarship and he goes to court. The court will not ask the university 'Why did you grant the scholarship to A'. On the other hand it will only ask 'how and on what grounds have you given the scholarship to A'. If the University argues that the grant has been given just like that and does not show the rationale (refer to the principle of reasoned decisions), such administrative action is bad in law and deserves to be set aside. However, if it is shown that it was given on the basis of academic merit, the Court is unlikely to interfere.

Did You Know?

In India, there is no legislation for basic and standard administrative procedure, whereas in England, there is the Tribunals and Inquiries Act, 1956, which was subsequently amended in 1998. Similarly, the United States has an Administrative Procedure Act, 1946. Despite the Law Commission's recommendation of framing some minimum administrative contours, there is no such legislation in India.

F. The Scope of Administrative Law

Administrative Law deals with how the administration exercises its powers. What are the strategies to keep the administration within its defined limits, what are the remedies in cases of administrative inaction or wrong administrative action etc., - these issues form the basis of Administrative Law. Hence, Administrative Law must not only be interpreted in the negative sense or in some vacuum. It is essentially the sociology of law and not philosophy of law.

Note that it is only Administrative Action (as discussed above in **Types of Administrative Action**) that is regulated, governed and checked by Administrative Law.

Following are examples of Administrative and Non-Administrative Actions.

Administrative Action	Non-Administrative Actions
Government Officer's decision to compulsorily acquire land	Legislative decisions (e.g. the making of laws; however, delegated legislation may be reviewable on a similar basis to administrative decisions)
Government Officer's decision to declare a person not fit and proper to hold a financial services license	Broad policy decisions (e.g. deciding to reduce a grants program)
	Government Officer's decision not to grant a visaEmployment decisions (e.g. decisions to hire an employee; however, administrative law may apply to public service misconduct decisions)

Government Officer's decision to cease paying a benefit	Criminal cases (e.g. decisions to prosecute; however, administrative law does apply to investigations)
Government Officer's decision to impose conditions on a license	Contract decisions (e.g. decisions by government to enter into a contract; however, tender processes may be subject to some administrative law principles)

G. Fundamental Principles of Administrative Law: Rule of Law, Separation of Powers and Principles of Natural Justice

In a democratic society, fundamental principles of Administrative Law are: transparency or openness, the principle of participation, of impartiality and objectivity, reasoned decisions, legality, effective review of administrative rules and administrative decisions, accountability and non-arbitrariness. All these principles are broadly encompassed under the rule of law, doctrine of separation of powers, and principles of natural justice.

Rule of Law

It essentially deals with the doctrine of constitutional morality which says that *even in doing something legal, an administrative action must always be fair and reasonable.*

> For example, University guidelines read that you can appoint any person as the Professor of Law. No other qualification as such is laid down. University appoints a person who has no qualification of Law and has no teaching experience. Hence in this case, it is the principle of administrative morality which operates and vitiates the said appointment.

Rule of law is an essential tool to protect the freedom and dignity of individuals against organized powers. In the landmark ruling by the Supreme Court of India in the *Keshavananda Bharti v. State of Kerala*, 'rule of law' was categorized as a 'basic structure' of the constitution.

> ***Basic structure*** means those basic characters/attributes which are enshrined in the heart of the Constitution and which cannot be repealed/ replaced by any Parliament. Hence, it is a bundle of characteristics of the Indian Constitution which can never lose their relevance and can never be derogated.

There was opposition to the doctrine in the days of monarchy as it limits the powers of the monarch or king to change laws and rules according to his own fancy. Hence, rule of law as a principle is essentially based only in democratic societies and is not a known feature of monarchies.

Did You Know?

India's vedas, smritis and upanishads are all texts which perpetuate the idols of fair administration (dharma) and hence, rule of law!

'Rule of Law' essentially means that **law carries supremacy over all individuals, even those in the position of power**. The notions of **equality and non-arbitrariness are also important and non-detachable components of rule of law**. When Administrative Law was growing as a separate discipline, Professor Dicey had objected to its expansion stating that the doctrine of rule of law was being violated given that most administrative procedures and mechanisms are their resultant follies being addressed internally (reference to the Droit system as discussed below).

However, the checks and balances which the different principles of rule of law brought within the fold of the principle, completely blunted the criticism of Dicey and only made a stronger case for the continuation of the growth trajectory of Administrative Law. Hence, rule of law can be best understood by these three expressions: *rule **by** law, rule **under** law and rule **according** to law*.

