# CONTENTS

# SYLLABUS

## MH-404 LAWS AND SOCIOLOGY

### UNIT I

**Rights:** Concept of Rights: legal rights, civil rights and under criminal procedure code, equality before law, rights of children, women and Scheduled Castes and Scheduled Tribes.

### UNIT II

**Law in India: Division of Law:** Substantive Law: that creates, discovers and defines the rights and duties of each individual, for example, criminal code (Penal Codes); Procedure Law: when a crime is committed, the procedure law is activated (Cr. Pc. Evidence Act, etc.); Civil Law: (Private Wrongs) like those for inheritance, divorce, Juvenile Justice Laws; Lecture and small group work.

### UNIT III

**Criminal Justice System:** Criminal Justice System in the country: Police, prosecution, judiciary and correction, district courts, session courts, high courts and the Supreme Court.

### UNIT IV

**The Components: Police:** Structure, reporting, registration, investigation, arrest; How and what can be done, powers of the police bail and critique; Prosecution: Structure, screening, decision to prosecute, deciding the charges, public prosecutor and critique; Courts–district court, high court, supreme court; Structure (Civil, Criminal and Juveniles), Functions, trial participation, sentencing-institutional and non-institutional juvenile proceedings and critique; Correction-Structure, function, treatment, rehabilitation and critique.

### UNIT V

**Legal Aid:** History of Legal Aid; Concept of Legal Aid; Need for legal aid, who needs legal aid, legal aid schemes, problems, Public Interest Litigation History of Public Interest Litigation with special references to India. What is public interest litigation: Concept, processes and problems?

# UNIT– I

# RIGHTS

## STRUCTURE



### *LEARNING OBJECTIVES*

After going through this unit, students will be able to :

- understand the concept of rights;
- distinguish between natural, legal and civil rights;
- explain the concept of equality before law;
- know the rights of children, women, scheduled castes and scheduled tribes.

## 1.1 INTRODUCTION

Rights are legal, social, or ethical principles of freedom or entitlement — *i.e.*, rights are normative rules about what is allowed of people or owed to people, according to some legal system, social convention, or ethical theory. The concept of rights is often fundamental to civilized societies, and it is of vital importance in such disciplines as law and ethics, especially theories of justice and deontology.

## 1.2 CONCEPT OF RIGHTS

Many other words related to normative or regulatory concepts derive from this same root, including correct, regulate, and rex (meaning "king"), whence

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regal and thence royal. Likewise many more geometric terms derive from this same root, such as erect (as in "upright"), rectangle (literally "right angle"), straight and stretch. Like right, the English words rule and ruler, deriving still from the same root, have both normative or regulatory and geometric meanings (e.g., a ruler as in a king, or a ruler as in a straightedge).

Several other roots have similar normative and geometric descendants, such as Latin norma, whence norm, normal, and normative itself, and also geometric concepts such as surface normals; and likewise Greek ortho whence Latin ordo, meaning either "right" or "correct" (as in orthodox, meaning "correct opinion") or "straight" or "perpendicular" (as in orthogonal, meaning "perpendicular angle"), and thence order, ordinary, etc.

Rights are widely regarded as the basis of law, but what if laws are bad? Some theorists suggest civil disobedience is, itself, a right, and it was advocated by thinkers such as Henry David Thoreau, Martin Luther King Jr., and Gandhi.

There is considerable disagreement about what is meant precisely by the term rights. It has been used by different groups and thinkers for different purposes, with different and sometimes opposing definitions, and the precise definition of the concept, beyond having something to do with normative rules of some sort or another, is controversial.

One way to get an idea of the multiple understandings and senses of the term is to consider different ways it is used. Many diverse things are claimed as rights:

> "A right to life, a right to choose; a right to vote, to work, to strike; a right to one phone call, to dissolve parliament, to operate a forklift, to asylum, to equal treatment before the law, to feel proud of what one has done; a right to exist, to sentence an offender to death, to launch a nuclear first strike, to carry a concealed weapon, to a distinct genetic identity; a right to believe one's own eyes, to pronounce the couple husband and wife, to be left alone, to go to hell in one's own way."

There are likewise diverse possible ways to categorize rights, such as:

> "Who is alleged to have the right: Children's rights, animal rights, workers' rights, states' rights, the rights of peoples. What actions or states or objects the asserted right pertains to: Rights of free expression, to pass judgment; rights of privacy, to remain silent; property rights, bodily rights. Why the rightholder (allegedly) has the right: Moral rights spring from moral reasons, legal rights derive from the laws of the society, customary rights are aspects of local customs. How the asserted right can be affected by the rightholder's actions: The inalienable right to life, the forfeitable right to liberty, and the waivable right that a promise be kept."

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There has been considerable debate about what this term means within the academic community, particularly within fields such as philosophy, law, deontology, logic, and political science. One way to look at different senses of the term of rights is to examine contrasting ideas about the concept.

## 1.3 LEGAL AND OTHER RIGHTS

Legal rights are, clearly, rights which exist under the rules of legal systems. They raise a number of different philosophical issues. (1) Whether legal rights are conceptually related to other types of rights, principally moral rights; (2) What the analysis of the concept of a legal right is; (3) What kinds of entities can be legal right-holders; (4) Whether there any kinds of rights which are exclusive to, or at least have much greater importance in, legal systems, as opposed to morality; (5) What rights legal systems ought to create or recognise.

### *Natural Rights versus Legal Rights*

According to some views, certain rights derive from God or Nature are Natural Rights.

- ***Natural rights*** are rights which are derived from Nature or God. They are universal; they don't depend on the laws of a specific society. They exist necessarily and can't be taken away. For example, it has been argued that humans have a natural right to life. They're sometimes called moral rights or inalienable rights.
- ***Legal rights,*** in contrast, are based on a society's customs, laws, statutes or actions by legislatures. An example of a legal right is the right to vote of citizens. Citizenship, itself, is often considered as the basis for having legal rights, and has been defined as the "right to have rights". Legal rights are sometimes called civil rights or statutory rights and are culturally and politically relative since they depend on a specific societal context to have meaning.

Some thinkers see rights in only one sense while others accept that both senses have a measure of validity. There has been considerable philosophical debate about these senses throughout history. For example, Jeremy Bentham believed that legal rights were the essence of rights, and he denied the existence of natural rights; whereas Thomas Aquinas held that rights purported by positive law but not grounded in natural law were not properly rights at all, but only a facade or pretense of rights.

### *Claim Rights versus Liberty Rights*

- ***A claim right*** is a right which entails that another person has a duty to the right-holder. Somebody else must do or refrain from doing something to or for the claim holder, such as perform a service or supply a product for

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him or her; that is, he or she has a claim to that service or product. In logic, this idea can be expressed as: "Person A has a claim that person B do something if and only if B has a duty to A to do that something." Every claim-right entails that some other duty-bearer must do some duty for the claim to be satisfied. This duty can be to act or to refrain from acting. For example, many jurisdictions recognize broad claim rights to things like "life, liberty, and property"; these rights impose an obligation upon others not to assault or restrain a person, or use their property, without the claim-holder's permission. Likewise, in jurisdictions where social welfare services are provided, citizens have legal claim rights to be provided with those services.

- ***A liberty right*** or privilege, in contrast, is simply a freedom or permission for the right-holder to do something, and there are no obligations on other parties to do or not do anything. This can be expressed in logic as: "Person A has a privilege to do something if and only if A has no duty not to do that something." For example, if a person has a legal liberty right to free speech, that merely means that it is not legally forbidden for them to speak freely: it does not mean that anyone has to help enable their speech, or to listen to their speech; or even, per se, refrain from stopping them from speaking, though other rights, such as the claim right to be free from assault, may severely limit what others can do to stop them.

Liberty rights and claim rights are the inverse of one another: a person has a liberty right permitting him to do something only if there is no other person who has a claim right forbidding him from doing so. Likewise, if a person has a claim right against someone else, then that other person's liberty is limited. For example, a person has a liberty right to walk down a sidewalk and can decide freely whether or not to do so, since there is no obligation either to do so or to refrain from doing so. But pedestrians may have an obligation not to walk on certain lands, such as other people's private property, to which those other people have a claim right. So a person's liberty right of walking extends precisely to the point where another's claim right limits his or her freedom.

### *Positive Rights versus Negative Rights*

In one sense, a right is a permission to do something or an entitlement to a specific service or treatment, and these rights have been called positive rights. However, in another sense, rights may allow or require inaction, and these are called negative rights; they permit or require doing nothing. For example, in the United States, citizens have the positive right to vote and they have the negative right not to vote; people can stay home and watch television instead, if they desire. In Belgium, however, citizens have a positive right to vote but they don't have a negative right to not vote, since non-voting citizens can be fined. Accordingly:

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- ***Positive rights*** are permissions to do things, or entitlements to be done unto. One example of a positive right is the purported "right to welfare."
- ***Negative rights*** are permissions not to do things, or entitlements to be left alone. Often the distinction is invoked by libertarians who think of a negative right as an entitlement to "non-interference" such as a right against being assaulted.

Though similarly named, positive and negative rights should not be confused with active rights (which encompass "privileges" and "powers") and passive rights (which encompass "claims" and "immunities").

### *Individual Rights versus Group Rights*

The general sense of right is that they are possessed by individuals in the sense that they are permissions and entitlements to do things which other persons, or which governments or authorities, can not infringe. This is the understanding of thinkers such as Ayn Rand who argued that only individuals have rights, according to her philosophy called Objectivism. However, others have argued that there are situations in which a group of persons is thought to have rights, or group rights. Accordingly:

- ***Individual rights*** are rights held by individual people regardless of their group membership or lack thereof.
- ***Group rights*** have been argued to exist when a group is seen as more than a mere composite or assembly of separate individuals but an entity in its own right. In other words, it's possible to see a group as a distinct being in and of itself; it's akin to an enlarged individual which has a distinct will and power of action and can be thought of as having rights. For example, a platoon of soldiers in combat can be thought of as a distinct group, since individual members are willing to risk their lives for the survival of the group, and therefore the group can be conceived as having a "right" which is superior to that of any individual member; for example, a soldier who disobeys an officer can be punished, perhaps even killed, for a breach of obedience. But there is another sense of group rights in which people who are members of a group can be thought of as having specific individual rights because of their membership in a group. In this sense, the set of rights which individuals-as-group-members have is expanded because of their membership in a group. For example, workers who are members of a group such as a labor union can be thought of as having expanded individual rights because of their membership in the labor union, such as the rights to specific working conditions or wages. As expected, there is sometimes considerable disagreement about what exactly is meant by the term "group" as well as by the term "group rights."

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There can be tension between individual and group rights. A classic instance in which group and individual rights clash is conflicts between unions and their members. For example, individual members of a union may wish a wage higher than the union-negotiated wage, but are prevented from making further requests; in a so-called closed shop which has a union security agreement, only the union has a right to decide matters for the individual union members such as wage rates. So, do the supposed "individual rights" of the workers prevail about the proper wage? Or do the "group rights" of the union regarding the proper wage prevail? Clearly this is a source of tension.

## 1.4 CIVIL AND POLITICAL RIGHTS

Civil and political rights are a class of rights and freedoms that protect individuals from unwarranted action by government and private organizations and individuals and ensure one's ability to participate in the civil and political life of the state without discrimination or repression.

Civil rights include the ensuring of peoples' physical integrity and safety; protection from discrimination on grounds such as physical or mental disability, gender, religion, race, sexual orientation, national origin, age, and individual rights such as the freedoms of thought and conscience, speech and expression, religion, the press, and movement.

Political rights include natural justice (procedural fairness) in law, such as the rights of the accused, including the right to a fair trial; due process; the right to seek redress or a legal remedy; and rights of participation in civil society and politics such as freedom of association, the right to assemble, the right to petition, and the right to vote.

Civil and political rights comprise the first portion of the Universal Declaration of Human Rights (with economic, social and cultural rights comprising the second portion). The theory of three generations of human rights considers this group of rights to be "first-generation rights", and the theory of negative and positive rights considers them to be generally negative rights.

Civil and political rights were among the first to be recognized and codified. In many countries, they are constitutional rights and are included in a bill of rights or similar document. They are also defined in international human rights instruments, such as the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights.

