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March, 2013

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ISBN: 978-81-266-6345-3

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Further information on the Indira Gandhi National Open University courses may be obtained from the University's office at Maidan Garhi, New Delhi.

Printed and published on behalf of the Indira Gandhi National Open University, New Delhi by the Registrar, MPDD, IGNOU, New Delhi.

Laser Typeset by Tessa Media & Computers, C-206, A.F.E.-II, Okhla, New Delhi

Printed at : Akashdeep Printers, 20, Ansari Road, Daryaganj, New Delhi-110002

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 - Unit 3 Justice Delivery System
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-

Block 2 Empowering Laws

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BLOCK 4 LEGAL REMEDIES LAW

Introduction to the Block

We have dealt with “Empowering Laws” in Block 2, and “Liability Creating Laws” in Block 3. But, law is useless if there are no remedies against violation of individual’s rights or for getting the liability discharged by the violators. Block 4, therefore, attempts to present the law related to different types of legal remedies available in respect of various kinds of violation of rights. This Block has the following six Units.

Unit 14 is on “*Writs as Remedies*”. It presents in detail the fundamental rights of citizens and different types of ‘writs’, which are the constitutional remedies available against violation of these rights. It also highlights the powers conferred on the Supreme Court and High Courts to issue writs of different nature to protect these rights in various kinds of violation.

Unit 15 titled “*Law of Specific Performance*”, discusses specific conditions under which the rights and obligations arise on the part of the individual person or entity as well as groups of persons, and how such obligations can be fulfilled. It focuses on fulfillment of certain obligations with special emphasis on the relevance of the Specific Relief Act, 1963 regarding fulfillment of such obligations.

Unit 16 deals with “*Law of Compensation*”. It highlights the constitutional and legal aspects and issues of compensation. It also highlights the need, significance and inadequacies of compensation in the emerging and evolving contexts of socio-economic development, among others.

Unit 17 is about “*Law of Legal Aid*”. It presents, in brief, the historical background of emergence of the provision of legal aid. It emphasizes different forms and means of legal aid available to the disadvantaged for ensuring protection of their rights so as to save them from unwarranted destruction. It highlights the important aspects/provisions of Legal Services Authorities Act, 1987 in respect of legal aid to the needy people to ensure justice to them.

Unit 18, “*Law of Human Rights*”, explains the concept, origin, principles and classification of human rights. It describes the international as well as the national human rights protection frameworks with focus on Human Rights Act, 1993 in India.

Unit 19 focuses on “*Panchayat Raj Law*”. It highlights the functioning of the Panchayat Raj Institutions including those relevant for administration of justice at the grassroots level in India.

UNIT 14 WRITS AS REMEDIES

Structure

- 14.0 Introduction
- 14.1 Objectives
- 14.2 Fundamental Rights
 - 14.2.1 Right to Equality
 - 14.2.2 Right to Freedom
 - 14.2.3 Right against Exploitation
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- 14.3 Who Can Issue Writs?
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 - 14.4.1 Writ of Habeas Corpus
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- 14.5 Let Us Sum Up
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14.0 INTRODUCTION

You may recall that we have talked briefly about the fundamental rights in Unit-5 of Block-2. While Block-4 focuses on 'Legal Remedies Law', Unit-14 of it highlights 'writs' as remedies available to us, when our fundamental rights are violated or infringed upon or threatened by the State or by any others for that matter. Writs are issued by only the Supreme Court of India and the High Courts of the States. So, before focusing on writs as remedies, we will also deal with the fundamental rights in greater details in this Unit, as it is violation of these rights which will lead to issuance of writs by the said courts.

14.1 OBJECTIVES

Once you go through this Unit, we expect you to be able to:

- Explain the fundamental rights and the right to constitutional remedies available under Article 32 and Article 226 of the Constitution of India;
- Describe the nature and scope of different types of writs available under our Constitution;
- Distinguish between and among the various types of writs issued as remedies by the High Court and Supreme Court to the aggrieved persons; and

- Analyse the significance of the writs issued by the said Courts in protecting and promoting the fundamental rights and interests of the citizens.

14.2 FUNDAMENTAL RIGHTS

Under the Indian legal system, jurisdiction to issue ‘prerogative writs’ is given, at present, to the Supreme Court of India and the High Courts of Judicature of all Indian States. Parts of the law relating to writs are set forth in the Constitution of India. The Supreme Court, the highest Court in the country, may issue writs under Article 32 of the Constitution for enforcement of Fundamental Rights, and under Articles 139 for enforcement of rights other than Fundamental Rights, while High Courts, the superior courts of the States, may issue writs under Articles 226. The Constitution broadly provides for five kinds of “prerogative” writs: habeas corpus, certiorari, mandamus, quo warranto and prohibition (<http://en.wikipedia.org/wiki/Writ>).

Part-III of the Indian Constitution provides for fundamental rights, Articles 12-35. These rights are broadly classified into the following types.

- Right to Equality
- Right to Freedom
- Right against Exploitation
- Right to Freedom of Religion
- Cultural and Educational Rights

These fundamental rights, as enshrined in the Constitution, are given below.

14.2.1 Right to Equality

Right to equality is provided under the following articles.

Article 14: Equality before law: The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth: It is as follows.

- 1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them.
- 2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to:
 - a) access to shops, public restaurants, hotels and places of public entertainment; or
 - b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
- 3) Nothing in this article shall prevent the State from making any special provision for women and children.

- 4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Article 16: Equality of opportunity in matters of public employment: It provides as follows.

- 1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- 2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
- 3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment.
- 4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
- 4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
- 4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year.
- 5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 17: Abolition of untouchability: It states: “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law.

Article 18: Abolition of titles: It abolishes the titles as follows.

- 1) No title, not being a military or academic distinction, shall be conferred by the State.

- 2) No citizen of India shall accept any title from any foreign State.
- 3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.
- 4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

14.2.2 Right to Freedom

Right to freedom is provided under the following articles.

Article 19: Protection of certain rights regarding freedom of speech, etc.: It is as follows.

- 1) All citizens shall have the right:
 - a) to freedom of speech and expression;
 - b) to assemble peacefully and without arms;
 - c) to form associations or unions;
 - d) to move freely throughout the territory of India;
 - e) to reside and settle in any part of the territory of India; and
 - * * * * *
 - g) to practise any profession, or to carry on any occupation, trade or business.
- 2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
- 3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
- 4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
- 5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.
- 6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions

on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevents the State from making any law relating to:

- i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business; or
- ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

Article 20: Protection in respect of conviction for offences: This protection is as follows.

- 1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
- 2) No person shall be prosecuted and punished for the same offence more than once.
- 3) No person accused of any offence shall be compelled to be a witness against himself.

Article 21: Protection of life and personal liberty: It states: No person shall be deprived of his life or personal liberty except according to procedure established by law.

Article 22: Protection against arrest and detention in certain cases: This protection is as provided below.

- 1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.
- 2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
- 3) Nothing in clauses (1) and (2) shall apply:
 - a) to any person who for the time being is an enemy alien; or
 - b) to any person who is arrested or detained under any law providing for preventive detention.
- 4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless:
 - a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

- Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or
 - b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).
- 5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.
- 6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.
- 7) Parliament may by law prescribe:
- a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);
 - b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and
 - c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

14.2.3 Right against Exploitation

Right against exploitation is provided under the following articles.

Article 23: Prohibition of traffic in human beings and forced labour: It provides as follows.

- 1) Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
- 2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Article 24: Prohibition of employment of children in factories, etc.: It states: No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

14.2.4 Right to Freedom of Religion

Following articles provide for the right to freedom of religion.

Article 25: Freedom of conscience and free profession, practice and propagation of religion: It is as follows.

- 1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.
- 2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law:
 - a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
 - b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.
 - *Explanation-I:* The wearing and carrying of *kirpans* shall be deemed to be included in the profession of the Sikh religion.
 - *Explanation-II:* In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article 26: Freedom to manage religious affairs: Subject to public order, morality and health, every religious denomination or any section thereof shall have the right:

- a) to establish and maintain institutions for religious and charitable purposes;
- b) to manage its own affairs in matters of religion;
- c) to own and acquire movable and immovable property; and
- d) to administer such property in accordance with law.

Article 27: Freedom as to payment of taxes for promotion of any particular religion: No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Article 28: Freedom as to attendance at religious instruction or religious worship in certain educational institutions: It states:

- 1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
- 2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.
- 3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

14.2.5 Cultural and Educational Rights

The cultural and educational rights include the following.

Article 29: Protection of interests of minorities: It provides as follows.

- 1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.
- 2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30: Right of minorities to establish and administer educational institutions: It is as follows.

- 1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
- 1A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.
- 2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Article 31: Repealed by section 6 of the Constitution (Forty-fourth) Amendment Act, 1978 w.e.f. 20-6-1979.

14.2.6 Right to Constitutional Remedies

Article 32: Remedies for enforcement of rights conferred by this Part: These are as follows.

- 1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- 2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
- 3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
- 4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

In this context, it may be further noted that under Article 226, the High Court of the concerned State can also be moved for appropriate proceedings for enforcement of these rights.

Three Articles – Article 33: Power of Parliament to modify the rights conferred by this Part in their application in forces, etc, **Article 34:** Restriction on rights conferred by this Part while martial law is in force in any area., **Article 35:** Legislation to give effect to the provisions of this Part – do not provide for any right, rather talk of exception to, restriction on, or means of giving effect to the fundamental rights. Thus, because of little relevance of these Articles in the present context, the text of these Articles is not reproduced.

Where there is right there is remedy. A right is effective only when there is a remedy. A right without remedy is meaningless. Hence, the Constitution has provided writs as remedies. Court helps those who are vigilant of their rights. Therefore, let us look at different matters related to writs, which are issued against violation of fundamental rights.

14.3 WHO CAN ISSUE WRITS?

The main intention of the Constitution of India in respect of fundamental rights is to protect the individuals from the arbitrary action of the State or others. Writs can, therefore, be considered as an important instrument used by the aggrieved against the State or other violators. The aggrieved can approach the Supreme Court under Article 32 or they can approach the High Court under Article 226.

14.3.1 Writ Jurisdiction of the Supreme Court

The Supreme Court jurisdiction is laid down under Article 32 of the Constitution of India. To avoid repetition, Article 32 presented under sub-section 14.2.6 above, be also read as part of this sub-section here. The writ jurisdiction of the Supreme Court is, however, narrower than that of the High Courts, which you can understand from the discussion in sub-section 14.3.2 below.

14.3.2 Writ Jurisdiction of the High Court

The High Court's jurisdiction is laid down under Article 226 of the Constitution of India, and is as follows.

Article 226: Power of High Courts to issue certain writs: It is as follows.

- 1) Notwithstanding anything in Article 32 every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.
- 2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

- 3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without:
 - a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
 - b) giving such party an opportunity of being heard,

makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.

- 4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

Distinction between Articles 32 and 226: Article 32 can be exercised for the enforcement of fundamental rights only, but Article 226 can be exercised not only for the enforcement of fundamental rights but also for the enforcement of rights other than fundamental rights. Thus, *the writ jurisdiction of High Courts under Article 226 is wider than the writ jurisdiction of the Supreme Court under Article 32.*

According to Dr. Ambedkar, right to Constitutional remedy is the heart and soul of the Constitution. The Constitution of India incorporated a long list of fundamental rights and also provided for an effective remedy under Articles 32 and 226 for the enforcement of these rights. Enforcement of fundamental rights itself is a fundamental right under the Constitution (Article 32) and must be sought within a reasonable time.

In following section, we will discuss these writs in greater detail.

14.4 TYPES OF WRITS: WHO CAN SEEK WRITS, WHEN AND WITH WHAT EFFECT?

Fundamental rights are enforced by way of filing writ petitions in the appropriate courts. The writs issued are of the following types.

- The *writ of habeas corpus* is issued to a detaining authority, ordering the detainer to produce the detained person in the issuing court, along with the cause of his or her detention. If the detention is found to be illegal, the court issues an order to set the person free.
- The *writ of mandamus* is issued to a subordinate court, an officer of government, or a corporation or other institution commanding the performance of certain acts or duties.

- The *writ of certiorari* is issued to a lower court or any body exercising quasi-judicial authority directing that the record of a case be sent up for review, together with all supporting files, evidence and documents, usually with the intention of overruling the judgment of the lower court or the decision of the body/authority concerned. It is one of the mechanisms by which the fundamental rights of the citizens are upheld.
- The *writ of prohibition* is issued by a higher court to a lower court or a quasi-judicial authority prohibiting it from taking up a case because it falls outside its jurisdiction. Thus, the higher court transfers the case from the lower court to itself.
- The *writ of quo warranto* is issued against a person who claims or usurps a public office. Through this writ the court inquires 'by what authority' the person supports his or her claim.

In the following sub-sections, we will explain different types of writs along with details as to who can seek them when and with what effect.

14.4.1 Writ of Habeas Corpus

Writ of habeas corpus, is a Latin phrase, which can be literally translated as "We command that you have the body". It means, you have the body and produce it before the Court. The object of this writ is to release a person who is illegally detained. It secures the release of a person from illegal detention either in prison or in private custody. According to law, no person shall be detained unlawfully. The Court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. If a person who is arrested is not produced before the Magistrate within 24 hours from the time of arrest, he will be entitled to be released on the writ of *Habeas Corpus*. It can be issued against any private person or executive authority. The disobedience of this writ amounts to contempt of Court, and is punishable.

i) **Conditions:** For this writ, following conditions must be fulfilled.

- There must be illegal detention of a person.
- The detention must be illegal at the time of filing the petition.
- The detention must be unwarranted by law.

ii) **Who can apply for writ of Habeas Corpus?**

- A person who has been detained illegally,
- A prisoner himself whose detention is illegal, or
- Any person on behalf of the detainee/prisoner.

iii) **When writ of Habeas Corpus is not issued?**

- If the detention has been made in accordance with law and procedure.
- Where the person against whom the writ is issued or the person who is detained is not within the jurisdiction of the Court.
- If a person who has been imprisoned by a Court of law on a criminal charge.
- If the proceedings interfere with a proceeding for contempt by a Court of record or by Parliament.

Some cases: Given below are some cases that enhance your understanding of this writ.

- In *A. D. M. Jabalpur v S. Shukla* (1976, p.1207) case, popularly known as '*Habeas Corpus Case*', the Court *held* that if the enforcement of Article 21 is suspended by the Presidential Order under Article 359, the detainee shall not have right to file a writ petition challenging the legality of detention. However, after 44th amendment of the Constitution the rule passed in *Habeas Corpus Case* is no longer a good law. According to the present position even the Presidential Order cannot suspend the right to life and liberty under Article 21.
- In *Sunil Batra v Delhi Administration* (1978, p.1575), the solitary confinement imposed on Sunil Batra and Charles Sobhraj, who were under sentence of death was challenged as violative of Article 14, 19, 20 and 21 of the Constitution. The Court treated their letter as writ petition. The Court *held* that writ of *Habeas Corpus* can not only be granted for releasing a person illegally detained but also it will be used for protecting him from ill-treatment inside jails.
- In *Kanu Sanyal v District Magistrate, Darjeeling* (1974, p.510), Kanu Sanyal, a top-ranking Naxalite leader was arrested and detained without trial in Visakhapatnam jail. He challenged the validity of his detention and filed a writ of *Habeas Corpus*. The Court issued necessary directions and *held* that the production of the body of the person detained before the Court was not necessary for hearing and disposing of the writ petition under Article 32.
- In *Bhim Singh v State of J & K* (1986, p.494), Bhim Singh, an MLA of State of J & K was wrongfully arrested and detained in the police station and was prevented from attending the State Legislative Assembly. The Court awarded a sum of Rs.50,000 to the petitioner as compensation for the violation of his Constitutional right of personal liberty under Art. 21.

14.4.2 Writ of Mandamus

A writ of mandamus, which in Latin means “we command”, or sometimes “we mandate”, is the name of this prerogative writ in the common law. It is issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly.

Mandamus means ‘the order’. Mandamus is an order by Supreme Court or High Courts to any public authority to do or not to do something in the nature of public duty. It is issued against the persons or authorities who fail to perform their mandatory duties. For the purpose of issuing writ of *mandamus*, the officer must have a public duty and must fail to perform such duty. The applicant of this writ must also have right to compel the performance of some duty cast upon the authority.

In *State of M. P v G. C. Mandawara*, (1954, p.493), it was held that a licensing officer has a duty to issue licence to the persons who fulfil the necessary conditions. Despite the fulfilment of all the necessary conditions by the applicant, if the licensing officer fails to issue licence, the aggrieved-applicant has a right to seek the remedy through a writ of *mandamus*. The object of writ of *Mandamus* is to compel performance of public duties prescribed by Statute.

i) **Conditions:** For this writ, following conditions must exist.

- There must be public duty upon the respondent.
- The petitioner must have legal right to compel the performance of public duty (*State of M. P. v G. C. Mandawara*, 1954, p.493).
- Such duty must be mandatory duty cast by law.
- The petitioner must have demanded for the performance of such duty.
- The public authority must have failed to perform or refuse to perform the public duty (*Saraswati Industrial Syndicate Ltd. v Union of India*, 1975, p.46).

ii) **Against whom Mandamus is issued?**

- Against public authorities and institutions.
- Against officers exercising public functions.
- Against Government and public corporations.

In *Gujarat State Financial Corporation v M/s Lotus Hotel Pvt. Ltd.* (1983, p.848) case, the Corporation established under the State Financial Corporation Act, 1951 had entered into an agreement with Lotus Hotels to provide finance on long-term credit and failed to release the funds. The Court issued the writ of *Mandamus* and directed the Corporation to release the funds as per agreement.

iii) **When writ of Mandamus is not issued?**

- When the duty is merely discretionary in nature (*State of M. P v Mandawara*, 1954, p.493).
- Writ of *Mandamus* cannot be issued against private individuals or private organisations because they don't have public duty (*Barada Kanta v State of West Bengal*, 1963, p.161).
- Writ of *Mandamus* cannot be granted to enforce a duty arising out of contract. (*Bihar EGF Co-operative Society v Sipahi Singh*, 1977, p.2149).

In *Manjula v Director, Public Instructions* (1952, p.344), the petitioner published a book namely '*Ama Itihasa Gapa*' and filed a writ of *Mandamus* to compel the director, Public Instructions to include her book in the list of books approved for the schools. The writ was not granted on the ground that the choice of the textbooks was a matter entirely left to the discretion of the DPI and DPI was not under duty to include the petitioner's book in the approved list.

14.4.3 Writ of Certiorari

It is an Order by the Supreme Court or the High Courts to an inferior Court to remove a suit from such inferior Court and adjudicate upon the validity of the proceedings or to quash the Orders of the inferior Court. Writ of Certiorari can be issued not only against any inferior Courts but also against a body exercising judicial or quasi-judicial functions. This writ is issued under the supervisory or original jurisdiction and not under appellate jurisdiction.

i) **Conditions:** These include the following.

- There must be want or excess of jurisdiction.
- Principles of natural justice must be violated.
- There must be an error of law on the face of the judicial record.

ii) *When can a writ of Certiorari be invoked or granted?*

- Before the trial to prevent an excess or abuse of jurisdiction and remove the case for trial to higher Court.
- After trial to quash an order which has been made without jurisdiction or in violation of the principles of natural justice.

In other words, whenever any body of persons having legal authority to determine questions affecting the rights of subject and having the duty to act judicially, acts in excess of their legal authority, writ of certiorari can be granted.

iii) *Who can apply for writ of Certiorari?*

- Any person whose fundamental right is violated can apply for writ of *Certiorari*.

iv) *Against whom writ of Certiorari is issued?*

- Inferior Courts, and
- A body exercising judicial or quasi-judicial functions.

v) *Against whom writ of Certiorari cannot be issued?*

- Against a private individual or body of private persons (*A. Ranga Reddy v General Manager, Co-op Electric Supply Society Ltd*, 1977, p.232).

vi) *When a writ of Certiorari cannot be granted?*

- To remove ministerial acts.
- To remove or cancel executive acts.
- To declare an Act as unconstitutional or void.

In the case of *Rafiq Khan v State of UP* (1954, p.3) the Magistrate maintained the conviction of the accused as passed by a Panchayat Adalat which is not authorised under Section 85 of the U. P. Panchayat Raj Act, 1947. Hence, the High Court quashed the conviction by a writ of *certiorari*.

In *G Nageshwara Rao v A.P.S.R.T.C* (1959, p.308), the Secretary, APSRTC invited objections for nationalisation of motor transport in the State. The petitioner who was running transport business filed his objections, but the Secretary did not pay attention to them. Moreover, the secretary himself was the adjudicating authority and thus violated the principles of natural justice. Hence, the Supreme Court issued writ of *Certiorari* against the Secretary.

14.4.4 Writ of Prohibition

Prohibition means 'to prevent'. Each Court is expected to act within the limits of their jurisdiction. A writ of *prohibition* is issued to prevent an inferior Court or Tribunal from exceeding its jurisdiction, which is not legally vested, or acting without jurisdiction or acting against the principles of natural justice. The writ of *Prohibition* can be issued not only against the Courts but also against the authorities exercising judicial or quasi-judicial functions.

- In *East India Commercial Co. v Collector of Customs* (1962, p.1893) the Court compelled the inferior court to keep itself within the limits of jurisdiction.

i) Who can apply for the Writ of Prohibition?

- The person whose right is violated can apply for the writ of prohibition.

ii) When can a Writ of Prohibition be granted?

- When the inferior Court or quasi-judicial authority exceeds its jurisdiction.
- When the inferior Court acts without lawful jurisdiction.
- When the inferior Court or quasi-judicial authority acts against the rule of natural justice.
- When there is an apparent error on the face of the judicial record.

iii) When is Writ of Prohibition not issued?

- When the Court acts within its lawful jurisdiction.
- When the Court observes principles of natural justice.

14.4.5 Writ of Quo Warranto

Quo warranto means 'what is your authority?' It is an Order questioning the authority of a person holding a public office. It is issued against the holder of a public office calling upon him to show with what authority he holds such office. The object of this writ is to control the executive action in making appointments to the public offices and also to protect the public from usurpers of public offices.

i) Conditions: These include the following.

- The office must be a public office.
- The office must be substantive in character with independent title.
- The respondent must not be legally qualified to hold the public office.
- The respondent must have held the office against the law.

ii) Who can file Writ of Quo Warranto?

- Any member of the public can file writ of *Quo Warranto*, whether any right of such person has been infringed or not (*Venkatarama v Sivarama*, 1965, p.491).

iii) When Writ of Quo Warranto is not issued?

- When the office is a private office.
- When the holder of the office is qualified to hold that office.
- When the holder subsequently gets qualified for the office.
- When issue of writ becomes futile. It means if the writ does not serve any purpose.

Some Cases are given below, which will enhance your understanding of this writ.

- In *Jamalpur Arya Samaj Sabha v Dr. D. Ram* (1954, p.297), the member of the Working Committee of the Bihar Arya Samaj Sabha held the office for more than the prescribed tenure. The High Court refused to issue writ of *Quo Warranto* on the ground that it was a private association.

- ### Reflection

Don't you think that the writs play very vital role in protecting the fundamental rights of the citizens? Prior to reading this Unit, have you ever heard about the writs and the powers of the High Courts and the Supreme Court of India to issue the writs? Did you ever approach the High Court or the Supreme Court for enforcement of your fundamental rights? Being a citizen of India, don't you think that no one should be tolerant to violation of the fundamental rights of citizens? Just reflect upon these questions and do what you feel is right in the facts and circumstances of any given case.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.
b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

1) Write in brief about writ jurisdiction of the Supreme Court and the High Courts. Mention the five types of writs.

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2) What are the broad types of writs as provided for in the Constitution of India?

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14.5 LET US SUM UP

We have presented you the fundamental rights as enshrined in the Constitution of India and also the powers conferred by it on the Supreme Court and the High Courts to issue writs to protect these rights. We have also highlighted different types of writs along with details as to who can seek these writs, when and with what effect.

We hope the discussion in this Unit must have given you the broader understanding of the writs and their significance as remedies against violation of fundamental rights. We believe that the understanding you have had here will enable you to play your roles effectively as a citizen and as an adult educator.

14.6 ANSWERS TO ‘CHECK YOUR PROGRESS’ QUESTIONS

- 1) Under the Indian legal system, jurisdiction to issue ‘prerogative writs’ is given to the Supreme Court, and the High Courts of Judicature of all Indian states. Parts of the law relating to writs are set forth in the Constitution of India. The Supreme Court, the highest court in the country, may issue writs under Article 32 of the Constitution for enforcement of Fundamental Rights and under Article 139 for enforcement of rights other than Fundamental Rights, while High Courts, the superior courts of the States, may issue writs under Article 226.
- 2) The Constitution broadly provides for *five kinds* of “prerogative” writs: *habeas corpus*, *certiorari*, *mandamus*, *quo warranto* and *prohibition*. These writs are issued for enforcement of fundamental rights.
 - The *writ of habeas corpus* is issued to a detaining authority, ordering the detainer to produce the detained person in the issuing court, along with the cause of his or her detention. If the detention is found to be illegal, the court issues an order to set the person free.
 - The *writ of mandamus* is issued to a subordinate court, an officer of government, or a corporation or other institution commanding the performance of certain acts or duties.
 - The *writ of certiorari* is issued to a lower court or any body exercising quasi-judicial authority directing that the record of a case be sent up for review, together with all supporting files, evidence and documents, usually with the intention of overruling the judgment of the lower court or the decision of the body/authority concerned. It is one of the mechanisms by which the fundamental rights of the citizens are upheld.
 - The *writ of prohibition* is issued by a higher court to a lower court or a quasi-judicial authority prohibiting it from taking up a case because it falls outside its jurisdiction. Thus, the higher court transfers the case to itself.
 - The *writ of quo warranto* is issued against a person who claims or usurps a public office. Through this writ the court inquires ‘by what authority’ the person supports his or her claim.

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UNIT 15 LAW OF SPECIFIC PERFORMANCE

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15.0 INTRODUCTION

You must have come across or heard about many instances when a person or a group of persons is bound to do or expected to do something to other person(s) but is not performing the same. In such situations, you too must have felt or thought of as to what a person can do to get the relief. Or, there may be different situation when the person or group is willing to do the required, but do not know how it should be done. In real life situations, many persons may come across such instances when they are thoroughly unaware of the possible ways and means of finding realistic solutions or performing the possible and acceptable things.

In this Unit, we attempt to present you the specific conditions under which the rights and obligations arise on the part of the individual persons or groups of persons, and how such obligations can be fulfilled.

15.1 OBJECTIVES

After you go through this Unit, we expect you to be able to:

- Explain different types of rights and obligations of individuals and/or groups;
- Analyse conditions under which different types of rights and obligations arise on the part of the individual persons and/or groups of persons; and
- Find out the ways and means of fulfilling specific obligations under specific conditions by the individual persons and/or groups of persons.

15.2 RIGHTS

As you learnt in Units 1 and 2 of Block 1, right is the correlative of duty; for whoever has a right due to him, some other must owe him a duty. A legal right, thus, secures “control” over the actions of others, that is, places others under a legal duty. For every right there must be a corresponding duty imposed on someone else (Subba Rao, 1994, p.101). To understand the ‘right’ better, let us look at its ingredients.

15.2.1 Ingredients of Right

According to Sir John Salmond (1966, p.25) a legal right involves *five essential elements*:

- The *first* ingredient in the conception of a right is, the subject of the right — a person in whom the right resides, the person of inherence, or the person entitled to the right. A right without a subject or a person who owns it is inconceivable. The owner of the right, however, need not be certain or determinate — for instance, the subject of the right is uncertain, when the owner is a person unborn, and right is indeterminate when it is owned by the society at large.

- The *second* ingredient is, a person against whom the right avails may be distinguished as “*the person of incidence*”. He is the person bound by the duty and so may be described also as the “*subject of the duty*.”
- The *third* element, is the content of the right, *the act, or forbearance* which the person in whom the right resides can extract.
- The *fourth* element is, the object of the right or thing over which the right is exercised. Dr. Holland (1908, p.88) seems to consider that some rights have no objects. Salmond (1966, p.245) observes that it is not necessary to define the object of a right with such narrowness and that the object of a right is as essential an element in the idea of right as the subject of the right itself.
- The *fifth* and last element in the conception of a legal right is the ‘title’ – the events by which the right has become vested in the owner.

15.2.2 Classification of Rights under Specific Conditions

Rights can be classified into various categories depending upon different circumstances. Rights are classified even by their specific sources in different sorts of rules. We discuss hereunder the major categories of rights.

15.2.2.1 Perfect and Imperfect Rights

The rights can be classified as *perfect* and *imperfect rights*. If the things on which we have a right to possess or the actions where we have a right to do are fixed and determinate, the right is a perfect one. But, when the things or the actions are vague and indeterminate, the right is an imperfect one. If a man demands his property, which is withheld from him, the right that supports his demand is a perfect one, because the thing demanded is fixed and determinate.

15.2.2.2 Absolute and Qualified Rights

Rights are also classified as *absolute* and *qualified rights*. A man has an absolute right to recover property which belongs to him; an agent has a qualified right to recover such property, when it had been entrusted to his care, and which has been unlawfully taken out of his possession. The absolute rights of mankind may be reduced to three principal or primary articles: i) *the right of personal security*, which consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation; ii) *the right of personal liberty*, which consists in the power of locomotion, of changing situation, or moving one’s person to whatsoever place one’s inclination may direct, without any restraint, unless by due course of law; and iii) *the right of property*, which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.

15.2.2.3 Natural and Civil Rights

Rights might, with propriety, be also divided into *natural* and *civil rights*. However, as all the rights which man has received from nature have been modified they acquired an additional form of the civil law. Considering their object, they can be divided into *political* and *civil rights*. Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public offices, and of being elected to the same; these

are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like.

15.2.2.4 Public and Private Rights, and Right in Rem and Right in Personam

Rights are also divided into *public* and *private rights*. The former subsist between the people and the government, as the right of protection on the part of the people, and the right of allegiance which is due by the people to the government. The latter are the reciprocal rights such as those of husband and wife, parent and child, guardian and ward, master and servant, etc.

Again, a *right in rem* is a right that holds against all second parties; and a *right in personam* is a right that holds against one or a few others.

15.2.2.5 Legal and Equitable Rights

Rights can also be divided into *legal* and *equitable rights*. The former are those where the party has the legal title to a thing, and in that case, his remedy for an infringement of it is by an action in a court of law. Although the person holding the legal title may have no actual interest, but hold only as trustee, the suit must be in his name. The latter, i.e. the equitable rights, are those which may be enforced in a court of equity by the *cestui que trust*, i.e. a beneficiary, or the person or persons who are entitled to the benefit of any trust arrangement.

15.3 OBLIGATIONS

Rights are conceptually contrasted with duties because rights are advantages while duties are disadvantages. Still, many jurists and philosophers have held that rights and duties are logical correlatives. This does seem to be true of *claim rights*; thus, the creditor's right to be repaid implies the debtor's duty to repay and vice versa. But, the logical correlative of a *liberty right*, such as one's right to park in front of one's house, is the absence of any duty for one not to do so. With this basic understanding of right as contrasted with duty, let us examine the obligations.

15.3.1 What is an Obligation?

Duty is the predicament of a person whose acts are controlled by the State in respect of a right vested in another. It is thus the correlative of right. Obligation is a generic term for any type of legal duty or liability (Gray, 1909, p.18).