Doctrine of Separation of Powers

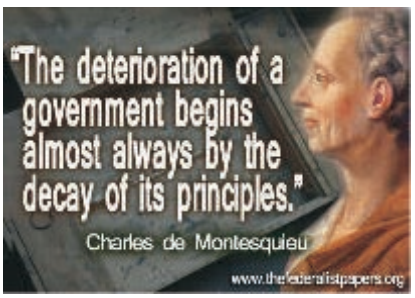
Ever since the dawn of civilization, most struggles in history have been between disempowered citizenry and the organized power of the Government structure. Freedom requires constant safeguarding and that is the price we pay for liberty. 'Separation of powers' was meant to create divisions within the Government setup to create partition within the State. Separation aimed not only at efficiency alone, but also at dividing power against itself, as power can be countered only with power. In this struggle to balance power, the liberty of citizens is expected to be safe, for separation serves as a guarantee of protecting the life and liberty of people. When power and control lies with more than one center, the opportunity for it to be misused is reduced.

Illustration: How The Different Forces Of The State Interact In A Single Administrative Action

A person can be in jail only when he has violated the law (made by the legislature). The executive implements the law (the prosecution who charged the person with the crime). The judiciary (the magistrate who decides on the person's arrest) must also agree that there are reasons to curtail this person's liberty. Hence, all three forces have to mutually interact for any kind of an outcome.

Montesquieu gave separation of powers a socio-scientific and structured meaning.

Montesquieu's theory has three aspects:



- Institutional separation or structural separation means that members of one *organ of the State must not be the members of another organ*. In the United States of America, the President does not sit in the Congress. However, in the Republic of India, the Prime Minister and his cabinet also participate in the legislature. **Can we say that India follows a 'flexible' principle of 'separation of powers'?**
- One organ of the State should not exercise the functions of the other organs.
- One organ of the Government should not interfere in the function of the other organs.

The aforesaid points can be fully implemented only in an idealistic circumstance. Hence, *the doctrine of separation of powers in the classical sense is not applicable to any modern Government and some overlapping among different organs is inevitable*. Hence, the doctrine of separation of powers has adapted to the relative circumstances of a polity in different ways than Montesquieu envisaged.

Both the 'rule of law' and the 'separation of powers' together establish that *Administrative Law is not an exclusive domain of the executive*. In fact, such is applicable to each branch of the State.

Role of Principles of Natural Justice: No bias and right to fair hearing

Principles of natural justice are not fixed rules. They are flexible and can be molded to suit the requirements of a situation or a specific purpose to do justice in any particular case.

For centuries, courts have developed two principles of natural justice, namely the *'rule against bias' and the 'rule of fair hearing'*. These principles are not written in any Act. In fact, they are derived from the law of nature. Such has been the evolution of Administrative Law that a *third rule of transparency* and reasons can also be added to the above two. Reasons alone show the application of mind in decision making.

> These different shades of natural justice can be best explained through examples: If a workman assaulted a manager in a factory and the same manager is appointed as the enquiry officer, such an administrative action is clearly hit by the rule against bias.

The administrative officials are required to act under the consideration of principles upheld by the Constitution-and not to act with prejudice. In a case where bias is alleged, there must be a real likelihood of such or actual bias and not mere baseless suspicion of bias. Even in cases when there is a necessity and the bias has a reason given the circumstance, the administrative action is not vitiated. Bias can be of many types, such as *pecuniary bias, subject-matter bias, personal bias, departmental bias* etc. While there may be significant overlapping in their shades and kinds, there are certain guidelines which must always be followed.

> For example, every aggrieved person first has a right of notice as regards his own wrongdoing and the material which proved the same on the basis of which action is taken against him.

Similarly, there is a right of cross-examination which also accrues to the parties whenever the veracity(verification of truth) of the evidence presented is put to question.

Likewise, a party always has a right to present his case or to go for legal representation and then there are constitutional safeguards in place which further govern administrative action such as Article 311 in the Constitution of India which protects the Civil Servants.

H. Delegated Legislation: The Hotspot of Administrative Law Studies

To put it simply, when legislation proceeds from an authority other than the Supreme Authority and is dependent for its continued existence as well as the validity on the supreme authority, it is called 'delegated legislation' or 'subordinate legislation'. It is a natural companion of intensive form of Governance, meaning that *when a governance setup is so spread out that it is not possible for the top legislative authority to directly reach out to the grassroots on its own strength, it can be legitimately expected that rule-making would*

vest in the appropriate and corresponding administrative authority. This also opens the avenues of specialization of law where regulation can be more aptly framed for the specific need of different regions in a diverse land like India. Moreover, *crisis/emergency legislation is also possible in such a situation*. However, it must be remembered that no delegation must be unfettered as no democratic society can ever afford an unaccountable authority to govern against the popular will of the people. Hence, delegation of law-making power to the administrative authorities as has been shown in a welfare State is often controlled. In view of our written constitution, **such delegation cannot be unlimited and must always conform to the basic features of the Constitution as well as the ambit which is given for the delegation by the corresponding legislation**. Moreover, essential legislative functions cannot be delegated. While appreciating the doctrine of delegation of powers, care must be taken in not reading too much into it.