Civil and political rights need not be codified to be protected, although most democracies worldwide do have formal written guarantees of civil and political rights. Civil rights are often considered to be natural rights. Thomas Jefferson wrote in his 1774 A Summary View of the Rights of British America that "a free people claim their rights as derived from the laws of nature, and not as the gift of their chief magistrate."

Custom also plays a role. Implied or unenumerated rights are rights that courts may find to exist even though not expressly guaranteed by written law or custom; one example is the right to privacy in the United States.

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The question of who civil and political rights apply to is a subject of controversy. In many countries, citizens have greater protections against infringement of rights than non-citizens; at the same time, civil and political rights are considered to be universal rights that apply to all persons.

### *Civil Rights Movement*

When civil and political rights are not guaranteed to all as part of equal protection of laws, social unrest may ensue.

The civil rights movement was a worldwide political movement for equality before the law occurring between approximately 1950 and 1980. It was accompanied by much civil unrest and popular rebellion. While civil rights movements over the last 60 years have resulted in an extension of civil and political rights, the process was long and tenuous in many countries, and most of these movements did not achieve or fully achieve their objectives. In its later years, the civil rights movement took a sharp turn to the radical left in many cases.

## 1.5 RIGHTS UNDER CRIMINAL PROCEDURE CODE

A Criminal Case starts with occurrence of any activity described crime by any law The Code of Criminal Procedure describes the path to punish. The Indian Evidence Act describes how to and what to prove regarding to crime for punishment. The quantum of punishment is given within limitations and according to Law.

The first schedule of Code of Criminal Procedure classifies the offences .In two categories. Cognizable or non cognizable and bailable or non bailable. In Cognizable crimes Police is main authority to inquire and prosecute the criminal .The Police is empowered to arrest without warrant in cognizable cases. In non-cognizable cases Police can inquire only after permission from Magistrate and arrest with warrant. In bailable cases a person is entitled to bail after his arrest. Police can take this bail also. In non-bailable cases normally Court grants bail in its discretion.

In cognizable cases Police register 'First Information Report (F.I.R.)' If Police refuses to register F.I.R. One can send its complaint in writing by post to District Superintendent of Police. Courts including Courts of Magistrates are also authorised to order Police to register F.I.R. if complainant approach them.

Police enquires about the alleged offences in F.I.R. Police Officer enquiring can ask any person to appear before him for inquiry. In case of women and Children no Police Officer can call them to Police Station or anywhere else for inquiry, they can only be enquired at their home.

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If after Enquiry Police found no evidence of crime as alleged in complaint/ F.I.R. It prepares cancellation report and send it to Magistrate. Magistrate after giving opportunity to complainant decides whether to cancel or to take any other action on F.I.R. This is special to reference that an F.I.R. once registered can only be cancelled by Magistrate and before canceling it a reasonable opportunity for filing objections is given to complainant.

If after enquiry the allegations found true the accused is arrested .In case of bail he is released otherwise he is kept under custody.

Any person arrested for crime is produced before Magistrate with in 24 hours of its arrest and he can be further kept in custody only after the Magistrate order

The Police put up charge sheet against accused in the court. Public Prosecutor does Court proceedings against accused.

The Court first considers the charge sheet, if it found accusation not sustainable as per law. It discharges the accused and close the case. Court also supplies the copy of charge sheet to accuse. The charge sheet contain all matter including witnesses, statements etc by which Police found allegations true. If court found charges prima facie sustainable it asks accused if he pleads guilty or wanted to contest the case. If accused pleads guilty Court award punishment according to law.

If accused pleads for contesting the case. The court asks Prosecution to prove its allegations The accused has right to cross-examine any witness produced by Prosecution. After that accused is given opportunity to defend. At the last stage both parties give arguments regarding the case.

If after hearing the case court found allegations against accused true without any reasonable doubt it punish the accused. Otherwise it acquits the accused. The court if at any stage of case found charges baseless or unsustainable it can acquit the accused Provisions are also made for compensation to accused for a complaint without any reasonable base.

The High Courts are given power to make any order etc; to stop abuse of legal proceedings or in interest of justice.

The first hearing of the case are done lower courts .Any person aggrieved with their decision can appeal against their judgment to Higher Courts. Higher Courts are authorised to change the lower courts judgment

This is not necessary that one can approach Higher courts after the judgment of acquittal or punishment is passed. The Higher courts can be approached before it also if one feels anything against law is going on.

Any person can directly make its complaint of crime to Court: These are called private complaints. Court can hear the complaint and punish the accused. In private complaint complainant has to prove its case and normally has to engage

a lawyer at his own cost. While in Police/Government case, the case is proved by Prosecuting Agency and cost of lawyer is born by them. Main procedure of court proceeding is almost same.

In case of one complaint to police about non-cognizable offence, police officer directs him to Magistrate. Police can enquire in Non-Cognizable offences only after permission from Magistrate. In these cases police can arrest with warrant only. Other procedure is almost the same.

In many cases Government also complaints to Magistrates about Non-Cognizable offences: Courts are empowered to summon and prosecute accused persons. A General example of such cases is Traffic Challans. Court procedures are almost same as in other type of criminal cases.

*Civil Case*

There are many matter in ordinary life which are not crime and relates to private relations amongst citizen etc; These are covered under Civil Law.

Civil Courts are established for the adjudications of civil matters in normal practice Criminal Courts are also given powers of civil courts. . The procedure use by Civil Courts is described in Code of Civil Procedure. Matters relating to it are to be proved according to Indian Evidence Act.

There must be a subject matter, opposing parties and relief claimed in a civil case. For a civil case normally one has to engage a lawyer. He has to pay court fee also.

The civil case is instituted in Civil Courts in writing with sufficiently stamped paper as fee. If any law does not bar such suit the court can admit it.

Then court issue summons to opposing (defendant) party. The defendant gives a written reply in its defence dealing with each allegation and stating whether he admitted or denied.

Next important part of civil case is called discovery. Both parties are entitled to know about the case from each other and to obtain admissions regarding matters related to case.

After that court frames issues relating to case and are to be decided by court. Both parties then produce evidence in their favour. Defendant produces its evidence after the party, which instituted the case. Both parties' then give necessary arguments regarding the case.

After the completion of above stages courts pronounce its judgment. It can dismiss the suit or accept the plea and give relief.

Successful parties are issued Decrees in its favour and last stage is Execution. In which courts judgment is implemented.

- Any person accused of any offence is a competent witness for him. He can give witness in his favour, which is admissible in law. Accused has to apply to court for becoming witness in his favour.

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- No person can be compelled for being witness against himself. Though he himself may voluntarily give such evidence.
- Indian Law does not accept any confession of offence before Police. Only a confession made before Court is admissible in law
- If you wanted to contest any criminal complaint/case against you in Court you have to obtain bail from Court. A common man mostly comes in grip of bailable offences. The Courts without any hesitation grants bails in these cases.

## 1.6 EQUALITY BEFORE LAW

Equality before the law or equality under the law or legal egalitarianism is the principle under which each individual is subject to the same laws, with no individual or group having special legal privileges.

The Article 14 of the Constitution is one of the fundamental rights of the Constitution of India. Let us now know about this Article.

Article 14 of the Constitution reads:

"The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"

What do the two phrases in this Article namely "equality before the law" and "equal protection of law" mean? On the face of it the two phrases may seem to be identical, but in fact, they mean different things.

While "Equality before the law" is negative concept; "equal protection of laws" is a positive one. The former declares that everyone is equal before3law, that no one can claim privileges and that all classes are equally subject to the ordinary law of the land. "Equal protection of Law", on the other hand means, that among equals, the law should be equal and equally administered. That like should be treated as like. Or in other words, persons differently circumstanced need not be treated in the same manner. For example 'Equal protection of Law' does not mean that every persons shall be taxed equally, but that persons under the same category should be taxed by the same standard. The guarantee of "equal protection" thus is a guarantee of equal treatment of persons in "equal circumstances" permitting differentiation in different circumstances.

If there were a reasonable basis for classification, the legislature would be entitled to make different treatment. Thus, the legislature may *(i)* exempt certain classes of property from taxation at all, such as charities, libraries etc; *(ii)* impose different specific taxes upon different trades and profession.

## 1.7 RIGHTS OF CHILDREN

Children's rights are the perceived human rights of children with particular attention to the rights of special protection and care afforded to the young,

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including their right to association with both biological parents, human identity as well as the basic needs for food, universal state-paid education, health care and criminal laws appropriate for the age and development of the child. Interpretations of children's rights range from allowing children the capacity for autonomous action to the enforcement of children being physically, mentally and emotionally free from abuse, though what constitutes "abuse" is a matter of debate. Other definitions include the rights to care and nurturing.

"A child is any human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier." According to Cornell University, a child is a person, not a subperson, and the parent has absolute interest and possession of the child, but this is very much an American view. The term "child" does not necessarily mean minor but can include adult children as well as adult nondependent children. There are no definitions of other terms used to describe young people such as "adolescents", "teenagers," or "youth" in international law, but the children's rights movement is considered distinct from the youth rights movement.

The field of children's rights spans the fields of law, politics, religion, and morality.

### *Types of Rights*

Children's rights are defined in numerous ways, including a wide spectrum of civil, cultural, economic, social and political rights. Rights tend to be of two general types: those advocating for children as autonomous persons under the law and those placing a claim on society for protection from harms perpetrated on children because of their dependency. These have been labeled as the right of empowerment and as the right to protection. One Canadian organization categorizes children's rights into three categories:

- ***Provision:*** Children have the right to an adequate standard of living, health care, education and services, and to play. These include a balanced diet, a warm bed to sleep in, and access to schooling.
- ***Protection:*** Children have the right to protection from abuse, neglect, exploitation and discrimination. This includes the right to safe places for children to play; constructive child rearing behavior, and acknowledgment of the evolving capacities of children.
- ***Participation:*** Children have the right to participate in communities and have programs and services for themselves. This includes children's involvement in libraries and community programs, youth voice activities, and involving children as decision-makers.

In a similar fashion, the Child Rights Information Network, or CRIN for short, categorizes rights into two groups:

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- ***Economic, social and cultural rights,*** related to the conditions necessary to meet basic human needs such as food, shelter, education, health care, and gainful employment. Included are rights to education, adequate housing, food, water, the highest attainable standard of health, the right to work and rights at work, as well as the cultural rights of minorities and indigenous peoples.
- ***Environmental, cultural and developmental rights,*** which are sometimes called "third generation rights," and including the right to live in safe and healthy environments and that groups of people have the right to cultural, political, and economic development.

Amnesty International openly advocates four particular children's rights, including the end to juvenile incarceration without parole, an end to the recruitment of military use of children, ending the death penalty for people under 21, and raising awareness of human rights in the classroom. Human Rights Watch, an international advocacy organization, includes child labor, juvenile justice, orphans and abandoned children, refugees, street children and corporal punishment.

Scholarly study generally focuses children's rights by identifying individual rights. The following rights "allow children to grow up healthy and free":

- Freedom of speech
- Freedom of thought
- Freedom from fear
- Freedom of choice and the right to make decisions
- Ownership over one's body

Other issues affecting children's rights include the sale of children, child prostitution and child pornography.

### *Difference Between Children's Rights and Youth Rights*

"In the majority of jurisdictions, for instance, children are not allowed to vote, to marry, to buy alcohol, to have sex, or to engage in paid employment." Within the youth rights movement, it is believed that the key difference between children's rights and youth rights is that children's rights supporters generally advocate the establishment and enforcement of protection for children and youths, while youth rights (a far smaller movement) generally advocates the expansion of freedom for children and/or youths and of rights such as suffrage. Also, many people who support youth rights, are concerned with adolescents and not children.

### *Children's Rights in India*

India is a party to the UN declaration on the Rights of the Child 1959. Accordingly, it adopted a National Policy on Children in 1974. The policy reaffirmed the constitutional provisions for adequate services to children, both

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before and after birth and through the period of growth to ensure their full physical, mental and social development.

Accordingly, the government is taking action to review the national and state legislation and bring it in line with the provisions of the Convention. It has also developed appropriate monitoring procedures to assess progress in implementing the Convention-involving various stake holders in the society.