Obligation is the requirement to do what is imposed by law, promise, or contract; a duty. In its general and most extensive sense, obligation is synonymous with duty. In a more technical meaning, it is a tie which binds us to pay or to do something agreeably to the laws and customs of the country in which the obligation is made. The term obligation also signifies the instrument or writing by which the contract is witnessed. In another sense, an obligation still subsists, although the civil obligation is said to be a bond containing a penalty, with a condition annexed for the payment of money, performance of covenants or the like. The word 'obligation', in its most technical signification imports a sealed instrument (Allen, 1992, p.42).

Obligation or Legal duty may be defined as the predicament of a person whose acts are liable to be controlled by another with the assent and assistance of the State (Venkata Subbarao, 1994, p.136). In its original sense, the term *obligation* was very technical in nature and applied to the responsibility to pay money owed on certain written documents that were executed under seal. Currently obligation is used in reference to anything that an individual is required to do because of a promise, vow, oath, contract, or law. It refers to a legal or moral duty that an individual can be forced to perform or penalized for neglecting to perform. The chief sources of obligation are a *contract* and *quasi-contract* (Ibid, p.145).

15.3.2 Classification of Obligations under Specific Conditions

According to Walter Wheeler Cook (1919, pp.1-15), obligations under specific conditions are as follows.

Imperfect and perfect obligations: Obligations can be classified into *imperfect* and *perfect obligations*.

- i) *Imperfect obligations* are those which are not binding on us as between man and man, and for the non-performance of which we are accountable to God only; such as charity or gratitude.
- ii) A *perfect obligation* is one which gives a right to another to require us to give him/her something, or to do or not to do something. These obligations are either natural or moral, or they are civil.
 - A *natural or moral obligation* is one which cannot be enforced by action, but which is binding on the party who makes it, in conscience and according to natural justice. As for instance, when the action is barred by the act of limitation, a natural obligation is extinguished. Although natural obligations cannot be enforced by action. Also, no suit will lie to recover back what has been paid, or given in compliance with a natural obligation. A natural obligation is a sufficient consideration for a new contract.
 - A *civil obligation* is one which has a binding operation in law, *vinculum juris*, and which gives to the obligee the right of enforcing it in a court of justice; in other words, it is an engagement binding on the obligor. Civil obligations are divided into:
 - *express and implied,*
 - *pure and conditional,*
 - *primitive and secondary,*
 - *principal and accessory,*
 - *absolute and alternative,*
 - *determinate and indeterminate,*
 - *divisible and indivisible,*
 - *single and penal, and*
 - *joint and several.*

They are also purely personal, purely real, and both real and mixed at the same time. These are briefly explained below.

15.3.2.1 Express or Conventional and Implied Obligations

Express or conventional obligations are those by which the obligor binds himself in express terms to perform his obligation. An *implied* obligation is one which arises by operation of law. For example, if A sends B daily a loaf of bread without any express authority and B makes use of it in his family, the law raises an obligation on B's part to pay A the value of the bread.

15.3.2.2 Pure or Simple and Conditional Obligations

A *pure* or *simple* obligation is one which is not suspended by any condition, either because it has been contracted without condition or having been contracted with one, it has been fulfilled. A *conditional* obligation is one the execution of which is suspended by a condition which has not been accomplished and subject to which it has been contracted.

15.3.2.3 Primitive and Secondary Obligations or Principal and Accessory Obligations

A *primitive* obligation, which in one sense may also be called a principal obligation, is one which is contracted with a design that it should, itself, be the first to be fulfilled. A *secondary* obligation is one which is contracted and is to be performed in case the primitive cannot be. For example, if A sells B his house, A binds himself to give a title but A finds that A cannot as the title is in another, then A's secondary obligation is to pay B damages for A's non-performance of his obligation.

A *principal* obligation is one which is the most important object of the engagement of the contracting parties. An *accessory* obligation is one which is dependent on the principal obligation. For example, if A sells B a house and lot of ground, the principal obligation on A's part is to make B a title for it; the accessory obligation is to deliver B all the title papers which A has relating to it; to take care of the estate till it is delivered to B and the like.

15.3.2.4 Absolute and Alternative Obligations

An *absolute* obligation is one which gives no alternative to the obligor, but he is bound to fulfill it according to his engagement. An *alternative* obligation is, where a person engages to do, or to give several things in such a manner that the payment of one will acquit him of all; as if A agrees to give B, upon a sufficient consideration, a horse or one hundred dollars. In order to constitute an alternative obligation, it is necessary that two or more things should be promised disjunctively. The choice of performing one of the obligations belongs to the obligor, unless it is expressly agreed that all belong to the creditor. If one of the acts is prevented by the obligee, or the act of God, the obligor is discharged from both.

15.3.2.5 Determinate and Indeterminate Obligations

A *determinate obligation* is one which has for its object a certain thing; For example, an obligation to deliver a certain horse named Bucephalus. In this case, the obligation can only be discharged by delivering the identified horse. An *indeterminate obligation* is one where the obligor binds himself to deliver one of a certain species; as to deliver a horse, the delivery of any horse will discharge the obligation.

15.3.2.6 Divisible and Indivisible Obligations

A *divisible obligation* is one which being a unit may nevertheless be lawfully divided with or without the consent of the parties. It is clear, it may be divided by consent, as those who made it, may modify or change it as they please. But, some obligations may be divided without the consent of the obligor; For example, where a tenant is bound to pay two hundred dollars a year rent to his landlord, the obligation is entire, yet, if his landlord dies and leaves two sons, each will be entitled to one hundred dollars; or if the landlord sells one undivided half of the estate yielding the rent, the purchaser will be entitled to receive one hundred dollars, and the seller the other hundred. An *indivisible obligation* is one which is not susceptible to division; as, for example, if A promises to pay B one hundred dollars, B cannot assign one half of this to another, so as to give him a right of action against A for his share.

15.3.2.7 Single and Penal Obligations

A *single obligation* is one without any penalty; as, where I simply promise to pay you one hundred dollars. This is called a single bill, when it is under seal. A *penal obligation* is one to which is attached a penal clause which is to be enforced, if the principal obligation is not performed. In general, equity will relieve against a penalty, on the fulfillment of the principal obligation.

15.3.2.8 Joint and Several Obligations

A *joint obligation* is one by which several obligors promise to the obligee to perform the obligation. When the obligation is only joint and the obligors do not promise separately to fulfill their engagement they must be all sued, if living, to compel the performance; or, if any be dead, the survivors must all be sued. A *several obligation* is one by which one individual or several individuals bind themselves separately to perform the engagement. In this case, each obligor may be sued separately, and if one or more be dead their respective executors may be sued. The obligation is, purely personal when the obligor binds himself to do a thing.

15.3.2.9 Personal and Real Obligations

The obligation is *personal* in another sense, as when the obligor binds himself to do a thing, and he provides his heirs and executors shall not be bound; as, for example, when he promises to pay a certain sum yearly during his life and the payment is to cease at his death. The obligation is *real* when real estate, and not the person, is liable to the obligee for the performance. For example, when an estate owes an easement, as a right of way, it is the thing and not the owner who owes the easement. Another instance occurs when a person buys an estate which has been mortgaged, subject to the mortgage, he is not liable for the debt, though his estate is. In these cases, the owner has an interest only because he is seised of the servient estate or the mortgaged premises, and he may discharge himself by abandoning or parting with the property. The obligation is *both personal and real* when the obligor has bound himself, and pledged his estate for the fulfillment of his obligation (<http://www.brainyquote.com/words/ob/obligation195364.html#ixzz1OIEr8Dpn>).

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

1) Define Right. What are the essentials of a Right?

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2) List out the major kinds of Right.

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3) Define 'obligation'.

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4) List out the major kinds of obligation.

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15.4 SPECIFIC PERFORMANCE OR FULFILLMENT OF SPECIFIC OBLIGATION – THE SPECIFIC RELIEF ACT, 1963

Every person who is injured in the social process must have a social redress. Only then it will be possible to say that human societies have been so organized as to assure that wherever there is a wrong there must be a remedy. A mere declaration of rights and duties is not sufficient to give protection to life and property. Enumeration of rights and duties must be supplemented by legal devices which can help the individual to enforce his rights. The Specific Relief Act, 1963 is one such device.

The Specific Relief Act, 1963: The Specific Relief Act, 1963 was passed by the Parliament of India following the recommendation of the Law Commission of India and repealing the earlier “Specific Relief Act” of 1877. The Act of 1877 was originally drafted upon the lines of the Draft, New York Civil Code, 1862, and its main provisions embodied the doctrines evolved by the English Equity Courts. Under the 1963 Act, most equitable concepts were codified and made statutory rights, thereby ending the discretionary role of the courts to grant equitable reliefs.

With this codification, the nature and tenure of the equitable reliefs available earlier have been modified to make them statutory rights and are also required to be pleaded specifically to be enforced. Further to the extent that these equitable reliefs have been codified into rights, they are no longer discretionary upon the courts but are enforceable rights subject to the conditions specified under the 1963 Act. Though the Act widens the sphere of the civil court, it is not exhaustive of all kinds of specific reliefs. The Act is not restricted to specific performance of contracts as the statute governs powers of the court in granting specific reliefs in a variety of fields.

Concept of Specific Performance (of Obligation/Duty): The concept of *specific performance* is available under the Specific Relief Act, 1963 in India. It applies both to movable property and immovable property. The Act applies in cases where Court can order specific performance of a contract or an act. The Act defines and amends laws relating to specific relief including specific performance of an immovable property. In the Specific Relief Act, the word ‘obligation’ has an inclusive definition and it includes every duty enforceable by law.

The Specific Relief Act, 1963 provides for specific reliefs for the purpose of enforcing individual *civil rights* and not for the mere purpose of enforcing civil law. It includes all the cases where the Court can order *specific performance* of an enforceable contract.

The courts in India continue to exercise their inherent powers in terms of Section 151 of the Code of Civil Procedure, 1908, in the event of situations not covered under the 1963 Act. This applies to all civil courts in India and there is no such inherent power with the criminal courts in India except with the High Courts in terms of Section 482 of the Code of Criminal Procedure, 1973. Further, such inherent powers are vested in the Supreme Court of India in terms of Article 142 of the Constitution of India which confers wide powers on the Supreme Court to

pass orders “as necessary for doing complete justice in any cause of matter pending before it.”

‘*Specific performance*’ is a form of equitable relief which a court dispenses, by ordering one party to perform a definite and certain contract that the party has promised to perform. The aggrieved party may approach a Court for specific performance of a contract. The Court will direct the offender party to fulfill his part of obligations as per the enforceable contract. Specific performance is generally granted when there is no standard for ascertaining actual damages. For example, if the object of the sale under the contract is picture by a famous dead-painter, compensation in terms of money will not provide adequate relief to the plaintiff. *Specific performance* is a form of equitable relief, given by the court in case of breach of contract, in the form of a judgment that the defendant does actually perform the contract according to the terms and stipulations (Lord Mackay, 2005, p.356).

The Specific Relief Act provides for *specific reliefs*. Specific relief means relief of certain species, i.e. an exact or particular, a named, fixed or determined relief. The term is generally understood as providing relief of a specific kind rather than a general relief or damages or compensation. It is a remedy which aims at the exact fulfillment of an obligation or specific performance of the contract. The expression ‘Specific Relief’ is used in contract to compensatory relief. In executor contracts, a suit may be brought to compel the performance of the contract by the person in default. Such relief may be either positive or negative. It is positive when there is a claim to the performance of it and negative when it is desired to prevent the doing of thing enjoined or under taken as not to be done.

The *remedies* or the *reliefs* which have been administered by the Civil Courts of Justice against any wrong or injury fall broadly into two classes:

- i) those by which the suitor obtains the very thing to which he is entitled, and
- ii) those by which he (the suitor) obtains not that very thing, but compensation for the loss of it.

The former is the *specific relief*. Thus, specific relief is a remedy which aims at the exact fulfillment of an obligation. It is remedial when the court directs the specific performance of contract and protective when the court makes a declaration or grants an injunction. The Specific Relief Act deals with certain kinds of *equitable reliefs* also. Thus, the object of the Specific Relief Act is confined to that class of remedies which a suitor seeks to obtain and a Court of justice seeks to give him the very relief to which he is entitled. Therefore, in the sub-sections that follow, we will focus on certain specific reliefs as provided for in the Specific Relief Act, 1963.

15.4.1 Recovery of Possession of Property

Recovery of possession of property is dealt with in Sections 5 to 8 of Chapter II of the Specific Relief Act, 1963. The Act provides for the recovery of the property. Here, property may be immovable property or movable property. Sections 5 and 6 deal with the immovable property while Sections 7 and 8 deal with the movable property.

- a) **The recovery of specific immovable property:** Section 5 of the Specific Relief Act deals with the recovery of specific immovable property; When a person is entitled to the possession of specific immovable property he can recover the same by filing the suit as per provisions of CPC. He may file suit for ejectment on the strength of his title and can get a decree for ejectment on the basis of title within 12 years of the date of possession.

A person who is entitled to possession of a specific immovable property may recover it in the manner provided in Code of Civil Procedure, 1908. If any person is disposed, without his consent, of immovable property otherwise than by course of law, he can recover possession, even if any other title is set up in such suit. Such suit shall be brought within 6 months. No suit can be filed against Government for recovery of possession (Section 6 of the Specific Relief Act, 1963.).

The word 'entitled to possession' means having a legal right to title and to possession on the basis of ownership of which the claimant has been dispossessed (*Kartar Singh v Dayal Das*, 1939, p.210). Plaintiff must show that he had possession before the alleged trespasser got possession. There may be title by contract, inheritance, and prescription or even by possession; and the last will prevail where no preferable title is shown. That is the reason why it is termed as 'possession is 9 points in law'. Even an unlawful possession of immovable property can be taken away only by lawful means and not forcefully. The action that is brought in law for the recovery of specific immovable property can merely be based on the previous possession of the plaintiff of which, he has been dispossessed of without his consent, otherwise than in due course of law.

Section 6 of 1963 Act provides summary and speedy remedy through the medium of Civil Court for the restoration of possession to a party dispossessed by another, within 6 months of its dispossession, leaving them to fight out the question of their respective titles in a competent Court if they are so advised. The object of the Section appears to give special remedy to the party illegally dispossessed by depriving the dispossessor of the privilege of proving a better title to the land in dispute. Section 6 should be read as part of Limitation Act and its object is to put an additional restraint upon illegal dispossession with a view to prevent the author of that dispossession, from getting rid of the operation of the Act by his unlawful conduct. If the suit is brought within the period prescribed by that Section, even the right owner of the land is precluded from showing his title. If a person has the possession of property as a fact and once he becomes settled as such, it is enough for the purpose of relief under Section 6, irrespective of his being without any right to the same or mere trespasser (*Yashwant Singh v Jagdish Singh*, 1968, p.620; *State of U. P. v Maharaja Djarmender Prasad Singh*, 1989, p.997; and *Ram Rattan v State of U. P.*, 1983, p.188). The possession must have been 'juridical' i.e. possession recognized by law. It should be neither by force nor by fraud. In *Nayar Service Society Ltd. v K. C. Alexander* (1968, p.1165), the Supreme Court has also expressed the same view and said that a trespasser has not right to disturb peaceful possession of long time of any person and cannot reap benefit of his illegal act.

For the application of this section the dispossession must be without the consent of plaintiff (*Shree Onama Glass Works Ltd. v Shri Ram Harak Pandey*, 1966, p.282; *Sukhjeet Singh v Sirajunnisa*, 2001, p.59) or against the process of and operation of law invoked by the ordinary method of Civil Court. In *Rudrappa v Narsingh Rao* (1905, p.213) it was held that, "To read the words 'due course of law' as merely equivalent to the word 'legally' is, we think, to deprive them of a force and significance which they carry on their face. For a thing which is practically legal may still by no means mean a thing done in due course of law."

The Section 6 prescribes its own period of limitation of 6 months from the date of disposition for suits to be filed there under. In *T. T. Devasthanams v K.M. Krishnaiah* (1998, p.1132); and *Smt. Amar Kaur v Hardev Singh* (1991, p.551) it was held that where the suit for possession under Section 6 was filed by plaintiff with allegation of being dispossessed from property, beyond six months of dispossession. Such suit was held to be not maintainable, moreover when title of defendant was subsisting and not extinguished. Dispossession must be only of such properties, of which physical possession can be given under the Act and it does not cover incorporeal rights, since the incorporeal rights are not rights of which possession can be taken and delivered to the claimant. No suit can be filed against Government for recovery of possession. Dispossession has not been made by the Government, but by any other person under this Section, an order or decree is final in the sense that it is not open to review or appeal, although it is subject to revision by High Court. Revision against the decree restoring possession is maintainable but only by way of exception and only if grounds within parameters of Section 115 of C.P.C. were clearly available.

- b) Recovering possession of specific movable property:** A person who is entitled to possession of a specific movable property may recover it in the manner provided in Code of Civil Procedure, 1908. The Act provides for the recovery of movable property in specie, i.e. the thing itself. The things to be recovered must be specific in the sense they are ascertained and capable of identification. The nature of things must continue without alteration. This section entitles a person to bring a regular suit for the recovery of possession of movable property if he has right to the same at the time of action for detinue. Where the Court decrees delivery of such property, the decree shall also state the amount of money to be paid in alternative, if delivery cannot be had. If any person is in possession or control of a specific movable property of which he is not owner, he can be compelled to specifically deliver it to the person entitled to immediate possession in cases specified in Section 6 (Sections 7 and 8 of the Specific Relief Act, 1963).

Thus, if a person holding the movable property is owner of goods, he cannot be compelled to deliver it to other. However, in other cases, he can be compelled to deliver it, even if other person is not owner, as long as he is entitled to its immediate possession. In cases where the property has a peculiar value or association and cannot be adequately compensated in terms of money. The relief under section 8 can only be granted against a person having the possession control of the particular article claimed by the plaintiff. Possession is foundation of that suit though a suit is not competent under this section against one who is the owner of the movable property.

15.4.2 Specific Performance of Contracts

The contract is an agreement upon consideration to do or not to do particular thing; if the person on whom this contractual obligation rests fails to discharge it, other party has right either to insist on the literal and actual performance of the contract or to obtain compensation for the non-performance of it. The former is called the '*specific performance*' and the latter '*equitable relief*'.

Pomeroy (1926, p.447) defines specific performance as “consisting in the contracting party’s exact fulfillment of obligation which he has assumed — in his doing or omitting the very act which he has undertaken to do or omit”. According to Halsbury (Lord Mackay, 2005, p.143), specific performance is “an equitable relief given by the Courts in cases of breach of contract, in the form of a judgment that the defendant do actually perform the contract according to its terms and stipulation”.

The subject of specific performance is dealt with in Part II, Chapter II of the Specific Relief Act, 1963 which may be classified under the following heads:

- a) Contracts which may be specifically enforced;
- b) Contracts which cannot be specifically enforced;
- c) Parties to an action for specific performance;
- d) Specific performance with a variation;
- e) Discretion of the Court in ordering specific performance.

15.4.2.1 Specific Performance of Contract Can be Ordered at the Discretion of Court

Specific performance of contract can be ordered at the discretion of Court, under the following circumstances.

- i) ***Where there exists no standard for ascertaining damage caused by the nonperformance of act agreed to be done:*** The remedy of specific performance being an equitable remedy is at the discretion of the Court. But, in the exercise of this discretion, the Court is governed by certain principles. The circumstances in which specific performance may be granted are enumerated in Section 10 of the very Act.

Section 10 provides for specific performance of contract in those cases where there is no standard for ascertaining damages or where the money cannot form adequate relief for the non-performance. Further, enforcement of the specific performance is at discretion of the court and no one claim it as a matter of right. In *Banwari Lal Agarwala v Ram Swarup Agarwala* (1998, p.88), it was held that the plaintiff tenant was entitled to a decree of specific performance of contract under Section 10 of Specific Relief Act. Where, from some special or practical features or incidents of the contract either in its subject-matter or in its terms or in the relations of the parties, it is impossible to arrive at a legal measure of damages at all, or at least with any sufficient degree of certainty so that not real compensation can be obtained by means of action at law, the contract will be enforced in specie.

- ii) ***When the act agreed to be done is such that compensation in money for non-performance will not give sufficient relief*** (The Specific Relief Act, 1963, Section 10): The specific performance will also be granted when compensation in money is not adequate relief in facts and circumstances of case. Damages may be considered to be an inadequate remedy if it is difficult to quantify them. In *Jainarain v Surajmal* (1949, p.216), it was held that where shares are limited in number and are not ordinarily available in the market, it is quite proper to grant decree for specific performance of contract of sale of such shares. In *Ram Karan v Govind Lal* (1999, p.167), there was an agreement for the sale of agricultural land. The buyer had paid full sale consideration to the seller, but the seller avoided executing the sale deed as per the agreement. The buyer brought an action for the specific performance of the contract. It was held that the case is covered under Section 10(b) of the Act.
- iii) ***Doctrine of mutuality***: No person can sue for specific performance if he cannot be sued for it, whether because he is minor or for any other reason. The contract to be specifically enforced must be mutual. The doctrine of mutuality means, the contract must be mutually enforceable by each party against the other. It does not, however, mean that for every right there must be corresponding clause. Mutuality in this context means, each party to the contract must have the freedom to enforce his right under the contract against each other (*Dasarath Gayan v Satyanarain Ghose*, 1963, p.325). The doctrine of mutuality though a technical one is founded on common sense and amounts to that the party to the contract should not be bound to that contract, when he could not enforce it against the other. In India, the contract by a minor himself is absolutely void (*Mohri Bibi v Dharmodas*, 1903, p.539).

As per explanation (ii) to section 10, breach of contract in respect of movable property can be relieved (by paying damages) unless the property is not an ordinary article of commerce or is of specific value or interest to the tariff, or consists of goods which are not easily available in the market. In other words, Court may order to deliver specific article only if it is special or unique article, not available in market. In other cases, Court will order damages but not order specific performance of contract.

- iv) ***In case of immovable property, normally, specific performance will be ordered, as such property is usually unique***: The Act 1963 further states that defendant may raise any ground available in law to him while resisting suit for specific performance (The Specific Relief Act, 1963; Section 9). In other words, all those pleas as recognized under law of contract like incapacity of parties, the absence of concluded contract (*New Mofussil co. v Shankerlal Narayandas Mundade*, 1941 p.247; and *J. I. J. Hyam v M. E. Gubbay*, 1916, p.1), the uncertainty of the contract, coercion, fraud, misrepresentation, mistake, illegality or want of authority, to enter into contract, etc are available to defendant in a suit for specific performance.

15.4.2.2 Specific Performance of Part of Contract

When the act agreed to be done is in the performance, wholly or partly, of a trust, specific performance of the same may be granted at the discretion of the court (The Specific Relief Act, 1963; Section 11). Section 12 deals with the specific

performance of part of contract. The general rule of equity is that the court will not compel specific performance of a contract unless it can enforce the whole contract. In *Merchants Trading Co. v Banner* (1871, p.21), Lord Romilly held that: "this court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all." A court of equity is not concerned to make the new contract for the parties. The rule laid in above case is contained in Section 12(1) of the Specific Relief Act, which says that the court shall not direct the specific performance of a part of contract, except in cases coming under one or other of the three proceeding sections.

To this general rules there are certain exceptions which proceed upon the principle of that 'equity looks to the substance of contract and requires substantial compliance with its conditions rather than its literal fulfillment' and these are embodied in Section 12(2), (3) and (4).

Section 12(2) becomes applicable when the part of contract which cannot be performed is the conveyance of an item which is only a small portion of the whole in value and admits of compensation in money (The Specific Relief Act, Section 12(2)). The inability to perform the contract may be by reason of deficiency in quantity of the subject-matter, variance in quality, defect in title or of some other legal prohibition or lapse of time. For the applicability of these provisions of this sub-section, two conditions must co-exist, namely: That the part which must be left unperformed bears only a small proportion to the whole value; and the part which must be left unperformed admits of compensation in money.

The equitable principle underlying the section is that specific performance of contract will not be enforced for the benefit of the purchaser and cannot operate to his detriment. The important points under Section 12(3) are that, the part unperformed must be a considerable portion of the whole; or that it does not admit of compensation in money; not either of the parties, but party who is not in default may sue for part performance. Provided the plaintiff relinquishes, claims to further performance and also, all rights to compensation on account of default of the defendant. Section 12(3) of the specific relief Act can be invoked only where terms of contract permit segregation of rights and interest of parties in the property. Neither law nor equity is in favour of the vendee to grant specific performance of the contract (*Secretary, Communist Party of India v Judhistr Patnaik*, 2004, p.67).

Section 12(4) is the third exception to the general law provided in sub-section 12(1). The ordinary presumption is that a contract is intended to be dealt with as a whole and not piecemeal. But, this section permits the Court in certain cases where this presumption is rebutted to afford relief by way of partial performance. The basic principle of Section 12(4) is that when a contract consists of several parts which are separate from and independent of another, and some of which cannot or ought not to be performed, such part or parts as can and ought to be performed may alone be specifically enforced. The court must not make a new contract for the parties, nor proceed merely on surmises that the requirements of the section would be satisfied, if further enquiry were allowed (*William Graham v Krishna Chandra*, 1925, p.45).

Rights of purchaser or lessee against person with no title or imperfect title:

Section 13 is based on the extended principle, what is known in English Law as the doctrine of feeding the grant by estoppels. This doctrine found acceptance in India, in the form of Section 43 of the Transfer of Property Act. It has been extended in Section 13 of the Specific Relief Act. The right of the person of purchaser or lessee against the person with no title or imperfect title has been enumerated in Section 13 of the Specific Relief Act.

A contract may be specifically enforced even though the promisor had no title or imperfect title at the time of the contract. The promisor is bound to comply with the terms of the contract if he subsequently acquires the power of performing the contract. The promisee can compel the promisor to make good the contract out of the interest which the latter acquired subsequent to the contract (*Silla Chandre Sekharan v Ramchandra Sahu*, 1964, p.1789). Section 13(a) says about the right of vendee. Section 13 of the Act applies only where the matter is still in the stage of contract. It applies to contract for sale or lease of immovable property and contracts for sale or hire of movable property which is in existence and applies to contract for sale, lease or hire properties, movable or immovable.

15.4.3 Contracts which Cannot be Specifically Enforced

According to Section 14 of the Specific Relief Act 1963, following contracts cannot be specifically enforced.

15.4.3.1 Where Compensation is Adequate Relief

Courts will not order specific performance of a contract where the aggrieved party can be adequately compensated in terms of money. An ordinary contract to lend or borrow money, whether with or without security, is an example of a contract which cannot be specifically enforced. But, where a loan has been already advanced on the understanding that a security would be provided against it, this can be specifically enforced (*Meenakshisundara v Rathnasami*, 1918, p.959).

15.4.3.2 Contracts Involving Personal Skill

It is not possible for the court to supervise the performance of a contract which runs into minute and numerous details or is dependent upon the personal qualifications of the promisor or is otherwise of volitional nature. Contracts of employment, contracts of personal service, contracts involving performance of artistic skill like contract to sing, to paint, to act or dance, contract of authorship, etc., are ordinary examples of things requiring personal skill and, therefore, beyond the capacity of the judicial process to enforce their actual performance. The only choice in such cases is to be content with damages (*Gunpat Narain Singh Re*, 1876, p.74; and *Bansi Sah v Krishna Chandra*, 1951, p.508). In *Purshottam v Purshottam* (1985, p.33), it was held that a contract to marry would fall under the category of such contracts from which a court cannot enforce the specific performance.

15.4.3.3 Contracts of Determinable Nature

Specific performance is not ordered of a contract which, in its nature, is determinable. Thus, no order of specific performance is likely to be passed when the contract is revocable at the option of the opposite party. A revocable lease comes under this category (*Oil and Natural Gas Corp. Ltd. v Streamline Shipping*

Co. P. Ltd., 2002 p.420). The court will not enforce a contract which, in its nature, is revocable by the defendant, for its interference in such case would be idle in as much as what it had done might be instantly undone by one of the parties. In *Jawahar Sao v Shatrughan Sonar* (1949, p.286), it has been held that where a contract of sale is determinable at the option of the seller within a specified period on repayment of the consideration, the other party cannot get decree of specific performance of the agreement.

15.4.3.4 Contracts Requiring Constant Supervision

Clause (d) of Section 14(1) says that the contract cannot be specifically enforced where it involves the performance of continuous duty which the court cannot supervise. Contracts requiring the performance of a continuous duty extending over period longer than three years from the date of the contract cannot be specifically enforced. In *Central Bank Yeotmal v Vyankatish* (1949, p.286), the respondent-defendant was required to execute a *Kabuliyat* every year for 25 years. It was held that there was continuous duty in the sense that it had to be performed annually for 25 years and, therefore, the contract must be held to be specifically unenforceable.

15.4.3.5 Construction Contracts

Subject to certain exceptions, the court will not enforce specific performance to build, repair, or maintain works or building because specific performance is decreed only where the party wants the thing in specie and cannot have it in any other way; and such contracts are for the most part so uncertain that the court will be unable to enforce its own decree. In *Her Highness Maharani Shantidevi P. Gaikwak v Savjibhai Haribahi Patel* (2001, p.101), the Supreme Court held that, having regard to the nature of the scheme and the facts and the circumstances of the case, the performance of the contract involves continuous supervision which is not possible for the court. Further, such continuous supervision cannot be directed to be undertaken by the competent authority as such an authority is now non-existent.

15.4.4 Parties to an Action for Specific Performance

It is a general rule that a contract cannot be got enforced except by a party to the contract. This general rule is embodied in clause (a) of Section 15 of the Specific Relief Act, 1963. There are, however, certain exceptions to this general rule. These exceptions are contained in clauses (b) to (h) of this section of the Act.

- Although not a party to the contract, the person who is entitled to obtain specific performance of contract is a representative in interest or the principal of any party thereto (Section 15(b)).
- Where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder (Section 15(c));
- The remainder man, where the contract has been entered into by a tenant for life in due exercise of a power (Section 15(d));
- A reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant (Section 15(e));

- A reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach (Section 15(f);
- The new company which arises out of the amalgamation, when a company has entered into a contract and subsequently becomes amalgamated with another company (Section 15(g)).
- The company, when the promoters of a company have, before its incorporation, entered into a contract for the purposes of the company, and such contract is warranted by the terms of the incorporation, provided that the company has accepted the contract and has communicated such acceptance to the other party to the contract (Section 15(h)).

In the case of *Shyam Singh, v Daryao Singh* (2004, p.348), it was held that under the provisions of Section. 15(b) 'any party thereto' or 'their representative in interest' clearly includes the transferees and assignees from the contracting party in whose favour the right exists. Such right of seeking specific performance would, however, be not available in terms of proviso below clause (b) where the contract provides that the 'interest shall not be assigned'.