For example, the Parliament cannot be called the delegate of the people as the people have given to themselves, the constitution. Within that particular limit, the Parliament as an organ is supreme and not a legislative agent.

I. Administrative Law in Ascertaining the Policy of Any Given Legislation

Principles of Administrative Law set the benchmark of interpreting, understanding and practicing the underline themes of all legislations and judicial decisions. The first step to find out the policy of any law is to see the plain meaning of the words in a statute through which the power has been delegated. Then, reference can be made to the 'object & reason clause'. Moreover, the 'head notes' and section-names of statutes can also be used and if need be, external sources of interpretation like Parliamentary debates can also be used for ascertaining the purpose of law.

J. Mechanisms of Control Against Illegitimate Administrative Processes

In the United States of America, the procedural control is effective within the prescribed guidelines. In the United Kingdom, Parliamentary control is extremely strong and effective given that theirs is an unwritten constitution with the supremacy of Parliament. In India, it is neither the procedural control nor the Parliament which has an absolute power. Hence, Indians turn to the judiciary to frame the scope of administrative anomalies and privileges of the Parliament. In such cases, the Court starts with a presumption of constitutionality. If for a law/rule/regulation, two interpretations are possible, the court will follow the one which makes the law

constitutional. The Court may also read down or read up the law in order to uphold the constitutionality. Hence, a balanced and holistic approach is adopted while assessing and adjudicating upon administrative matters since the court has to always aim at delivering justice and at the same time ensure that it does not transcend its own domain and pose a part of the legislature.

K. Grounds of Challenge of Rules and Regulations

Rules and regulations framed by administrative authorities can always be challenged on the grounds of uncertainty and vagueness. Arbitrariness is in the presence of non-causality between the rule and the object sought to be achieved by the said rule. It is also clear that when there is a patent denial of equality, arbitrariness will be in force.

Furthermore, reasons form an essential aspect of administrative action as dearth of reasons reflects the non-application of mind. The value of 'reasonableness' in Administrative Law has increased manifold times especially in the post-Renaissance period. To decipher the reasonableness one needs to pay attention to the prevalent customs, traditions and practices while acting under the ambit of Administrative law.

L. Control Over Administrative Discretion and Rule-making

Under the Constitution of India, the general Parliamentary control in the form of debates, notices, adjournments etc., operate as a potent weapon. Special controls such as the 'lay in' provisions and consideration for special committees are also of prime significance. Lay in provisions refers to delegated administrative rules that are laid on the table of the house and only on the approval of the Parliament or the respective legislature will those rules said to have the power of law.

'Lay in' in turn, can be of two kinds - recommendatory or mandatory. While in the former, affirmative Parliamentary approval may not be required, in the latter, such approval is non-negotiable and vital. Delegated legislation is always subject to judicial review on the standards of the Constitution, the parent Act and others.

M. Remedies Under Administrative Law

The Government machinery cannot be excused under the statutory immunities against any wrongs on the people. Administrative Law provides various remedies which a citizen can seek against a wrongful administrative commission or omission.

For example, the Government grants a construction contract to A. After A has begun operations, the contract is revoked on the grounds that the Government changed its policy. A, in this case, has a remedy against the Government's high handedness.

There are different kinds of remedies available against wrongful actions. Different statutes provide for guidelines and benchmarks which are to be adhered to by the administration. For example, the Indian Evidence Act deals in detail with when and how can public officers be compelled to disclose information. Apart from constitutional and statutory remedies; control over the administration can also be exercised by non-constitutional and non-statutory means, wherein the media and the social media assume an important role.

N. A Comparative Analysis: Droit System

Droit Administrative Law

Under the French system of administration of justice a landmark event occurred when Napoleon took over the power of administration and became the Consul General in the late Eighteenth Century. To exercise the judicial powers, there existed the King's court called Conseil Du Roi. This Court only played an advisory role to the King. Ordinary Courts on the other hand were much neglected and their salary was dependent on the fee collected.

As a competitor to the King's court, they started developing an attitude of putting breaks on schemes and programmes of the Government. Hence, the reforms brought about by the Napoleon had two objectives, namely to usher in as quickly as possible, socio-economic movements in the country and in this process, if there is any dispute between an individual and the Government departments, it should be decided as quickly as possible. Hence, the Court was disallowed from putting a spanner in the wheels of administration.

Likewise, the King's powers were also curtailed and the King's court was abolished. The new system evolved a paradigm shift from conventional judicial decision-making. Special Courts had been established to expeditiously dispose the matter pending by this system. France had evolved a dual system of justice operating on the same land, governing the same set of people in the same constituency. While an all-private parties' dispute found its way in the civil court, a dispute between a private individual and Government departments nearly always went to the administrative courts.