India is also a signatory to the World Declaration on the Survival, Protection and Development of Children. In pursuance of the commitment made at the World Summit, the Department of Women and Child Development under the Ministry of Human Resource Development has formulated a National Plan of Action for Children. Most of the recommendations of the World Summit Action Plan are reflected in India's National Plan of Action- keeping in mind the needs, rights and aspirations of 300 million children in the country.

The priority areas in the Plan are health, nutrition, education, water, sanitation and environment. The Plan gives special consideration to children in difficult circumstances and aims at providing a framework, for actualization of the objectives of the Convention in the Indian context.

The Convention on the Rights of the Child defines basic rights of children covering multiple needs and issues. India endorsed it on December 11, 1992.

Following are a few rights in the immediate purview of Smile Foundation as well as India.

***The Right to Education:*** 50% of Indian children aged 6-18 do not go to school Dropout rates increase alarmingly in class III to V, its 50% for boys, 58% for girls.

***The Right to Expression:*** Every child has a right to express himself freely in which ever way he likes. Majority of children however are exploited by their elders and not allowed to express.

***The Right to Information:*** Every child has a right to know his basic rights and his position in the society. High incidence of illiteracy and ignorance among the deprived and underprivileged children prevents them from having access to information about them and their society.

***The Right to Nutrition:*** More than 50% of India's children are malnourished. While one in every five adolescent boys is malnourished, one in every two girls in India is undernourished.

***The Right to Health and Care:*** 58% of India's children below the age of 2 years are not fully vaccinated. And 24% of these children do not receive any form of vaccination. Over 60% of children in India are anemic. 95 in every 1000 children born in India, do not see their fifth birthday. 70 in every 1000 children born in India, do not see their first birthday.

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***The Right to Protection from Abuse:*** There are approximately 2 million child commercial sex workers between the age of 5 and 15 years and about 3.3 million between 15 and 18 years. They form 40% of the total population of commercial sex workers in India. 500,000 children are forced into this trade every year.

***The Right to Protection from Exploitation:*** 17 million children in India work as per official estimates. A study found that children were sent to work by compulsion and not by choice, mostly by parents, but with recruiter playing a crucial role in influencing decision. When working outside the family, children put in an average of 21 hours of labour per week. Poor and bonded families often "sell" their children to contractors who promise lucrative jobs in the cities and the children end up being employed in brothels, hotels and domestic work. Many run away and find a life on the streets.

***The Right to Protection from Neglect:*** Every child has a right to lead a well protected and secure life away from neglect. However, children working under exploitative and inhuman conditions get neglected badly.

***The Right to Development:*** Every child has the right to development that lets the child explore her/his full potential. Unfavourable living conditions of underprivileged children prevents them from growing in a free and uninhibited way.

***The Right to Recreation:*** Every child has a right to spend some time on recreational pursuits like sports, entertainment and hobbies to explore and develop. Majority of poor children in India do not get time to spend on recreational activities.

***The Right to Name & Nationality:*** Every child has a right to identify himself with a nation. A vast majority of underprivileged children in India are treated like commodities and exported to other countries as labour or prostitutes.

***The Right to Survival:*** Of the 12 million girls born in India, 3 million do not see their fifteenth birthday, and a million of them are unable to survive even their first birthday. Every sixth girl child's death is due to gender discrimination.

### National Commission for Protection of Child Rights

In order to ensure child rights practices and in response to India's commitment to UN declaration to this effect, the government of India set up a National Commission for Protection of Child Rights.

The Commission is a statutory body notified under an Act of the Parliament on December 29, 2006. Besides the chairperson, it will have six members from the fields of child health, education, childcare and development, juvenile justice, children with disabilities, elimination of child labour, child psychology or sociology and laws relating to children.

The Commission has the power to inquire into complaints and take suo motu notice of matters relating to deprivation of child's rights and non-

implementation of laws providing for protection and development of children among other things.

Aimed at examining and reviewing the safeguards provided by the law to protect child rights, the Commission will recommend measures for their effective implementation. It will suggest amendments, if needed, and look into complaints or take suo motu notice of cases of violation of the constitutional and legal rights of children.

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The Commission is to ensure proper enforcement of child rights and effective implementation of laws and programmes relating to children- enquiring into complaints and take suo motu cognizance of matters relating to deprivation of child rights; non-implementation of laws providing for protection and development of children and non-compliance of policy decisions, guidelines or instructions aimed at their welfare and announcing relief for children and issuing remedial measures to the state governments.

## 1.8 WOMEN'S RIGHTS

The term women's rights refers to freedoms and entitlements of women and girls of all ages. These rights may or may not be institutionalized, ignored or suppressed by law, local custom, and behavior in a particular society. These liberties are grouped together and differentiated from broader notions of human rights because they often differ from the freedoms inherently possessed by or recognized for men and boys, and because activists for this issue claim an inherent historical and traditional bias against the exercise of rights by women and girls.

Issues commonly associated with notions of women's rights include, though are not limited to, the right: to bodily integrity and autonomy; to vote (suffrage); to hold public office; to work; to fair wages or equal pay; to own property; to education; to serve in the military or be conscripted; to enter into legal contracts; and to have marital, parental and religious rights. Women and their supporters have campaigned and in some places continue to campaign for the same rights as men.

The Government of India has formulated many laws to protect the rights of women who are being ill-treated by their husbands and in-laws. But how many of these laws really help women gain custody of their children and protect their property? The woman's husband and in-laws usually claim all the wealth and property and also the custody of the child.

At the end of the day, everything depends on the verdict of the judge. In case the lady is able to appoint an influential advocate, she may win the case, but this rarely happens. Nowadays, money and muscle power are used to obtain almost anything one desires.

Wealthy individuals get away with almost everything; with no questions being asked. There are some women who even use these laws to their advantage

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and get all that they want from the husband and his family. Again, this also depends on the verdict of the judge. If the verdict is passed in favour of the wrong individual, an appeal has to be made again in a higher court and more money has to be spent.

In such a case, it is suggested that more judges from different parts of the country and from different religious backgrounds be appointed, so as to give the individuals a fair hearing and good judgment. This will also make it possible to reach a judgment without any delays.

Broadly speaking we can classify rights into following types:

A. Constitutional Rights,

B. Legal Rights, and

C. Other rights

**A. Constitutional Rights** include the rights which are enshrined under the fundamental rights and those which are mentioned under the Directive principles of state policy. These include the right to equality, right to have equal remuneration,right to have good health,right to have due respect and right to have maternity banefits, along with other rights.

**B. Legal Rights** include the rights which are civil rights which include the rights of equal standing of the women like that of the men,equal treatmtnt at the workplace. Where she is not capable to claim her paternal property, now she can do that. She can adopt a child even at her bachelorhood & widowhood. Like such rights are given to her.

***Crimrinal rights*** include that she could not be given the death sentence except in rarest cases, she could not be called at any police station after sunset, she could not be arrested without the presence of the women police officer. Along with that she should be given all the proper medical assistance.

**C. Other Rights** includes social rights,which includes that she should be given right to live, right to proper health.

***Educational Rights*** which includes that she should be equal right of getting education of her choice, she should be educated.

***Physical Rights*** includes right to have control over her body, even where she is a women of easy virtue, to say no to the expansion of the family, to resist the physical violence against her.

## 1.9 SCHEDULED CASTES AND SCHEDULED TRIBES

Scheduled Castes ("SC"s) and Scheduled Tribes ("ST"s) are Indian population groupings that are explicitly recognized by the Constitution of India, previously called the "depressed classes" by the British. SCs/STs together comprise over 24% of India's population, with SC at over 16% and ST over 8% as per the

2001 Census. The proportion of Scheduled Castes and Scheduled Tribes in the population of India has steadily risen since independence in 1947.

Post Independence Scheduled Castes have been benefited by Reservation policy. The policy was made an integral part of Constitution by the efforts of Dr. Ambedkar who was the leader of the Depressed classes and participated in Round Table Conferences and fought for the rights of Depressed classes. The Constitution lays down general principles for the policy of affirmative action for the SCs and STs.

Scheduled castes and scheduled tribes in 2010 Some of the sub-castes of scheduled castes have become relatively better economically. As a benefit of Reservation they have acquired technical and management education as well. Many of them are working in the Government sector, again because of a certain percentage of seats specifically reserved for them in the Government sector. However, the prevailing condition of SCs/STs can not be ascertained in the private sector because of absence of reservation in private sector and due to the absence of any data on the community wise break up of work force in private sector.

### *Constitutional Framework for Safeguarding of Interests*

The Constitution provides a framework with a three pronged strategy to improve the situation of SCs and STs.

1. ***Protective Arrangements*** - Such measures as are required to enforce equality, to provide punitive measures for transgressions, to eliminate established practices that perpetuate inequities, etc. A number of laws were enacted to operationalize the provisions in the Constitution. Examples of such laws include The Untouchability Practices Act, 1955, Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, The Employment of Manual scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, etc.
2. ***Affirmative action*** - provide positive preferential treatment in allotment of jobs and access to higher education, as a means to accelerate the integration of the SCs and STs with mainstream society. Affirmative action is also popularly referred to as Reservation.
3. ***Development*** - Provide for resources and benefits to bridge the wide gap in social and economic condition between the SCs/STs and other communities.

### *National Commissions*

To effectively implement the various safeguards built into the Constitution and other legislations, the Constitution, under Articles 338 and 338A, provides for two statutory commissions - the National Commission for Scheduled Castes, and National Commission for Scheduled Tribes.

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In the original Constitution, Article 338 provided for a Special Officer, called the Commissioner for SCs and STs, to have the responsibility of monitoring the effective implementation of various safeguards for SCs/STs in the Constitution as well as other related legislations and to report to the President. To enable efficient discharge of duties, 17 regional offices of the Commissioner were set up all over the country.

In the meanwhile there was persistent representation for a replacement of the Commissioner with a multi-member committee. It was proposed that the 48th Amendment to the Constitution be made to alter Article 338 to enable said proposal. While the amendment was being debated, the Ministry of Welfare issued an administrative decision to establish the Commission for SCs/STs as a multi-member committee to discharge the same functions as that of the Commissioner of SCs/STs. The first commission came into being in August 1978. The functions of the commission were modified in September 1987 to advise Government on broad policy issues and levels of development of SCs/STs.

In 1990 that the Article 338 was amended to give birth to the statutory National Commission for SCs and STs via the Constitution (Sixty fifth Amendment) Bill, 1990. The first Commission under the 65th Amendment was constituted in March 1992 replacing the Commissioner for Scheduled Castes and Scheduled Tribes and the Commission set up under the Ministry of Welfare's Resolution of 1987.

In 2002, the Constitution was again amended to split the National Commission for Scheduled Castes and Scheduled Tribes into two separate commissions - the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes.

## SUMMARY

- Rights are legal, social, or ethical principles of freedom or entitlement — *i.e.*, rights are normative rules about what is allowed of people or owed to people, according to some legal system, social convention, or ethical theory.
- Legal rights are, clearly, rights which exist under the rules of legal systems.
- Civil and political rights are a class of rights and freedoms that protect individuals from unwarranted action by government and private organizations and individuals and ensure one's ability to participate in the civil and political life of the state without discrimination or repression.
- Equality before the law or equality under the law or legal egalitarianism is the principle under which each individual is subject to the same laws, with no individual or group having special legal privileges.
- Children's rights are the perceived human rights of children with particular attention to the rights of special protection and care afforded to the young, including their right to association with both biological parents, human

identity as well as the basic needs for food, universal state-paid education, health care and criminal laws appropriate for the age and development of the child.

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## REVIEW QUESTIONS

1. What is legal right? Give a comparative analysis of legal and natural right.
2. Do you think civil rights as a weapon in hand of citizens against state? Explain.
3. Which are those protective measures given to an accuse in criminal procedure code? discuss.
4. What do you understand by equality before law?
5. What are those rights granted to children in India?
6. How are scheduled castes and scheduled tribes protected by Indian law?

## FURTHER READINGS


- *An Introduction to Legal Systems of the World* : Edited by Gokulesh Sharma, Deep and Deep, Delhi, 2008.
- *Challenges in Human Rights : A Solid Work Perspective* : Edited by Elisabeth Reichert, Rawat Pub, Delhi, 2008.
- *Child Abuse and Human Rights* (2 Vols-Set) : Edited by A.K. Jha, Anmol Pub, Delhi, 2006.