15.4.4.1 Personal Bars to Relief under the Act

Specific performance of a contract cannot be enforced in favour of a person (The Specific Relief Act 1963, Section 16(a), (b) and (c)). In clause (a) of Section 16, Court of equity would refuse the specific performance not only for fraud but also for trickiness for 'he who comes for equity must come with clean hands.' In clause (b), the incapacity may be physical or mental or even legal. The insolvency of the Judgement-debtor, however does not render a contract of assignment decree invalid. In *B. R. Mulani v Dr. A. B. Aswathanarayana and other* (1993, p.1318), it was held that where the plaintiff pays mortgage debt created by defendant and the defendant in term agrees to sell certain property on its failure to pay off amount advanced, specific performance of such agreement cannot be ordered as it was not agreement of sale only. However, in this case Supreme Court decreed suit for repayment of money paid against mortgage with accrued interest. If there is violation of essential terms of contract on his part then also relief is not granted. In clause (c), when a plaintiff in his suit for specific performance of the contract insists upon the implementation of the terms of the contract but on his own does not disclose his readiness and willingness to perform his own part of term, it was held in *Ardeshir H. Mama v Flora Sassoon* (1923, p.208) that such contract cannot be enforced. It is necessary for the party claiming specific performance to aver and prove that he has been all the time ready and willing to perform his part of contract (*Gajanan Jaikishan Joshi v Probhakar Mohanlal Kalwar*, 1990, p.166; *Jagraj Singh v Labh Singh*, 1995, p.945; *M. K. Makbool Khan v Shamsunisa*, 2002, p.87; *Sardar Joginder Singh v Vasandran Kakani*, 2003, p.340; *N. Satyanarayana v Vedprakash Dusaj*, 2003, p.385; *Ram Awadh v Achhaibar Dubey*, 2000, p.860). In *Sukhbir Singh v Brij Pal* (1997, p.200) and *Hakim Singh V. Ram Snehi* (2001, p.231), the fact that the party was present in the sub-registrar's office with necessary funds was held to be a proof of the party's readiness and willingness. The plea that the vendee did not show readiness and willingness can be taken by vendor only and not by subsequent buyer. Moreover, the person who makes himself party to an illegal contract cannot enforce his rights under this section (*ITC. Ltd. v George Joseph Fernandes*, 1989, p.839).

Under Section 17, it is specifically provided that the contract to sell or let property by one who has no title, not specifically enforceable and the bar shall also apply, as far as may be, to contracts for the sale or hire of movable property.

15.4.5 Specific Performance with a Variation

Section 18 of the Act deals with cases in which the contract entered into is valid contract. In other words, it is one in respect of which the remedy of damages is available. Section 18 does not apply unless there is complete contract. It sets out the cases in which contracts cannot be enforced except with a variation and there are three particular cases set out in which a contract may be enforced subject to variation, such a variation being in favour of the defendant. But, the remedy of specific performance is available when the plaintiff is prepared to accept the variation pleaded by the defendant.

- In the case of *K. Narendra v Riviera Apartments (P) Ltd.* (1999, p.2309), it was held that, “when the defendant sets up a variation then the plaintiff may have the contract specifically performed subject to the variation so set up only, but not in cases of fraud, mistake of fact or misrepresentation or where the contract has failed to produce a certain legal result which the contract was intended to do or where the parties have subsequent to the execution of the contract varied its terms”.

Specific performance of a contract may be enforced against either party thereto (The Specific Relief Act 1963, Section 19(a), (b), (c), (d), (e)). In a suit for specific performance, the parties to the contract are the sufficient parties. A stranger to the contract is not a proper or necessary party.

- In *Kasturi v Jyamperumal* (2005, p.2813), the apex Court held that third party or stranger to the contract cannot be added so as to convert a suit of one character into another character. Four things for the applicability of this clause (b) are that: the transfer is for value, the consideration has been paid, the subsequent transferee has taken the transfer in good faith, and both the transfer and the payment of the consideration had been made without notice of the prior contract.
- In the case of *R. K. Mohammaed Abidullah v Haji C. Abul Wahab* (2001, 1658), it was held that the plaintiff who was in possession of certain property as a tenant and purchased the same property brought an action for specific performance. Subsequent purchaser contended that he was buyer in good faith and for consideration without notice and therefore he had a better title. It was found that the defendant who were the subsequent purchasers, were aware of the fact that the plaintiff was in occupation of the property as tenant for several years. The defendants could not be said to be bonafide subsequent purchasers without notice of the suit property. Hence, the plaintiff was held entitled to the relief of specific performance.

Clause(c) applies to cases where suit is not brought against the contracting party but against another whose title has been displaced by the former.

- In the case of *Mohd. Hanif v Mariam Begum* (1986, p.15), the scope of a suit for specific performance of an agreement for sale of land coupled with a prayer for possession cannot be enlarged and the suit cannot be turned also into a title unless it comes under Section 19(c).

The principle in the clause(d) is that the amalgamated company is not allowed to exercise powers acquired by means of agreements with its component companies, except upon the terms of complying with those agreements, provided they are such as the amalgamated company would itself have been bound by, if it had entered into them. Clause (e) is not intended to apply to contracts to take share but only to contracts for the working purposes of the company.

15.4.6 Discretion of the Court in Ordering Specific Performance

Decree for specific performance is a 'matter of discretion of the court' does not mean that it is open to the court to do just what it pleases in an individual case without regard to authority or principle.

Jurisdiction of Court to decree specific performance is discretionary. Court will not order specific performance merely because it is lawful to do so [Section 20(1)]. This discretion is not arbitrary, but sound and reasonable, guided by the judicial principles. Under no circumstances, the court should exercise its discretion, where it would be improper. Mere on the ground that the contract is unenforceable, court can't refuse relief to any party. The discretion of the court is to decide whether enforcement of the contract in the present circumstances is fair, and if the contract is fair and reasonable, and the character of the plaintiff has been good then the discretion of the court has no application (*Rajkumari v Lachman Ram*, 1992, p.627).

- In the case of *Noble Resources Ltd. v State of Orissa* (2007, p.119), it was held that, specific performance of contract would not be enforced by issuing a writ in the nature of mandamus, particularly when keeping in view the provisions of the Specific Relief Act, 1963 damages may be an adequate remedy for breach of contract.
- In the case of *P. S. Ranakrishna Reddy v M. K. Bhagyalakshmi* (2007, p.1256), it was held that rise in the price of an immovable property by itself is not a ground for refusal to enforce a lawful agreement of sale.
- In the case of *John Thomas v Joseph Thomas* (2000, p.408), it was held that, there was sale of land at a stated price. There was no record to show that the value stated on the plaint was not correct. The suit for specific performance was resisted on the ground that the value of the property was understated to avoid stamp duty and taxes. It was held that specific performance could not be refused on the above ground.

Court can grant compensation in lieu of or even in addition to specific performance. The plaintiff in a suit for specific performance of contract under Section 21 may also ask for compensation in case of the breach of the contract, either in addition to or in substitution for such performance. In *Jagdish Singh v Nathu Singh* (1992, p.1604), the Supreme Court held that when the plaintiff has made specific performance impossible, Section 21 does not entitle him to seek damages. But, if the plaintiff in a suit for specific performance omits to ask for compensatory relief and his suit for specific performance is dismissed, then his subsequent suit for compensation will be barred by the provisions of Section 24. In *Jaya Sen v Sujit Kumar Sarkar* (1998, p.288), it has been held that the parties are bound by their pleadings and they can be awarded only such relief as is claimed in the plaint.

Section 22 provides for the power to grant relief for possession, partition, refund of earnest money, and such other reliefs. In *P. C. Verghese v Devaki Amma* (2006, p.145), the apex court held that, in view of Section 22(1)(a) of the Specific Relief Act, a decree of partition and separate possession of the property can be granted in addition to a decree for specific performance.

- In *Satya Narayana v Yelloji Rao* (1965, p.1045) and *Matadeen Agarwal v Syed Abdul Razzak* (1997, p.103), the Supreme Court has observed that discretion referred to in Section 22 of the Specific Relief Act cannot be defined as it is not possible or desirable to lay down the circumstances under which the court will exercise discretion against the plaintiff, but at the same time the said discretion shall not be arbitrary and must be in accordance with sound and reasonable judicial principles.
- In *Goparaju Venkata Bharata Rao v Nagula Ramakotayya* (2001, p.425), there was an agreement for sale of property in favour of the plaintiff. The plaintiff was put in possession of suit property. The execution of the agreement was to take place after entire consideration was paid by the plaintiff. The original owner died. Her legatees under will dispossessed the plaintiff and postponed execution of sale deed. The plaintiff proved that the agreement to sell was a genuine document. It was held that the plaintiff was entitled to relief of specific performance of agreement for possession of property against the legatees of the original owner of property.

Under Section 23, a contract, otherwise proper to be specifically enforced, may be so enforced, though a sum named in it as the amount to be paid in case of its breach and the party in default is willing to pay the same, if the court, having regard to the terms of the contract and other attending circumstances, is satisfied that the sum was named only for the purpose of securing performance of the contract and not for the purpose of giving to the party in default an option of paying money in lieu of specific performance. In those cases, the plaintiff does not treat the contract to be at an end and asserts that he has been all along willing to perform his part of the contract.

The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be, but shall not bar his right to sue for any other relief to which he may be entitled, by reason of such breach (The Specific Relief Act 1963, Section 24). If the court grants him the specific performance, he will discharge his obligation. But, in an action for damages only for breach of the contract, that cannot be the position there; the contract is taken to be no longer subsisting to be enforced (*Ram Prasad v Babu Kashi Prasad Tewari*, 1965, p.214).

15.4.7 Other Cases when Court can Order Specific Performance

There are certain other cases when the court can order specific performance. We touch upon such cases in brief here.

15.4.7.1 Rectification

The Specific Relief Act 1963, Section 26(1) to (4) provides for the rectification of the instruments. Court can order for rectification of instrument where the content of the instrument does not reflect real intention of parties. This may happen through fraud or mutual mistake of the parties. The Court can also order rescission of contract (Specific Relief Act 1963, Sections 27 to 30).

Rectification means correction of an error in an instrument in-order to give effect to the real intention of the parties. Where a contract has been reduced into writing in pursuance of a previous engagement and the writing, but owing to fraud or mutual mistake it fails to express the real intention of the parties, then the court will rectify the writing instrument in accordance with their true intent. Here, the fundamental assumption is that there exists in between the parties a complete and perfectly unobjectionable contract, but the writing designed to embody it is incorrect or imperfect, either due to fraud or mutual mistake, and the relief sought is to rectify the writing so as to bring it into conformity with true intent. In such a case, to enforce the instrument as it stands must be to injure at least one party to it; to rescind it all together must be to injure both, but rectify it and then enforce it is to injure neither but to carry out the intention of both. In cases of rectification the court does not put it to the other party to submit to the variation alleged but makes the instrument confirmable to the intention of the parties without such offer or submission (Collett, 1907, pp.260-261).

- In *Dagdu v Bhana* (1904, p.420), it was observed that, “The Court in administering equitable principles permits mistakes to be proved where they are common; that is where the expression of the contract is contrary to the concurrent intention of the parties. If such mistakes be established, then the court can give relief of rectification, but what is rectified is not the agreement, but the mistaken expression of it.”
- The persons who are entitled to apply for rectification are either party or his representative in interest (*Durga Prasad v Bhajan*, 1919, p.614). The principle on which the court acts in correcting instruments is that the parties are to be placed in the position as that in which they would have stood if no error had been committed (*Suddha Singh v Munshi Ram*, 1927, p.605).
- In *Haji Abdul Rahman Allarakia v The Bombay and Persia Steam Navigation Company* (1892, p.56), it was held that the mistake was not mutual, but on the plaintiff’s part alone, and therefore, there could be no rectification. The court further expressed its opinion that, in the given facts and circumstances, even if both parties were under the mistake, the court would not rectify but only cancel the instrument.

15.4.7.2 Cancellation of Instrument by Getting Declared that it is Void

Sections 31, 32 and 33 of the Specific Relief Act deal with cancellation of instrument by getting it declared that it is void. Cancellation may be ordered in the cases where, any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.

Where an instrument is evidence of different rights or different obligations, the court may, in a proper case, cancel it in part and allow it to stand for the residue. On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require. Where a defendant successfully resists any suit on the

ground that the instrument sought to be enforced against him in the suit is *voidable*, the court may, if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it; that the agreement sought to be enforced against him in the suit is *void* by reason of his not having been competent to contract under Section 11 of the Indian Contract Act, 1872, the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party to the extent to which he or his estate has benefited thereby.

15.4.8 Declaratory Decrees

A declaratory decree is a mode of relief where there is no specific performance and no award of compensation. Section 34 provides for the discretion of court as to declaration of status or right. There is only a declaration of rights of the parties without any consequential relief which can be enforced by the execution of the decree. In other words, declaratory decrees are those where some right is declared in favour of the plaintiff but nothing is sought to be paid or performed by the defendant. Further, the declaration does not confer any new rights upon the plaintiff; it merely declares what he had before.

The object of such decrees is that where a person's status or legal character has been denied or where a cloud has been cast upon his titles to rights and interests in some property, he may have the cloud removed by having his legal status or rights declared by the court. But, it is not a matter of absolute right to obtain a declaratory decree. It is discretion of the Court. The object of Section 34 is to perpetuate and strengthen testimony regarding title and protect it from adverse attacks. The policy of legislature is not only to secure to a wronged party possession of the property taken away from him but also to see that he is allowed to enjoy that property peacefully.

15.4.8.1 Essential Requisites for a Declaratory Action

The essential requisites for a declaratory action include the following.

- a) The plaintiff must be entitled to any legal character or to any right as to any property (*Padmini Chandrasekharan v R. Rajagopal Reddy*, 1996, p.632; *Sowrashtra Vipra Sabha v Namakal Municipality*, 1996, p.584; *Prabhakar Adsule v State of M. P.*, 2004, p.3557; and *Niranjan Singh v Bant Singh*, 2004, p.334).
- b) The defendant should have denied or be interested in denying the character or title of the plaintiff. It is this denial which gives a cause of action for declaratory relief.
- c) The plaintiff is not in a position to claim further relief than mere declaration of his title, or where he is so able to seek further relief, he can seek such relief also (*S. Madasamy v A. M. Arjuna Raja*, 2000, p.465). It has been held that in a suit for declaration of title and consequential injunction, the burden is on the plaintiff to prove his right and possession over property.

The declaratory decree is not binding on everybody in the world (The Specific Relief Act 1963, Section 35). It cannot bind strangers and as such a declaration will not operate as a judgement in *rem* (*SNP Shipping Service Pvt. Ltd. v World*

Tanker Carrier Corp., 2000, p.34) and will be binding only between parties to the suit and their representatives. Hence, a declaratory decree is binding between the parties inter se and its effect does not bind persons who are not connected with the suit in question (*Munyaraj v Venkatapati*, 1955, p.172; *Prabhakar Adsude v State of M. P.*, 2004, p.3557; *B. S. Ruta v S. N. Ruta*, 2004, p.2546; and *M. P. Mathur v D.T.C.*, 2007, p.414).

15.4.9 Injunction

There are cases in which the nature of the contract does not admit of specific performance nor are damages likely to serve any purpose. In such cases, the court may have to restrain the party threatening breach, to the extent to which it is possible to do so. This type of remedy is known as preventive relief. It is granted by issuing an order, known as *injunction*.

An *injunction* is a specific order of the court forbidding the commission of a wrong threatened or the continuance of a wrongful course of action already begun or in some cases, when it is called mandatory injunction commanding active restitution of the former state of things. In Barney's Encyclopedia of Laws of England it is defined as "a judicial process by which one, who has invaded or is threatening to invade the rights (legal or equitable) of another, is restrained from continuing or commencing such wrongful act." Lord Halsbury is most explicit when he says: "An injunction is a judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing." In former case it is called *restrictive injunction* and in the latter case it is called *mandatory injunction*.

As per Section 36 of the Specific Relief Act, *preventive relief* is granted at the discretion of the court by injunction, temporary or perpetual. Section 37(1) and (2) provides for temporary and perpetual injunctions respectively. Temporary injunctions are such as to continue until a specified time, or until the further order of the court, and they may be granted at any stage of a suit, and are regulated by the Code of Civil Procedure, 1908 (5 of 1908). A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit; the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Under Chapter VIII Section 38 of the Act, it is further provided that, *perpetual injunction* is granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication. When any such obligation arises from contract the court shall be guided by the rules and provisions contained in Chapter II. When the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, the court may grant a perpetual injunction in the following cases: where the defendant is trustee of the property for the plaintiff; where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion; where the invasion is such that compensation in money would not afford adequate relief; where the injunction is necessary to prevent a multiplicity of judicial proceedings {The Specific Relief Act, 1963, Section 38(3)(a) to (d)}.

When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of,

and also to compel performance of the requisite acts, such kind of injunction is termed as *mandatory injunction* (The Specific Relief Act 1963, Section 39).

Section 40 of the Specific Relief Act 1963 provides for the Damages in lieu of, or in addition to, injunction. The plaintiff in a suit for perpetual injunction under section 38, or mandatory injunction under section 39, may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages {Section 40(1)}. No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint: Provided that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim {Section 40(2)}. The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach {Section 40(3)}.

As per the provision of Section 41 of the Act, an injunction cannot be granted:

- a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
- b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;
- c) to restrain any person from applying to any legislative body;
- d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;
- e) to prevent the breach of a contract the performance of which would not be specifically enforced;
- f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;
- g) to prevent a continuing breach in which the plaintiff has acquiesced;
- h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;
- i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court; and
- j) when the plaintiff has no personal interest in the matter.

Section 42 provides for injunction to perform negative agreement. Notwithstanding anything contained in clause (e) of section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement: Provided that the plaintiff has performed the contract so far as it is binding on him.

From the analysis of the above provisions of law, it can be concluded, though the Act widens the sphere of the civil court, that *its preamble shows that the act is not exhaustive of all kinds of specific reliefs*. The Act is not restricted to specific performance of contracts as the statute governs powers of the court in granting specific reliefs in a variety of fields.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

5) What kinds of remedies are available under the Specific Relief Act, 1963?

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6) What is meant by Specific Performance?

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7) Which are the cases where specific performance of contract is enforceable?

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8) Which cases of contracts are not specifically enforceable under Specific Relief Act?

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9) What are the essential requisites for a declaratory action?

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10) What is an 'injunction'? Enumerate different kinds of injunction.

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15.5 LET US SUM UP

In this Unit, we have touched upon the meaning of right as well as its essential ingredients and types. We have explained you what an obligation is, when it arises, what are its types, and how it can be fulfilled in general, and with specific reference to the Specific Relief Act, 1963.

We have discussed that in the Specific Relief Act, the word 'obligation' has an inclusive definition which makes every duty enforceable by law. Specific Reliefs Act is complimentary to provisions of Contract Act and Transfer of Property Act, as the Act applies both to movable property and immovable property.

To have an overview of the Act, the *first chapter* of the Specific Relief Act, 1963 provides relief as to recovery of possession of property for those who have been dispossessed of their property. The *second chapter* of the Act deals with the specific performance of contracts. One of the important aspects of civil right is the fulfillment of the expectations created by a contract voluntarily made by the parties. Contract is not just an isolated transaction. It is often a link in a chain of several contracts. A failure at one place can cause a serious dislocation of economic social life. The contract must be enforced. The only way the law of contract can enforce a contract is by awarding compensation to the injured person or by specifically enforcing the obligations under the contract. The *third chapter* deals with rectification and cancellation of instruments and rescission of contract. The *fourth chapter* deals with the category of documents which are afterwards discovered to be void or which become void. They ought to be cancelled. The *fifth chapter* deals with a category of contract which, for one reason or another, such as, for example, lacks free consent, are voidable at the option of the party whose consent was not free. He has right to have the contract rescinded in such cases in which the nature of the contract neither admits a specific performance

nor are damages likely to serve any purpose. In such cases, the court may have to restrain the party threatening breach, to the extent to which it is possible to do so. *Chapter six* of the Act deals with the declaratory relief. Thus, the reliefs provided under the Act are remedial when the court directs the specific performance of contract and protective when the court makes a declaration or grants an injunction as under chapter seven and eight of the Specific Relief Act, 1963.

Thus, the Specific Relief Act, 1963 deals only with certain kinds of *equitable reliefs*. The rights codified under the Act are: Recovery of possession of immovable property, Specific performance of Contract, Rectification of Instruments, Rescission of Contracts, Cancellation of Instruments, Declaratory Decrees and Injunctions.

We hope and believe that the discussion in this unit will help you in claiming your rights and discharging your obligations in different conditions or situations in your life and career.

15.6 ANSWERS TO ‘CHECK YOUR PROGRESS’ QUESTIONS

- 1) According to Sir John Salmond “Right is an interest recognized and protected by a rule of legal justice”. According to him, a Legal Right involves five essential elements, viz. the person of inherence, the person of incidence, the act or forbearance, object of the right or thing over which the right is exercised, and the title.
- 2) The major kinds of Right are: legal and equitable rights, public and private rights, a right in rem and a right in personam, natural and civil rights, political and civil rights, absolute and qualified rights, and perfect and imperfect rights.
- 3) Obligation is a legal duty to pay or do something.
- 4) The major kinds of obligation are: Imperfect obligations and perfect obligations, and natural or moral and civil obligations. Civil obligations are further divided as follows: express and implied, pure and conditional, primitive and secondary, principal and accessory, absolute and alternative, determinate and indeterminate, divisible and indivisible, single and penal, and joint and several. They are also purely personal, purely real, and both real and mixed at the same time.
- 5) According to Section 4 of the Specific Relief Act, specific relief is granted for the purpose of enforcing individual civil rights. The remedies are provided in the form of Recovery of Possession of Property, Specific Performance of the contract, Rectification of Instrument, Rescission of Contract, Declaratory Decree and Preventive Relief in the form of Injunction.
- 6) Specific performance is a form of equitable relief, given by the court in case of breach of contract, in the form of a judgment that the defendant does actually perform the contract according to the terms and stipulations.
- 7) The specific performance of any contract may, in the discretion of the court, be enforced:

- i) When there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or
 - ii) When the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.
- 8) No, not all the contracts are specifically enforceable. These include the following.
- i) A contract for non-performance of which compensation in money is an adequate relief.
 - ii) A contract that runs into such minute details which is so dependent on the personal qualification or violation of the parties or otherwise its nature is such that the court cannot enforce specific performance of its material terms.
 - iii) A contract which is by its nature terminable.
 - iv) A contract, the performance of which involves a continuous duty, which the Court cannot supervise.
- 9) The plaintiff must be entitled to any legal character or to any right as to any property. The defendant should have denied or be interested in denying the character or title of the plaintiff. It is this denial which gives a cause of action for declaratory relief. And that the plaintiff is not in a position to claim further relief than mere declaration of his title, or where he is so able to seek further relief, he can seek such relief also.
- 10) Injunction is a measure for preventive relief. As per the provisions of the Specific Relief Act, the parties are ordered to perform the obligations as per the contract. There are 4 types of injunctions, namely:
- a) *Temporary*: These are continued until a specific time or till any further order from the court.
 - b) *Perpetual*: Granted by decree made at the hearing of both the parties.
 - c) *Permanent*.
 - d) *Mandatory*: A party may be required to perform a certain act to prevent further breach of an obligation.

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UNIT 16 LAW OF COMPENSATION

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16.0 INTRODUCTION

You may recall from the discussion in 'Unit-11: Tort Law' of Block-3, a few points that: the wrongs may be criminal or civil in nature; the same set of circumstances will, from one point of view, constitute a crime and, from another point of view, a tort; the distinction between civil and criminal wrongs depends on the nature of the remedy provided by law; and same wrong, sometimes, is capable of being made the subject of proceedings of both civil and criminal kinds, and accordingly, civil proceeding concerns with the enforcement of some right claimed by the plaintiff as against the defendant, whereas criminal proceedings have for their object the punishment of the defendant for some act of which he is accused. Thus, in any society governed by law, any wrong doer including the State, is appropriately punished, and/or made to compensate the loss, suffering or injury caused to the person.

In Block-4, while Unit-14 highlighted writs as effective remedies in case of violation of fundamental rights, Unit-15 focused on 'Law of Specific Performance' that ensures fulfillment of specific obligations. In the present Unit, i.e. Unit-16, we will specifically focus on compensation as a legal remedy available to the individuals when certain rights of them are violated.

16.1 OBJECTIVES

After you go through this Unit, we expect you to be able to:

- Explain the provisions of compensation as exist under the Constitution of India and under other relevant laws;

- Discuss the matters of compensation with special reference to liability of State, individuals and certain organizations to the aggrieved persons; and
- Analyse and appreciate the aspects of computation of compensation to the aggrieved persons.

16.2 COMPENSATION: EXTENT OF GRIEVANCE AND LIABILITY

Compensation is a monetary relief provided to the aggrieved person, whose rights have been violated. According to Oxford Dictionary (2012), compensation means “something, typically money, awarded to someone in recognition of loss, suffering, or injury”. Compensation is a remedy available under civil suits. As far as criminal case is concerned, prime stress is on punishing the wrongdoer to cause the deterrent effect on the mind of wrongdoer and other persons of the society. In general, in a criminal case, the victim gets nothing from punishing of wrongdoer except the satisfaction that the person who infringed his rights got punished. However, compensation is also available under certain criminal cases wherever provided by the legislature for the ends of justice.

Latest legislative developments and judicial response to the provision of compensation shows that relevance of compensation is fully recognized even in criminal justice administration. The Constitution of India, Law of Torts, Criminal Procedure Code, Motor Vehicle Act and Workman’s Compensation Act are some of the legislations, which provide for payment of compensation to the person(s) whose rights have been violated. International law also equally provides for compensation to ensure justice to the aggrieved. We will briefly discuss these laws in order to provide you an understanding of the nature, extent and computation of compensation.

16.2.1 Compensation under Constitution of India: State Liability

As you are aware by now, there is no meaning of right if no remedy is provided for its infringement. Preamble of the Constitution of India, which is a part of the basic structure of the Constitution, secures to all of its citizens “Justice”. It is, therefore, the duty of State to ensure justice to all. If there is infringement of fundamental rights then right to claim compensation is secured by the right infringed. This right is specifically provided under Articles 32 of the Constitution. Article 32(1) provides for the right to move the Supreme Court. Further, Article 226 provides for similar right to move the High Court by appropriate proceedings for the enforcement of the fundamental rights.

The Supreme Court under Article 32(2) is free to devise any procedure for the enforcement of fundamental right and it has the power to issue any process necessary in a given case. In view of this constitutional provision, the Supreme Court may even give remedial assistance, which may include compensation in “appropriate cases”.

A question regarding awarding of monetary compensation through writ jurisdiction was first raised before the Supreme Court in *Khatari (II) v State of Bihar* (1981, p.627). In this case, Bhagwati, J. observed:

“Why should the court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty?”

Regarding the liability of the State to pay compensation for infringing Article 21, the Court answered in the affirmative saying that if it were not so, Article 21 will be denuded of its significant content.

The seed of compensation for infraction of the rights implicit in Article 21 was first sowed in *Khatri case*, which sprouted with such a vigorous growth that it finally enabled the Court to hold the State liable to pay compensation. This dynamic move of the Supreme Court resulted in the emergence of compensatory jurisprudence for the violation of right to personal liberty through *Rudul Sah case*. The Supreme Court of India, in *Rudul Sah v State of Bihar* (1983, p.141), brought about a revolutionary breakthrough in human rights jurisprudence by granting monetary compensation of Rs.30,000 to an unfortunate victim of State lawlessness on the part of the Bihar Government for keeping him in illegal detention for over 14 years even after his acquittal of a murder charge.

According to Justice G. Yethirajulu (2004) till the pronouncement made in the above case, the Supreme Court, while acknowledging the inadequacy of conventional judicial remedies in this type of cases, was hesitant to recognise the principle of monetary compensation for violation of fundamental rights. The concern of the highest court to do justice rather than mechanically applying the law based on precedents is reinforcing the credibility of the judiciary among the public, especially the helpless have-nots.

Liability of State to pay compensation for the action of its official was evolved by the Hon'ble Supreme Court against the doctrine of Sovereign Immunity in the case of *Nilabati Behra v State of Orissa* (1993, p.746). The Supreme Court observed:

“It may be mentioned straight away that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort.”

In this case, the son of petitioner was arrested by the police and next morning his body was found laying down with several injuries on the railway track. The Hon'ble Supreme Court awarded the compensation of Rs.1,50,000 to be paid by the State.

The case of *Bhim Singh v State of J & K* (1986, p.494) is another important case where Bhim Singh, an MLA, was arrested by the police only to prevent him to attend the Legislative Assembly. The Hon'ble Court not only entertained the writ petition of his wife but also awarded the compensation of Rs.50,000 to be paid by the State. The case of *Meja Singh v SHO Police Station Zira* (1991, p.439) is another case where High Court of P & H took the cause of victim and awarded the compensation of Rs.25,000 for illegal detention of son of the petitioner.

Use of force and misuse of authority by the police on people not in their custody is another instance where gross violation of basic rights of people was reported. In the case of *Saheli v Commissioner of Police* (1990, p.513), the son of Kamlesh Kumari died due to ill-treatment by an S.I. of Delhi Police. The Hon'ble Supreme Court directed the Delhi Administration to pay the compensation of Rs.75,000. Another important case is of *Gudalure M. J. Cherian and Ors. v Union Of India (UOI) and Ors.* (1992) where the Hon'ble Supreme Court directed the Govt. of U.P. to first suspend the police officials and medical officers who tried to save the accused and pay compensation of Rs. 2,50,000 to the victim of rape and Rs.1,00,000 to victim of other crime.

16.2.2 Compensation under Criminal Procedure Code: State and Individual Liability

The Code of Criminal Procedure provides for payment of compensation by State under two circumstances which are as follows:

- i) When State as an accused party gets convicted.
- ii) When third person as an accused party could not be convicted.

16.2.2.1 Compensation When State as an Accused Party Gets Convicted

First circumstance when State can be made liable to pay compensation is when it gets convicted. Provision for compensation to victim, dependants, bona fide purchaser of stolen property and defraying expenses of prosecution on conviction of an accused is provided under section 357, which not only provides for compensation when fine forms part of the sentence but also when fine does not form part of substantive sentence. Provision for compensation for wrongful arrests and payment of cost to the successful complainant is provided under section 358 and section 359 respectively.

In the land mark case of *Sarwan Singh & Ors Etc v State of Punjab* (1978, p.1525), the Supreme Court laid down, in exhaustive manner, what all should be taken into account while imposing fine or compensation. The Court observed:

“The object of the section 357(3) is to provide compensation payable to the persons who are entitled to recover damage from the person sentenced even though fine does not form part of the sentence. In awarding compensation, it is necessary for the court to decide whether the case is a fit one in which compensation has to be awarded. If it is found that compensation should be paid, then the capacity of the accused to pay compensation has to be determined. In directing compensation, the object is to collect the fine and pay it to the person who has suffered the loss. The purpose will not be served if the accused is not able to pay the fine or compensation. If the accused is in a position to pay the compensation to the injured or his dependents to which they are entitled, there could be no reason for the court not directing such compensation. It is the duty of the court to take into account the nature of the crime, the injury suffered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of fine or compensation.”

Harikishan and State of Haryana v Sukhbir Singh and others (1988, p.2127) is another important case, where court reaffirmed its stand on method of determining compensation in following words:

“The payment by way of compensation must, however, be reasonable. What is reasonable may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by installments, may also be given. The court may enforce the order by imposing sentence in default.”