The highest administrative court was Counseil de' Etat. Initially, when this system was established, direct filing of cases was not allowed. The court could only entertain the petition when the Minister had forwarded the same to the court and the decision of the court could have only been of advisory value for the minister.

Criticism of the Droit System

Prof. A.V. Dicey denounced the Droit system of administration as being a system where no justice was possible while in theory Dicey's renunciation appeared reasonable; in practice it is often rightly pointed out that this system of justice was far more efficient than its contemporary common law systems. Moreover, in 1872, the Government passed a decree known as the Blanco decree by which this Counseil de' Etat was made an independent system of court where direct filing of cases as well as open hearings were allowed. Hence, speedy administration was a characteristic of Droit and an institution was created by the name of Tribunal Desk Conflict which was to decide where different types of cases were to go - whether to the civil law court or to the administrative law court.

Effectiveness of Droit

Notwithstanding the legitimate theoretical objections to the Droit system, it cannot be denied that this system gave some of the most revered doctrines of Administrative Law.

- **Doctrine of legitimate expectation -** wherein, the Court recognized due Governmental liability in case the promises to the citizens were not honored. Legitimate expectation may arise-
  - If there is an express promise given by a public authority; or
  - Because of the existence of a regular practice which the claimant can reasonably expect to continue;
  - Such an expectation must be reasonable.
- Doctrine of proportionality - The classical definition of proportionality has been given by Lord Diplock in *R V. Goldsmith* (1983) 1 WLR 151 when his Lordship rather ponderously stated "you must not use a steam hammer to crack a nut if a nut cracker would do". Hence, proportionality broadly requires that government action must be no more intrusive than is necessary to meet an important public purpose.

For example, the law mandates the University to take action against the employees who absent themselves from the duty without application. There is a person A, who is not coming since one month and did not respond to show cause notice. His services are terminated. Another person B was absent for one day and the next day when he reported for service, he was issued a show cause notice. The relationship between the fault and the action taken in both cases explains the doctrine of proportionality.

- **Doctrine of Governmental liability-** This basically determines that on what basis the Government will be held responsible for the violation of another's right. Such liability is based on the twin assessment of fault and risk.

Conclusion

After a holistic understanding of this discipline which pertains to the administration and its functioning, it can be concluded that in the modern time it is absolutely essential to constantly analyze and check the administrative processes to ensure that it does not fall prey to deviance from prescribed guidelines and established practice. We have seen that the study of administrative law is an appreciably substantive addition to the study of the Constitution. Moreover, concepts like the Rule of Law and Separation of Powers are the basis of advanced legal study today. In addition to the same, principles of natural justice ensure that Administrative Law becomes a bridge which connects the bare text of law with justice and fairness.

O. Exercise

I. Questions

Short Answer Questions

1. Distinguish the discipline of Administrative Law from Constitutional Law.
2. What is the scope or purpose of Administrative Law?
3. List the different types of administrative actions and give examples.
4. Explain the need of having the doctrine of separation of powers in the scheme of most constitutions across the globe.
5. What has the Kesavananda Bharati v. State of Kerala case stated about the Basic Structure Doctrine?
6. Explain some of the remedies available in the gambit of administrative law against the State.
7. Outline the positive and the negative features of the Droit system of Administration.

Long Answer Questions

1. Can the two disciplines of Administrative Law and Constitutional Law be studied completely separately in watertight compartments? Validate with examples.
2. Can a system like the Droit system of administration be successful in a country like India?
3. Separation of powers, as illustrated by Montesquieu is impossible to be achieved. Give reasons.
4. Do you think that delegated legislation as a phenomenon should be discouraged due to lack of accountability? Give reasons.
5. How can the policy of any given law be assessed from its bare text?
6. Discuss the role of principles of natural justice in Administrative Law?

True/False

1. The study of administrative law must always limit to the domain of Constitution.
2. The Droit administrative system is a classic example of how even theoretically bad systems can become practically sound, if operated with sincerity.
3. Delegated legislations are permissible in the Indian judicial system but only with checks and balances.
4. Principles of natural justice are applicable only when incorporated in a statute.
5. The rule of law is only a philosophical concept with no statutory basis.
6. No country in the world operates on the classical idea of separation of power as visualized by Montesquieu.
7. Administrative law continues to hold its relevance even as the State's role as an entrepreneur is receding.

II. Activity Based Learning

1) Find out the hierarchy of posts of administrative officers in your home district/ state.

2) Plan a visit to the court of your local SDM. Observe the proceedings. List the matters which may be heard by the court of SDM/ Executive Magistrate.

   Find out how these proceedings differ from proceedings conducted in a court of law.