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# UNIT – II

# LAW IN INDIA

STRUCTURE



*LEARNING OBJECTIVES*

After going through this unit, students will be able to :

- understand the concept and use of substantive law;
- discuss the concept, use and importance of procedure law;
- explain the civil laws such as divorce and juvenile justice laws.

## 2.1 INTRODUCTION

Law of India refers to the system of law which presently operates in India. It is largely based on English common law because of the long period of British colonial influence during the period of the British Raj. Much of contemporary Indian law shows substantial European and American influence. Various

legislations first introduced by the British are still in effect in their modified forms today. During the drafting of the Indian Constitution, laws from Ireland, the United States, Britain, and France were all synthesized to get a refined set of Indian laws, as it currently stands. Indian laws also adhere to the United Nations guidelines on human rights law and the environmental law. Certain international trade laws, such as those on intellectual property, are also enforced in India.

Indian family law is complex, with each religion having its own specific laws which they adhere to. In most states, registering of marriages and divorces is not compulsory. There are separate laws governing Hindus, Muslims, Christians, Sikhs and followers of other religions. The exception to this rule is in the state of Goa, where a Portuguese uniform civil code is in place, in which all religions have a common law regarding marriages, divorces and adoption.

## 2.2 DIVISION OF LAW

The two main branches of law are substantive and procedural law. Procedural law sets forth the steps and procedures involved in enforcing civil and criminal laws. Substantive law is the sector of the legal system that determines the obligations and rights of people and legal entities. This branch of the legal system refers to private law and public law and included contracts, real estate, torts and criminal justice.

Substantive laws derive from common law as well as legislative statutes. As more statutes are created and passed, the volume of substantive law increases and changes. In the 20th century, substantive laws were refined to replace many statutes based more upon conservative common law principles. For example, in the United States, new substantive laws have provided the Uniform Commercial Code governing commercial transactions. This code has been adopted in part or whole by all states as the authority of substantive law in the commercial sector and has made application of complex legal principles more uniform in order to facilitate more consistent laws of interstate commerce.

Some legal concepts seem to overlap both branches of law, which can cause confusion. Substantive law defines how a crime or tort will be charged and how the evidence and case facts will be presented and handled. Procedural law dictates how the processes leading up to trial and including the trial will occur. The criminal code that sets out the elements of a crime and what evidence is necessary to charge and support a verdict of guilt is substantive in nature, and the procedural laws that determine how the rights of the plaintiff and defendant will be protected and enforced throughout the course of the case are procedural. For example, the definition of manslaughter is substantive, and the right to a speedy trial for a person accused of manslaughter is procedural.

Many people consider procedural law more important than substantive law, but one would not be effective without the other. Substantive law concepts

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define what is right and wrong but also give the expectation that doing wrong will come with a penalty. Police and courts rely on procedural law to determine how evidence is obtained, searches are conducted, arrests are made, bail is set, defendants are treated, juries are chosen, presentation of evidence will occur at trial and sentencing will proceed. Without laws of a substantive nature, procedural law would not have much to regulate, and without those of a procedural nature, fair and consistent application of substantive law would be nearly impossible to maintain and enforce.

## 2.3 SUBSTANTIVE LAW

Substantive law is the statutory or written law that governs rights and obligations of those who are subject to it. Substantive law defines the legal relationship of people with other people or between them and the state. Substantive law stands in contrast to procedural law, which comprises the rules by which a court hears and determines what happens in civil or criminal proceedings. Procedural law deals with the method and means by which substantive law is made and administered. The time allowed for one party to sue another and the rules of law governing the process of the lawsuit are examples of procedural laws. Substantive law defines crimes and punishments (in the criminal law) as well as civil rights and responsibilities in civil law. It is codified in legislated statutes or can be enacted through the initiative process.

Another way of summarizing the difference between substantive and procedural is as follows: Substantive rules of law define rights and duties, while procedural rules of law provide the machinery for enforcing those rights and duties. However, the way to this clear differentiation between substantive law and, serving the substantive law, procedural law has been long, since in the Roman civil procedure the actio included both substantive and procedural elements.

### *Substantive Law that Creates, Discovers and Defines the Rights and Duties*

Substantive law creates, defines, and regulates rights, as opposed to adjective, procedural, or remedial law, which provides a method of enforcing rights. It is exactly what its name implies: the body, essence, and substance that guides the conduct of citizens. It encompasses principles of right and wrong as well as the principle that wrong will result in penalty. It includes the rights and duties of citizens, and it provides the basis to resolve issues involving those rights. Every citizen has the right to live and enjoy his or her own property free from intrusion by other citizens.

All members of a populous society are obligated to respect and to not interfere with the rights of others. Substantive law establishes the extent of this right and obligation to which all persons are subject.

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When a person engages in conduct that has an adverse effect on another individual, an injury may occur. An innocent injured party who wants to be compensated for the damage caused by the injury may request assistance from the legal system on the basis that the injuring party acted wrongfully. Such wrongful conduct gives rise to the dispute between the two parties. The court will examine the situation to determine whether the conduct of the party alleged to be at fault was indeed wrongful by society's standards. If it was, the party will be judged and will be penalized. If it was not, the party will be judged innocent. In either situation, the court resolves the issue based on what society has determined to be right and wrong conduct between individuals and entities.

The part of the law that creates, defines, and regulates rights, including, for example, the law of contracts, torts, wills, and real property; the essential substance of rights under law.

Substantive law and procedural law are the two main categories within the law. Substantive law refers to the body of rules that determine the rights and obligations of individuals and collective bodies. Procedural law is the body of legal rules that govern the process for determining the rights of parties.

Substantive law refers to all categories of public and private law, including the law of contracts, real property, torts, and criminal law. For example, criminal law defines certain behavior as illegal and lists the elements the government must prove to convict a person of a crime.

### *Domain of Substantive Law*

Substantive law is the area of the law which concerns the definition of rights and responsibilities. This is in contrast with procedural law, which describes how those rights and responsibilities are enforced. To illustrate an example, laws which define the various degrees of murder are substantive laws, while laws which protect the right to a speedy trial for people accused of murder are procedural laws. Substantive and procedural law are the two main areas of the law, and they are closely interconnected with each other, as one defines the rules of society while the other creates the framework for enforcing them.

The body of substantive law includes things like defining crimes and prescribing appropriate punishments or providing sentencing guidelines which can be used when determining how someone should be sentenced, along with discussions about legal relationships between people as well as entities. People can be given certain rights under substantive law along with responsibilities which they must fulfill, and the law can also define situations in which liability is incurred.

Substantive law includes both civil and criminal law. For example, definitions of torts are an example of substantive law because they deal with describing infractions of the law, determining which actions would be considered unacceptable under the law, and prescribing remedies for tort violations. Likewise,

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laws against sexual assault and physical abuse are in the criminal code and are additional examples of substantive laws.

Substantive law is usually drafted in the legislature and passed by vote, although there are some regions of the world where laws can be put to a public vote on the ballot. There are also cases in which laws may be repealed because they are deemed outdated or unnecessary. Several governments have embarked on efforts to clear old laws which are no longer enforced from their legal codes for the purpose of making substantive law somewhat more concise and accurate.

In procedural law, rights and responsibilities are not defined, but the law does cover how substantive law is enforced, ranging from protecting rights which people are due under the law to laying out how trials should be conducted. Violations of procedural law can result in questions about whether or not a case was handled justly, and in some cases can cause a verdict to be overturned not because someone is necessarily innocent, but because procedure was not followed. This is one reason why people who work in law enforcement are very careful about following procedure.

### *Indian Penal Code*

Indian Penal Code is a document that covers almost all the crime happening in the society. It is a piece ot British colonial legislation dating from 1860. Now it provides a penal code for all of India. The code applies to any offence committed by an Indian Citizen anywhere and on any Indian registered ship or aircraft. The Indian Penal Code came into force in 1862 (during the British Raj) and is regularly amended, such as to inc aspects of the Criminal Law. The nature of these have led to allegations of abuse of those laws.

After independence, Indian Penal Code was inherited by Pakistan(now called Pakistan Penal Code) and Bangladesh, formerly part of British India. It was also adopted wholesale by the British colonial authorities in Burma, Sri Lanka, Malaysia, Singapore and Brunei, and remains the basis of the criminal codes in those countries.

The draft of the Indian Penal Code was prepared by the First Law Commission. It was chaired by Lord Macaulay. Its basis is the law of England freed from superfluities, technicalities and local peculiarities. Suggestions were also derived from the French Penal Code and from Livingstone's Code of Louisiana. The draft underwent a very careful revision at the hands of Sir Barnes Peacock, Chief Justice, and puisne Judges of the Calcutta Supreme Court who were members of the Legislative Council, and was passed into law in 1860, unfortunately Macaulay did not survive to see his masterpiece enacted into a law.

Though it is principally the work of a man who had hardly held a brief, and whose time was devoted to politics and literature, it was universally acknowledged to be a monument of codification and an everlasting memorial to

the high juristic attainments of its distinguished author. For example even cyber crimes can be punished under the code.

**Reforms**

Indian Penal Code is widely criticized especially from the human rights angle.

1. The section 377 has been used against legitimate rights of sexual minorities in India. This section has been termed as the biggest hurdle in dealing with control of HIV/AIDS in the Country. This section was revoked by the Delhi High Court on the 2nd of July, 2009.
2. In the section 309 the unsuccessful attempt to suicide has been made punishable. Rather than providing suitable counseling to the victim, the section punishes the victim. This section has been the result of the colonial society where people did not have rights of their own.
3. Section 497 deals with adultery, which punishes even consensual sex between adults.

In 2003, the Malimath Committee submitted its report recommending several far-reaching penal reforms including separation of investigation and prosecution (similar to the CPS in the UK) to streamline the clogged up Indian criminal justice system.

The essence of the report was a perceived need for shift from an adversarial to an inquisitorial criminal justice system, based on the Continental European systems.

## 2.4 PROCEDURE LAW

Procedural law is a term used to describe a set of rules governing how all aspects of a court case are conducted, including the events that occur before, during, and after the trial. It applies in both criminal and civil cases as well as in administrative proceedings, although different procedural rule sets may be used in each of these categories. Procedural rules can also be unique to certain categories of law. For example, bankruptcy courts often have their own unique rules for conducting a suit.

The primary purpose behind procedural law is to make certain that every case brought to court is justly and consistently treated. Uniform legal procedural rules help ensure that courts do not impose criminal or civil penalties against a person without due process or fundamental justice. For instance, procedural law helps ensure that a defendant in a civil lawsuit or a criminal case has received notice of the suit or case and has been given an opportunity to defend himself and present evidence in court.

Despite providing parties with a basic level of fairness, procedural law can be unfair in some circumstances because it is often rigid and complex. This can

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be particularly disadvantageous for a party who is pro se, or unrepresented by a lawyer. Due to unfamiliarity with the rules, a pro se party may inadvertently violate certain procedural laws. As a result, he could be penalized or his case could even be thrown out of court.

In a typical case, procedural law would govern jurisdiction, jury selection, entry of evidence, and the process for appealing a verdict or conviction. In a criminal court case, it dictates the non-substantive issues relating to prosecuting a crime. Procedural rules can also specify a statute of limitations for bringing a case, which is a time limitation on filing a civil suit with a court or on prosecuting a crime.

Procedural law is distinct from substantive law, which is primarily concerned with setting forth rights and responsibilities of people or entities. Substantive law includes criminal law, real property law, tort law, and contract law. Procedural law, on the other hand, establishes a mechanism for determining those rights and responsibilities. To illustrate, substantive criminal law may dictate that murder is illegal and that the prosecution must prove certain elements in order to convict the defendant of murder. Procedural criminal law in that instance would detail the procedural rules relating to the crime, such as that the defendant has the right to a jury trial.

Procedural law prescribes a method of enforcing rights or of obtaining redress for the invasion of rights. The basic function of civil procedural law is to facilitate the movement of a lawsuit through the legal system. Procedural laws are created to ensure that each party will be afforded fair and impartial treatment.