16.2.2.2 Compensation When Third Person as an Accused Party Could Not be Convicted

Second circumstance when State can be made liable to pay compensation is when the accused who is a third person could not be convicted. As it is the duty of State to protect the rights of people and if it fails to protect the rights of people then it is liable to pay compensation to victim of crime for failure in discharge of its duty. There was no such provision earlier under Code of Criminal Procedure. In this regard, even the Hon'ble S.C. in the case of *Delhi Domestic Working Women Forum v Union of India* (1995, p.14), had shown its concern in following words:

“It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India, to set up Criminal Injuries Compensation Board Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result

The Code of Criminal Procedure (Amendment) Act, 2008 inserted a new section 357A after section 357. It provides for the compensation to victim when accused could not be convicted. The provision of victim compensation scheme is as follows:

- 1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his/her dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.
- 2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).
- 3) If the trial Court, at the conclusion of the trial, is satisfied that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

- 4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.
- 5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.
- 6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.”

The Supreme Court, in the case of *State of Rajasthan and Others v Sanyam Lodha* (2011, p.262), interpreted the provision of Victim Compensation Scheme as follows:

“Section 357 of the Code of Criminal Procedure provides for a direction to pay compensation to the victim, from out of the fine. It does not provide that the compensation awarded should be a uniform fixed amount. Section 357A of Code of Criminal Procedure (introduced with effect from 31.12.2009) requires every state government in co-ordination with the central government, to prepare a scheme for providing funds for the purpose of payment of compensation to the victims who require rehabilitation (or who have suffered loss or injury as a result of the crime). This section also does not provide that the compensation should be an identical amount. The victim may also sue the offender for compensation in a civil proceeding. There also, the quantum may depend upon the facts of each case.”

Check Your Progress

Notes: a) Space given below the question is for writing your answer

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

- 1) Explain as to how State can be made liable to pay compensation under the Constitution of India.

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16.2.3 Compensation under Law of Torts: State and Individual Liability

Tort committed by a government servant while discharging his duty imposed by law is exempted from liability. The Supreme Court, in the case of *Kasturi Lal v State of U. P.* (1965, p.1039), explained the concept of sovereign immunity as follows:

“If the tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: Was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on the delegation of the sovereign powers of the State of such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharge of duties assigned to him, not by virtue of the delegation of any sovereign power, an action for damage would lie. The act of public servant committed by him during the course of his employment is, in this category of cases, as an act of a servant who might have been employed by a private individual for the same purpose.”

The decision laid down in *Kasturi Lal case* has not been expressly overruled till now, but with the passage of time the Supreme Court has started deviating from its earlier decision given in *Kasturi Lal case*. We can see in many decisions that the court has imposed liability on government servant for those acts which were earlier exempted from the liability.

One of such cases is *Peoples Union for Democratic Rights v State of Bihar* (1987, p.355). About 600 to 700 poor peasants and landless persons had collected for a peaceful meeting. Without any previous warning by the police or provocation on the part of those collected, the superintendent of police surrounded the gathering with the help of police force and opened the fire, as a result of which at least 21 persons, including children died and many more were injured. The Peoples Union for Democratic Rights filed an application before the Supreme Court under article 32 of the constitution, claiming compensation for the victims of the firing. It was held by the Supreme Court that State should pay compensation of Rs.20,000 for every case of death and Rs.5000 for every injured person.

16.2.4 Compensation under Motor Vehicle Act, 1988: Liability of Insurance Company and Individual

The Motor Vehicle Act, 1988 made insurance of a motor vehicle compulsory. The owner of every motor vehicle is bound to insure the vehicle against the third parties risk. If the vehicle is insured against the third party risk, the injured party can claim compensation from the insurance company.

Insurance policy is a personal contract between the parties for indemnifying the insured in case of an accident covered under the policy. Even if a vehicle is not insured against third party risk, the claimant still has a right to claim compensation from the owner of the vehicle under the principle of vicarious liability.

The judiciary in India has followed liberal approach in case of any questions relating to breach of insurance policy. For example, in *Nagaraju v Oriental Insurance Company* (1996, p.647), the Supreme Court observed:

“The exclusive term of insurance policy must be read down so as to serve the main purpose of the policy, that is, to indemnify the damage caused to the vehicle.”

In this case, the appellant was the owner of the insured truck which was covered by a comprehensive insurance policy issued by Oriental Insurance Company covering risk to the limit of two lakhs. The truck sustained major damage in an accident, the repair of which amounted to Rs.87,000/-. At the time of the accident the truck was carrying nine persons while the policy did not cover use for carrying passengers in the vehicle except employees not exceeding six in number. The Supreme Court observed that the presence of nine persons had not contributed in any manner to the cause of accident and also the claim did not relate to any injuries to those nine persons. The claim is primarily for damage caused to the insured vehicle, which would not have been denied in the present case.

16.2.5 Compensation under Workmen’s Compensation Act, 1923

The Workmen’s Compensation Act provides for payment of compensation for injuries suffered by a workman in the course of and arising out of his employment. Where death results from the injury, the amount of compensation is payable to the dependants of the workmen. In *Sk. Jumman and Others v Shahjahanbi*, the court observed that the provision for payment of compensation to the dependents of the deceased workman is of the nature of indemnity for the amount of maintenance which the workman might have provided to the dependents during his life time if he had been alive, and it is the duty of the commissioner to ascertain the same during enquiry. In this connection, the relevant facts would be: i) the status of the family of the deceased and his dependants; ii) in the case of a widow, the possibility of a remarriage in which case the workman would altogether cease to pay any money; and iii) the circumstances of the parents and minor brothers and to what extent they were provided maintenance by the deceased during his lifetime. For arriving at a reasonable decision on the question of allocation and distribution of compensation, the commissioner would have to record evidence clarifying the above factors.

16.2.6 Compensation under International Law: Liability of State

Liability of State to pay compensation is equally recognized under various international instruments/conventions which are as follows:

- i) The Universal Declaration of Human Rights, 1948, under Article 8, provides that everyone has the right to an effective remedy by the competent national tribunal for acts violating the rights granted to him by the Constitution or by law.
- ii) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, under Article 14, provides that every State party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for full rehabilitation.
- iii) U. N. Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, under Article 12, provides that when compensation is not fully available from the offender or other sources, State should endeavour to provide financial compensation to:

- a) Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes; and
- b) The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

iv) European Convention for the Protection of Human Rights and Fundamental Freedoms, 1990, under Article 5(5), provides that “everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation”.

v) International Covenant on Civil and Political Rights of 1966, under Article 9(5), provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

The Supreme Court of India, in *D. K. Basu case* (1997, p.416), made the following observation with reference to the above Covenant:

“The Government of India, at the time of ratification of International Covenant on Civil and Political Rights in 1979, had made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention and thus did not become a party to the Covenant. Reservation, however, has now lost its relevance in view of the law laid down by this Court in a number of cases awarding compensation for the infringement of the fundamental right to life of a citizen.”

If the victim, whose right has been violated, is not compensated, then it shakes the credibility of justice administration system and people start losing trust in it. This can lead to tyranny and lawlessness in the society. Peace and harmony among the people depend on the efficiency of justice administration system of a country. So, compensating the victim is the indispensable part of the justice delivery system. It is evident from the above stated provisions and judicial decisions that relevance of compensation is fully recognized in India. That is why even the State is made equally liable, subject to few exceptions, to pay compensation.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

2) Explain the third party insurance and liability of insurance company in respect of compensation under Motor Vehicle Act, 1988.

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16.3 COMPUTATION OF COMPENSATION: BROAD CONSIDERATIONS

From Unit-11 (Sub-sub-section 11.4.5.2), you may recall the discussion on computation of compensation as a part of damages (under remedy for tort) which can be claimed by individuals for personal injury, pain and suffering and loss of enjoyment of life. Also, it was mentioned therein that, if there is probable future loss of income by reason of incapacity or diminished capacity of work, damages (i.e. compensation) for the same are also recoverable. Sometimes, damages (compensation) for the future loss, i.e. *prospective damages* may also be awarded by the competent courts/bodies. Since there can be only one action, and the law does not permit more than one suit for the same cause of action, damages for the likely loss can also be claimed as part of the same suit.

- *Shortening of expectation of life of the injured party entitles him/her to claim compensation for the same.* If such a person dies before he/she could claim compensation for the same, his/her legal representatives can claim compensation for the benefit of his/her estate.
- *Damages under the Fatal Accidents Act:* Certain dependants of the deceased are entitled to claim compensation under the (Indian) Fatal Accidents Act, 1855. A claim under the Act can be made only on behalf of certain heirs, i.e. the wife, the husband, the parent or the child. No action can be brought by the brothers and sisters of the deceased.

16.3.1 Assessment of the Value of Dependency

Though the 'assessment of the value of dependency' has been discussed under sub-sub-section 11.4.5.3 of Unit-11 of Block-3 of this Course, the relevant theories are reproduced here for comprehensiveness of the coverage of the topic in the present Unit here.

- *Interest theory:* One possible method of assessing compensation payable to the dependants could be to award such amount of compensation that the interest on fixed deposit of it could bring that much income to the dependants which is equivalent to the loss of dependency. This theory (interest theory) cannot work well in practice, for two reasons. *Firstly*, due to erosion in the value of money in course of time, specific amount of interest may not suffice to cover future loss; and *secondly*, due to illiteracy and ignorance, the claimant may not be in a position to plan a sound investment of the compensation received.
- *Multiplier theory:* According to this theory, the likely future loss is assessed by multiplying the likely future loss due to occur every year with a multiplier, which indicates the number of years for which the loss is likely to continue. On the death of a person, his dependants may sometimes receive certain payments like gratuity, family pension, provident fund, insurance money, etc. Such receipts are not to be deducted from the compensation payable. The reason for not allowing such amounts to be deducted from compensation is, *firstly*, the deceased may have paid premiums to secure such benefits thereof, and he never intended that the tortfeasor should derive the benefits thereof, and *secondly*, some of the payments may have been received by the deceased or the dependants even if the death as at present had not occurred.

16.4 LET US SUM UP

We have discussed the compensation with emphasis on the extent of liability on the part of the State, individuals and certain organizations vis-à-vis the magnitude of grievance of the aggrieved person(s). Further, we have touched upon computation of compensation including the coverage of prospective damages and assessment of the dependency in this regard.

In addition, you may note that, we will be discussing certain other aspects of compensation with regard to land acquisition for public purpose by the State, among others, in 'Unit-24: Rights of Land Holders' of Block-5 of this course, because of greater relevance of such aspects there in that Unit than here in this Unit.

16.5 ANSWERS TO 'CHECK YOUR PROGRESS' QUESTIONS

- 1) Preamble of the Constitution of India, which is a part of the basic structure of the Constitution, secures to all of its citizens "Justice". It is, therefore, the duty of State to ensure justice to all. If there is infringement of fundamental rights then right to claim compensation is secured by the right infringed. This right is specifically provided under Articles 32. Article 32(1) provides for the right to move the Supreme Court. Article 226 also provides for similar right to move the High Court by appropriate proceedings for the enforcement of the fundamental rights. The Supreme Court under Article 32(2) is free to devise any procedure for the enforcement of fundamental right and it has the power to issue any process necessary in a given case. In view of this constitutional provision, the Supreme Court may even give remedial assistance, which may include compensation in "appropriate cases". Regarding the liability of the State to pay compensation for infringing Article 21, the Court answered in the affirmative saying that if it were not so, Article 21 will be denuded of its significant content. The seed of compensation for infraction of the rights implicit in Article 21 was first sowed in *Khatri case*, which sprouted with such a vigorous growth that it finally enabled the Court to hold the State liable to pay compensation. This dynamic move of the Supreme Court resulted in the emergence of compensatory jurisprudence for the violation of right to personal liberty through *Rudul Sah case*. The Supreme Court of India, in *Rudul Sah v State of Bihar*, brought about a revolutionary breakthrough in human rights jurisprudence by granting monetary compensation to an unfortunate victim of State lawlessness on the part of the Bihar Government for keeping him in illegal detention for over 14 years after his acquittal of a murder charge.
- 2) The Motor Vehicle Act, 1988 made insurance of a motor vehicle compulsory. The owner of every motor vehicle is bound to insure the vehicle against the third parties risk. If the vehicle is insured against the third party risk, the injured party can claim compensation from the insurance company.

Insurance policy is a personal contract between the parties for indemnifying the insured in case of an accident covered under the policy. Even if a vehicle is not insured against third party risk, the claimant still has a right to claim compensation from the owner of the vehicle under the principle of vicarious liability.

The judiciary in India has followed liberal approach in case of any questions relating to breach of insurance policy. For example, in *Nagaraju v Oriental Insurance Company*, the Supreme Court observed:

“The exclusive term of insurance policy must be read down so as to serve the main purpose of the policy, that is, to indemnify the damage caused to the vehicle.”

In this case, the appellant was the owner of the insured truck which was covered by a comprehensive insurance policy issued by Oriental Insurance Company covering risk to the limit of two lakhs. The truck sustained major damage in an accident, the repair of which amounted to Rs.87,000/-. At the time of the accident the truck was carrying nine persons while the policy did not cover use for carrying passengers in the vehicle except employees not exceeding six in number. The Supreme Court observed that the presence of nine persons had not contributed in any manner to the cause of accident and also the claim did not relate to any injuries to those nine persons. The claim is primarily for damage caused to the insured vehicle, which would not have been denied in the present case.

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UNIT 17 LAW OF LEGAL AID

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- 17.4 Let Us Sum Up
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17.0 INTRODUCTION

The very basic references to India include: the world's largest democracy, the second most-populated country and the largest growing economy. This growth is, however, not an indication of the improvement of the rule of law and human rights standards in the country. Constitution of India, more importantly, assures to each citizen political, social and economic justice. Access to justice, in more real terms, would include the sum total of all those rights and remedies available to a person through which he can seek the enforcement of his or her rights. The issues of poverty, social deviance and access to justice talked very much since the birth of the country have also been considered to be the prime factors for non-availability of social justice for all.

It is important to note that a plethora of laws in the realm of social welfare have been passed by the legislatures at the national and state levels to provide legal aid services. Statistical data highlights that welfare laws are not only an indicator to curb social evil but also aimed at social justice, in real sense. The issues of poverty, illiteracy, helplessness, disability and/or socially and economically disadvantaged position delimit the people to approach the court or to have access to justice to redress their grievances. Of course, a number of measures have been taken to improve the quality of justice dispensing system in India including speeding-up of the judicial decision-making process by strengthening the legal and judicial institutions and bringing them up to the world standards.

To reassure the mandate of international human rights documents, the constitutional courts have remarkably recognized the right to speedy justice through free legal aid and Lok Adalat as form and part of the law of the land. To response to the judicial directives, constitutional amendments and statutory enactments were made to that extent. These initiatives helped the people to exhaust an alternative means of dispute resolution system at national, state, district and taluk levels.

The pivotal aim of these measures is not only to protect the people from unwarranted destruction but also to ensure justice at all levels. In this Unit, we will, therefore, highlight different forms and means of legal aid available to the disadvantaged so as to ensure protection of their rights.

17.1 OBJECTIVES

After you go through this Unit, you should be able to:

- Explain the need and significance of the Constitutional and Statutory rights in respect of free legal aid and Lok Adalats in India;
- Discuss the role of Non-Governmental Organisations, Social Action Groups and other Non-State Actors to ensure justice to all;
- Appreciate the current developments both in terms of legislative and judicial means of access to justice;
- Avail and promote different types of legal aid and services available in India; and
- Encourage and assist the needy people to identify and assert to enforce their legal rights through different opportunities available to protect their integrity, personal life and property as our Constitutional goal.

17.2 LEGAL AID SERVICES: BACKGROUND, CONCEPT AND ORIGIN

It is presumed that the justice dispensation system in India does not discriminate between the poor and the rich. But, fact is that the large number of people are living below poverty line, are illiterate and ignorant, and are not aware of their legal rights. It has resulted in lack of their access to justice in the court to redress their grievances. However, access to justice is essential to ensure that the justice dispensation system serves the poor through effective promotion, protection and fulfillment of human rights and the rule of law.

In India, humanism is the source and the strength of legality. Social scientists advocate protection of the rights of all, irrespective of their socio-economic status through the process of involving the community in the administration of justice through legal aid. This is considered to be the basic means legitimizing the legal order through the willing sanction of the social order.

Hindu and Muslim Rulers of Pre-Constitution India had witnessed unsophisticated methodology of disposing justice to the poor, inexpensively and immediately. In short, justice to the citizens – high or low – has been an Indian creed. Eminent judges of the constitutional courts envisioned creating semi-voluntary legal aid societies as early as 1924.

Indian Constitution does not directly guarantee any right to free legal aid and assistance by the States as a mandatory part. However, there are constitutional articles to ensure equality before law, equal protection, right to life including livelihood and the safeguards to the persons who are arrested both under regular criminal law and preventive detention laws. The Supreme Court and High Courts assured various mandates of constitutional articles and declared that right to life includes right to engage counsel to get judicial redress. Subsequently, to protect the life and personal liberty, as a constitutional mandate, voluminous measures have been initiated by the parliament both by making constitutional amendments and legislative enactments.

The matter of legal aid is referred in the Law Commission Reports. Responding to the recommendations of the Law Commission, in 1960, the Government of India prepared a national scheme providing legal aid in all courts including tribunals. It also envisaged the establishment of committees at the State, District and Teshil level. The commission also suggested that an autonomous Corporation be set up, law clinics be established in the Universities and lawyers be urged to help. However, due to the inability of the States to implement the scheme because of lack of finance the scheme did not survive. XIV Report of the Law Commission (1995-97) categorically highlights that the free legal aid is a service which should be provided by the State to the poor. The State must, while accepting the obligation, make provisions for funds to provide legal aid.

The judicial and legal community must play a pivotal role in accepting the responsibility for administration and working of the legal aid scheme. Meanwhile, the judicial attitudes towards legal aid became more progressive and resulted in effective Legal Aid in India. Constitutional Courts have also acted as watchdogs to effective implementation of the legal aid programmes. It was a moral and social obligation and, therefore, the Bar Association should take a step forward

in rendering voluntary legal aid. These include representation by lawyers at government expenses to the accused persons in criminal proceedings, in jails and in appeals.

17.2.1 Meaning and Definition of Legal Aid

There is no specific definition of the term 'legal aid' either in the Constitution of India or in any enactment to that extent. The Encyclopedia Britannica defines 'legal aid' as a "phrase which acquired, by usage and court decisions, a specific meaning of giving to persons of limited means grants or nominal fees for advice or counsel to represent them in a court in civil or criminal matters".

Section 2(1)(c) of the Legal Services Authority Act, 1987 describes 'Legal service' as the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter. This definition is not exhaustive, rather an illustrative one.

17.2.2 Constitutional and Statutory Provisions related to Legal Aid

Article 39-A (of the Constitution of India, 1950): To give due concern to the judicial directives and the law Commissions recommendation, the Parliament of India, in 1976, inserted Article 39-A in Part IV of the Constitution. It (Article 39-A) mandates the State to see that the legal aid system promotes justice on the basis of equal opportunity for all its citizens. It must, therefore, arrange to provide free legal aid to those who cannot access justice due to economic and other disabilities such as poverty, illiteracy and helplessness. Persons, who are arrested, have certain rights — both at the time of arrest and immediately thereafter — which are inherent in Articles 21 and 22(1) of the Constitution. The Supreme Court has observed in several decisions that these rights are to be recognised and scrupulously protected. However, it is not enforceable before the court of law which indirectly confers an option on the part of government.

Code of Civil Procedure, 1908: Order XXXIII Rule 1 to 16, Civil Procedure Code, 1908 provides that suits may be instituted by indigent persons.

Code of Criminal Procedure, 1973: Section 304 of Criminal Procedure Code, 1973 authorises that, if the accused does not have sufficient means to engage a lawyer, the court must provide one for the defense of the accused at the expense of the State.

17.2.3 Legal Aid, Public Interest and Judicial Responsibility

One of the basic functions of the Constitutional Courts is to declare the constitutional validity of the laws in force. However, for achieving the constitutional mandate the paradigm shift has taken place which is helping to widen and extend their arm. Interestingly, the concept of judicial review is not expressly designated in Constitution nor in any statute in India. Nevertheless, the various judgments of the Supreme Court and High Courts unhesitatingly recognized the concept of judicial review as an essential ingredient of basic structure of the Constitution.

17.2.3.1 The Concept of Public Interest Litigation

The very basis to get judicial redress is injury to person, i.e. *ubi jus ibi remedium* (Where there is injury there is remedy). However, the fact is that all injured or affected cannot seek redress in courts in all situations. Interestingly, to provide remedy to weaker sections of the society – the downtrodden, the poor, the illiterate, women and other socially and economically disadvantaged – the Public Interest Litigation (PIL) was discovered. PIL is used as a device for the welfare of every section of society and also considered as working as an important instrument of social change. The innovation of this legitimate instrument proved beneficial to the under-privileged and unrepresented in the society. PIL has been used as a strategy to combat the atrocities prevailing in society. It is an institutional initiative towards the welfare of the needy classes of the society. PIL today offers such a paradigm which locates the content of informal justice without the formal legal system. PIL had already molded the State into the instrument of socio-economic change. Social justice is the byproduct of this and transcends beyond the formal legal system.

17.2.3.2 Evolution of Public Interest Litigation

Indian Public Interest Litigation is the improved version of the United States of America's jurisprudence. The Council for Public Interest Law, set up by the Ford Foundation in USA, in its Report of Public Interest (1976) defines: Public Interest Law as "the name that has recently been given to efforts that provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in the recognition that ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the proper environmentalists, consumers, racial and ethnic minorities and others." PIL emerged as a result of an informal nexus of pro-active judges, media persons and social activists. This trend shows stark difference between the traditional justice delivery system and the modern informal justice system where the judiciary is performing administrative judicial role.

A new branch of proceedings known as 'Social Interest Litigation' or 'Public Interest Litigation' was evolved with a view to render complete justice to the weaker sections of the society. Representative actions and test-litigations were entertained in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural shortcoming. It is to be noted that in India there is no definition for the concept of Public Interest Litigation either in Constitution or in any statute. Similarly, in India, there is no Article to exhaust jurisdiction to initiate PIL in any part of the Constitution. However, Article 32 of the Constitution of India ensures that "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed". Article 226 of the Constitution of India also confers jurisdiction on the High Courts to enforce their fundamental rights.

Justice V. R. Krishna Iyer, Justice P. N. Bhagwati and Justice Chandrachud of the Supreme Court are the chief architects of Public Interest Litigation in India. During emergency, State repression and governmental lawlessness was widespread. Thousands of innocent people including political opponents were sent to jails and there was complete deprivation of civil and political rights. The

post-emergency period provided an occasion for the judges of the Supreme Court to openly disregard the impediments of Anglo-Saxon procedure in providing access to justice to the poor. In the post-emergency period when the political situations had changed, investigative journalism also began to expose gory scenes of governmental lawlessness, repression and custodial violence, thus, drawing attention of lawyers, judges and social activists. PIL has become necessary to reject *laissez faire* notions of traditional jurisprudence.

In a leading case, *Indian Banks' Association, Bombay and Others v M/s Devkala Consultancy Service and other* (2004, p.587), the Supreme Court held that: "In an appropriate case, where the petitioner might have moved a court in her private interest and for redressal of the personal grievance, the court in furtherance of Public Interest may treat it as a necessity to enquire into the state of affairs of the subject of litigation in the interest of justice. Thus, a private interest case can also be treated as public interest case". The rule of *locus standi* was diluted and relaxed to a person acting bonafide and having sufficient interest in the proceeding both to wipe out violation of fundamental rights and genuine infraction of statutory provisions. It is not available to a person for personal gain or private profit or political motive or any oblique consideration. *Pro bono publico* constituted a significant state in the present day judicial system. However, PIL provided the dockets with much greater responsibility for rendering the concept of justice available to the disadvantaged sections of the society. The Court in place of disinterested and dispassionate adjudicator became active participant in the dispensation of justice.

In *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v Union of India & Others* (1981 p.298), the Supreme Court held that 'class actions', 'public interest litigation', and 'representative proceedings' are broad-based and people-oriented, and envision access to justice to those who otherwise cannot have access to it so easily. Indeed, for little Indians in large numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, it is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concepts of 'cause of action', 'person aggrieved' and 'individual litigation' are becoming obsolescent in some jurisdictions.

17.2.3.3 Aspects of Public Interest Litigation

Different aspects of Public Interest Litigation are as follows.

- 1) **Remedial in Nature:** In Public Interest Litigation cases the court can fashion any relief to the victims. Remedial nature of PIL departs from traditional *locus standi* rules. It indirectly incorporated the principles enshrined in part IV of the Constitution of India into part III of the Constitution. By riding the aspirations of part IV into part III of the Constitution and by introducing flexibility in the procedural part, it had changed the procedural nature of the Indian law into dynamic welfare one.
- 2) **Representative Standing:** The concept of Public Interest Litigation is a modified version of class action. Earlier, the person injured alone can approach the court for want of legal remedy against the violation of fundamental right. However, the doctrine of citizen standing marked a significant expansion of the court's rule, from protector of individual rights

to guardian of the rule of law wherever threatened by official lawlessness. Irrespective of status any citizen, person, association, body corporate, civil society and Non-Governmental Organisation can initiate any proceedings in the Constitutional Courts.

- 3) **Relaxation of strict rule of Locus Standi:** The strict rule of locus standi has been relaxed by way of initiating petition by a person as a member of public having 'sufficient interest' to maintain a petition under Article 32. The rule of *locus standi* has been relaxed and a person acting bonafide and having sufficient interest in the proceeding can approach the court to wipe out violation of fundamental rights and genuine infraction of statutory provisions. However, relaxation of *locus standi* is not for personal gain or private profit or political motive or any oblique consideration. Constitutional court has to strike a balance between two conflicting interests — individual rights and government duty. In doing so, the courts also give due consideration to avoid public mischief through mischievous petitions with an ulterior motives.
- 4) **Non-adversarial litigation:** It seems that the application or non-application of adversarial procedure under Article 32 is a vital question. The inability of the vast masses of our people to produce relevant evidence before the court is too well known. PIL is a totally different kind of litigation from the ordinary traditional litigation, which is essentially of an adversary character where there is a dispute between two litigating parties, one making claim or seeking relief against the other and the other opposing such claim or resisting such relief. Non-adversarial litigation has two aspects. The court has to manage the collection of facts, data and evidence on its own by appointing committees.
- 5) **Epistolary Jurisdiction:** For enforcing fundamental human right the petitioner has to file a petition with all the traditional procedure. In PIL cases, the Supreme Court and the High Courts have the flexibility introduced in the adherence to procedural laws. This dilution is somehow different from collective action. Effective dilution of traditional procedure in PIL cases all over India provided the footing or at least platform to the needy-class of the society. For want of an effective remedy, person with *pro bono publico* who writes letters and sends postcards and telegrams to that effect would be considered as a prima facie for taking cognizance.
- 6) **By devising new techniques of fact-finding:** In most of the cases, the court has appointed its own socio-legal commissions of inquiry or has deputed its own official for investigation. Sometimes, it has taken the help of National Human Rights Commission or Central Bureau of Investigation (CBI) or the experts to inquire into human rights violations. This may be called investigative litigation. By creating a new regime of human rights it has expanded the meaning of fundamental right to equality, life and personal liberty. In this process, the right to speedy trial, free legal aid, dignity, means of livelihood, education, housing, medical care, clean environment, right against torture, sexual harassment, solitary confinement, bondage and servitude, exploitation and so on emerge as human rights.

There are criticisms against the expansive role of the Supreme Court and High Courts for ensuring free legal aid in all means. It is also to be noted that Public Interest Litigation on account of trumpety proceedings initiated before the courts,

innumerable days are wasted, which time otherwise could have been spent for the disposal of cases of genuine litigants. Unless the appropriate government is ready to take up that task, it is often impossible to expect it to happen in reality.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

1) Define Legal Aid.

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2) What are the constitutional safeguards available to an accused?

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3) Define Public Interest Litigation.

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4) Analyse the role of government in providing free legal aid.

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17.3 LEGAL SERVICES AUTHORITIES ACT, 1987

Inability to consult or to be represented by a lawyer may amount to the same thing as being deprived of the security of law. To resurrect the mandate of the Constitution and judicial directives, the Parliament of India enacted Legal Services Authorities Act, 1987. Preamble of the Legal Services Authorities Act, 1987 describes it as an Act to constitute legal services authorities to provide free and competent legal service to the weaker sections of the society, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organise Lok Adalats to secure that the operation of the legal system promotes justice on the basis of equal opportunity. The very mandate of government is to ensure free legal aid at all levels. To realize intended goal of the Act and to provide legal aid at all levels, Legal Services Authorities are set up at different levels. Let us examine the important aspects and procedures of Legal Aid Schemes.

17.3.1 Entitlement to Legal Aid Services

Sections 12 and 13 of the Legal Services Authorities Act, 1987 describe entitlement to free legal aid services in India. According to Section 12, every person who has to file or defend a case shall be entitled to legal services under this Act if that person is:

- a member of the scheduled castes or tribes;
- a victim of trafficking in human beings or beggar;
- a woman or child;
- a person with disability;
- a victim of mass disaster, ethnic violence, caste atrocity, flood, drought, earth quake, industrial disaster and such other circumstances of undeserved want;
- an industrial workman;
- in custody, including protective custody;
- facing a charge which might result in imprisonment;
- poor (with an annual income of not more than Rs.50,000/- for cases in the Supreme Court and Rs.25,000 in other courts).

But, according to Section 13 it is clear that: 1) Persons who satisfy any of the criteria specified in section 12 shall be entitled to receive legal services provided that the concerned Authority is satisfied that such person has a prima-facie case to prosecute or to defend; and 2) An affidavit made by a person as to his income may be regarded as sufficient for making him eligible to the entitlement of legal services under this Act unless the concerned Authority has reason to disbelieve such affidavit.

The Supreme Court has also extended and prescribed the qualification for providing free legal aid to the person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence and incommunicado situation.

In addition to the above, legal service may be granted in cases of great public importance considered as special cases deserving of legal services.

17.3.1.1 Cases for Which Free Legal Aid is Not Available

Though the right to free legal aid is a statutory one, for the following cases right to free legal aid is not available.

- Cases in respect of defamation, malicious prosecution, contempt of court, perjury, etc;
- Proceedings relating to election;
- Cases where the fine imposed is not more than Rs.50/-;
- Economic offences and offences against social laws;
- Cases where the person seeking legal aid is not directly concerned with the proceedings and whose interests will not be affected, if not represented properly.

17.3.1.2 Authorities that Can be Approached for Free Legal Aid

The person who needs free legal aid can approach the Legal Services Authority at any level — national, state, district or taluk (Sections 3, 6, 9 and 11). The request can be made to:

- the Senior Civil judge nominated as the chairperson of the Mandal/Taluq Legal Services Authority;
- the Secretary, District Legal Services Authority at the district level;
- the Secretary, High Court Legal Services Committee at the state level;
- the Secretary, Supreme Court Legal Services Committee at the higher level;
- the member secretary of the State Legal Services Authority;
- the magistrate before whom s/he is produced; or
- the custodial authorities, if under detention.

17.3.1.3 Procedures for Filing and Withdrawal

For availing the entitlement to legal services the applicant has to follow the below mentioned procedures such as:

- A written application can be made to the concerned authority.
- Where the person cannot read or write, the legal services authority will record his/her statement along with thumb impression. Such a statement is treated as an application.
- The person who claims legal aid has to file an affidavit of his income.