Further, procedural law has its goal that judges and juries will receive only evidence that will allow them to make a fair and impartial decision. Civil procedure can be likened to a large piece of machinery that assembles a product. It does not feel or possess opinions. The function of procedural law is to assemble all of the pieces into a complete product. The parties to the suit provide the pieces to the product at appropriate times and in the appropriate manner. The completed product delivered from the machine is the decision that resolves the dispute. This decision is based on the pieces of information (substantive law and facts of the case) that have been fed into the machine and assembled.

Procedural law also plays a part in the litigation and includes the following:

1. The time limit for bringing a lawsuit.
2. The manner in which the lawsuit is begun (e.g., by filing a complaint or petition).
3. The proper way to inform the defendant that a lawsuit has been filed.
4. The types of information that each party must release to the other party.
5. The procedure at trial.
6. The evidence that can be introduced at trial.

7. The method for appealing the decision if the losing party feels the decision was unfair.

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### *Creating Laws of Procedure*

Laws of procedure, sometimes referred to as rules, are created by the authority of the legislature. Procedural law applies to all people and is created to facilitate an organized court system and to protect the constitutional guarantees to citizens.

Because the laws deal with the mechanics of the court system, judges are often better equipped than the legislature to create fair and reasonable rules that provide for an efficient court system. Therefore, in many jurisdictions, the legislatures vest the courts with authority to create such laws. At the very least, the courts have input into what the procedural laws should be.

Even though they are created with the assistance of the judicial branch, procedural laws are adopted by the legislature as statutes. Thus, they can often be found in the published statutes along with the other enactments of the legislature. Although procedural rules are not published with the opinions of the judges on individual cases, interpretations of the rules often appear in judicial opinions.

### *Types of Procedural Law*

For the sake of convenience, procedural law has been divided into several categories.

A person researching the law has a much easier time finding the particular laws or rules that apply to a given case if the law is organized according to subject. Most often, a jurisdiction will divide its procedural law into the following categories:

1. Rules of civil procedure
2. Rules of criminal procedure
3. Rules of evidence
4. Rules of appellate procedure

In addition to having the power to create rules that are enacted into law for an entire jurisdiction, courts generally have the power to create local rules, which apply only to the court that creates them and to no other court. An example would be a county rules court. Although the procedural laws of a state apply to all of the state courts including county courts, each county court may enact its own local rules as well. Local rules are designed to supplement the state laws of procedure.

The rules of civil procedure include the laws that dictate how a suit will be filed, all pretrial matters, trial proceedings (with the possible exception of rules of evidence), and posttrial issues until the case is concluded or an appeal is initiated.

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Most state rules of civil procedure follow or are similar to a standard model. It should be noted, however, that each state has the right to create its own procedural rules that are followed and enforced in the state courts and that may vary from the standard rules followed in most jurisdictions.

### *Legal Procedure*

Although different legal processes aim to resolve many kinds of legal disputes, the legal procedures share some common features. All legal procedure, for example, is concerned with due process. Absent very special conditions, a court can not impose a penalty - civil or criminal - against an individual who has not received notice of a lawsuit being brought against them, or who has not received a fair opportunity to present evidence for themselves.

The standardization for the means by which cases are brought, parties are informed, evidence is presented, and facts are determined is intended to maximize the fairness of any proceeding. Nevertheless, strict procedural rules have certain drawbacks. For example, they impose specific time limitations upon the parties that may either hasten or (more frequently) slow down the pace of proceedings. Furthermore, a party who is unfamiliar with procedural rules may run afoul of guidelines that have nothing to do with the merits of the case, and yet the failure to follow these guidelines may severely damage the party's chances. Procedural systems are constantly torn between arguments that judges should have greater discretion in order to avoid the rigidity of the rules, and arguments that judges should have less discretion in order to avoid an outcome based more on the personal preferences of the judge than on the law or the facts.

Legal procedure, in a larger sense, is also designed to effect the best distribution of judicial resources. For example, in most courts of general jurisdiction in the United States, criminal cases are given priority over civil cases, because criminal defendants stand to lose their freedom, and should therefore be accorded the first opportunity to have their case heard.

### *Criminal Code*

A Criminal Code is a compilation of government laws that outline a nation's laws regarding criminal offenses, and the maximum and minimum punishments that courts can impose upon offenders when such crimes are committed (for example: vandalism, retail theft, theft of property, mob action, criminal trespass).

### *Indian Evidence Act*

The Indian Evidence Act, originally passed by the British parliament in 1872, contains a set of rules and allied issues governing admissibility of any evidence in the Indian courts of law.

### Importance

The enactment and adoption of the Indian Evidence Act was a path-breaking judicial measure introduced in India, which changed the entire system of concepts pertaining to admissibility of evidences in the Indian courts of law. Up to that point of time, the rules of evidences were based on the traditional legal systems of different social groups and communities of India and were different for different persons depending on his or her caste, religious faith and social position. The Indian Evidence Act removed this anomaly and differentiation, and introduced a standard set of law applicable to all Indians.

The Indian Evidence act of 1872 is mainly based upon the firm work by Sir James Fitzjames Stephen, who could be called the founding father of this comprehensive piece of legislation.

### The Act

The Indian Evidence Act, identified as Act no. 1 of 1872, and called the Indian Evidence Act, 1872, has eleven chapters and 167 sections, and came into force 1st September 1872. At that time, India was a part of the British Empire. Over a period of more than 125 years since its enactment, the Indian Evidence Act has basically retained its original form except certain amendments from time to time.

### Applicability

When India gained independence on 15th August 1947, the Act continued to be in force throughout the Republic of India and Pakistan, except the state of Jammu and Kashmir. The Act continues in force in India, however it was repealed in Pakistan in 1984 by the Evidence Order 1984.

## 2.5 PROCEDURAL LAW VS SUBSTANTIVE LAW

Procedural law comprises the set of rules that govern the proceedings of the court in criminal lawsuits as well as civil and administrative proceedings. The court needs to conform to the standards setup by procedural law, while during the proceedings. These rules ensure fair practice and consistency in the "due process".

Substantive law is a statutory law that deals with the legal relationship between people or the people and the state. Therefore, substantive law defines the rights and duties of the people, but procedural law lays down the rules with the help of which they are enforced. The differences between the two need to be studied in greater detail, for better understanding.

#### *Differences in Structure and Content*

In order to understand the differences between the structure and content of substantative and procedural law, let's use an example. If a person is accused

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and undergoing a trial, substantive law prescribes the punishment that the under-trial will face if convicted. Substantaive law also defines the types of crimes and the severity depending upon factors such as whether the person is a repeat offender, whether it is a hate crime, whether it was self-defense etc. It also defines the responsibilities and rights of the accused.

Procedural law, on the other hand provides the state with the machinery to enforce the substantive laws on the people. Procedural law comprises the rules by which a court hears and determines what happens in civil or criminal proceedings. Procedural law deals with the method and means by which substantive law is made and administered. In other words, substantive law deals with the substance of the case, how the charges are to be handled and how the facts are to be dealt with; while procedural law will give a step by step action plan on how the case is supposed to proceed in order to achieve the desired goals. Therefore its procedural law that helps decide whether the case requires trial or otherwise.

### *Powers of Substantive vs Procedural Laws*

Substantive law is an independent set of laws that decide the fate of a case. It can actually decide the fate of the under-trial, whether he wins or loses and even the compensation amounts etc. Procedural laws on the other hand, have no independent existence. Therefore, procedural laws only tell us how the legal process is to be executed, whereas substantive laws have the power to offer-legal solution.

### *Differences in Application*

Another important difference lies in the applications of the two. Procedural laws are applicable in non legal contexts, whereas substantive laws are not. So, basically the essential substance of a trial is underlined by substantive law, whereas procedural law chalks out the steps to get there.

### *Example*

An example of substantive law is how degrees of murder are defined. Depending upon the circumstances and whether the muderer had the intent to commit the crime, the same act of homicide can fall under different levels of punishment. This is defined in the statute and is substantive law.

Examples of procedural laws include the time allowed for one party to sue another and the rules governing the process of the lawsuit.

## 2.6 CIVIL LAW

Civil procedure is the body of law that sets out the rules and standards that courts follow when adjudicating civil lawsuits (as opposed to procedures in criminal law matters). These rules govern how a lawsuit or case may be

commenced, what kind of service of process (if any) is required, the types of pleadings or statements of case, motions or applications, and orders allowed in civil cases, the timing and manner of depositions and discovery or disclosure, the conduct of trials, the process for judgment, various available remedies, and how the courts and clerks must function.

### *Divorce in India*

All major religions have their own laws which govern divorces within their own community, and separate regulations exist regarding divorce in interfaith marriages.

Hindus, including Buddhists, Sikhs and Jains, are governed by the Hindu Marriage Act, 1955; Christians by the Indian Divorce Act, 1869; Parsis by the Parsi Marriage and Divorce Act, 1936; and Muslims by the Dissolution of Muslim Marriages Act, 1939, which provides the grounds on which women can obtain a divorce, and the uncodified civil law. Civil marriages and inter-community marriages and divorces are governed by the Special Marriage Act, 1956 .Other community specific legislation includes the Native Converts' Marriage Dissolution Act, 1866 that allows a Hindu to appeal for a divorce if a spouse converts to Christianity.

#### Grounds for Divorce

In most Western nations, there are approximately 16 distinct reasons for which divorces are granted. In India, however, only five main reasons are generally accepted as sufficient grounds for divorce.

Adultery. While no formal definition of adultery exists, it does have "a fairly established meaning in matrimonial law", namely "the voluntary sexual intercourse of a married man or woman with a person other than the offender's wife or husband". While the law considers it valid grounds for either sex, adulterous women are "judged more harshly" than men.

The various religious regulations are not unanimous on this issue. The law regarding Hindus allows divorce to be granted on the grounds of infidelity of either husband or wife. The Christian law, however, would traditionally not have granted a divorce to a woman solely on the grounds of adultery. She would have had to prove another violation, such as cruelty .A recent Bombay High Court decision "recognised cruelty and desertion as independent grounds for the dissolution of a Christian marriage," striking down a section of the law that allowed for an unconstitutional distinction between the sexes.

**Desertion :** The three main components of desertion are the "disruption of cohabitation, absence of just or reasonable cause and their combination throughout three years" before the abandoned spouse may petition for a divorce. There also must be an obvious intent on the part of the offending spouse to remain

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permanently apart from the other. This statute also applies to cases in which a spouse has been heard from for at least seven years .

**Cruelty :** As with adultery, "the definition of the type of behavior that constitutes cruelty varies according to the gender of the petitioner" of the divorce. "Despite the fact that cruelty is often equally available to husbands and wives, the way in which the law is interpreted and applied suggests that women and men are evaluated by rather different standards" .This category includes both physical and mental abuse and neglect.

A court decision made in early May 1997 made cruelty sufficient grounds for a Christian woman to obtain a; previously, the law required both adultery and cruelty to be proven. The national Indian Christian community seems to have embraced this judgment.

**Impotency :** This refers to the physical inability of the couple to consummate the marriage or the refusal by one spouse to do so. Some cases have established that sterility can be construed to mean non-consummation if the other partner is not aware of the condition before the marriage.

**Chronic Disease :** Both mental and physical illnesses are included in this category, as well as sexually transmitted diseases. Not all religions recognize identical diseases as grounds for divorce. Christians and Parsis do not allow divorce for a sexually transmitted disease or leprosy while the other communities do.

### *Divorce under Muslim Law*

Muslims are governed by their personal laws under which "Nikah" (i.e. marriage) is a contract and may be permanent or temporary and permits a man 4 wives if he treats all of them equally. To have a valid "Nikah" under the Muslim Law, presence of a Qazi (Priest) is not necessary. Merely a proposal in the presence and hearing of two sane males or one sane male and two sane female adults, all Muslims and acceptance of the said proposals at the same time constitute a valid Nikah under the Muslim Personal Law. A husband can divorce his wife without any reasons merely by pronouncing thrice the word "Talak". However for a Muslim woman to obtain divorce certain conditions are necessary.

### *Juvenile Justice Act*

The Juvenile Justice Act 1986 is the primary legal framework for juvenile justice in India. The act provides for a special approach towards the prevention and treatment of juvenile delinquency and provides a framework for the protection, treatment and rehabilitation of children in the purview of the juvenile justice system. The law replaced the Children Act, 1960.