The legal services committee can withdraw the services if,

- the aid is obtained through misrepresentation or fraud;
- any material change occurs in the circumstances of the aided person;
- there is misconduct, misbehavior or negligence on the part of the aided person;
- the aided person does not cooperate with the allotted advocate;
- the aided persons appoint another legal practitioner; and
- the aided person dies, except in civil cases.

17.3.2 Legal Services Authorities

To implement the directives of the Constitution and the Legal Services Authorities Act, the government has set up National Legal Services Authority, State Legal Services Authority and District Legal Services Authority under the Legal Services Authorities Act. Let us analyse the Constitution, Composition, Powers and Functions of these Legal Services Authorities.

17.3.2.1 National Legal Services Authority

Chapter II of the Legal Services Authorities Act, 1987 deal with different aspects of National Legal Services Authority.

Constitution of the National Legal Services Authority (Section 3): The Central Government shall constitute a body to be called the National Legal Services Authority to exercise the powers and perform the functions conferred on, or assigned to, the Central Authority under the Legal Services Authorities Act {Sub-section (1)}.

Composition of National Legal Services Authority: The Central Authority shall consist of:

- **Patron-in-Chief:** The Chief Justice of India.
- **Executive Chairman:** A serving or retired Judge of the Supreme Court to be nominated by the President, in consultation with the Chief Justice of India.
- **Members:** Such number of other members, possessing such experience and qualifications, as may prescribed by the Central Government, to be nominated by that Government in consultation with the Chief Justice of India {Sub-section (2)}.
- **Member Secretary:** The Central Government shall, in consultation with the Chief Justice of India, appoint a person to be the Member-Secretary of the Central Authority, possessing such experience and qualifications as may be prescribed by that Government, to exercise such powers and perform such duties under the Executive Chairman of the Central Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority {Sub-section (3)}.

Service Conditions and Salaries and Allowances: The terms of office and other conditions relating thereto of members and the Member-Secretary of the Central Authority shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India {Sub-section (4)}.

Other Officials: The Central Authority may appoint such number of officers and other employees as may be prescribed by the Central Government, in consultation with the Chief Justice of India, for the efficient discharge of its functions under the Legal Services Authorities Act {Sub-section (5)}.

The officers and other employees of the Central Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India {Sub-section (6)}.

The administrative expenses of the Central Authority, including the salaries, allowances and pensions payable to the Member-Secretary, officers and other employees of the Central Authority, shall be defrayed out of the Consolidated Fund of India {Sub-section (7)}.

All orders and decisions of the Central Authority shall be authenticated by the Member-Secretary or any other officer of the Central Authority duly authorised by the Executive Chairman of that Authority {Sub-section (8)}.

Validity of an action of the Authority: No act or proceeding of the Central Authority shall be invalid merely on the ground of the existence of any vacancy in or any defect in the constitution of the Central Authority {Sub-section (9)}.

Functions of the Central Authority (Section 4): The Central Authority shall perform all or any of the following functions, namely:

- a) Lay down policies and principles for making legal services available under the provisions of the Legal Services Authorities Act;
- b) Frame the most effective and economical schemes for the purpose of making legal services available under the provisions of the Legal Services Authorities Act;
- c) Utilise the funds at its disposal and make appropriate allocations of funds to the State Authorities and District Authorities;
- d) Take necessary steps by way of social justice litigation with regard to consumer protection, environmental protection or any other matter of special concern to the weaker sections of the society and for this purpose, give training to social workers in legal skills;
- e) Organise legal aid camps, especially in rural areas, slums or labour colonies with the dual purpose of educating the weaker sections of the society as to their rights as well as encouraging the settlement of disputes through Lok Adalats;
- f) Encourage the settlement of disputes by way of negotiations, arbitration and conciliation;
- g) Undertake and promote research in the field of legal services with special reference to the need for such services among the poor;
- h) To do all things necessary for the purpose of ensuring commitment to the fundamental duties of citizens under Part IV-A of the Constitution of India;
- i) Monitor and evaluate implementation of the legal aid programmes at periodic intervals and provide for independent evaluation of programmes and schemes implemented in whole or in part by funds provided under the Legal Services Authorities Act;
- j) Provide grants-in-aid for specific schemes to various voluntary social service institutions and the State and District Authorities from out of the amounts placed at its disposal for implementation of the legal services schemes under the provisions of the Legal Services Authorities Act;
- k) Develop, in consultation with the Bar Council of India, programmes for clinical legal education and promote guidance and supervise the

establishment and working of legal services clinics in universities, law colleges and other institutions;

- l) Take appropriate measures for spreading legal literacy and legal awareness amongst the people and, in particular, to educate weaker sections of the society about the rights, benefits and privileges guaranteed by social welfare legislations and other enactments as well as administrative programmes and measures;
- m) Make special efforts to enlist the support of voluntary social welfare institutions working at the grass-root level, particularly among the Scheduled Castes and the Scheduled Tribes, women and rural and urban labour; and
- n) Coordinate and monitor the functioning of State Authorities, District Authorities, Supreme Court Legal Services Committee, High Court Legal Services Committees, Taluk Legal Services Committees and voluntary social service institutions and other legal services organisations and give general directions for proper implementation of the legal services programmes.

Duty of Central Authority to work in coordination with other agencies: In the discharge of its functions under this Act, the National Legal Services Authority shall, wherever appropriate, act in coordination with other governmental and non-governmental agencies, universities and others engaged in the work of promoting the cause of legal services to the poor (Section 4).

17.3.2.2 State Legal Services Authority

Chapter III of the Legal Services Authorities Act, 1987 deals with different aspects of State Legal Services Authority.

Constitution of State Legal Services Authority (Section 6): Every State Government shall constitute a body to be called the Legal Services Authority for the State to exercise the powers and perform the functions conferred on, or assigned to a State Authority under the Legal Services Authorities Act {Sub-section (1)}.

Composition of the State Legal Services Authority: A State Authority shall consist of:

- *Patron-in-Chief:* The Chief Justice of the High Court.
- *Executive Chairman:* A serving or retired Judge of the High Court to be nominated by the Governor, in consultation with the Chief Justice of the High Court.
- *Members:* Such number of other members, possessing such experience and qualifications as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court (Sub-section 2).
- *Member Secretary:* The State Government shall, in consultation with the Chief Justice of the High Court, appoint a person belonging to the State Higher Judicial Service, not lower in rank than that of a District Judge, as the Member-Secretary of the State Authority, to exercise such powers and perform such duties under the Executive Chairman of the State Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority.

- Provided that a person functioning as Secretary of a State Legal Aid and Advice Board immediately before the date of constitution of the State Authority may be appointed as Member-Secretary of that Authority, even if he is not qualified to be appointed as such under this sub-section, for a period not exceeding five years (Sub-section 3).

Service Conditions and Salaries and Allowances: The terms of office and other conditions relating thereto the members and the Member-Secretary of the State Authority shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court (Sub-section 4).

Other Officials: The State Authority may appoint such number of officers and other employees as may be prescribed by the State Government, in consultation with the Chief Justice of the High Court, for the efficient discharge of its functions under the Legal Services Authorities Act (Sub-section 5).

The officers and other employees of the State Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court (Sub-section 6).

The administrative expenses of the State Authority including the salaries, allowances and pensions payable to the Member-Secretary, officers and other employees of the State Authority shall be defrayed out of the Consolidated Fund of the State (Sub-section 7).

All orders and decisions of the State Authority shall be authenticated by the Member Secretary or any other officer of the State Authority duly authorised by the Executive Chairman of the State Authority (Sub-section 8).

Validity of an act by the Authority: No act or proceeding of a State Authority shall be invalid merely on the ground of the existence of any vacancy in or any defect in the constitution of the State Authority (Sub-section 9).

Functions of the State Authority (Section 7): These are as follows.

- 1) It shall be the duty of the State Authority to give effect to the policy and directions of the Central Authority.
- 2) Without prejudice to the generality of its functions, the State Authority shall perform all or any of the following functions, namely:
 - a) Give legal service to persons who satisfy the criteria laid down under the Legal Services Authorities Act;
 - b) Conduct Lok Adalats including Lok Adalats for High Court cases;
 - c) Undertake preventive and strategic legal aid programmes; and
 - d) Perform such other functions as the State Authority may, in consultation with the Central Authority, fix by regulations.

State Authority to act in coordination with other agencies, etc., and be subject to directions given by Central Authority (Section 8): In the discharge of its functions the State Authority shall appropriately act in coordination with other governmental agencies, non-governmental voluntary social service institutions,

universities and other bodies engaged in the work of promoting the cause of legal services to the poor and shall also be guided by such directions as the Central Authority may give to it in writing.

17.3.2.3 District Legal Services Authority

Sections 9 to 11 of Legal Services Authorities Act deal with different aspects of District Legal Services Authority.

District Legal Services Authorities (Section 9): The State Government shall, in consultation with the Chief Justice of the High Court, constitute a body to be called the District Legal Services Authority for every District in the State to exercise the powers and perform the functions conferred on or assigned to the District Authority under this Act (Sub-section 1).

Composition of District Legal Services Authority: A District Authority shall consist of (Sub-section 2):

- *Chairman:* The District Judge; and
- *Members:* Such number of other members, possessing such experience and qualifications, as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

The State Authority shall, in consultation with the Chairman of the District Authority, appoint a person belonging to the State Judicial Service not lower in rank than that of a Subordinate Judge or Civil Judge posted at the seat of the District Judiciary as Secretary of the District Authority to exercise such powers and perform such duties under the Chairman of that Committee as may be assigned to him by such Chairman (Sub-section 3).

Terms of Service and Salaries and Allowance: The terms of office and other conditions relating thereto the members and Secretary of the District Authority shall be such as may be determined by regulations made by the State Authority in consultation with the Chief Justice of the High Court (Sub-section 4).

Other officials: The District Authority may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions (Sub-section 5).

The officers and other employees of the District Authority shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court (Sub-section 6).

The administrative expenses of every District Authority, including the salaries, allowances and pensions payable to the Secretary, officers and other employees of the District Authority shall be defrayed out of the Consolidated Fund of the State (Sub-section 7).

All orders and decisions of the District Authority shall be authenticated by the Secretary or by any other officer of the District Authority duly authorised by the Chairman of that Authority (Sub-section 8).

Validity of an act of the District Legal Services Authority: No act or proceeding of a District Authority shall be invalid merely on the ground of the existence of any vacancy in, or any defect in the Constitution of, the District Authority (Sub-section 9).

Functions of District Authority (Section 10): These are as follows.

- 1) It shall be the duty of every District Authority to perform such of the functions of the State Authority in the District as may be delegated to it from time to time by the State Authority (Sub-section 1).
- 2) Without prejudice to the generality of its functions, the District Authority may perform all or any of the following functions, namely:
 - a) Co-ordinate the activities of the Taluk Legal Services Committee and other Legal Services in the District;
 - b) Organise Lok Adalats within the District; and
 - c) Perform such other functions as the State Authority may fix by regulations.

District Authority to act in coordination with other agencies and be subject to directions given by the Central Authority, etc (Section 11): In the discharge of its functions under this Act, the District Authority shall, wherever appropriate, act in coordination with other governmental and non-governmental institutions, universities and others engaged in the work of promoting the cause of legal services to the poor and shall also be guided by such directions as the Central Authority or the State Authority may give to it in writing.

17.3.3 Legal Services Committees

To make an effective verification of the legal aid programmes the central government had established Legal Services Committees such as Supreme Court Legal Services Committee, High Court Legal Services Committee and Taluk Legal Services Committee.

17.3.3.1 Supreme Court Legal Services Committee

Section 3A provides for Supreme Court Legal Services Committee.

Constitution of the Supreme Court Legal Services Committee: The Central Authority shall constitute a committee to be called the Supreme Court Legal Services Committee for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the Central Authority (Sub-section 1).

Composition of Supreme Court Legal Services Committee: The Committee shall consist of (Sub-section 2):

- **Chairman:** A sitting Judge of the Supreme Court.
- **Members:** Such number of other members possessing such experience and qualifications as may be prescribed by the Central Government, to be nominated by the Chief Justice of India. There is no restriction as for as this appointment is concerned.

Secretary: The Chief Justice of India shall appoint a person to be the Secretary to the Committee, possessing such experience and qualifications as may be prescribed by the Central Government (Sub-section 3).

Terms of Office and Salaries and Allowances: The terms of office and other conditions relating thereto the members and Secretary of the Committee shall be such as may be determined by regulations made by the Central Authority (Sub-section 4).

Other officials: The Committee may appoint such number of officers and other employees as may be prescribed by the Central Government, in consultation with the Chief Justice of India, for the efficient discharge of its functions (Sub-section 5).

The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the Central Government in consultation with the Chief Justice of India (Sub-section 6).

17.3.3.2 High Court Legal Services Committee

Section 8A provides for High Court Legal Services Committee.

Constitution of the High Court Legal Services Committee: The State Authority shall constitute a Committee to be called the High Court Legal Services Committee for every High Court for the purpose of exercising such powers and performing such functions as may be determined by regulations made by the State Authority (Sub-section 1).

Composition of the High Court Legal Services Committee: The Committee shall consist of (Sub-section 2):

- **Chairman:** A sitting Judge of the High Court.
- **Members:** Such number of other members as may be determined by regulations made by the State Authority, to be nominated by the Chief Justice of the High Court.

Secretary: The Chief Justice of the High Court shall appoint a Secretary to the Committee possessing such experience and qualifications as may be prescribed by the State Government (Sub-section 3).

Terms of Office and Salaries and Allowances: The terms and other conditions relating thereto the members and Secretary of the Committee shall be such as may be determined by regulations made by the State Legal Services Authority (Sub-section 4).

Other officials: The Committee may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions (Sub-section 5).

The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court (Sub-section 6).

17.3.3.3 Taluk Legal Services Committee

Sections 11A and 11B deal with different aspects of Taluk Legal Services Committee.

Taluk Legal Services Committee (Section 11A): The State Authority may constitute a Committee to be called the Taluk Legal Services Committee for each taluk or mandal or for group of taluks or mandals (Sub-section 1).

Composition of the Taluk Legal Services Committee: The Committee shall consist of (Sub-section 2):

- **Chairman:** The Senior Civil Judge operating within the jurisdiction of the Committee shall be the ex-officio chairman.
- **Members:** Such number of other members possessing such experience and qualifications as may be prescribed by the State Government, to be nominated by that Government in consultation with the Chief Justice of the High Court.

Other officials: The Committee may appoint such number of officers and other employees as may be prescribed by the State Government in consultation with the Chief Justice of the High Court for the efficient discharge of its functions (Sub-section 3).

Salaries and Allowances: The officers and other employees of the Committee shall be entitled to such salary and allowances and shall be subject to such other conditions of service as may be prescribed by the State Government in consultation with the Chief Justice of the High Court (Sub-section 4).

The administrative expenses of the Committee shall be defrayed out of the District Legal Aid Fund by the District Authority (Sub-section 5).

Functions of Taluk Legal Services Committee (Section 11B): The Taluk Legal Services Committee may perform all or any of the following functions, namely:

- a) Coordinate the activities of legal services in the taluk;
- b) Organise Lok Adalats within the taluk; and
- c) Perform such other functions as the District Authority may assign to it.

17.3.4 Legal Aid Fund

For effective implementation of the Legal Services Authority, Legal Services Committee, Lok Adalat and Permanent Lok Adalat the government has specifically established Legal Aid fund such as National Legal Aid Fund, State Legal Aid Fund and District Legal Aid Fund. The Central Government shall, after due appropriation made by Parliament by law in this behalf, pay to the Central Authority, by way of grants, such sums of money as the Central Government may think fit for being utilised for the purposes of this Act.

17.3.4.1 National Legal Aid Fund

Section 15 of the Legal Services Authorities Act, 1987 provides for National Legal Aid Fund.

- 1) The Central Authority shall establish a fund to be called the National Legal Aid Fund and there shall be credited thereto:

- a) All sums of money given as grants by the Central Government,
 - b) Any grants or donations that may be made to the Central Authority by any other person for the purposes of the Legal Services Authorities Act,
 - c) Any amount received by the Central Authority under the orders of any court or from any other source.
- 2) The National Legal Aid Fund shall be applied for meeting:
- a) The cost of legal services provided under this Act including grants made to State Authorities;
 - b) The cost of legal services provided by the Supreme Court Legal Services Committee;
 - c) Any other expenses which are required to be met by the Central Authority.

17.3.4.2 State Legal Aid Fund

Section 16 of the Legal Services Authorities Act, 1987 provides for State Legal Aid Fund.

- 1) A State Authority shall establish a fund to be called the State Legal Aid Fund and there shall be credited thereto:
 - a) All sums of money paid to it or any grants made by the Central Authority for the purposes of the Legal Services Authorities Act,
 - b) Any grants or donations that may be made to the State Authority by the State Government or by any person for the purposes of the Legal Services Authorities Act,
 - c) Any other amount received by the State Authority under the orders of any court or from any other source.
- 2) A State Legal Aid Fund shall be applied for meeting:
 - a) The cost of functions referred to in section 7;
 - b) The cost of legal services provided by the High Court Legal Services Committees;
 - c) Any other expenses which are required to be met by the State Authority.

17.3.4.3 District Legal Aid Fund

Section 17 of the Legal Services Authorities Act, 1987 provides for District Legal Aid Fund.

- 1) Every District Authority shall establish a fund to be called the District Legal Aid Fund and there shall be credited thereto:
 - a) All sums of money paid or any grants made by the State Authority to the District Authority for the purposes of this Act;
 - b) Any grants or donations that may be made to the District Authority or by any person, with the prior approval of the State Authority, for the purposes of this Act.
 - c) Any other amount received by the District Authority under the orders of any court or from any other source.

- 2) A District Legal Aid Fund shall be applied for meeting:
 - a) The cost of functions referred to in the Legal Services Authorities Act, and
 - b) Any other expenses which are required to be met by the District Authority.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.
b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

5) Who are entitled to claim Legal Aid?

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6) When are the Legal Aid Services withdrawn to a person?

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7) Describe the Composition of National Legal Services Authority.

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8) Explain the functions of the District Legal Services Authority.

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17.3.5 Lok Adalats

Lok Adalats have been constituted and functioning as voluntary and conciliatory agencies without any statutory backing for their decisions. It is felt that such a statutory support would not only reduce the burden of arrears of work in regular courts, but would also take justice to the door-steps of the poor and the needy and make justice quickly and with less expense.

Chapter VI of the Legal Services Authority Act, 1987 mandates the states to set up a permanent Lok Adalat for settling the dispute when the disputes are pending before the competent court in the territory of India. Lok Adalats are judicial and adjudicatory bodies set up for the purpose of facilitating peaceful resolution of dispute between litigating parties. Lok Adalats are described as *peoples' courts* which can try to promote amicable and mutually acceptable solutions outside the formal judicial set-up through conciliation. Lok Adalats have the powers of an ordinary civil court including summary and examining evidence, etc., for the disposal of large number of cases expeditiously and without much cost.

According to the Legal Services Authorities Act, 1987 "Lok Adalat" means a Lok Adalat organised under Chapter VI of the Legal Services Authorities Act. Lok Adalats are being constituted at various places in the country for the disposal, in a summary way and through the process of settlement between the parties, of a large number of cases expeditiously and with lesser costs. It has been proved to be very popular in providing for a speedier system of administration of justice. The award of Lok Adalat are like any court order but the parties cannot make any recourse and appeal against such order which is final and binding.

Let us examine organization, cognizance of cases, award and powers of Lok Adalat in detail below.

17.3.5.1 Organisation of Lok Adalats

Section 19 of the Legal Services Authorities Act, 1987 deals with organisation of Lok Adalats.

- 1) Every State Authority or District Authority or the Supreme Court Legal Services Committee or every High Court Legal Services Committee or, as the case may be, Taluk Legal Services Committee, may organise Lok Adalats at such intervals and places and for exercising such jurisdiction and for such areas as it thinks fit.
- 2) Every Lok Adalat organised for an area shall consist of such number of:
 - a) Serving or retired judicial officers; and
 - b) Other persons of the area as may be specified by the State Authority or the District Authority or the Supreme Court Legal Services Committee or the High Court Legal Services Committee or, as the case may be, the Taluk Legal Services Committee, organising such Lok Adalat.
- 3) The experience and qualifications of other persons referred to in clause b) of sub-section 2) above, for Lok Adalats organised by the Supreme Court Legal Services Committee shall be such as may be prescribed by the Central Government in consultation with the Chief Justice of India.

- 4) The experience and qualifications of other persons referred for Lok Adalats other than those referred to in clause b) of sub-section 2) for Lok Adalats other than those referred to sub-section 3) above shall be such as may be prescribed by the State Government in consultation with the Chief Justice of the High Court.
- 5) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of:
 - i) any case pending before; or
 - ii) any matter, which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organized.
 - Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.

17.3.5.2 Cognizance of Cases by Lok Adalats

Section 20 of the Legal Services Authorities Act, 1987 deals with cognizance of cases by Lok Adalats.

- 1) Where, in any case referred to in clause (i) of sub-section (5) of Section 19:
 - i) a) The parties thereof agree; or
 - b) One of the parties thereof makes an application to the court, for referring the case to the Lok Adalat for settlement and if such court is prima facie satisfied that there are chances of such settlement; or
 - ii) The court is satisfied that the matter is an appropriate one to be taken cognizance of by the Lok Adalat, the court shall refer the case to the Lok Adalat.
 - Provided that no case shall be referred to the Lok Adalat under sub-clause (b) of clause (i) or clause (ii) by such court except after giving a reasonable opportunity of being heard to the parties.
- 2) Notwithstanding anything contained in any other law for the time being in force, the Authority or Committee organising the Lok Adalat under sub-section (1) of section 19 may, on receipt of an application from any one of the parties to any matter referred to in clause (ii) of sub-section (5) of section 19 that such matter needs to be determined by a Lok Adalat, refer such matter to the Lok Adalat, for determination:
 - Provided that no matter shall be referred to the Lok Adalat except after giving a reasonable opportunity of being heard to the other party.
- 3) Where any case is referred to a Lok Adalat under sub-section (1) or where a reference has been made to it under sub-section (2), the Lok Adalat shall proceed to dispose of the case or matter and arrive at a compromise or settlement between the parties.
- 4) Every Lok Adalat shall, while determining any reference before it under the Legal Services Authorities Act, act with utmost expedition to arrive at a compromise or settlement between the parties and shall be guided by the principles of justice, equity, fair play and other legal principles.

- 5) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, the record of the case shall be returned by it to the court, from which the reference has been received under sub-section (1) for disposal in accordance with law.
- 6) Where no award is made by the Lok Adalat on the ground that no compromise or settlement could be arrived at between the parties, in a matter referred to in sub-section (2), that Lok Adalat shall advise the parties to seek remedy in a court.
- 7) Where the record of the case is returned to the Court under sub-section (5) to the court, such court shall proceed to deal with such case from the stage, which was reached before such reference under sub-section (1).

17.3.5.3 Award of Lok Adalat

Section 21 of the Legal Services Authorities Act, 1987 deals with Award of Lok Adalat.

- 1) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of Section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court Fees Act (7 of 1870).
- 2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award.

17.3.5.4 Powers of Lok Adalats or Permanent Lok Adalat

Powers of Lok Adalats or Permanent Lok Adalat are specified under Section 22 of the Legal Services Authorities Act, 1987.

- 1) The Lok Adalat or Permanent Lok Adalat shall, for the purposes of holding any determination under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:
 - a) The summoning and enforcing the attendance of any witness and examining him on oath;
 - b) The discovery and production of any document;
 - c) The reception of evidence on affidavits;
 - d) The requisitioning of any public record or document or copy of such record or document from any court or office; and
 - e) Such other matters as may be prescribed.
- 2) Without prejudice to the generality of the powers contained in sub-section (1), every Lok Adalat shall have the requisite powers to specify its own procedure for the determination of any dispute coming before it.
- 3) All proceedings before a Lok Adalat or Permanent Lok Adalat shall be deemed to be judicial proceedings within the meaning of sections 193, 219 and 228 of the Indian Penal Code (45 of 1860) and every Lok Adalat or Permanent Lok Adalat shall be deemed to be a civil court for the purpose of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

17.3.6 Permanent Lok Adalat

Pre-Litigation Conciliation and Settlement: Chapter VI-A of the Legal Services Authority Act, 1987 mandates the States to constitute a Permanent Lok Adalat for speedy disposal; before approaching any regular court when the dispute is relating to essential services.

Permanent Lok Adalat has the jurisdiction to deal with Public Utility Services. According to the Legal Services Authorities Act, Public Utility Services means any *transport* services for the carriage of passengers or goods by air, road or water, *postal*, telegraph or telephone service, *supply* of power, light or water to the public by any establishment; *system* of public conservancy or sanitation; *service* in hospital or dispensary; *insurance* service and includes any service which the Central Government or the State Government, as the case may be, may in the public interest, by notification, declare to be a public utility service for the purposes of the Chapter VI-A of the Legal Services Authority Act, 1987.

17.3.6.1 Establishment of Permanent Lok Adalat

Section 22B describes the process under which Permanent Lok Adalats are established. According to it (Sub-section 1): *Notwithstanding anything contained in Section 19*, the Central Authority or, as the case may be, every State Authority shall, by notification, establish Permanent Lok Adalat at such places and for exercising such jurisdiction in respect of one or more public utility services and for such areas as may be specified in the notification.

Composition of Permanent Lok Adalat (Sub-section 2): *Every Permanent Lok Adalat established for an area notified under sub-section (1) of Section 22B shall consist of the following* appointed by the Central Authority or, as the case may be, the State Authority:

- *Chairman:* a person who is, or has been, a district judge or additional district judge or has held judicial office higher in rank than that of a district judge.
- *Members:* Two other persons having adequate experience in public utility services to be nominated by the Central Government or, as the case may be, the State Government on the recommendation of the Central Authority or, as the case may be, the State Authority, establishing such Permanent Lok Adalat and the other terms and conditions of the appointment of the Chairman and other persons referred to shall be prescribed by the Central Government.

17.3.6.2 Cognizance of Cases by Permanent Lok Adalat

Section 22C: 1) Any party to a dispute may, before the dispute is brought before any court, make an application to the Permanent Lok Adalat for the settlement of dispute:

- Provided that the Permanent Lok Adalat shall not have jurisdiction in respect of any matter relating to an offence not compoundable under any law;
- Provided further that the Permanent Lok Adalat shall also not have jurisdiction in the matter where the value of the property in dispute exceeds ten lakh rupees;
- Provided also that the Central Government may, by notification, increase the limit of ten lakh rupees specified in the second proviso in consultation with the Central Authority.

- 2) After an application is made under sub-section (1) to the Permanent Lok Adalat, no party to that application shall invoke jurisdiction of any court in the same dispute.
- 3) Where an application is made to a Permanent Lok Adalat under sub-section (1), it:
 - a) shall direct each party to the application to file before it a written statement, stating therein the facts and nature of dispute under the application, points or issues in such dispute and grounds relied in support of, or in opposition to, such points or issues, as the case may be, and such party may supplement such statement with any document and other evidence which such party deems appropriate in proof of such facts and grounds and shall send a copy of such statement together with a copy of such document and other evidence, if any, to each of the parties to the application;
 - b) may require any party to the application to file additional statement before it at any stage of the conciliation proceedings;
 - c) shall communicate any document or statement received by it from any party to the application to the other party to enable such other party to present reply thereto.
- 4) When statement, additional statement and reply, if any, have been filed under the above circumstances to the satisfaction of the Permanent Lok Adalat, it shall conduct conciliation proceedings between the parties to the application in such manner as it thinks appropriate taking into account the circumstance of the dispute.
- 5) The Permanent Lok Adalat shall, during conduct of conciliation proceedings under sub-section (4), assist the parties in their attempt to reach an amicable settlement of the dispute in an independent and impartial manner.
- 6) It shall be the duty of every party to the application to cooperate in good faith with the Permanent Lok Adalat in conciliation of the dispute relating to the application and to comply with the direction of the Permanent Lok Adalat to produce evidence and other related documents before it.
- 7) When a Permanent Lok Adalat, in the aforesaid conciliation proceedings, is of opinion that there exist elements of settlement in such proceedings which may be acceptable to the parties, it may formulate the terms of a possible settlement of the dispute and give to the parties concerned for their observations and in case the parties reach at an agreement on the settlement of the dispute, they shall sign the settlement agreement and the Permanent Lok Adalat shall pass an award in terms thereof and furnish a copy of the same to each of the parties concerned.
- 8) Where the parties fail to reach at an agreement under sub-section (7), the Permanent Lok Adalat shall, if the dispute does not relate to any offence, decide the dispute.

17.3.6.3 Procedure of Permanent Lok Adalat

Section 22D: The Permanent Lok Adalat shall, while conducting conciliation proceedings or deciding a dispute on merit under this Act, be guided by the

principles of natural justice, objectivity, fair play, equity and other principles of justice, and shall not be bound by the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872.

17.3.6.4 Award of Permanent Lok Adalat to be Final

Section 22E: 1) Every award of the Permanent Lok Adalat under this Act, made either on merit or in terms of a settlement agreement, shall be final and binding on all the parties thereto and on persons claiming under them.

- 2) Every award of the Permanent Lok Adalat under this Act shall be deemed to be a decree of a civil court.
- 3) The award made by the Permanent Lok Adalat under this Act shall be by a majority of the persons constituting the Permanent Lok Adalat.
- 4) Every award made by the Permanent Lok Adalat under this Act shall be final and shall not be called in question in any original suit, application or execution proceedings.
- 5) The Permanent Lok Adalat may transmit any award made by it to a Civil Court having local Jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

- 9) Describe the jurisdiction of the Lok Adalat.

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- 10) Examine the validity of the Award of Permanent Lok Adalat.

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17.4 LET US SUM UP

Constitution of India guarantees a set of fundamental rights, which inter alia, include the right to life and personal liberty, the right to equality and the right to approach a court of law and also seek free legal aid in the event of violation of these rights. There are provisions in the legislations that mandate the state to accept their commitment towards legal aid services. However, the issue of poverty, illiteracy and other disadvantages among the people reveal that mere promises in legal provisions cannot strive to achieve social and economic justice and stability among such people. The Public Interest Litigation and Judicial Activism are the twin concepts that need to continue with the task of justice delivery in its true sense and spirit, in particular to those who have been constantly deprived of justice on account of the above mentioned issues. For reinforcing the constitutional mandate the work of the NGOs is highly commendable in the world which had come forward for protecting the human rights. Legal Services Authorities Act, 1987 was enacted by the Parliament to redress grievances of the needy people by providing legal aid services through legal services authorities, legal services committees, lok adalats and permanent lok adalat. This unit, therefore, adequately highlighted the important aspects of legal services and lok adalats, among others, so as to enable you promote the same in the real life situation, and also to help yourself or other needy-people in appropriate circumstances.