The first legislation on juvenile justice in India came in 1850 with the Apprentic Act which required that children between the ages of 10-18 convicted in courts to be provided vocational training as part of their rehabilitation process.

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This act was transplanted by the Reformatory Schools Act, 1897, the Indian Jail Committee and later the Children Act of 1960. The Juvenile Justice Bill was first introduced in the Lok Sabha on 22 August 1986.

*The Act*

This act was amended in 2000 and is now known as the Juvenile Justice (Care and Protection) Act.

Section 21 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (56 of 2000) as amended by the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006 (33 of 2006)., states that: "Prohibition of *publication of name, etc.; of juvenile or child in need of care and protection* involved in any proceeding under the Act-(1) No report in any newspaper, magazine, news-sheet or visual media of any inquiry regarding a juvenile in conflict with law or a child in need of care and protection under this Act shall disclose the name, address or school or any other particulars calculated to lead to the identification of the juvenile or child shall nor shall any picture of any such juvenile or child shall be published: Provided that for any reason to be recorded in writing, the authority holding the inquiry may permit such disclosure, if in its opinion such disclosure is in the interest of the juvenile or the child. (2) Any person who contravenes the provisions of sub-section (1), shall be liable to a penalty which may extend to twenty-five thousand rupees".

## 2.7 DIFFERENCES BETWEEN CIVIL AND CRIMINAL PROCEDURE

Criminal and civil procedure are different. Although some systems, including the English, allow private persons to bring a criminal prosecution against another person, prosecutions are nearly always started by the state, in order to punish the defendant. Civil actions, on the other hand, are started by private individuals, companies or organisations, for their own benefit. The cases are usually in different courts, and juries are not so often used in civil cases.

In criminal matters, action is taken by the "state" (either federal, state, or local government agencies) against an individual for a violation of the law. A criminal matter can result a sentence such as a fine, probation or time in jail. The sentence is imposed upon a defendant who pleads or is found guilty to keep him from acting in the same manner in the future and also to deter others from acting in a similar manner. Since a criminal matter can result in the "state" taking away a person's freedom, there are additional constitutional protections built into the rules of criminal procedure.

In civil matter, the controversy is between two or more "people" ("people" can include individuals, businesses or government agencies). Most often, the result is an award of money to be paid by one party to the other. The judgment is imposed to make the aggrieved person "whole" for the harm that has been caused

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by the other. A judgment in a civil matter does not include the imposition of a criminal sentence.

The rules of civil procedure are different than that of criminal procedure because proceedings are different.

Most countries make a clear distinction between civil and criminal procedure. For example, a criminal court may force a convicted defendant to pay a fine as punishment for his crime, and the legal costs of both the prosecution and defence. But the victim of the crime generally pursues his claim for compensation in a civil, not a criminal, action. In France and England, however, a victim of a crime may incidentally be awarded compensation by a criminal court judge.

Evidence from a criminal trial is generally admissible as evidence in a civil action about the same matter. For example, the victim of a road accident does not directly benefit if the driver who injured him is found guilty of the crime of careless driving. He still has to prove his case in a civil action, unless the doctrine of collateral estoppel applies, as it does in most American jurisdictions. In fact he may be able to prove his civil case even when the driver is found not guilty in the criminal trial, because the standard to determine guilt is higher than the standard to determine fault. However, if a driver is found by a civil jury not to have been negligent, a prosecutor may be estopped from charging him criminally.

If the plaintiff has shown that the defendant is liable, the main remedy in a civil court is the amount of money, or "damages", which the defendant should pay to the plaintiff. Alternative civil remedies include restitution or transfer of property, or an injunction to restrain or order certain actions.

The standards of proof are higher in a criminal case than in a civil one, since the state does not wish to risk punishing an innocent person. In English law the prosecution must prove the guilt of a criminal "beyond reasonable doubt"; but the plaintiff in a civil action is required to prove his case "on the balance of probabilities". Thus, in a criminal case a crime cannot be proven if the person or persons judging it doubt the guilt of the suspect and have a reason (not just a feeling or intuition) for this doubt. But in a civil case, the court will weigh all the evidence and decide what is most probable.

## SUMMARY

- The two main branches of law are substantive and procedural law. Procedural law sets forth the steps and procedures involved in enforcing civil and criminal laws.
- Substantive law is the statutory or written law that governs rights and obligations of those who are subject to it. Substantive law defines the legal relationship of people with other people or between them and the state.

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- Procedural law is a term used to describe a set of rules governing how all aspects of a court case are conducted, including the events that occur before, during, and after the trial.
- Civil procedure is the body of law that sets out the rules and standards that courts follow when adjudicating civil lawsuits (as opposed to procedures in criminal law matters).
- The Juvenile Justice Act 1986 is the primary legal framework for juvenile justice in India. The act provides for a special approach towards the prevention and treatment of juvenile delinquency and provides a framework for the protection, treatment and rehabilitation of children in the purview of the juvenile justice system.

## REVIEW QUESTIONS

1. What are the essential features of substantive law?
2. What is a procedure law? Classify it also.
3. Disscuss the importance of Indian Evidence Act.
4. What is a civil law?
5. Give a comparative explaination of civil and criminal procedure.

## FURTHER READINGS


- Mulla, Code of Civil Procedure, Universal, Delhi.
- C.K.Thakkar, Code of Civil Procedure, 2000 Universal Delhi.
- M.P.Tandon, Code of Civil Procedure
- Anil Nandwani, Code of Civil Procedure
- Ratanlal & Dhiraj Lal- The Code of Criminal Procedure.
- Juvenile Justice (Care & Protection of Children) Act, 2000 -Bare Act
- Probation of Offenders' Act, 1958-Bare Act
- R.V.Kelkar- Criminal Procedure.
- Report of the Committee on Reforms of Criminal Justice System.

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# UNIT– III

# CRIMINAL JUSTICE SYSTEM

STRUCTURE



*LEARNING OBJECTIVES*

After going through this unit, students will be able to :

- understand the status of criminal justice system of the country;
- discuss the role of police and prosecution under criminal justice system;
- explain the role of judiciary as per criminal justice system.

## 3.1 INTRODUCTION

India, being a common law country, derives most of its modern judicial framework from the British legal system. There exists a uniform system of justice dispensation, with the Supreme Court at the apex and High Courts in the States (provincial units in India), as well as numerous other subordinate courts. Thus, in the strict sense, the Indian judicial system does not operate on wholly federal lines, as may be seen in the United States. It does not have a dual system of courts and the judiciary is one integrated whole. There are no federal courts as such to decide federal questions exclusively.

The decisions of the subordinate courts are appealable in the High Courts. However, though the High Courts function independently in their area of

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jurisdiction, their decisions can be challenged in the Supreme Court. The procedures for this mechanism are laid down in the Constitution and various rules have also been framed by the courts for this purpose. It may be said, therefore, that the Indian judiciary operates on "quasi-federal" lines.

The British rule in India brought about the introduction and development of the common law legal system, on which India has based its present judicial framework. In the early seventeenth century, the Crown, through a series of Charters, introduced a judicial system functioning under its authority in the three "presidency" towns (Bombay, Madras and Calcutta), i.e. the largest and most important towns under British rule (the courts were called 'Admiralty Courts' in Bombay and Madras and 'Collector's Court' in Calcutta). These judicial systems were formulated independently by the Governor and the Council of those towns, and had authority to decide both civil and criminal matters. However, the towns functioned independently, and there was a lack of coherence due to dissimilarities in functioning. Moreover, the courts did not derive their authority directly from the Crown, but from the East India Company. This also contributed in making the system unsystematic.

In the eighteenth century, with the strengthening of the British yoke in India, a more uniform pattern emerged. All "presidency" towns now had a uniform judicial system (called a Mayor's Court). Soon thereafter, by Royal Charter, the courts derived their authority directly from the Crown. A system of appeals to the Privy Council was initiated, and this marked a historic landmark in the development of the Indian judicial system, because the Privy Council functioned as the last court of appeal in India for more than 200 years. However, the courts functioned under the English law, without any regard for local laws, which raised questions regarding their effectiveness. Moreover, much of the local criminal justice, at the grass root level, was left in the hands of local landlords.

In the late eighteenth century, the Mayor's Court was replaced with a Supreme Court (in presidency towns). This was the first attempt to create a separate and independent judicial organ in India, under the direct authority of the King. The Chief Justice and Pusine Judges were appointed by the King. This court had jurisdiction over civil, criminal, admiralty and ecclesiastical matters and was required to formulate rules of practice and procedure. Appeals from this court lay to the Privy Council.

In the beginning, the territorial jurisdiction of the court extended only to British subjects and "His Majesty's" subjects (all those in employment of the East India Company and those entering into a contract with one of "His Majesty's" subjects). In areas except the presidency towns (called "mofussil"), the Company reigned supreme over all judicial matters. Its jurisdiction had no relation with the Crown. Local civil and criminal justice was left in the hands of the locals, functioning under a system known as the "adalat system".

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By the mid nineteenth century, a regular hierarchy of courts and a sound procedural practice had evolved. The declaration by Queen Victoria that made India a British dependency called for absolute sovereign control over India. The adalat system and Supreme Court were abolished, a High Court was established in each presidency town, and more were envisaged in other provinces as well. Appeals from them went to the Privy Council.

Thus, this created a uniform judicial system in India, which, in substance, has largely continued till today. The predecessor of the present Supreme Court of India was the Federal Court (established in 1937), which heard appeals from the High Courts, and whose decisions were appelable to the Privy Council. The current Supreme Court of India enjoys the combined jurisdiction of the Privy Council and the Federal Court, which are no longer in existence.

The criminal justice system descends from the British model. The judiciary and the bar are independent although efforts have been made by some politicians to undermine the autonomy of the judiciary. From about the time of Indira Gandhi's tenure as prime minister, the executive has treated judicial authorities in an arbitrary fashion.

Judges who handed down decisions that challenged the regime in office have on occasion been passed over for promotion, for example. Furthermore, unpopular judges have been given less-than-desirable assignments. Because the pay and perquisites of the judiciary have not kept up with salaries and benefits in the private sector, fewer able members of the legal profession have entered the ranks of the senior judiciary.

Despite the decline in the caliber and probity of the judiciary, established procedures for the protection of defendants, except in the case of strife-torn areas, are routinely observed. The penal philosophy embraces the ideals of preventing crime and rehabilitating criminals.

## 3.2 CRIMINAL JUSTICE SYSTEM IN THE COUNTRY

Criminal justice is the system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime, and sanctioning those who violate laws with criminal penalties and rehabilitation efforts.

The rights of the accused are rights that protect those accused of crime.

The criminal justice system consists of three main parts: (1) law enforcement (police); (2) adjudication (courts); and (3) corrections (jails, prisons, probation and parole). In a criminal justice system, these distinct agencies operate together both under the rule of law and as the principal means of maintaining the rule of law within society.

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## POLICE

The first contact an offender has with the criminal justice system is usually with the police (or law enforcement) who investigate a suspected wrong-doing and make an arrest. When warranted, law enforcement agencies or police officers are empowered to use force and other forms of legal coercion and means to effect public and social order. The term is most commonly associated with police departments of a state that are authorized to exercise the police power of that state within a defined legal or territorial area of responsibility. The word comes from the Latin politia ("civil administration"), which itself derives from the Ancient Greek word polis ("city"). The first police force comparable to the present-day police was established in 1667 under King Louis XIV in France, although modern police usually trace their origins to the 1800 establishment of the Marine Police in London, the Glasgow Police, and the Napoleonic police of Paris.

Police are primarily concerned with keeping the peace and enforcing criminal laws based on their particular mission and jurisdiction. Policing has included an array of activities in different contexts, but the predominant ones are concerned with order maintenance and the provision of services.

## PROSECUTION AND JUDICIARY

The courts serve as the venue where disputes are then settled and justice is administered. With regard to criminal justice, there are a number of critical people in any court setting. These critical people are referred to as the courtroom work group and include both professional and non professional individuals. These include the judge, prosecutor, and the defence attorney. The judge, or magistrate, is a person, elected or appointed, who is knowledgeable in the law, and whose function is to objectively administer the legal proceedings and offer a final decision to dispose of a case.

In this system, two parties will both offer their version of events and argue their case before the court (sometimes before a judge or panel of judges, sometimes before a jury). The case should be decided in favor of the party who offers the most sound and compelling arguments based on the law as applied to the facts of the case.

The prosecutor, or district attorney, is a lawyer who brings charges against a person, persons or corporate entity. It is the prosecutor's duty to explain to the court what crime was committed and to detail what evidence has been found which incriminates the accused. The prosecutor should not be confused with a plaintiff or plaintiff's counsel. Although both serve the function of bringing a complaint before the court, the prosecutor is a servant of the state who makes accusations on behalf of the state in criminal proceedings, while the plaintiff is the complaining party in civil proceedings.

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A defense attorney counsels the accused on the legal process, likely outcomes for the accused and suggests strategies. The accused, not the lawyer, has the right to make final decisions regarding a number of fundamental points, including whether to testify, and to accept a plea offer or demand a jury trial in appropriate cases. It is the defense attorney's duty to represent the interests of the client, raise procedural and evidentiary issues, and hold the prosecution to its burden of proving guilt beyond a reasonable doubt. Defense counsel may challenge evidence presented by the prosecution or present exculpatory evidence and argue on behalf of their client. At trial, the defense attorney may attempt to offer a rebuttal to the prosecutor's accusations.

In the India, an accused person is entitled to a government-paid defense attorney if he or she is in jeopardy of losing his or her life and/or liberty. Those who cannot afford a private attorney may be provided one by the state. Historically, however, the right to a defense attorney has not always been universal. For example, in Tudor England criminals accused of treason were not permitted to offer arguments in their defense. In many jurisdictions, there is no right to an appointed attorney, if the accused is not in jeopardy of losing his or her liberty.

The final determination of guilt or innocence is typically made by a third party, who is supposed to be disinterested. This function may be performed by a judge, a panel of judges, or a jury panel composed of unbiased citizens. This process varies depending on the laws of the specific jurisdiction. In some places the panel (be it judges or a jury) is required to issue a unanimous decision, while in others only a majority vote is required. In America, this process depends on the state, level of court, and even agreements between the prosecuting and defending parties. Other nations do not use juries at all, or rely on theological or military authorities to issue verdicts.

Some cases can be disposed of without the need for a trial. In fact, the vast majority are. If the accused confesses his or her guilt, a shorter process may be employed and a judgement may be rendered more quickly. Some nations, such as India and America, allow plea bargaining in which the accused pleads guilty, solo contendere or not guilty, and may accept a diversion program or reduced punishment, where the prosecution's case is weak or in exchange for the cooperation of the accused against other people. This reduced sentence is sometimes a reward for sparing the state the expense of a formal trial. Many nations do not permit the use of plea bargaining, believing that it coerces innocent people to plead guilty in an attempt to avoid a harsh punishment.

The entire trial process, whatever the country, is fraught with problems and subject to criticism. Bias and discrimination form an ever-present threat to an objective decision. Any prejudice on the part of the lawyers, the judge, or jury members threatens to destroy the court's credibility.

Manipulations of the court system by defense and prosecution attorneys, law enforcement as well as the defendants have occurred and there have been cases where justice was denied.

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### *Corrections*

Offenders are then turned over to the correctional authorities, from the court system after the accused has been found guilty. Like all other aspects of criminal justice, the administration of punishment has taken many different forms throughout history. Early on, when civilizations lacked the resources necessary to construct and maintain prisons, exile and execution were the primary forms of punishment. Historically shame punishments and exile have also been used as forms of censure.

The most publicly visible form of punishment in the modern era is the prison. Prisons may serve as detention centers for prisoners after trial. For containment of the accused, jails are used. Early prisons were used primarily to sequester criminals and little thought was given to living conditions within their walls.

Punishment (in the form of prison time) may serve a variety of purposes. First, and most obviously, the incarceration of criminals removes them from the general population and inhibits their ability to perpetrate further crimes. Many societies also view prison terms as a form of revenge or retribution, and any harm or discomfort the prisoner suffers is "payback" for the harm they caused their victims. A new goal of prison punishments is to offer criminals a chance to be rehabilitated. Many modern prisons offer schooling or job training to prisoners as a chance to learn a vocation and thereby earn a legitimate living when they are returned to society. Religious institutions also have a presence in many prisons, with the goal of teaching ethics and instilling a sense of morality in the prisoners. If a prisoner is released before his time is served, he is released as a parole. This means that they are released, but the restrictions are greater than that of someone on probation.

There are numerous other forms of punishment which are commonly used in conjunction with or in place of prison terms. Monetary fines are one of the oldest forms of punishment still used today. These fines may be paid to the state or to the victims as a form of reparation. Probation and house arrest are also sanctions which seek to limit a person's mobility and his or her opportunities to commit crimes without actually placing them in a prison setting. Furthermore, many jurisdictions may require some form of public or community service as a form of reparations for lesser offenses.

Execution or capital punishment is still used around the world. Its use is one of the most heavily debated aspects of the criminal justice system. Some societies are willing to use executions as a form of political control, or for relatively

minor misdeeds. Other societies reserve execution for only the most sinister and brutal offenses. Others still have outlawed the practice entirely, believing the use of execution to be excessively cruel or hypocritical.

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## 3.3 FUNCTIONING OF THE SUPREME COURT, HIGH COURTS AND SUBORDINATE COURTS

The Supreme Court is primarily a court of appeal and has extensive appellate jurisdiction. Its primary function is to interpret the Constitution and declare whether or not any legislation or administrative action is unconstitutional. The Supreme Court is the final arbiter in all constitutional controversies. The law declared by the Supreme Court is binding on all courts in India, and is the law of the land. The Court is a court of record and can also punish for its contempt. Any judgment of the High Court can be brought before it, if the High Court certifies that the matter at hand concerns a substantial question of interpretation of law or the Constitution. Appeal to the Supreme Court is not a matter of right. In cases where a High Court does not issue certificate of appeal, and there exists an important legal question, recourse to "Special Leave" may be made, as per the Constitution of India. This provision (Article 136 of the Constitution) enables the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in India. This power is extremely wide and enables the Supreme Court to act as a check against improper exercise of jurisdiction by judicial or quasi judicial bodies as well as maintain a uniformity of legal approach. In certain special circumstances, the Supreme Court can also transfer to itself any case from any of the High Courts. This usually takes place when cases are pending before the Supreme Court and High Court, or before two or more High Courts, involving same or similar questions of law and the Supreme Court is satisfied either suo motu or on an application made by the attorney general or any party to any case that such questions are of general importance, the Supreme Court may withdraw the cases from the High Courts and dispose them itself. Thus, the Supreme Court possesses the ultimate jurisdiction over all courts and legal proceedings in India and enjoys a wide appellate power.

The Supreme Court also enjoys advisory jurisdiction, by which the President of India may refer any question of law or a question of public importance to the Court for its opinion. The court also has the power to review its own decisions.

In no other Constitution there are to be found such detailed provisions regarding the highest judicial organ, as in the Indian Constitution. This Court is one of the most potent judicial organs in the world today, and plays a fundamental role in shaping constitutional jurisprudence in India.

The High Courts are courts of record and as such can punish for their contempt. The Constitution makers realized that the High Courts were destined

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to play a pivotal role in the administration of justice not only in deciding civil and criminal matters but also by way of protecting fundamental rights guaranteed under the Constitution (for which High Courts are also conferred with Writ jurisdiction.). Therefore, a high degree of judicial independence was given to the High Courts. They enjoy original as well as appellate jurisdiction and derive their jurisdiction from the Constitution, Codes of Civil and Criminal Procedure and various statutes. They also exercise supervisory jurisdiction over subordinate courts. They are vested with the power to hear references for the confirmation of death sentences and may also be consulted in the matter of exercise of the prerogative of mercy by the President or Governor. Revisional powers are also granted to the High Courts.

The High Courts have jurisdiction and superintendence over all courts and tribunals within its territorial jurisdiction. The power of High Courts extends also to the other judicial or quasi judicial bodies within its territorial limits, in judicial and administrative matters. Thus, the Constitution of India has empowered the High Courts with significant and effective powers to administer justice, to ensure that lower courts espouse the cause of promoting justice, to take prompt action when there is a miscarriage of justice, to secure the rights and liberties of the people, and to ensure that the administration functions within the limits of the law without arbitrariness.

The Subordinate Courts in each State function under the authority of the High Court and have fixed pecuniary, territorial and sentencing limits. There exists a hierarchical structure in the lower judiciary and these limits are fixed accordingly, in ascending order.

India thus has a single integrated judiciary having jurisdiction in all cases, civil, criminal and constitutional. Such a system plays an important role in maintaining the unity of the country. A uniform interpretation of laws by the Supreme Court has a great unifying effect because the unconscious process of consolidation which a uniformity of laws and interpretation involves makes the unifying unconscious and therefore more stable.

### *Relationship between the Supreme Court and High Courts*

The Supreme Court of India, in a 2004 case *(Tirupati Balaji Developers Pvt. Ltd. v. State of Bihar, AIR 2004 SC 2351)*, delved into the nuances of the nature of the relationship between the Supreme Court and High Courts.

Generally speaking, the High Court is not subordinate to the Supreme Court. In a way, the canvass of judicial power vested with the High Courts is wider inasmuch as its writ jurisdiction is concerned. However, if the Supreme Court and the High Courts both were to be thought of as brothers in the administration of justice, the High Court has larger jurisdiction but the Supreme Court still remains the elder brother. This is because though the Constitution

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allowed a certain degree of independence to the High Courts, certain constitutional provisions were incorporated to give supervisory powers to the Supreme Court. This was done to create a unified hierarchical judicial system in India, with the Supreme Court at the pinnacle.

There are a few constitutional provisions which give an edge, and assign a superior place in the hierarchy, to the Supreme Court over High Courts. So far as the appellate jurisdiction is concerned, in all civil and criminal matters, the Supreme Court is the highest and the ultimate court of appeal. It is the final interpreter of the law. Secondly, the Supreme Court may transfer any case pending before one High Court to another High Court or may withdraw the case to itself. Thirdly, the law declared by the Supreme Court shall be binding on all courts, including High Courts, within the territory of India. Lastly, all authorities, civil and judicial, in the territory of India, including the High Court are under a constitutional obligation to act in aid of the Supreme Court.

Therefore, in a unified hierarchical judicial system which India has accepted under its Constitution, vertically the Supreme Court is placed over the High Courts. Because of the fact that the Constitution confers an appellate power on the Supreme Court over the High Courts, certain consequences naturally flow and follow. Appeal implies in its natural and ordinary meaning the removal of a cause from any inferior court or tribunal to a superior one for the purpose of testing the soundness of decision and proceedings of the inferior court or tribunal. The superior forum shall have jurisdiction to reverse, confirm, annul or modify the decree or order of the forum appealed against and in the event of a remand the lower forum shall have to re-hear the matter and comply with such directions as may accompany the order of remand. The appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below.

### *Appointment to the Courts*

To be appointed as a judge of the Supreme Court, a person must be an Indian citizen and should either have been a High Court judge for 5 years or an advocate of the High Court for 10 years, or must be in the opinion of the President, a distinguished jurist. Judges are appointed by the President, after consultation with the Chief Justice of India and other senior judges forming a collegium. Usually, the seniormost judge of the Supreme Court is appointed as its Chief Justice. The sanctioned strength of the Supreme Court is 26.

A judge of the Supreme Court enjoys a fixed tenure insofar as he retires at the age of 65. He cannot be removed except by a Presidential order passed after an address of each House of Parliament supported by a majority of the total membership of each House, and by a majority of not less than two-thirds of the members of each House present and voting, and has been presented to the President in the same session for such removal on the ground of proved

misbehavior or incapacity. Salaries of Supreme Court judges are fixed by the Constitution and may be varied by law made by the Parliament. The salaries and allowances cannot be varied to the disadvantage of the judge during his tenure. No discussion can take place in Parliament or State Legislature with respect to the conduct of a Supreme Court judge in the discharge of his duties except when a motion for his removal is under consideration of a House of Parliament.