17.5 ANSWERS TO 'CHECK YOUR PROGRESS' QUESTIONS

- 1) There is no specific definition for the term 'legal aid' either in the Constitution of India or in any enactment to that extent. The Encyclopedia Britannica defines legal aid as a "phrase which has acquired, by usage and court decisions, a specific meaning of giving to person of limited means grants for nominal fees, advice or counsel to represent them in court in civil or criminal matters".
- 2) Article 39-A of the Constitution of India mandates, as the duty of the State, to see that the legal aid system promotes justice on the basis of equal opportunity for all its citizens. It must, therefore, arrange to provide free legal aid to those who cannot access justice due to economic and other disabilities such as poverty, illiteracy and helplessness. Persons, who are arrested, have certain rights — both at the time of arrest and immediately thereafter — which are inherent in Articles 21 and 22(1) of the Constitution. Section 304 of Criminal Procedure Code, 1973 authorises that, if the accused does not have sufficient means to engage a lawyer, the court must provide one for the defense of the accused at the expense of the State. The Supreme Court has observed in several decisions that these rights are to be recognised and scrupulously protected.
- 3) The Council for Public Interest Law, set up by the Ford Foundation in USA, in its Report of Public Interest (1976) defines: Public Interest Law as "the name that has recently been given to efforts that provide legal representation to previously unrepresented groups and interests. A new branch of proceedings known as 'Social Interest Litigation' or 'Public Interest Litigation' was evolved with a view to render complete justice to the weaker sections of the

society. Representative actions and test-litigations were entertained in keeping with the current accent on justice to the common man and a necessary disincentive to those who wish to bypass the real issues on the merits by suspect reliance on peripheral procedural shortcoming.

- 4) PIL is used as a device for the welfare of every section of society and also considered as working as an important instrument of social change. It is the sword of every one used only for taking the justice. The innovation of this legitimate instrument proved beneficial for the under privileged and unrepresented in the society. PIL has been used as a strategy to combat the atrocities prevailing in society. It is an institutional initiative towards the welfare of the needy-class of the society. PIL today offers such a paradigm which locates the content of informal justice within the formal legal system. PIL had already molded the State into the instrument of socio-economic change.
- 5) According to Section 12 of the Legal Services Authorities Act, 1987 every person who has to file or defend a case shall be entitled to legal services under this Act if that person is:
 - a member of the scheduled castes or tribes;
 - a victim of trafficking in human beings or beggar;
 - a woman or child;
 - a person with disability;
 - a victim of mass-disaster, ethnic violence, caste atrocity, flood, drought, earth quake, industrial disaster and such other circumstances of undeserved want;
 - an industrial workman;
 - in custody, including protective custody;
 - facing a charge which might result in imprisonment;
 - poor (with an annual income of not more than Rs.50,000/- for cases in the Supreme Court and Rs.25,000/- in other courts).
- 6) The legal services committee can withdraw the services if,
 - the aid is obtained through misrepresentation or fraud;
 - any material change occurs in the circumstances of the aided person;
 - there is misconduct, misbehavior or negligence on the part of the aided person;
 - the aided person does not cooperate with the allotted advocate;
 - the aided person appoints another legal practitioner; and
 - the aided person dies, except in civil cases.
- 7) Sub-sections (2) and (3) of Section 3 of Legal Services Authorities Act provide for the Composition of National Legal Services Authority, which shall consist of:
 - *Patron-in-Chief*: The Chief Justice of India.
 - *Executive Chairman*: A serving or retired Judge of the Supreme Court to be nominated by the President, in consultation with the Chief Justice of India.

- *Members:* Such number of other members, possessing such experience and qualifications, as may be prescribed by the Central Government, to be nominated by that Government in consultation with the Chief Justice of India {Sub-section (2)}.
 - *Member-Secretary:* The Central Government shall, in consultation with the Chief Justice of India, appoint a person to be the Member-Secretary of the Central Authority, possessing such experience and qualifications as may be prescribed by that Government, to exercise such powers and perform such duties under the Executive Chairman of the Central Authority as may be prescribed by that Government or as may be assigned to him by the Executive Chairman of that Authority {Sub-section (3)}.
- 8) Functions of District Authority as specified under Section 10 of Legal Services Authorities Act include:
- i) It shall be the duty of every District Authority to perform such of the functions of the State Authority in the District as may be delegated to it from time to time by the State Authority.
 - ii) Without prejudice to the generality of its functions, the District Authority may perform all or any of the following functions, namely:
 - a) Co-ordinate the activities of the Taluk Legal Services Committee and other Legal Services in the District;
 - b) Organise Lok Adalats within the District; and
 - c) Perform such other functions as the State Authority may fix by regulations.
- 9) A Lok Adalat shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of:
- i) any case pending before; or
 - ii) any matter, which is falling within the jurisdiction of, and is not brought before, any court for which the Lok Adalat is organized.
 - Provided that the Lok Adalat shall have no jurisdiction in respect of any case or matter relating to an offence not compoundable under any law.
- 10) According to Section 22E of Legal Services Authorities Act:
- i) Every award of the Permanent Lok Adalat under this Act made either on merit or in terms of a settlement agreement shall be final and binding on all the parties thereto and on persons claiming under them.
 - ii) Every award of the Permanent Lok Adalat under this Act shall be deemed to be a decree of a civil court.
 - iii) The award made by the Permanent Lok Adalat under this Act shall be by a majority of the persons constituting the Permanent Lok Adalat.
 - iv) Every award made by the Permanent Lok Adalat under this Act shall be final and shall not be called in question in any original suit, application or execution proceedings.
 - v) The Permanent Lok Adalat may transmit any award made by it to a Civil Court having local Jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

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UNIT 18 LAW OF HUMAN RIGHTS

Structure

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18.0 INTRODUCTION

Human beings in the past had suffered from most destructive wars of different kinds in history which violated the human rights. Historical background of the human rights was more social and moral than legal one. The traditional approaches towards protecting the rights of the people were determined by his/her birth or social status in a class of society. Human Rights, now, are common to all people, on all continents of the globe, irrespective of their colour, sex, race, religion, language, cultural and economic differences. Human Rights have become part of the current international relations, and most countries participate in the human rights system. This inalienability of human rights reflects the idea of natural individual rights that precede the State's authority. Protection and promotion of human rights are increasingly seen as requiring international action and concern. In the origins of human rights ideology can be found in the natural law theory. In

this Unit, we will attempt to analyse the entire gamut of human rights including the methods and means of protecting them.

18.1 OBJECTIVES

The international community affords a unique opportunity to carry out a comprehensive analysis of the international human rights system and of the machinery for the protection of human rights in order to enhance and promote fuller observance of these rights in different countries in just and balanced manner. Hence, we will deal with the protection and promotion of human rights, which is a matter of priority for both the international and national communities.

After going through this Unit, you should be able to:

- Explain the concept of human rights.;
- Critically analyse the constitutional duty of the State in protecting and enforcing the fundamental human rights;
- Describe and discuss the international Human Rights Declarations, Covenants and Protocols.
- Appreciate the initiative of the Central government to give more emphasis on the personal life and liberty through Human Rights Act.
- Explain the scope and significance of different types of jurisdiction for enforcing the fundamental human rights in the Supreme Court, High Court and Human Rights Commissions.
- Describe the role and functions of the Human Rights Commissions in protecting human rights in India.
- Examine the role of Non-Governmental Organisations, Social Action Groups and Non-State Actors in ensuring justice to all.
- Promote the value of human rights system by creating awareness about human rights.

18.2 HUMAN RIGHTS: CONCEPT, ORIGIN, PRINCIPLES AND CLASSIFICATION

Human rights are often characterized as universal, fundamental, inherent and inalienable. It is hard to give exhaustive definition of the concept of Human Rights. Various definitions have been propounded in this regard by different scholars of different legal systems from time to time.

18.2.1 Concept and Scope of Human Rights

Bosanquet (1912) defines Human Rights as rights of claims recognized by society and enforced by the State. Human Rights are common to all people on all continents irrespective of their colour, sex, race, religion, language, cultural and economic differences.

After formation of the United Nations in 1945, Human Rights have become a universalized subject. The General Assembly of the United Nations is empowered to initiate studies and make recommendations for the purpose of promoting

cooperation in realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. The General Assembly adopted numerous declarations and conventions on human rights. It has also established some subsidiary organs to discharge some of its duties. Some notable organs are: United Nations International Emergency Fund (UNICEF) and United Nations High Commissioner for Refugees (UNHCR).

On December 1948 the United Nations General Assembly unanimously adopted Universal Declaration of Human Rights. It contained an elaborate list of human rights intended as common standard of achievement for all people and all nations with 30 Articles. Thereafter, the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic Social and Cultural Rights (ICESCR) of 1966 have further widened the network of international covenants and treaties sought to cover the several facets of individual life.

Economic and Social Council (ECOSOC) is one of the organs of the United Nations. It recommends measures to promote respect for and observance of human rights and fundamental freedom. ECOSOC also coordinates the activities of the specialized agencies of the United Nations. ECOSOC has set up the Commission on Human Rights in 1946 consisting of government representatives. The Human Rights Commission prepared a detailed report and submitted it to the ECOSOC relating to the implementation of the Charter on Human Rights. It stressed the need for an international agency to implement provisions of Human Rights. In 1967, the Council recommended to the Secretariat for establishment of the UN High Commissioner of Human Rights.

The policy document issued by the Government of USA in 1978 defines Human Rights as: freedom from arbitrary arrest and imprisonment, torture, unfair trial, cruel and unusual punishment, invasion of privacy, right to food, shelter, health care and education, and freedom of thought, speech, assembly, religion, press, movement and participation in government.

This broad definition rather gives us clear idea of the scope of human rights with range of aspects embedded in it.

18.2.2 Origin of Human Rights

Origin, evolution and development of Human Rights occurred predominantly due to agitations for civil and political liberation, among other things. Here, let us examine some details of human rights development in pre-United Nations period.

- ***Magna Carta (1215)***: Magna Carta was a grant of privileges conceded by King John of England to his subjects in June 1215. The charter was achieved through a rebellion that had deep-seated cause. Some prominent Kings, at a time of acute inflation, invented new forms of taxation, supervised local government more stringently and developed feudal and judicial prerogatives of the Crown as means of financial extraction and political control. They greatly expanded the functions of the Royal household and exchequer, and were ably supported both in central and local government by career administration. The Magna Carta sought to establish, nationally and on a vast scale, a system of liberties that were being accumulated locally by purchase and in a more limited fashion in the preceding generation.

- ***Petition of Rights (1628):*** The Petition of Right is a major English constitutional document passed by the Parliament in May 1628 that sets out specific liberties of the subject that the King is prohibited from infringing. The Petition of Right was produced by the English Parliament in the run-up to the English Civil War. The Petition is most notable for its confirmation of the principles that taxes can be levied only by the Parliament, that martial law may not be imposed in time of peace, and that prisoners must be able to challenge the legitimacy of their detentions through the writ of habeas corpus.
- ***Bill of Rights (1789):*** During the debates on the adoption of the Constitution, its opponents repeatedly charged that the Constitution as drafted would open the way to tyranny by the central government. Fresh in their minds was the memory of the British violation of civil rights before and during the Revolution. They demanded a “bill of rights” that would spell out the immunities of individual citizens. Several state conventions in their formal ratification of the Constitution asked for such amendments; others ratified the Constitution with the understanding that the amendments would be offered.

On September 25, 1789, the First Congress of the United States therefore proposed to the state legislatures 12 amendments to the Constitution that met arguments most frequently advanced against it. The first two proposed amendments, which concerned the number of constituents for each representative and the compensation of Congressmen, were not ratified. The first 10 amendments of the US Constitution are known as the Bill of Rights. The ‘Bill of Rights’ lays down limits on the powers of sovereign and sets out the rights of Parliament and rules for freedom of speech in Parliament, the requirement to regular elections to Parliament and the right to petition the monarch without fear of retribution.

- ***French Declaration (1789):*** The Representatives of the French people organized in National Assembly, considering that ignorance, forgetfulness or contempt of the rights of man are the sole causes of public miseries and the corruption of governments, have resolved to set forth in a solemn declaration the natural, inalienable and sacred rights of man so that this declaration, being ever present to all the members of the social body, may unceasingly remind them of their rights and duties; in order that the acts of the legislative power and those of the executive power, may at each moment, be compared with the aim of every political institution and thereby may be more respected; and in order that the demands of the citizens, grounded henceforth upon simple and incontestable principles may always take the direction of maintaining the constitution and welfare of all.

18.2.3 Principles and Characteristics of Human Rights

To provide you better understanding of the nature of the human rights we present to you the principles and characteristics of human rights.

18.2.3.1 Principles of Human Rights

The very basic principles of human rights are: interdependency, indivisibility and inalienability.

- **Interdependence of Human Rights:** Each right is dependent on each other right for any and all human rights to be enjoyed in reality. Thus, a State cannot deny a person any of these rights.
- **Indivisibility of Human Rights:** All human rights form one indivisible body of norms that cannot be separated into different sets. No human right can be divided easily by any means of State action. Civil, Political and Economic rights of human beings are not easily separable from one another.
- **Inalienability of Human Rights:** Fundamental human rights are inherent rights of human being. These have interconnection with people because of their birth as human in the universe. There are no possibilities to alienate for any cause at any levels.

18.2.3.2 Characteristics of Human Rights

Human Rights have several distinctive characteristics that distinguish them from any other types of rights. These characteristics are as follows.

- Human rights are universal legal guarantees.
- Human rights belong to all human beings.
- Human rights protect individuals and/or groups from actions and omissions of the State and some non-State actors that affect fundamental human dignity.

18.2.4 Classification of Human Rights

Human rights may be classified into Civil, Political, Economic, Social and Cultural Rights.

- **Civil Rights:** Civil rights are those rights which enable an individual to lead a normal social life. These civil rights are protected by the States. These rights are otherwise described as civil liberties. The main liberties are freedom of speech and expression, freedom to form association and assembly, equality before law and equal protection of laws.
- **Political Rights:** Political rights are of paramount importance, as they provide a basis for working of a democratic government. Democracy is governed by consent, public opinion or public criticism through public participation in decision-making. The important political rights include: right to vote, right to free and fair elections, right to take active participation on governmental decision-making, right to claim corrupt-free government, right to recall and referendum. The individual has the right to stand for election, right to use public office, right to petition and criticize the government. Political rights provide equal opportunity for all to take part in political life.
- **Economic Rights:** The right to life and a worthy manner of living required certain economic rights. The chief among them are: right to employment, right to fair wages, right to humane conditions of work and the right to equal pay for equal work. These economic rights fulfill the basic livelihood of human being.
- **Social Rights:** Social rights of human being lay emphasis on social equality. The individual has the right of not being an isolated member of the society and the State. The social discrimination and oppression generally arises from harmful traditions such as those based on caste, religion, race, colour

and sex. These social divisions are the social evils and the social rights protect the individual from these evils.

- **Cultural rights:** Cultural rights are those rights that help to preserve their culture and heritage both in their public and private life.
- **Generational Human Rights:** Based on the origin, development and usage amongst people in the international arena generational human rights have been further classified as follows:
 - **First Generational Human Rights:** Civil and Political Rights are included under this category.
 - **Second Generational Human Rights:** These include Economic and Social Rights.
 - **Third Generational Human Rights:** Environmental Protection and Right to Economic Development have been put under this category.
 - **Fourth Generational Human Rights:** Rights of the Child and the Woman have come under this.

Human rights are also classified as follows:

- **Security rights** that prohibit crimes such as murder/enforced involuntary suicide, massacre, torture and rape.
- **Liberty rights** that protect freedoms in areas such as belief and religion, association, assembling and movement.
- **Political rights** that protect the liberty to participate in politics by expressing themselves, protesting, participating in a republic.
- **Due process rights** that protect against abuses of the legal system such as arrest and imprisonment without trial, secret trials and excessive punishments.
- **Equality rights** that guarantee equal citizenship, equality before the law and non-discrimination.
- **Welfare rights** (also known as economic rights) that require the provision for education, paid holidays, and protection against severe poverty and starvation.
- **Group rights:** right to form associations and assemble peacefully.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

1) What are the characteristics of Human Rights?

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2) Describe or classify Generational Human Rights.

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3) What are the various fundamental principles of Human Rights?

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18.3 INTERNATIONAL HUMAN RIGHTS FRAMEWORK

In the wake of a devastating world wars, the international community had witnessed some of the most barbarous crimes in human history. To serve the cause of human rights of all, the United Nations charter was adopted with consensus. The United Nations General Assembly adopted the Universal Declaration of Human Rights as a bulwark against oppression and discrimination. Member States of the United Nations represented a range of ideologies, political systems, and religious and cultural backgrounds as well as different stages of economic development. The Preamble of the United Nations Charter emphasizes the respect for and protection and promotion of human rights of all, irrespective of their colour, race, sex, religion and language. General Assembly, Security Council and Economic and Social Council are the chief organs that verify the effective implementation of the purpose and objectives of the United Nations Charter. The General Assembly can propose certain recommendations upon the request of the Economic and Social Council. Security Council may execute the provisions of declarations and conventions including the opinions of the International Court of Justice.

18.3.1 Universal Declaration of Human Rights

In accordance with the Charter of the United Nations and the principles of humanitarian law, Commission on Human Rights was appointed by the Economic and Social Council of the United Nations. The committee chaired by Mrs. Eleanor Roosevelt, widow of the former United States President, agreed on the central importance of affirming universal respect for human rights and fundamental freedoms, including the principles of non-discrimination and civil and political rights as well as social, cultural and economic rights. The Commission then

revised the draft declaration, in the light of replies from Member States, before submitting it to the General Assembly. The committee prepared the Universal Declaration on Human Rights (UDHR) during the years 1947 and 1948. The proclamation of the UDHR on the 10th December 1948 in the General Assembly of the United Nations can be seen as a turning point in the international protection of human rights. The drafters of the UDHR were very determinant to ensure that the draft text would reflect different cultural traditions and incorporate common values inherent in the world's principal legal systems and religious and philosophical traditions.

For the first time in history, the international community embraced a document considered to have universal value — “a common standard of achievement for all peoples and all nations”. Its Preamble acknowledges the importance of human rights legal framework to maintaining international peace and security, stating that recognition of the inherent dignity and equal and inalienable rights of all individuals is the foundation of freedom, justice and peace in the world. Elaborating the United Nations Charter's declared purpose of promoting social progress and well-being in larger freedom, the Declaration gives equal importance to economic, social and cultural rights, and to civil rights and political liberties, and affords them the same degree of protection. The Declaration has inspired more than 60 international human rights instruments, which together constitute a comprehensive system of legally binding treaties for the promotion and protection of human rights.

UDHR has remarkably, for the first time, set forth the rights and freedoms of individuals in such detail. It also represented the first international recognition that human rights and fundamental freedoms are applicable to every person everywhere. The foundation of international human rights law, the Universal Declaration, serves as a model for numerous international treaties and declarations and is incorporated in the constitutions and laws of many countries. Today, the Universal Declaration, translated into nearly 250 national and local languages, is the best known and most cited human rights document in the world.

The UDHR is remarkable in two fundamental aspects and classifies human rights as *Civil and Political Rights, and Economic, Social and Cultural Rights*.

- Civil and Political Rights include: life, prohibition of slavery, prohibition of inhuman treatment, equality before the law, prohibition of arbitrary arrest, right to marry, right to property, freedom of expression, right to assembly, right to association and right to take part in government.
- Economic, Social and Cultural Rights include the right to social security, right to an adequate standard of living and right to health.

The first two articles lay the universal foundation of human rights:

- i) Article 1 declares that “all human beings are born equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.” Human beings are equal because of their shared essence of human dignity; and
- ii) Article 2 recognizes the universal dignity of a life free from discrimination. “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind such as race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status.” Human rights are universal, not because of any State or international organization, but because they belong to all of humanity.

The two articles assure that human rights are the birthright of everyone, not privileges of a select few, nor privileges to be granted or denied by a few.

Articles 3 to 21 of UDHR set forth civil and political rights to which everyone is entitled. The right to life, liberty and personal security, recognized in Article 3, sets the base for all following political rights and civil liberties, including freedom from slavery, torture and arbitrary arrest as well as the rights to a fair trial, free speech and free movement and privacy.

Articles 22 to 27 of UDHR ensure the economic, social and cultural rights to which all human beings are entitled. The cornerstone of these rights is Article 22, acknowledging that, as a member of society, everyone has the right to social security and is, therefore, entitled to the realization of the economic, social and cultural rights “indispensable” for his or her dignity and free and full personal development. Five articles elaborate the rights necessary for the enjoyment of the fundamental right to social security, including economic rights related to work, fair remuneration and leisure, social rights concerning an adequate standard of living for health, well-being and education, and the right to participate in the cultural life of the community.

Articles 28 to 30 of UDHR provide a larger protective framework in which all human rights are to be universally enjoyed. Article 28 recognizes the right to a social and international order that enables the realization of human rights and fundamental freedoms. Article 29 acknowledges that, along with rights, human beings also have obligations to the community which enables them to develop their individual potential freely and fully. Article 30 protects the interpretation of the articles of the Declaration from any outside interference contrary to the purposes and principles of the United Nations. It explicitly states that no State, group or person can claim, on the basis of the Declaration, to have the right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth in the Universal Declaration.

In accordance with the Charter of the United Nations and the principles of humanitarian law, the UDHR was a landmark achievement in world history. Today, it continues to affect people’s lives and inspire human rights activism and legislation all over the world. Most important, the UDHR was to be a common statement of mutual aspirations — a shared vision of a more equitable and just world.

18.3.2 International Bill of Human Rights

The Commission on Human Rights, the premier human rights intergovernmental body within the United Nations, set out to translate its principles into international treaties that protected specific rights. The Member States debated the individual provisions for two decades, seeking to give explicit endorsement to certain aspects of the universality of human rights only implicitly referred to in the Universal Declaration such as the right of all peoples to self-determination, as well as reference to certain vulnerable groups such as indigenous people and minorities.

Given the unprecedented nature of the task, the United Nations General Assembly decided to draft two Covenants codifying the *two sets of rights* outlined in the Universal Declaration: Civil and Political Rights, and Economic, Social and Cultural Rights, which were adopted in 1966. The Preambles and Articles 1, 2, 3 and 5 are virtually identical in both — International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights. Both preambles recognize that human rights derive from the inherent dignity of human beings. Article 1 of each Covenant affirms that all peoples have the right of self-determination and by virtue of that right they are free to determine their political status and to pursue their economic, social and cultural development. Article 2, in both cases, reaffirms the principle of non-discrimination, echoing the UDHR. Article 3 stresses that States should ensure the equal right of men and women to the enjoyment of all human rights. Article 5 of both Covenants echoes the final provision of the UDHR, providing safeguards against the destruction or undue limitation of any human right or fundamental freedom.

UDHR, International Covenants on Civil and Political Rights, and International Covenants on Economic, Social and Cultural Rights together with the two Optional Protocols comprise the ***International Bill of Human Rights***. Two Optional Protocols of Civil and Political Rights, and Economic, Social and Cultural Rights were adopted in 1976. These Optional Protocols elaborate certain provisions of the Covenant on Civil and Political Rights, one providing for complaints by individuals, the other advocating the abolition of the death penalty.

International Bill of Human Rights elaborate fundamental rights and freedoms such as: prohibition of slavery and genocide, humanitarian law, the administration of justice, social development, religious tolerance, cultural cooperation, prevention of discrimination, violence against women, and the status of refugees and minorities. The following *four Conventions*, relating to racial discrimination, torture, women and children, are considered core human rights treaties, together with the two International Covenants. The *International Covenant on Civil and Political Rights* created an agency, the *Human Rights Committee* to promote participation with its standards; the committee expresses opinions as to whether a particular practice is a human rights violation, although these reports are not legally binding.

18.3.3 Vienna Declaration on Human Rights 1993

To celebrate International Year for Human Rights and to mark the twentieth anniversary of the UDHR, International Conference on Human Rights was convened in Tehran, Iran. After evaluating the impact of the Universal Declaration on national legislation and judicial decisions, the Conference approved the Proclamation of Tehran, which formulated a programme for the future, addressing the problems of colonialism, racial discrimination, illiteracy and the protection of the family. The Tehran Proclamation emphasized particularly the principle of non-discrimination, condemning the policy of apartheid as a “crime against humanity”, and urged the international community to ratify the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights adopted by the United Nations two years earlier.

World Conference on Human Rights, convened in Vienna in 1993, reassessed the progress of United Nations human rights work over the years. The Vienna Conference was marked by an unprecedented degree of support by the international community. There was broad consensus that, with fundamental rights codified and the essential machinery in place, it was time to implement the established human rights standards and norms with greater vigilance.

- Vienna Declaration and Programme of Action reaffirmed the centrality of the Universal Declaration for human rights protection, and recognized, for the first time unanimously, the right to development as an inalienable right and an integral part of international human rights law. The Conference emphasized that, as human rights are universal and indivisible as well as interrelated and interdependent, they should be promoted in equal manner. The delegates rejected arguments that some human rights were optional or subordinate to cultural traditions and practices. The Vienna Conference, thus, gave high priority to preserving the integrity of the Universal Declaration.
- The Vienna Declaration stressed that the protection and promotion of human rights are the “first responsibility” of Governments. It recognized democracy as a human right, thus strengthening the promotion of democracy and the rule of law. Also, giving high priority to the universal ratification of international human rights treaties the World Conference urged States especially to ratify promptly the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. Similarly, the Conference took innovative steps to protect the rights of vulnerable groups and to bring women’s rights into the mainstream of United Nations human rights work, supporting the establishment of a Special Rapporteur on violence against women and calling for an international decade of the world’s indigenous peoples.
- The World Conference on Human Rights further emphasised the importance of humanitarian assistance to victims of all natural and man-made disasters. The world conference also expresses its dismay and condemnation that gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in different parts of the world. The World Conference on Human Rights welcoming the early ratification of the Convention on the Rights of the Child stresses that the child, for the full and harmonious development of his or her personality, should grow up in a family environment which accordingly merits broader protection. Special attention needs to be paid to ensure non-discrimination and the equal enjoyment of all human rights and fundamental freedoms by disabled persons, including their active participation in all aspects of society.
- The World Conference on Human Rights reaffirmed that the importance and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, and their role in remedying human rights violations, in the dissemination of human rights information, and in appropriate human rights education. The World Conference also reiterated the need to consider the possibility for establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already

exist. The conference recognized the important role of Non-Governmental Organisations in the promotion of human rights and in humanitarian activities at national, regional and international levels. It appreciated their contribution to increasing public awareness of human rights issues and to the conduct of education, training and research in their fields for promoting and protecting all human rights and fundamental freedoms.

- The Vienna Declaration and Programme of Action provided the international community with a new framework of planning, dialogue and cooperation that enables an integrated approach to promoting human rights. The recognition of the interdependence between democracy, development and human rights, for example, laid the groundwork for increased cooperation among international development agencies and national organizations in promoting human rights. The Vienna Declaration states, for the first time explicitly, that all organs, programmes and specialized agencies of the United Nations system should have a central role in strengthening human rights. Its key institutional recommendation, however, was the establishment of the post of United Nations High Commissioner for Human Rights to coordinate all human rights activities system-wide. The World Conference also called for a comprehensive five-year review of the progress made in the implementation of the Vienna Declaration and Programme of Action in 1998. This review coincides with the fiftieth anniversary of the adoption of the Universal Declaration of Human Rights.

18.3.4 International Human Rights Documents: Specific Fields

In furtherance of the recognition of human rights in various aspects, both in international and national arena, the United Nations General Assembly has adopted some prominent human rights conventions on diversified fields. We present brief details of some of these conventions.

- 1) ***International Convention on the Elimination of All Forms of Racial Discrimination:*** This convention was a ground-breaking treaty defining and condemning racial discrimination. Calling for national measures towards the advancement of specific racial or ethnic groups, the Convention also makes the dissemination of ideas based on racial superiority or inspiring racial hatred punishable by law.
- 2) ***Convention on the Elimination of All Forms of Discrimination against Women:*** It specifies measures for the advancement and empowerment of women in private and public life, particularly in the areas of education, employment, health, marriage and the family.
- 3) ***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:*** This Convention bans torture, rape and weapons of war. In 1998, in a major effort to help torture victims and to step up international attempts to end torture, the United Nations declared 26 June as the *Annual International Day in Support of Victims of Torture*.
- 4) ***Convention on the Rights of the Child:*** It is the most universally ratified human rights Convention. Only two Member States, the United States and Somalia, are not yet parties to the Convention, which protects children, among other things, from economic and sexual exploitation. Some 14 States

have incorporated provisions of the Convention on the Rights of the Child into their constitutions, while 35 have passed new laws conforming to the Convention or amended laws related to child abuse, child labour and adoption. Other Member States have extended the length of compulsory education, guaranteed child-refugees and minority-children special protection or reformed juvenile justice systems, as stipulated by the Convention.

18.3.5 International Human Rights Agencies

Human Rights instruments are only one part of the UN's human rights programme. In fact, the UN has several agencies and courts, independent of its human rights declarations, covenants and protocol to address continuing human rights abuses. There are three notable agencies under the UN system to verify an effective implementation of the human rights declarations.

18.3.5.1 United Nations Commission on Human Rights

The Commission on Human Rights has been the central architect of the work of the United Nations in the field of Human Rights. It was established by the resolution of the Human Rights Council. The very role of Commission is to prepare the reports regarding the provisions of International Bill of Human Rights, International Covenants and Declarations on civil liberties, the status of women, the freedom of information, the prevention of discrimination on the grounds of race, sex, colour, language, religion and other matters concerning the human rights. The commission shall assist the Economic and Social Council in the coordination of activities concerning the human rights in the United Nations system.

18.3.5.2 The High Commissioner for Human Rights

To respect the recommendations of the World Conference on Human Rights, 1993 the United Nations General Assembly established the Office of the High Commissioner for Human Rights as part of the UN Secretariat. The OHCHR coordinates many human rights activities within the UN, working closely with treaty bodies such as the *Human Rights Committee*, and other UN agencies such as the *Human Rights Council*. The High Commissioner assists in the development of new treaties and procedures, sets the agenda for human rights agencies within the UN, and provides advisory services to governments. Most importantly, the High Commissioner serves as a full-time advocate for human rights within the United Nations. The OHCHR also has field offices throughout the world, including offices in Central Asia, East and Southern Africa, the Pacific, Latin America, and the Middle East.

The following are the functions of the United Nations High Commissioner for Human Rights:

- a) Promotes universal enjoyment of all human rights by giving practical effect to the will and resolve of the world community as expressed by the United Nations;
- b) Plays the leading role on human rights issues and emphasises the importance of human rights at the international and national levels;
- c) Promotes international cooperation for human rights;

- d) Stimulates and coordinates action for human rights throughout the United Nations system;
- e) Promotes universal ratification and implementation of international standards;
- f) Assists in the development of new norms;
- g) Supports human rights organs and treaty monitoring bodies;
- h) Responds to serious violations of human rights;
- i) Undertakes preventive human rights actions;
- j) Promotes the establishment of national human rights infrastructure;
- k) Undertakes human rights field activities and operations; and
- l) Provides education, information, advisory services and technical assistance in the field of human rights.

18.3.5.3 The Human Rights Council

UN Human Rights Commission was replaced by a new Human Rights Council in 2006. The Council consists of 47 members, elected directly and individually by the General Assembly with membership based on equitable geographic distribution. Council members serve terms of three years, with a limitation of no more than two consecutive terms. Procedures for Council membership are aimed at keeping countries with very poor human rights records off the Commission. Members must be elected by an absolute majority of the General Assembly, requiring 96 votes in a secret ballot, rather than a simple majority of General Assembly members present. The new Council's responsibilities include: promoting universal respect for the protection of all human rights, addressing gross human rights violations, making recommendations to the General Assembly, and responding promptly to human rights emergencies.

The Council's other responsibilities include providing direct assistance to UN member states to help them meet their human rights responsibilities through communication, technical assistance, and capacity building. The General Assembly also acts as a check on the Council, with the ability to suspend Council members whose countries commit gross human rights violations. The Council will meet no fewer than three times per year with the ability to hold special sessions when necessary. For now, the Council will adopt the procedures and responsibilities of the Human Rights Commission, but has a year-to-year review and change them.

18.3.6 Non-Governmental Organizations

The Non-Governmental Organisations (NGOs) of the world play major role in protecting human rights. The NGOs had to fight to secure representation in the UN after several years. NGOs without Borders are extremely active at the international level in the areas of human rights, war crimes, and humanitarian aid. NGOs allow for collaborations between local and global efforts for human rights by "translating complex international issues into activities to be undertaken by concerned citizens in their own community." The functions of international NGOs include: investigating complaints, advocacy with governments and international governmental organizations, and policy making.

Although NGOs do not have the authority to implement or enforce international law, they have several advantages when compared to State organizations in the human rights system. Much of their work includes: information processing and fact finding, in which NGOs educate people about their human rights and gather information regarding human rights abuses in violating countries. In this process NGOs have the benefit of access to local people and organizations and are often able to get direct and indirect access to critical information about current human rights violations. Once NGOs gather information, they can design campaigns to educate the international community of these abuses.

A key function of NGOs is *advocacy* — urging support for human rights and attempting to influence governments or international groups with regard to specific actions. Advocacy involves education, persuasion, public exposure, criticism and provoking specific responses to human rights abuses. Representatives of NGOs are seen everywhere in the international human rights system. Many international human rights NGOs attend and often participate in the meetings of UN human rights bodies. They provide information about human rights situations through their reports and testimony. They shape the agendas, policies, and treaties of the UN through participation and lobbying. Notable examples include NGO involvement in the development of the Universal Declaration of Human Rights and the UN Declaration on Torture and Other Cruel, Inhuman or Degrading Treatment.

Success in promoting human rights requires hard-to-achieve tasks including building responsive and non-corrupt governments, increasing economic productivity, improving the power and status of women and managing international tensions and conflicts. Realizing human rights worldwide is a project for centuries, not decades. The NGOs often publish reports condemning human rights violations throughout the world. NGOs with affiliates around the world include: *Amnesty International*, *Red Cross Society*, *Human Rights Watch*, *the International Commission of Jurists*, *the International Federation of Human Rights*, *Minority Group Rights*, *Doctors without Borders*, and *Oxfam*. Besides these high profile NGOs there are thousands of local and national organizations working on human rights issues.

Here, to provide you an idea of the kinds or types of role they can play, we just make a brief mention about *Amnesty International* and *Red Cross Society*.

- ***Amnesty International:*** It is the world's largest voluntary organization fighting for human rights. Its service is to free the prisoners from ill-treatment or inhuman treatment and torture. It has *three main aims* — the immediate release of all prisoners of conscience, the fair and prompt trials for all political prisoners, and the prevention of torture and executions. To achieve these aims, it follows simple methods of applying pressure on governments and authorities who are behaving unjustly. In 1983, it published Twelve-point plan for the prevention of torture. The members of Amnesty International are committed, idealistic and realistic.
- ***Red Cross Society:*** It was originally founded by Jean Henry Duant to help the wounded in the battle field. Red Cross and Red Crescent are recognized all over the world as symbols of aid and relief. Now, it is called International Committee for Red Cross movement. The fundamental principles of

International Red Cross and Red Crescent Movement are: Humanity, Impartiality, Neutrality, Independence, Voluntary service, Unity and Universality. It has also an extended area of activities including welfare of prisoners of war, war victims of civil war, health care to the wounded in the war, and helping the disabled people.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

4) What are the important agencies of United Nations that play crucial role in protecting Human Rights?

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5) Explain the role of United Nations Commission on Human Rights in protecting the human rights.

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6) What are the powers and functions of the Human Rights Council?

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7) What are the aims of Amnesty International?

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18.4 NATIONAL FRAMEWORK OF HUMAN RIGHTS

In India, the concept of Human Rights has received a set-back during the medieval period with invasions of Muslim rulers who followed a policy of discrimination against Hindus. Removal of social and economic inequality remains the greatest challenge for our government even today. As a result, our legislators and political leadership have to ceaselessly strive to address these challenges.

18.4.1 Pre-Independence Efforts

In India, the significance of human rights has, however, been recognized much before the international initiatives. Let us analyse the same in detail.

Practices of Ashoka: Following seven practices of Ashoka inspire the human beings to promote and protect not only human rights but also natural rights of animals.

- 1) Non-slaughter of breathing creatures.
- 2) Non-injury to the existing creatures.
- 3) Heartening to the words of parents.
- 4) Heartening to the words of elders.
- 5) Reverence to the teachers.
- 6) Simple behaviour towards the Brahmana and Sraman ascetics and slaves.
- 7) Small expense or necessary expenditure and small savings indicating the ethical way of spending and saving.

Motilal Nehru Committee: The Indian National Congress which was vanguard of freedom struggle took the lead to demand for fundamental freedoms, and civil and political rights of the people. The first explicit demand of the people of Indian sub-continent for fundamental rights was prepared by Indian National Congress in 1895. It is described as Home Rule Document. The document guarantees every one basic human right including fundamental freedom of expression, inviolability of one's own home, right to property and equality before law. In 1918, Indian National Congress demanded for a Declaration of the Rights of People of India on par with British Citizens. It guarantees equality before law, protection of life, personal liberty, property, freedom of speech and press, and right to form association. Delhi Declaration declared the Principles of Self Determination as one of the basic rights. The recommendations of the Motilal Committee include:

- Personal liberty, inviolability of dwelling-place and property;
- Freedom of conscience and profession and practice of religion subject to public order and morality;
- Right to free expression of opinion, to assemble peacefully and without arms, and to form association and union subject to public order, morality and decency;
- Right to free elementary education, and equality in the matter of admission into any educational institution maintained and aided by the State, without distinction of caste and creed;

- Equality for all citizens to the law and civil rights;
- Right to every citizen to seek redress from the courts;
- Protection of respect in punishment under ex-post-facto law;
- Non-discrimination against any person on grounds of religion, caste or creed in the matter of public employment, office or power in honour and in the exercise of any trade or callings;
- Equality of right to all citizens in the matter of access to and use of public roads, wells and other places of public resort;
- Freedom of combination and association for the maintenance and implementation of labour and economic conditions;
- Right to keep and bear arms in accordance with regulations; and
- Equality of rights to men and women as citizens.

Nevertheless, the Simon Commission totally rejected the demands voiced by the Motilal Nehru Committee Report.

18.4.2 Human Rights and Constitution of India, 1950

The Indian culture has been the product of assimilation of diverse cultures and religions that came into contact with the enormous Indian sub-continent over time. The international community has recognised the growing importance of strengthening national human rights institutions.

The Constitution of India which came into effect in 1950, incorporated “Fundamental Rights” of the citizens, though it does not directly authorise any Article on Human Rights. Preamble and Part III categorically describe and encompass different aspects of Human Rights, amongst others. Preamble unequivocally highlights justice (social, economic and political), liberty (of thought, expression, belief, faith and worship), equality (of status and of opportunity) and, to promote among all the citizens fraternity assuring the dignity of the individual. Articles 14 to 32 of the Constitution lay various fundamental rights including, equality before law and equal protection of laws with some exception relating to protective discrimination. Article 17 describes abolition of untouchability. Article 19 is a well known for fundamental freedoms — of speech and expression, to assemble, to form association, to roam and move throughout the territory of India and to carry out any trade, commerce, profession, occupation and so on. These fundamental freedoms are, however, not absolute where the appropriate governments can impose reasonable restrictions on the grounds of public order, morality, decency and friendly relations among people of the nation. These fundamental freedoms are possible only to the citizens of India.

Articles 20, 21 and 22 are bedrock of the Constitution of India which ensures right to life, livelihood and personal liberty. Articles 23 and 24 categorically direct the government to take appropriate measures to abolish bonded labour and slavery in India. Articles 25–28 recognise fundamental freedom of religion. Articles 29 and 30 assure the rights of all minority castes, languages, religions and cultures. Article 32 is the heart and soul of the constitution which emphasises that any affected person can approach the supreme court for enforcement of fundamental right. The justiciability of fundamental rights is itself guaranteed under the Indian Constitution. The responsibility for the enforcement of the

fundamental rights lies with the Supreme Court by virtue of Article 32, and with the High Courts by virtue of Article 226.

18.4.3 Human Rights Act, 1993

The Government of India did realize the need to establish an independent Act in conformity with the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights in view of the fact that India has become a party to these Covenants by ratifying them. To reassure the constitutional directions, judicial decisions and international bill of human rights the Parliament enacted Human Rights Act, 1993. The Human Rights Act (in India) contains broad provisions relating to definition human rights and Human Rights Commissions with their functions and powers, composition and other related aspects. Section 2(d) of the Act defines human rights as rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the international covenants and enforceable by Courts in India. The Act also authorizes the government to establish autonomous National and State Human Rights Commissions, thus, reflecting its commitment for effective implementation of human rights.

Let us look at the details related to the constitution, composition, powers and functions of these Commissions.

18.4.3.1 National Human Rights Commission

Chapter II and *Chapter III* of the Human Rights Act, 1993 deals with various significant aspects of National Human Rights Commission. We present the same here.

Constitution of National Human Rights Commission (Section 3): It is as follows.

- 1) The Central Government shall constitute a body to be known as the National Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to it, under this Act.
- 2) The Commission shall consist of:
 - a) *Chairperson* - Chief Justice of the Supreme Court;
 - b) *Members* - who is or has been, a Judge of the Supreme Court;
 - who is, or has been, the Chief Justice of a High Court;
 - two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.
- 3) The Chairpersons of the National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for Women shall be *deemed to be Members* of the Commission for the discharge of functions specified in clauses (b) to (j) of section 12.
- 4) *Secretary-General* - who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him.

- 5) The headquarters of the Commission shall be at Delhi and the Commission may, with the previous approval of the Central Government, establish offices at other places in India.

Appointment of Chairperson and other Members (Section 4): It is as follows.

- 1) The Chairperson and other Members shall be appointed by the President by warrant under his hand and seal.

Provided that every appointment under this sub-section shall be made after obtaining the recommendations of a Committee consisting of:

- a) *Chairperson* - The Prime Minister,
- b) *Members* - Speaker of the House of the People,
 - Minister in-charge of the Ministry of Home Affairs in the Government of India
 - Leader of the Opposition in the House of the People,
 - Leader of the Opposition in the Council of States,
 - Deputy Chairman of the Council of States.

Provided further that, no sitting Judge of the Supreme Court or sitting Chief Justice of a High Court shall be appointed except after consultation with the Chief Justice of India.

- 2) No appointment of a Chairperson or a Member shall be invalid merely by reason of any vacancy in the Committee.

Removal of a Member of the Commission (Section 5): It provides as follows.

- 1) Subject to the provisions of Sub-section (2), the Chairperson or any other Member of the Commission shall only be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground to be removed.
- 2) Notwithstanding anything in sub-section (1), the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member, as the case may be:
 - a) is adjudged an insolvent; or
 - b) engages during his term of office in any paid employment outside the duties of his office: or
 - c) is unfit to continue in office by reason of infirmity of mind or body; or
 - d) is of unsound mind and stands so declared by a competent court; or
 - e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude.

Term of office of Members (Section 6): It is as follows.

- 1) A person appointed as Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier.

- 2) A person appointed as a Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years.
 - Provided that no Member shall hold office after he has attained the age of seventy years.
- 3) On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of India or under the Government of any State.

Member to act as Chairperson or to discharge his functions in certain circumstances (Section 7): It is as follows.

- 1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the President may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.
- 2) When the Chairperson is unable to discharge his functions owing to absence on leave or otherwise, such one of the Members as the President may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

Terms and conditions of service of Members (Section 8): The salaries and allowances payable to, and other terms and conditions of service of, the Members shall be such as may be prescribed: Provided that neither the salary and allowances nor the other terms and conditions of service of a Member shall be varied to his disadvantage after his appointment.

Vacancies, etc., not to invalidate the proceedings of the Commission (Section 9): No act or proceedings of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Commission.

Procedure to be regulated by the Commission (Section 10): It provides as follows.

- 1) The Commission shall meet at such time and place as the Chairperson may think fit.
- 2) The Commission shall regulate its own procedure.
- 3) All orders and decisions of the Commission shall be audited by the Secretary-General or any other officer of the Commission duly authorised by the Chairperson in this behalf.

Officers and other staff of the Commission (Section 11): These include the following.

- 1) The Central Government shall make available to the Commission:
 - an officer of the rank of the Secretary to the Government of India who shall be the Secretary-General of the Commission; and
 - such police and investigative staff under an officer not below the rank of a Director General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the Commission.

- 2) Subject to such rules as may be made by the Central Government in this behalf, the Commission may appoint such other administrative, technical and scientific staff as it may consider necessary.
- 3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section 2) shall be such as may be prescribed.

Functions of the Commission (Section 12): The Commission shall perform all or any of the following functions, namely:

- a) inquire, suo motu or on a petition presented to it by a victim or any person on his behalf, into complaint of:
 - violation of human rights or abetment thereof, or
 - negligence in the prevention of such violation, by a public servant;
- b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;
- c) visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmates and make recommendations thereon;
- d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;
- e) review the factors, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;
- f) study treaties and other international instruments on human rights and make recommendations for their effective implementation;
- g) undertake and promote research in the field of human rights;
- h) spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;
- i) encourage the efforts of non-governmental organisations and institutions working in the field of human rights; and
- j) such other functions as it may consider necessary for the protection of human rights.

Powers relating to inquiries (Section 13): These are as follows.

- 1) The Commission shall, while inquiring into complaints under this Act, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, and in particular in respect of the following matters, namely:
 - summoning and enforcing the attendance of witnesses and examine them on oath;
 - discovery and production of any document;
 - receiving evidence on affidavits;

- requisitioning any public record or copy thereof from any court or office;
 - issuing commissions for the examination of witnesses or documents; and
 - any other matter, which may be prescribed.
- 2) The Commission shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of section 176 and section 177 of the Indian Penal Code.
 - 3) The Commission or any other officer, not below the rank of a Gazetted Officer, specially authorised in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies therefrom subject to the provisions of section 100 of the Code of Criminal Procedure, 1973, in so far as it may be applicable.
 - 4) The Commission shall be deemed to be a civil court and when any offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973, forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973.
 - 5) Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of Section 196 of the Indian Penal Code, and the Commission shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

Investigation (Section 14): It is as follows.

- 1) The Commission may, for the purpose of conducting any investigation pertaining to the inquiry, utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.
- 2) For the purpose of investigating into any matter pertaining to the inquiry, any officer or agency whose services are utilised under sub-section 1) may, subject to the direction and control of the Commission:
 - a) summon and enforce the attendance of any person and examine him;
 - b) require the discovery and production of any document; and
 - c) requisition any public record or copy thereof from any office.

- 3) The provisions of section 15 shall apply in relation to any statement made by a person before any officer or agency whose services are utilised under sub-section 1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.
- 4) The officer or agency whose services are utilised under sub-section 1) shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Commission within such period as may be specified by the Commission in this behalf.
- 5) The Commission shall satisfy itself about the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under sub-section 4) and for this purpose the Commission may make such inquiry (including the examination of the person or persons who conducted or assisted in the investigation) as it thinks fit.

Statement made by persons to the Commission (Section 15): No statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement:

- Provided that the statement:
 - a) is made in reply to the question which he is required by the Commission to answer; or
 - b) is relevant to the subject matter of the inquiry.

Persons likely to be prejudicially affected to be heard (Section 16): If, at any stage of the inquiry, the Commission:

- a) considers it necessary to inquire into the conduct of any person; or
- b) is of the opinion that the reputation of any person is likely to be prejudicially affected by the inquiry;

it shall give to that person a reasonable opportunity of being heard in the inquiry and to produce evidence in his defence.

- Provided that nothing in this section shall apply where the credit of a witness is being impeached.

Now, we present to you the *procedure that the National Human Rights Commission follows*. It is dealt with in Chapter IV of the Human Rights Act, 1993 and is as follows.

Inquiry into complaints (Section 17): The Commission while inquiring into the complaints of violations of human rights may:

- i) call for information or report from the Central Government or any State Government or any other authority or organisation subordinate thereto within such time as may be specified by it;

Provided that:

- if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;

- if, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly;
- ii) without prejudice to anything contained in clause i), if it considers necessary, having regard to the nature of the complaint, initiate an inquiry.

Steps after inquiry (Section 18): The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely:

- 1) where the inquiry discloses, violation of human rights or negligence in the prevention of violation of human rights by a public servant, the commission may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action, as the Commission may deem fit against the concerned person or persons;
- 2) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;
- 3) recommend to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;
- 4) subject to the provisions of clause 5), provide a copy of the inquiry report to the petitioner or his representative;
- 5) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;
- 6) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.

Procedure with respect to armed forces (Section 19): It is as follows.

- 1) Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of the armed forces, the Commission shall adopt the following procedure, namely:
 - a) it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;
 - b) after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government.
- 2) The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.
- 3) The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.

- 4) The Commission shall provide a copy of the report published under sub-section 3) to the petitioner or his representative.

Annual and special reports of the Commission (Section 20): These are as follows.

- 1) The Commission shall submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.
- 2) The Central Government and the State Government, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any.

18.4.3.2 State Human Rights Commission

Chapter V of the Human Rights Act categorically describes the various aspects of State Human Rights Commissions.

Constitution of State Human Rights Commissions (Section 21): It is as follows.

- 1) A State Government may constitute a body to be known as the (name of the State) Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned to, a State Commission under this chapter.
- 2) The State Commission shall consist of:
 - a) *Chairperson* — Chief Justice of a High Court;
 - b) *Members* — who is, or has been, a Judge of a High Court;
 - one Member who is, or has been, a district judge in that State;
 - two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.
- 3) *Secretary* - who shall be the Chief Executive Officer of the State Commission and shall exercise such powers and discharge such functions of the State Commission as it may delegate to him.
- 4) The headquarters of the State Commission shall be at such place as the State Government may, by notification, specify.
- 5) A State Commission may inquire into violation of human rights only in respect of matters relatable to any of the entries enumerated in List II and List III in the Seventh Schedule to the Constitution:
 - Provided that if any such matter is already being inquired into by the Commission or any other Commission duly constituted under any law for the time being in force, the State Commission shall not inquire into the said matter;

- Provided further that in relation to the Jammu and Kashmir Human Rights Commission, this sub-section shall have effect as if for the words and figures “List II and List III in the Seventh Schedule to the Constitution”, the words and figures “List III in the Seventh Schedule to the Constitution as applicable to the State of Jammu and Kashmir and in respect of matters in relation to which the Legislature of that State has power to make laws” had been substituted.

Appointment of Chairperson and other Members of State Commission (Section 22): It is as follows.

- 1) The Chairperson and other Members shall be appointed by the Governor by warrant under his hand and seal:
 - Provided that every appointment under this sub-section shall be made after obtaining the recommendation of a Committee consisting of:
 - *Chairperson* — The Chief Minister;
 - *Members* — Speaker of the Legislative Assembly;
 - Minister in-charge of the Department of Home, in that State;
 - Leader of the Opposition in the Legislative Assembly.
 - Provided further that where there is a Legislative Council in a State, the Chairman of that Council and the Leader of the Opposition in that Council shall also be members of the Committee.
 - Provided also that no sitting Judge of a High Court or a sitting District Judge shall be appointed except after consultation with the Chief Justice of the High Court of the concerned State.
- 2) No appointment of a Chairperson or a Member of the State Commission shall be invalid merely by reason of any vacancy in the Committee.

Removal of a Member of the State Commission (Section 23): It provides as follows.

- 1) Subject to the provisions of sub-section (2), the Chairperson or any other member of the State Commission shall only be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on a reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground to be removed.
- 2) Notwithstanding anything in sub-section 1), the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member, as the case may be:
 - a) is adjudged an insolvent; OR
 - b) engages during his term of office in any paid employment outside the duties of his office; OR
 - c) is unfit to continue in office by reason of infirmity of mind or body; OR
 - d) is of unsound mind and stands so declared by a competent court; OR
 - e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude.

Term of office of Members of the State Commission (Section 24): It is as follows.

- 1) A person appointed as Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier;
- 2) A person appointed as a Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years;
 - Provided that no Member shall hold office after he has attained the age of seventy years.
- 3) On ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government of a State or under the Government of India.

Member to act as Chairperson or to discharge his functions in certain circumstances (Section 25): It provides as follows.

- 1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the Governor may, by notification, authorise one of the Members to act as the Chairperson until the appointment of a new Chairperson to fill such vacancy.
- 2) When the Chairperson is unable to discharge his functions owing to absence on leave or otherwise, such one of the Members as the Governor may, by notification, authorise in this behalf, shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties.

Terms and conditions of service of Members of the State Commission (Section 26): The salaries and allowances payable to, and other terms and conditions of service of, the Members shall be such as may be prescribed by the State Government.

- Provided that neither the salary and allowances nor the other terms and conditions of service of a Member shall be varied to his disadvantage after his appointment.

Officers and other staff of the State Commission (Section 27): These are as follows.

- 1) The State Government shall make available to the Commission:
 - a) an officer not below the rank of a Secretary to the State Government who shall be the Secretary of the State Commission; and
 - b) such police and investigative staff under an officer not below the rank of an Inspector General of Police and such other officers and staff as may be necessary for the efficient performance of the functions of the State Commission.
- 2) Subject to such rules as may be made by the State Government in this behalf, the State Commission may appoint such other administrative, technical and scientific staff as it may consider necessary.

- 3) The salaries, allowances and conditions of service of the officers and other staff appointed under sub-section 2) shall be such as may be prescribed by the State Government.

Annual and special reports of State Commission (Section 28): These include the following.

- 1) The State Commission shall submit an annual report to the State Government and may at any time submit special reports on any matter which, in its opinion, is of such urgency or importance that it should not be deferred till submission of the annual report.
- 2) The State Government shall cause the annual and special reports of the State Commission to be laid before each House of State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House along with a memorandum of action taken or proposed to be taken on the recommendations of the State Commission and the reasons for non-acceptance of the sections, if any.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

- 8) Highlight the constitutional provisions aimed at protection of the Human Rights in India.

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- 9) Explain the steps that the Commission on Human Rights takes after completion of enquiry.

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18.5 LET US SUM UP

Human rights now are more widely accepted than they have ever been. They have become part of the current international relations, and most countries participate in the human rights system. Human rights are no doubt inherent rights of human being. Treaties, Declarations, Conventions, etc help encourage and pressure countries to deal with their human rights problems. To make appropriate enforcement against human rights violations there are large number of institutions working at the International, Regional and National levels. Besides the contribution by the governmental agencies, there are Civil Societies and Non-Governmental Organisations which are playing remarkable role in effective implementation of Human Rights.

18.6 ANSWERS TO 'CHECK YOUR PROGRESS' QUESTIONS

- 1) Human Rights have several distinctive characteristics that distinguish them from any other types of rights. These characteristics are as follows.
 - Human rights are universal legal guarantees.
 - Human rights belong to all human beings.
 - Human rights protect individuals and/or groups from actions and omissions of the State and some non-State actors that affect fundamental human dignity.
- 2) Based on the origin, development and usage amongst people in the international arena, generational human rights have been classified as follows:
 - *First Generational Human Rights:* Civil and Political Rights are included under this category.
 - *Second Generational Human Rights:* Include Economic and Social Rights.
 - *Third Generational Human Rights:* Environmental Protection and Right to Economic Development have been put under this category.
 - *Fourth Generational Human Rights:* Rights of the Child and Women have come under this.
- 3) The fundamental principles of human rights are: interdependency, indivisibility and inalienability.
 - *Interdependence of Human Rights:* Each right is dependent on each other right for any and all human rights to be enjoyed in reality. Thus, a state cannot deny a person any of these rights.
 - *Indivisibility of Human Rights:* All human rights form one indivisible body of norms that cannot be separated into different sets. No human right can be divided easily by any means of state action. Civil, Political and Economic rights of human beings are not easily separable from one another, and, thus, state cannot pick and choose them.

- *Inalienability of Human Rights*: Fundamental human rights are inherent rights of human being. These have interconnection with people because of their birth as human in the universe. There are no possibilities to alienate for any cause at any levels.
- 4) United Nations has several International Human Rights Agencies and courts which are independent of its human rights declarations, covenants and protocol to address human rights abuses. Human Rights instruments are just part of the UN's human rights programme. There are three notable agencies under the UN system through whom it plays its role including verification of effective implementation of the human rights declarations. They are: i) United Nations Commission on Human Rights, ii) The High Commissioner for Human Rights, iii) The Human Rights Council.
 - 5) The Commission on Human Rights has been the central architect of the work of the United Nations in the field of Human Rights. It was established by the Resolution of the Human Rights Council. The very role of Commission is to prepare the reports regarding the provisions of International Bill of Human Rights, International Covenants and Declarations on civil liberties, the status of women, freedom of information and similar matters, the prevention of discrimination on grounds of race, sex, colour, language, religion and other matters concerning the human rights. The commission shall assist the Economic and Social Council in the coordination of activities concerning the human rights in the United Nations system.
 - 6) UN Human Rights Council's responsibilities include: promoting universal respect for the protection of all human rights, addressing gross human rights violations, making recommendations to the General Assembly, and responding promptly to human rights emergencies. The Council's other responsibilities include providing direct assistance to UN member states to help them meet their human rights responsibilities through communication, technical assistance, and capacity building. The General Assembly also acts as a check on the Council, with the ability to suspend Council members whose countries commit gross human rights violations. The Council will meet no fewer than three times per year with the ability to hold special sessions when necessary. For now, the Council will adopt the procedures and responsibilities of the Human Rights Commission, but has a year-to-year review and change them.
 - 7) Amnesty International is the world's largest voluntary organization fighting for human rights. Its service is to free the prisoners from ill-treatment, inhuman treatment, and torture. Amnesty International has *three main aims* — the immediate release of all prisoners of conscience, fair and prompt trials for all political prisoners and the prevention of torture and executions. To achieve these aims, it follows simple methods of applying pressure on governments and authorities who are behaving unjustly. In 1983, it published Twelve-point plan for the prevention of torture. The members of Amnesty International are committed, idealistic and realistic.
 - 8) Articles 21 and 22 are bedrock of the Constitution of India which ensures right to life, livelihood and personal liberty. Persons who are arrested have certain rights – both at the time of arrest and immediately thereafter – which are inherent in Articles 21 and 22(1) of the Constitution. The Supreme Court

has observed in several decisions that these rights are to be recognised and scrupulously protected. Articles 23 and 24 categorically direct the government to take appropriate measures to abolish bonded labour and slavery in India. Articles 25–28 recognise fundamental freedom of religion. Articles 29 and 30 assure the rights of all minority castes, languages, religions and cultures. Article 32 is the heart and soul of the constitution which emphasises that any affected person can approach the Supreme Court for enforcement of fundamental right. The justiciability of fundamental rights is itself guaranteed under the Indian Constitution. The responsibility for the enforcement of the fundamental rights lies with the Supreme Court by virtue of Article 32, and with the High Court by virtue of Article 226.

- 9) The Commission may take any of the following steps upon the completion of an inquiry held under this Act, namely:
- i) where the inquiry discloses violation of human rights or negligence in the prevention of violation of human rights by a public servant, the commission may recommend to the concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against the concerned person or persons;
 - ii) approach the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;
 - iii) recommend to the concerned Government or authority for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;
 - iv) subject to the provisions of clause v), provide a copy of the inquiry report to the petitioner or his representative;
 - v) the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;
 - vi) the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.

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UNIT 19 PANCHAYAT RAJ LAW

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19.0 INTRODUCTION

The village is an important unit in the organization of Indian social life. The villages in India are known to have been governed by their own institutions of self-governing nature since the time immemorial. Even before the emergence of democratic polity, the democratic ideals and institutions flourished in ancient and medieval India. In spite of increasing industrialization, India is still a land of villages and her economy is mainly rural (Visalakshi, 1967).

After independence, the urge for a system of local Government suited to Indian conditions had become very strong. Accordingly, suitable provisions were incorporated under the Indian Constitution. Several development and welfare programmes were entrusted with the village panchayaths right from 1952. The Government of India appointed a Committee in 1957 headed by Balwant Rai Mehta to suggest measures to rectify the defects of the Panchayat administration and recommended a three tier system of Panchayat (The Government of India Report, 1957). It became the kingpin of the Government policy for the democratic decentralization of power and for the revitalization of the community development. As a result of further efforts aimed at local self-government the Panchayat Raj Law and system became increasingly vogue and effective.

Mahatma Gandhi, who cherished the idea of Gram Swaraj, said that a country cannot be developed without the participation of villages and he hoped that villages would be reformed socially and economically. Other prominent leaders

like Jawaharlal Nehru and Jaya Prakash Narayan had already indicated that the major task of independent India would be to take democracy at the grass root level and to involve the rural masses in the task of national reconstruction. Hence, decentralization of powers to local self government is highly needed (Shakuntala Sharma, 1997).

Decentralization does not mean division of the functions of the State between the State Government and local bodies, each discharging its functions independently. Decentralization means and includes devolution of State functions on local bodies. It is nothing but transferring decision-making powers and functions from the control of the State Government to the local bodies with a view to transforming the society. Democratic decentralization seeks to associate the people's participation in the decision-making process at the grass-roots level (Debesh Chakraborty, 1981). When the people living in villages become politically conscious, then only India will progress.

Therefore, in this Unit, we will be focusing on the Panchayat Raj Law and the functioning of the Panchayat Raj institutions including those relevant for administration of justice at the grassroots level in India.

19.1 OBJECTIVES

After you go through the Unit, we expect you to be able to:

- Describe the Panchayat Raj Law and Institutions;
- Analyze the advantages of decentralization of governance; and
- Evaluate the functions of Panchayat Raj Institutions as grassroots level agencies in the realization of the goals of democracy enshrined in the Indian Constitution.

19.2 PANCHAYAT RAJ SYSTEM: CONSTITUTIONAL BASIS, POWERS AND FUNCTIONS

In this section, we will look at the Panchayat Raj in its historical perspective, including the constitutional basis and its powers and functions, among other things.

19.2.1 Constitutional Basis of Panchayat Raj System

The constitutional basis of the Panchayat Raj System can be traced to the Constituent Assembly debates, which subsequently led to the incorporation of suitable provisions in the Constitution of India.

19.2.1.1 Constituent Assembly Debates

The Panchayat was an important institution of ancient India too, as it served as a bridge between the State and the community. The debate in the Constituent Assembly in 1948 on the draft constitution confirmed the popularity of Panchayat. Members of the Constituent Assembly averred that the panchayat was an ancient Indian institution and in our blood (Mathew George, 2000). Pandit Jawaharlal Nehru stressed, the power and authority must be transferred to elected panchayat so that the fear that the villages would make a mistake must not be allowed to

come in the way. Gandhiji observed: grama panchayat shall be entrusted with the dispensing of justice. The poor farmers need not go out of their village, need not spend hard-earned money and also need not waste their valuable time to meet the litigations in towns where they may be exploited by the lawyers (Dub, 1977, p.60).

19.2.1.2 Constitutional Provisions

With this background certain provision were incorporated in the Indian Constitution for the organization of *village panchayats*. Article 40 of the Indian Constitution directs the State to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. The object of this provision is to introduce democracy at the grassroots. These panchayats are expected to be the training grounds for the development of democratic traditions. As panchayat institutions were reorganized and oriented to a wider range of functions, it was felt that consideration of efficiency in performance of the assigned developmental and governmental tasks required relief from the judicial work load and, hence, *Nyaya-panchayats* came into existence.

Many States in our country have enacted laws for the organization and proper functioning of panchayats. But, unfortunately these panchayats were not functioning satisfactorily. Elections to panchayats had been very irregular and uncertain. In order to revitalize the Panchayat Raj Institutions and urban local bodies bold initiative was taken by late Prime Minister Rajiv Gandhi to grant constitutional status and backing to rural local self-government institutions and, thereby, deepen and strengthen our democratic system. Towards this end Parliament enacted the Constitution 73rd and 74th Amendment Acts, 1992 and incorporated Part-IX in the Constitution of India regarding the structure, composition, election and scope of powers of panchayats at the district, intermediate and village levels. Until the 73rd Amendment Act was passed, formation, structure, composition, powers, functions, elections and such other matters regarding panchayats were entirely looked after by the State legislature and the Government. With the coming into the effect of the 73rd Constitutional Amendment Act, the legislative and executive action of the State as regards panchayats will have to be now in accordance with the provisions of Part-IX of the Constitution. The underlying idea of this amendment is to make panchayats the vibrant units of local administration in the rural area. The Amendment is regarded to be historic as it is designed to establish strong, effective and democratic local administration which may lead to rapid implementation of rural development programmes (Jain, 2009). This Amendment was passed in pursuance of the Directive Principles of the State Policy contained in Article 40. This would help in realizing the objectives of Gram Swaraj, the idea cherished by Mahatma Gandhi. It will go a long way in ensuring democratic functioning of the democratic institutions at the grassroots level.

The 73rd Amendment Act envisages the *Gram Sabha* as the foundation of the Panchayat Raj system to perform functions and powers entrusted to it by the State legislatures. The amendment provides for a three-tier Panchayat Raj system. The Act provides that Panchayat bodies will have an assured duration of five years, with elections mandatory after this period. Article 243A provides that the Gram Sabha may exercise such powers and perform such functions at the village

level as the legislature of a State may by law provide. 'Gram Sabha' means a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of panchayat at the village level. Article 243B visualizes three-tier Panchayat Raj system. Small States having a population not exceeding twenty lakhs have been given an option not to constitute the panchayats at the intermediate level.

The legislature of a State may, by law, provide for representation of following persons in panchayats:

- The chairperson of the Panchayats at the village level,
- The chairpersons of the panchayats at the intermediate level, in the panchayats at the district level,
- The members of the Lok Sabha and the Legislative Assembly of the State representing constituencies.
- The members of the Rajya Sabha and Legislative Council of the State where they are registered as electors in Panchayat at the intermediate level.

Article 243D provides that in every Panchayat seats shall be reserved for the Scheduled Castes and Scheduled Tribes. The number of seats so reserved shall be in the same proportion to the total number of seats to be filled by direct election in the Panchayat as the population of SCs and STs in that Panchayat area, and such seats may be allotted by rotation to different constituencies in Panchayat. Out of total number of seats reserved, not less than 1/3 seats shall be reserved for women belonging to the SCs and STs. In general, out of total number of seats to be filled by direct election in every Panchayat not less than 1/3 seats shall be reserved for women (including the number of seats reserved for SCs and STs). Such seats may be allotted by rotation to different constituencies in a Panchayat. According to Article 243E every Panchayat, unless dissolved sooner under any law for the time being in force, shall continue for five years from the date of its first meeting.

Indian Constitution also guarantees that under Article 243-H the State is empowered to make law for the imposition of taxes by the Panchayats such as levy, collect and appropriate such taxes, duties, tolls and fees in accordance with the procedure and such limits. The State by such law is empowered to make grants-in-aid to the panchayats from the Consolidated Fund of the State. The Constitution also guarantees that the superintendence, direction and control of the preparation of electoral rolls and conduct of elections to the Panchayats shall be vested with State Election Commission. The validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies shall not be called in question in any court.

19.2.2 Structure and Functioning of Panchayat Raj System

Panchayat Raj is the democratic self-governing institution of a village with its upper linkages. It is a process of people's involvement in their affairs at the grassroots level. It means that the Panchayat Raj System consists of a three-tier structure – the *Village Panchayat* at the village level, *Panchayat Samiti* at the middle level and the *Zilla Parishad* at the district level. The team of Balwantrai Mehta emphasized that development cannot progress without responsibility and power. Community development can be real only when the community

understands its problems, realizes its responsibilities, exercises the necessary powers through its chosen representatives and maintains constant vigilance on local administration. Panchayat Raj extends to establish strong linkages between villages, taluks and districts (Shakuntala Sharma, 1997).

At the grassroots level, village panchayat is both an end and means. As a means, it should emerge as a system of democratic local government discharging all functions relating to integrated rural economy. As an end, it is an inevitable extension of democracy to the villages. Panchayat Raj is not a new concept. Panchayats have been a part of rural cultural heritage of India. From the times immemorial Panchayats have enjoyed the confidence of the people. The system survived in spite of turmoil and changes, because the village folk were fully confident of their own capabilities of sound thinking and resorting to right approaches to problems.

'Panchayat' literally means, *an assembly of five wise and respected elders chosen and accepted by the village community*. They were considered as the incarnation of God. Panchayats had a wide spectrum of activities covering executive, administrative, developmental and judicial activities in ancient India. Panchayat Raj was inaugurated in 1959. The panchayats, which formerly acted in advisory capacity to the community development programme, now undertook to assume full responsibility for carrying it ahead. The Balwant Rai Mehta Committee was set up by the National Development Council in 1957 to enquire into the questions of economy and efficiency, and suggest measures for the re-organization of community development programme and national extension service (Vishnoolal Bhagwan and Vidya Bhushan, 2005). The Committee suggested three-tier system of rural local government. It was termed as '*Democratic Decentralization*' which ultimately began to be called as 'Panchayat Raj'.

19.2.2.1 Legislative Efforts to Strengthen the Functioning of Panchayat Raj System

Mehta Report is considered as a historic document. It is described as the '*master blueprint*' and a sort of '*Bible of Panchayat Raj*'. By the end of 1963, Panchayat Raj was established in most of the Indian States. By 1965, all the States of India had enacted legislation for the introduction of panchayats in their area. In order to restructure and reorient the entire rural setting in India, the Constitution 73rd Amendment Act, 1992 brought several changes. The Act aims at creating Gram Sabha to perform such functions as may be entrusted to it by law. The Act provides for the reservation of seats for members belonging to Scheduled Castes and Scheduled Tribes in proportion to their population. Further, it also provides that not less than one-third of such seats shall be reserved for women (Vibhuti Singh Shekawat, 1998). The tenure of every panchayat shall be five years unless dissolved earlier. After dissolution, a new panchayat shall be elected within six months to discharge the functions for the remaining period and not for five years. Article 243G of the Constitution of India has spelt out the powers, authority and development of panchayat, which is the basic unit of the Panchayat Raj system. Apart from constitutional provisions, every State has enacted statutory provisions called the Panchayat Act within the State limits.

The functions of the panchayats are to prepare annual plans for the area, mobilization of relief in natural calamities, taking of census, registration of births, deaths and marriage, maintenance of small irrigation tanks and drinking water wells, construction and maintenance of village roads, promotion of literacy, implementation of family welfare programmes, etc. The panchayat shall also be vested with the power to levy and collect taxes within one year of commencement of this Amendment Act. The Governor of the State shall constitute a Finance Commission to review and allocate finance to the panchayats. However, the Act is silent about the executive powers of the Panchayat Raj Institutions with regard to recruitment and appointment of staff under them.

Twenty nine subjects are placed under the jurisdiction of the panchayats. They are enumerated in the XI schedule of the Indian Constitution. These subjects include: agriculture, implementation of land reforms, minor irrigation, animal husbandry, dairy, poultry and fisheries, social-forestry, small-scale industries, Khadi and village industries, rural electrification, roads, non-conventional energy, education including adult education, poverty alleviation programmes, family welfare, women and child development, the welfare of the weaker sections, etc. The Act also mandates for the appointment of State Election Commission to collect fresh population data and making reservations. It is a step to confirm that the States have embarked on the process of devolution of power to the masses.

It is to be noted that the Constitution of India now mandates structural uniformity, tenure-based periodicity and regularity of elections and bye-elections for the panchayats and, thus, the Panchayat Raj Institutions gained a stable niche in India's administrative system. However, there is an apprehension that the chairpersons from the segments which are reserved for SCs and women might become pawns in the hands of politicians and the male members of the family respectively who would manipulate them to their advantage.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

1) What is Panchayat Raj?

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2) Explain the constitutional provisions relating to Panchayat Raj.

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3) Highlight the recommendations of Mehta Committee on Panchayat Raj.

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19.2.3 Gram Sabha: Role, Powers and Responsibilities

Public vigilance is the price of democracy. Gram Sabha is a long-standing institution which will enable the people to establish direct democracy in the society. The *Gram Sabha or Village Assembly* lies at the base of Panchayati Raj superstructure. It may exercise such powers and functions at the village level as the legislature of a State may by law provide. Gram Sabha means a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village level. That means, it consists of all the adult citizens who are entitled to vote. 73rd Amendment to the Indian Constitution, thus, envisages the Gram Sabha as the foundation of the Panchayat Raj system.

Gram Sabha is a body of the people which has its own role and responsibility to be discharged. It should be in the hands of the people and should have freedom and flexibility for action. But, one should recognize that it is a constitutional entity which has to function within a set of rules and procedures as its decisions are binding. Gram Sabha can ensure transparent administration by performing its functions. It brings social harmony and community feeling among the people, conduct social audit, establish social justice, plan for development, achieve equality and expect participation of the people in the development activities of the community. Gram Sabha would also restrain corruption in the society to some extent.

According to the laws of most of the States, Gram Sabha is called at least twice a year, usually after *Rabi* and *Kharif* crops are harvested. In Jammu and Kashmir and Orissa, it meets only once in a year. In some other States, its meeting can be convened on the requisition of certain proportion of voters (at least 1/5th in most cases). The village panchayat owes responsibility to Gram Sabha. It presents its budget accounts of the previous year and the annual administrative report before Gram Sabha. Projects of local development, proposals for taxation and village

production plan have to secure the approval of Gram Sabha before it is implemented by the Panchayat. In Punjab, Bengal and Assam, the Village Panchayat is elected by Gram Sabha. In Bihar, Gram Sabha elects 50 of the members of the executive council and its President. In Tamil Nadu, though Gram Sabha was created through law and functions were assigned statutorily, Gram Sabha was not convened by the President of Gram Panchayat (Palanithurai and Raghupathy, 2006).

19.2.3.1 Evaluation of Working of Gram Sabha

The Gram Sabha has not been an active body. Its attendance is generally thin, probably because of low level of political education of the members and too much diffusive character of its membership. Proposals are taking place to strengthen the working of Gram Sabha so that it could effectively control the Panchayati Raj leadership. Giving it right to recall and making its meeting more effective and attractive are some of the important proposals which may be given due consideration. In fact, Gram Sabha is at an infant stage and necessitates constant nurture before it can develop into a base organ of Panchayati Raj. Through the political education of the masses, larger participation in development programmes, more effective control over Panchayat leadership and better mobilization of resources Gram Sabhas can be made more effective centres of political energy. It is expected that the Panchayats pay attention to the advice and suggestion of the Gram Sabha without reducing themselves to mere executive bodies.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

- 4) Panchayat Raj System is both a means and an end of democracy. Explain the statement with reasons.

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- 5) Explain the powers and functions of the Panchayats.

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- 6) Define Grama Sabha. Specify its composition.

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- 7) What are the functions of the Grama Sabha?

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19.3 ADMINISTRATION OF JUSTICE AT THE LEVEL OF PANCHAYAT

In this section, we will present you an overview of how justice is intended to be delivered at the level of Panchayats with special reference to the legislative efforts in this regard. Let us look at Nyaya Panchayats first.

19.3.1 Nyaya Panchayats

To administer justice at the village level Nyaya Panchayats were established. The earliest Nyaya Panchayats were the 'Village Courts' established under the Village Courts Act of 1988. The Royal Commission on Decentralization, 1909 recommended of revival of Nyaya Panchayats having both civil and criminal jurisdiction in petty cases arising within the village. In May 1915, by a resolution passed by the Government of India, the matter regarding the establishment of Nyaya Panchayat was left to the State Government. For the first time in the year 1920, Bombay Village Panchayat Act was passed and that resulted in the conduct of a series of *Panchayat Adalat*. However, select committee of the legislative council opposed the investing of judicial powers on Panchayats. In 1933, a village bench consisting of elected members and outsiders were created as per provisions of the Bombay Village Panchayat Act in Bombay. Since independence, almost all States enacted Village Panchayat Acts as guided by the directive principles and have resulted in the creation of statutory Nyaya Panchayat legislation. The *Village Panchayat* and *Nyaya Panchayat* existed as dual entities in order to have separation of judiciary from the executive (Kerala Calling, 1997).

A general account of the System of Nyaya Panchayat concerning its constitution and composition is as follows. The Legislative details concerning a Nyaya Panchayat vary; due regard given to regional diversity. Thus, the main features

of Nyaya Panchayat organization which have now become more general are that, the Naya Panchayats are established for a group of villages usually covering 7 to 10 villages. It usually covers a population of 14,000 to 15,000 villagers.

The essential prerequisites for the member of a Nyaya Panchayat are that the member must be able to read and write the State language, must not hold an office of Sarpanch or be a member in the samiti, parishad or State or Union legislature. Nyaya Panchayat has a chairperson and secretary elected by its members; one-third of its members retire every second year. Each Gram Panchayat, which is an elected body, elects members for Nyaya Panchayat. In some States like U. P. and Bihar, there is combination of both elections and nominations, and such nomination is done by consensus. In the State of Kerala, all the Nyaya Panchas are nominated and in the Union Territory of Delhi all of them are directly elected. The Law Commission, in its 14th Report (1969) said that in principle it did not support elected judiciary and it did not regard Nyaya Panchayat as judiciary in the proper sense of the term, but rather as 'tribunal' which has to inspire the confidence of the villagers (Law Commission Report, 1958, pp.857, 896-902).

The jurisdiction of Nyaya Panchayat is both civil and criminal. Civil jurisdiction of Nyaya Panchayat is confined to pecuniary claims of the value of Rs.100 and by agreement among the parties; it may be raised to Rs.200 involving money due on contracts not affecting any interest in immovable property, compensation for wrongfully taking or damaging property and recovery of movable property. The criminal jurisdiction is comparatively extensive such as criminal negligence or trespass, nuisance, possession or use of weights and measures, theft, misappropriation with pecuniary limit as low as Rs.25 to 50, intimidation, perjury and attempt to evade a summons and so forth. It has authority to levy fines, but they have no power to sentence offender to imprisonment, substantively or in default of fine. The State Government has the power to enhance the jurisdiction of Nyaya Panchayat as well as to diminish it if there is admission of injustice (Pillai, 1974, pp.56-57). More emphasis is given on the amicable settlement of disputes in the system of Nyaya Panchayat. Therefore, the method of conciliation is being emphasised over adjudication. In the States of Bihar and Kerala, it has been made obligatory on Nyaya Panchayat to first resort to conciliation in all matters including criminal cases, but in the state of Rajasthan conciliation is permissible though not obligatory.

The procedures adopted by Nyaya Panchayat are simple and flexible. The revenue for the functioning of Nyaya Panchayat is derived from the fine deposited to the Nyaya Panchayat and contributions of the village panchayats. The complaints may be made orally or in writing, the hearing before it is informal in nature, panchas confer among themselves and arrive at a decision, which is pronounced in open Court. The final judgment is written and read out in open Court. It is signed by the parties to the dispute, signifying the communication of judgment to them. Nyaya Panchayat has power to issue summons, to proceed ex-parte in case of recalcitrant defendant / respondent. It has power to levy execution through attachment orders in unfulfilled decrees. The Nyaya Panchayat maintains records of the civil and criminal matters, its judgments, gist of depositions by the witnesses and parties, Court fees and fines, summons and notices, and the expenses. The Sub-divisional or District magistrate can transfer a case from one Nyaya Panchayat to another, in case any miscarriage of justice has occurred. In addition to the

power of appeals from Nyaya Panchayat to the magistrate Court, parties have a privilege to apply for revision of a decision of Nyaya Panchayat (The Study Team on Nyaya Panchayat-1958, Report 1962, p.128). The Law Commission of India in its 14th Report (1969, pp.194-195) had insisted upon the need of short-term training programmes of the Panchas enabling them to act judicially in the sense that they must bear in mind that all are equal before law and that the law is no respecter of persons. They must conform to the principles of natural justice and must avoid bias, ill-will, affection and appear to have so avoided such ills.

Thus, the fervor for institutionalization of Panchayat Raj system and its democratic decentralization has contributed to the creation of Nyaya Panchayat. Through Nyaya Panchayat the administration of justice is brought at the doorstep of the villages. The Law Commission in its 14th report stressed that Nyaya Panchayat would educate the villager in the art of self-government. The Nyaya Panchayat is said to be the lowest rung of state system of administration of justice as well as a sub-system of the panchayats as organs of local self-government (The Manual for the Nyaya Panchayat, 1963).

19.3.2 Grama Nyayalayas

The Law Commission of India in its 114th Report on Gram Nyayalaya (August, 1986) suggested its establishment so that speedy, inexpensive and substantial justice could be provided to the common man. The Gram Nyayalayas Bill, 2007 was broadly based on the recommendations of the Law Commission. It provided for the establishment of Gram Nyayalayas for the purpose of providing access to justice – both civil and criminal – to the citizens at the grassroots level and to ensure that opportunities for securing justice are not denied to any citizen for reasons of social, economic or other disabilities and for matters connected therewith. The preamble of the Bill reverberated Article 39A of the Indian Constitution. The objective behind the introduction of this Bill is that the Government by bringing forward this Bill can ensure access to justice to citizens at grass root level. It will help the earnestness of the Government to clear the backlog of cases to render inexpensive, easily available, non-formal and substantial justice. However, there are still doubts as to whether setting up of Gram Nyayalayas as proposed in this Bill alone will reduce pendency of cases.

In New Delhi, Union Cabinet on April 24th 2008 approved the Bill to reduce pending Court cases (www.news.vakilno1.com/labels/law/amendments (April 2008)). According to an official note, the cabinet gave its approval for withdrawal of the Gram Nyayalayas Bill, 2007 pending before Rajya Sabha, and introduction of the Gram Nyayalayas Bill, 2008 in the upper house in the light of the recommendations of the Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, and the Law Ministers and Law Secretaries, and the Registrar Generals of High Courts Conference.

19.3.2.1 Jurisdiction of Grama Nyayalayas

The 2008 Bill provides that a Gram Nyayalaya shall be the lowest Court of subordinate judiciary in the State. However, the Committee takes cognizance of the fact that as per Section 29 of the Code of Criminal Procedure, 1973 the Court of a Magistrate of the Second Class is the lowest Court. Gram Nyayalayas will exercise jurisdiction over all offences under the Central Acts where the maximum punishment provided for is imprisonment not exceeding one year, whether with or without fine.

The Gram Nyayalaya will be in addition to the regular civil and criminal Courts. The Gram Nyayalayas will cover both civil and criminal cases of a simple nature as specified in the Schedule to the proposed legislation. The Nyayalayas will follow summary procedure in criminal cases and a simple procedure having regard to the principles of natural justice in civil cases. The proceedings in these Nyayalayas will be less expensive, free from protracted procedural wrangles, quick and available at the grassroots level, accessible to the common man and render justice to him as enshrined in Article 39A of the Constitution.

The Gram Nyayalayas shall not have jurisdiction to take cognisance of the following classes of disputes:

- A dispute by or against the Central Government or the State Government or a public servant for anything which is in good faith done or purported to have been done by him in his official capacity;
- A dispute where one of the parties is a minor or a person of unsound mind;
- Any claim cognizable by revenue Courts.

Further, the Nyayadhikari, in the interest of justice, may close a case and advise the parties to approach the appropriate Civil Court in respect of matters relating to any complicated issue of fact or of law, which should be decided by any other competent Court of law.

19.3.2.2 Functioning of Grama Nyayalayas

The proposed Gram Nyayalayas shall be presided over by a *Nyayadhikari*. As per the proviso, Nyayadhikari shall be a person qualified/eligible to be appointed as a Judicial Magistrate of the first class and belonging to a cadre of Nyayadhikaris constituted by the Governor in consultation with the Chief Justice of the High Court. Preference and the qualification required for the same is just a bachelor degree in law with or without prior experience in the Bar. The Bill is silent regarding the term of office, salary, allowances and other terms and conditions of the services of the Nyayadhikari. To ensure some uniformity throughout the country, provisions addressing the same would be vital and necessary.

The Nyayadhikari shall periodically visit the villages under his or her jurisdiction and conduct proceedings in close proximity to the place where the parties normally reside, thus, functioning as a mobile Court. However, mentioning 'periodical' visits to villages by the Nyayadhikari, without prescribing number of visits, might not serve the purpose. The Bill needs to prescribe a minimum number of visits to be made. The Bill is silent regarding the pecuniary jurisdiction of the Gram Nyayalayas, which also needs to be specified. Empowering Nyayalayas to take up a dispute without any ceiling in the matter of pecuniary jurisdiction would be a risky venture, as the Nyayalayas shall consist of Nyayadhikaris who hardly have any prior Court experience. Thus, a pecuniary jurisdiction of a specific amount is needed.

The Bill directs Gram Nyayalayas to make efforts for conciliation and settlement of civil disputes for which appointment of Conciliators by the District Judge in consultation with the District Magistrate has been envisaged. However, no minimum qualification is prescribed for their appointment. There is a need for some kind of uniformity amongst the States in regard to qualification, tenure, and the method of appointment and remuneration of the Conciliators. Since the

Conciliators play a very important role, any disparity would not be conducive to their working. Sufficient incentives including enhanced remuneration should be paid to the Conciliators and preference in appointment should be given to those with legal background apart from having experience in social service. This is vital to reduce nepotism and interference and to provide better solutions to the people.

- **Speedy Justice:** A deep-rooted problem in the functioning of the Courts, particularly in the Trial Courts, is the granting of frequent adjournments, mostly on flimsy grounds. The Bill under clause 33(9) gives Nyayalayas the right to adjourn the hearing beyond the following day provided the necessary reasons are recorded in writing. This very provision would undermine the objective of ensuring speedy justice, as the Judges usually tend to act with unfettered discretion. The Bill has armed the Nyayadhikari with directions 'not be bound by the procedure laid down in the Code of Civil Procedure, 1908' but to be guided by the principles of natural justice. Further, the Gram Nyayalayas have also been vested with powers to proceed ex-parte if any of the parties does not appear. To regulate the discretion, the Bill must lay down the exceptional circumstances when an adjournment may be granted. An appeal from the judgment of the Gram Nyayalaya will lie with the Sessions Court, which will be heard and disposed of within six months from the date of filing of the appeal.
- **Coordination:** All the officers including the Nyayadhikaris, conciliators, local police officers, and other officials need to coordinate with each other for the effective implementation of the Act. They need to work together to ensure justice within the rural mass. In particular, the Bill calls for a high degree of coordination for implementation between the State Government and the High Court. The coordination of prescribed tasks should be within their powers as laid down and need to ensure that neither overrides the other. In other words, either of them should not influence the other.
- **Grounds for Removal of Nyayadhikari:** Incompetence is one of the grounds for removal from the office of Nyayadhikari as provided in clause 8(1). However, incompetence is not a crime. Hence, a Nyayadhikari who has been removed based on incompetence should not be barred from other appointments in Government as stated in clause 8(2). His merits are to be acknowledged.

The Bill seeks to address, on top priority, the problem of tackling mounting arrears in Courts through decentralization of the system of administration of justice by providing for a participatory forum of justice within the Constitution. The Gram Nyayalayas Bill, 2008 was passed by the Parliament on December 21, 2008. The Rajya Sabha passed the bill on December 17, 2008. This bill ensures that inexpensive and efficacious justice possible is delivered to the remotest areas, as it provides for holding of mobile Courts and conducting proceedings by the 'Nyaya Adhikari' (Judicial Magistrates First Class) by periodically visiting the villages (www.cuts-international.org). The quality of justice through Gram Nyayalayas would finally depend upon the nature of the forum that will be set up ultimately to render justice. By setting up of Gram Nyayalayas for every Panchayat, the Constitutional goal to be achieved is to make justice inexpensive, easily available, non-formal and substantial.

Thus, at the grassroots level the alternative disputes redressal mechanisms includes Gram Panchayats, Nyaya Panchayat and the Gram Nyayalaya. The Gram Nyayalayas Bill is yet to get the accent of the President of India. From the above study it is evident that The Gram Nyayalaya Act will provide for the establishment the Gram Nyayalaya, which will be economical, with simple procedure and quick resolution of disputes at the grassroots level. It will be easily accessible to the villagers and common people in India for resolving their disputes of particular nature at the pre-litigation stage itself. Thus, it can be said to be one of the methods that can be adopted progressively as one of the solutions to the problem of judicial arrears.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

8) Discuss the main features of the Nyaya Panchayat.

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9) Explain the role of Grama Nyayalayas.

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19.4 LET US SUM UP

We have presented you the Panchayat Raj System highlighting its Constitutional basis, structure, powers and functions as well as how it can be strengthened to make it effective local self-government in the democratic system of India. Further, we have discussed the role, powers and responsibilities of Gram Sabha vis-à-vis its place in realization of the goal of decentralization of administration in a democratic set-up. Towards the end, we have focused on institutionalization of administration of justice at the level of Panchayat touching upon Nyaya Panchayats and Grama Nyayalayas along with their jurisdiction and functions.

We hope you have got the significance of Panchayat Raj institutions not only in democratic decentralization of administration but also in effective administration

of justice at the grassroots level. We believe that you are now better equipped to strengthen democracy at the grassroots level, as that will inevitably lead to better functioning of the institutions at the higher levels as well!.

19.5 ANSWERS TO 'CHECK YOUR PROGRESS' QUESTIONS

- 1) Panchayat Raj is the three-tier structure of the rural local Government at the village, taluka and the district levels. It is based on democratization and devolution of powers and resources for the specific purpose of planning and implementation of community development programmes with active, effective and spontaneous participation of the rural people.
- 2) Panchayat Raj system has its basis in the constitutional provisions. To introduce democracy at the grass root level, Article 40 of the Indian Constitution was incorporated under the Indian Constitution. It directs the State to take steps to organize village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self-government. The 73rd Constitutional Amendment Act envisages the Gram Sabha as the foundation of the Panchayat Raj system to perform functions and powers entrusted to it by the State legislatures. The amendment provides for a three-tier Panchayat Raj system. The Act provides that Panchayat bodies will have an assured duration of five years, with elections mandatory after this period.
- 3) The crux of recommendations of Mehta Committee on Panchayat Raj included the following. The panchayat samiti was to be constituted consisting of the President, and members with due representation from the Schedule Castes and women. The budgets of the panchayats were to be scrutinized by the Panchayati Samiti and those of panchayati samities by Zilla parishads. The panchayat samiti was to enjoy independent sources of revenue. It should work as a main agency of development work. The State Government was empowered to exercise control over these bodies.
- 4) In its structure and functioning, the Panchayat Raj System is the end as well as the means to make democratic-functioning more effective. As we know, Panchayat Raj is not a new concept. Panchayats have been a part of rural cultural heritage of India. Since the times immemorial, Panchayats have enjoyed the confidence of the people. The system survived in spite of turmoil and changes, because the village folk were fully confident of their own capabilities of sound thinking and right approach to problems. So, as a means, village Panchayat being at the grass root level, should emerge as a system of democratic local self-government, discharging all functions relating to integrated rural economy. As an end, it is an inevitable extension of democracy to the villages.
- 5) Statutorily, the Panchayats have *two types of functions* — obligatory and optional. With the passage of time and occurrence of new developments, such a division of functions has become obsolete. Now, the panchayats have municipal functions like public health, social education, public safety, public construction, etc. These functions include: lighting, medical relief, safe drinking water, sanitation, public recreations, registration of births, deaths and marriages, tree plantations, etc. Panchayats will also discharge social

welfare functions which include famine or emergency relief, aid to the handicapped, women and children, enforcement of Child Marriage Restraint Act or other similar social-welfare laws.

Powers of Panchayats: In order to discharge the above said functions, Panchayats have been given specific powers. These are regulatory powers like to remove a nuisance from public places or to remove a danger arising from the bad conditions of a house. It may punish the defaulter by imposing fine. It may reserve a well or a tank exclusively for drinking purposes. Panchayats also have judicial powers like hearing of civil and criminal suits. They can levy taxes prescribed under the statute.

- 6) Grama Sabha is otherwise known as Village Assembly. According to Article 243A of the Indian Constitution the Grama Sabha is a body which exercises its powers and performs such functions at the village level as the legislature of a State may by law provide. It is a body of people which has its own role and responsibility to be discharged. Grama Sabha consists of a body of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at village level. That means it consists of all the adult citizens who have been entitled to vote. Grama Sabha lies at the base of Panchayati Raj superstructure.
- 7) Gram Sabha can ensure transparent administration by performing its functions, viz. it brings social harmony and community feeling among the people; it conducts social audit, establishes social justice, and plans for development; and it strives to achieve equality and expects participation of the people in the development activities of the community. Gram Sabha would also restrain corruption in the society to some extent.
- 8) The main features of Nyaya Panchayats organization which have now become more general are as follows.
 - The Naya Panchayats are established for a group of villages usually covering 7 to 10 villages.
 - It usually covers a population of 14000 to 15000 villagers.
 - The essential prerequisites for the member of a Nyaya Panchayat are that the member must be able to read and write the State language, must not hold an office of Sarpanch or be a member in the samiti, parishad or State or Union legislature.
 - Nyaya Panchayat has a chairperson and secretary elected by its members; one-third of its members retire every second year.
 - Each Gram Panchayat, which is an elected body, elects members for Nyaya panchayat.
- 9) *Role of Grama Nyayalayas:* The Law Commission of India in its 114th Report on Gram Nyayalaya (1986) suggested establishment of Gram Nyayalayas. They provide speedy, inexpensive and substantial justice to the common man. The Gram Nyayalayas Bill, 2007 was broadly based on the recommendations of the Law Commission which provided for the establishment of Gram Nyayalayas for the purpose of providing access to justice – both civil and criminal – to the citizens at the grassroots level. Grama Nyayalayas will ensure that opportunities for securing justice are not denied to any citizen for reasons of social, economic or other disabilities

and for matters connected therewith. The preamble of the Bill reverberated Article 39A of the Indian Constitution which envisages equal justice and free legal aid to economically backward classes.

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