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To be appointed as a judge of the High Court, a person must be a citizen of India and must either have held a judicial office in India,or been an advocate of a High Court for at least 10 years. Judges are appointed by the President of India in consultation with the Chief Justice of India and other senior Supreme Court judges forming a collegium. A judge of the High Court enjoys a fixed tenure insofar as he retires at the age of 62 years. Provisions for removal are similar to those for Supreme Court judges. On many occasions, additional judges are appointed to High Courts for a 2 year period to take care of the arrears or increase in work. Such additional judges may be made permanent judges. High Court judges are transferred from time to time by the President after consulting the Supreme Court Collegium. At present there are 21 High Courts in India and more may be established by the Parliament.

Thus, the Supreme Court has been given a wide power in High Court appointments. The candidature of all the eligible judges is scrutinized by the Chief Justice of India and his senior colleagues and only those candidates who have displayed the highest standards of integrity in work, innovativeness in thinking and steadfastness in the resolve to uphold the cause of justice are recommended for elevation to the High Courts.

Appointments to the subordinate judiciary are made by way of State Judicial Service examinations. Senior judges of the subordinate judiciary also get opportunity of being elevated to the High Court. There is a District Court (each province or State is divided into a number of sub-parts, called a District) and a number of subordinate courts from which appeal lies to the District Court and then to the High Court. Appointments, posting and promotion of District Judges are made by the Governor in consultation with the concerned High Court. All other matters are controlled by the High Court of the particular State. There is a separate hierarchy for subordinate courts on the civil aide and on the criminal side.

### *Function of Tribunals*

Tribunals are established for discharging specific judicial functions in certain definite and demarcated areas. For example, The Central Administrative Tribunal has been established for adjudication of disputes with respect to recruitment and conditions of service of persons appointed to public services and posts. Tribunals also exist for areas such as securities and capital market disputes; inter state water

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disputes, debt recovery, industrial labour disputes and the like. Tribunals derive their powers from various statues constituted for the specific purpose. For example, Administrative Tribunals were established by the Administrative Tribunals Act, 1985. Tribunals are empowered to prescribe their own rules of practice for discharging their functions subject to the legislation from which they derive their authority. Employees of the tribunals are required to discharge their duties under the general superintendence of the Chairman, whose powers are equivalent to a High Court judge.

### *Jurisdiction of the Supreme Court of India*

The Supreme Court of India is the protector of the rights of the people and upholder of justice. This is its inherent and most fundamental role. The welfare of the people and progressive development of the nation in an organized civil society is of utmost significance for the Court, and towards this end, it has taken several historic measures. The judiciary has been the greatest bulwark against executive excesses and protector of individual liberty. A judiciary independent of the executive and legislature is necessary in the maintenance of the rule of law.

In India, Article 21 of the Constitution of India guaranteeing Right to Life stands at the fulcrum of the rule of law. Article 21 confers positive rights to life and liberty, which goes beyond mere animal existence. It has been given a multidimensional interpretation by the Supreme Court, in order to check legislative excesses on the rights of the people.

Through various judgments, the apex court has widened the scope of Article 21 and has provided within its ambit, a wide gamut of rights, including the right to education which has been included as apart of right to life. The Court has held that, "the right to education flows directly from the right to life" as "the right to life and the dignity of an individual cannot be assured unless it is accompanied by the right to education". *[Mohini Jain v. State of Karnataka (1992) 3 SCC 666]*

Thus, in their endeavour to promote the Rule of Law, the Court has given these Rights and Principles their real meaning. They have adopted substantive equality, and aimed for a result oriented approach. This approach tends to encourage the downtrodden and underprivileged to redeem themselves of previous inequalities, and has resulted in greater judicial activism, and has opened new vistas for judicial innovation and creativity, in order to fulfill the mandate of achieving social equality.

Public Interest Litigation is another innovation by the Supreme Court that has greatly furthered the Rule of Law. This arose because the poor did not have the capacity to represent themselves, or to take advantage of progressive legislation, and thus the Supreme Court, sensitive to the grim social realities, gave relief to these oppressed people, by allowing any member of the public to maintain an action or petition by way of Public Interest Litigation. Notable cases include:

*Shiram Food & Fertilizer case AIR (1986) 2 SCC 176* [on lethal chemical and gases posing danger to life and health of workmen]; *M.C Mehta v. Union of India (1988)* 1 SCC 471 [Ganga Pollution case]; *Parmanand Katara v. Union of India AIR 1989* SC 2039 [Public Interest Litigation filed by a human right activist.

The Supreme Court held that it is a paramount obligation of every member of medical profession to give medical aid to every injured citizen] and *Council for Environment Legal Action v. Union of India (1996)* 5 SCC 281 [Public Interest Litigation filed by registered voluntary organization regarding economic degradation in coastal area].

The Court has also widened its power of judicial review to include any executive decision that may be marred with arbitrariness. Through judicial review, the other organs of the State, namely, legislature and executive are kept in check from excesses.

The Rule of Law has also been furthered by the Supreme Court on various other occasions, through refreshingly creative strategies and judicial activism. Instances include, The Right to Health *[(Consumer Education and Research Centre v. Union of India (1995) 3 SCC 42)]*; Bonded Labor *(People's Union for Democratic Rights v. Union of India* [Asiad Workers' Case], AIR 1982 S.C. 1473 and *Bandhua Mukti Morcha v. Union of India,* [(1984) 3 SCC 161)]; Rights of Indigenous People *[(Samatha v. State of A.P. (1997)8 SCC 191)]* and Gender Justice *[Vishaka v. State of Rajasthan (1997 6 SCC 241)]*. Thus, through stellar judicial pronouncements, the Rule of Law was given a clear and coherent meaning by the Supreme Court, and this guides us to this day.

### *District Courts*

The District Courts in India take care of judicial matters at the district level. Headed by a judge, these courts are administratively and judicially controlled by the High Courts of the respective states, to which the district belongs. There are many secondary courts also at this level, which work under the District Courts. There is a court of the Civil Judge as well as a court of the Chief Judicial Magistrate. While the former takes care of the civil cases, the latter looks into criminal cases and offences.

The Chief Judicial Magistrate is endowed with the responsibility of deciding critical cases. He or she has the power of punishing the accused by imprisonment for a maximum of 7 years. The independence of the judiciary even at the district level needs a special mention. There is a strong bar in each district court that ensures proper decisions are made in the cases that come to these courts. The major problem that is faced by the district courts in India is that numerous cases get piled up day after day and as a result there is inordinate delay in the decisions of the court.

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## SUMMARY

- Criminal justice is the system of practices and institutions of governments directed at upholding social control, deterring and mitigating crime, and sanctioning those who violate laws with criminal penalties and rehabilitation efforts.
- The first contact an offender has with the criminal justice system is usually with the police (or law enforcement) who investigate a suspected wrong-doing and make an arrest.
- The courts serve as the venue where disputes are then settled and justice is administered. With regard to criminal justice, there are a number of critical people in any court setting.
- Offenders are then turned over to the correctional authorities, from the court system after the accused has been found guilty. Like all other aspects of criminal justice, the administration of punishment has taken many different forms throughout history.
- The Supreme Court is primarily a court of appeal and has extensive appellate jurisdiction. Its primary function is to interpret the Constitution and declare whether or not any legislation or administrative action is unconstitutional.
- The Supreme Court of India is the protector of the rights of the people and upholder of justice. This is its inherent and most fundamental role. The welfare of the people and progressive development of the nation in an organized civil society is of utmost significance for the Court, and towards this end, it has taken several historic measures.
- Tribunals are established for discharging specific judicial functions in certain definite and demarcated areas.
- The District Courts in India take care of judicial matters at the district level. Headed by a judge, these courts are administratively and judicially controlled by the High Courts of the respective states, to which the district belongs.

## REVIEW QUESTIONS

1. What is a criminal justice system?
2. What are the basic elements of criminal justice system?
3. How does the Supreme Court of India function as per the Constitution of India? Explain.
4. Discuss the relationship of Supreme Court of India with High Courts.
5. What are the basic functions of District Couts?

## FURTHER READINGS


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# UNIT– IV

# THE COMPONENTS

STRUCTURE



*LEARNING OBJECTIVES*

After going through this unit, students will be able to :

- know the structure and functions of components of criminal justice system *i.e.,* police, courts etc.;
- discuss the structure of prosecution and the the role of public prosecutor;
- describe the structure and function of courts.

## 4.1 INTRODUCTION

A criminal justice system is a set of legal and social institutions for enforcing the criminal law in accordance with a defined set of procedural rules and limitations.

Criminal justice systems include several major subsystems, composed of one or more public institutions and their staffs: police and other law enforcement agencies; trial and appellate courts; prosecution and public defender offices; probation and parole agencies; custodial institutions ( jails, prisons, reformatories, halfway houses, etc.); and departments of corrections (responsible for some or all probation, parole, and custodial functions). Some jurisdictions also have a sentencing guidelines commission. Other important public and private actors in this system include: defendants; private defense attorneys; bail bondsmen; other private agencies providing assistance, supervision, or treatment of offenders; and victims and groups or officials representing or assisting them (e.g., crime victim compensation boards). In addition, there are numerous administrative agencies whose work includes criminal law enforcement (e.g., driver and vehicle licensing bureaus; agencies dealing with natural resources and taxation). Legislators and other elected officials, although generally lacking any direct role in individual cases, have a major impact on the formulation of criminal laws and criminal justice policy. Such policy is also strongly influenced by the news media and by businesses and public-employee labor organizations, which have a major stake in criminal justice issues.

## 4.2 POLICE AND THE PROCESS OF CRIMINAL JUSTICE

The process of criminal justice has the following main steps:

**Step- 1:** Registration of the First Information Report ( FIR) The process of criminal justice is initiated with the registration of the First Information Report. The FIR is a written document prepared by the police when they receive information about the commission of a cognizable offence.

**Step- 2:** The police officer proceeds to the scene of crime and investigates the facts of the case. Police investigation mainly includes:

- Examination of the scene of crime
- Examination of witnesses and suspects
- Recording of statements
- Conducting searches
- Seizing property
- Collecting fingerprint, footprint and other scientific evidence
- Consulting records and making entries in the prescribed records, like case diary, daily diary, station diary etc.
- Making arrests and detentions
- Interrogation of the accused

**Step-3:** After completion of investigation, the officer in charge of the police station sends a report to the area magistrate. The report sent by the investigating officer is in the form of a charge sheet, if there is sufficient evidence to prosecute the

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accused. If sufficient evidence is not available, such a report is called the final report.

**Step-4:** On receiving the charge sheet, the court takes cognizance and initiates the trial of the case.

**Step- 5:** The charges are framed. The procedure requires the prosecution to prove the charges against the accused beyond a shadow of doubt. The accused is given a full opportunity to defend himself.

**Step- 6:** If the trial ends in conviction, the court may award any of the following punishments:

- Fine
- Forfeiture of property
- Simple imprisonment
- Rigorous imprisonment
- Imprisonment for life
- Death Sentence

The police is a state subject and its organisation and working are governed by rules and regulations framed by the state governments. These rules and regulations are outlined in the Police Manuals of the state police forces.

Each State/Union Territory has its separate police force. Despite the diversity of police forces, there is a good deal that is common amongst them. This is due to four main reasons:

- The structure and working of the State Police Forces are governed by the Police Act of 1861, which is applicable in most parts of the country, or by the State Police Acts modeled mostly on the 1861 legislation.
- Major criminal laws, like the Indian Penal Code, the Code of Criminal Procedure, the Indian Evidence Act etc are uniformly applicable to almost all parts of the country.
- The Indian Police Service (IPS) is an All India Service, which is recruited, trained and managed by the Central Government and which provides the bulk of senior officers to the State Police Forces.
- The quasi-federal character of the Indian polity, with specific provisions in the Constitution, allows a coordinating and counseling role for the Centre in police matters and even authorizes it to set up certain central police organisations.

### *The Organisational Structure*

Superintendence over the police force in the state is exercised by the State Government. The head of the police force in the state is the Director General of Police (DGP), who is responsible to the state government for the administration of the police force in the state and for advising the government on police matters.

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### Field Establishment

States are divided territorially into administrative units known as districts. An officer of the rank of Superintendent of Police heads the district police force. A group of districts form a range, which is looked after by an officer of the rank of Deputy Inspector General of Police. Some states have zones comprising two or more ranges, under the charge of an officer of the rank of an Inspector General of Police.

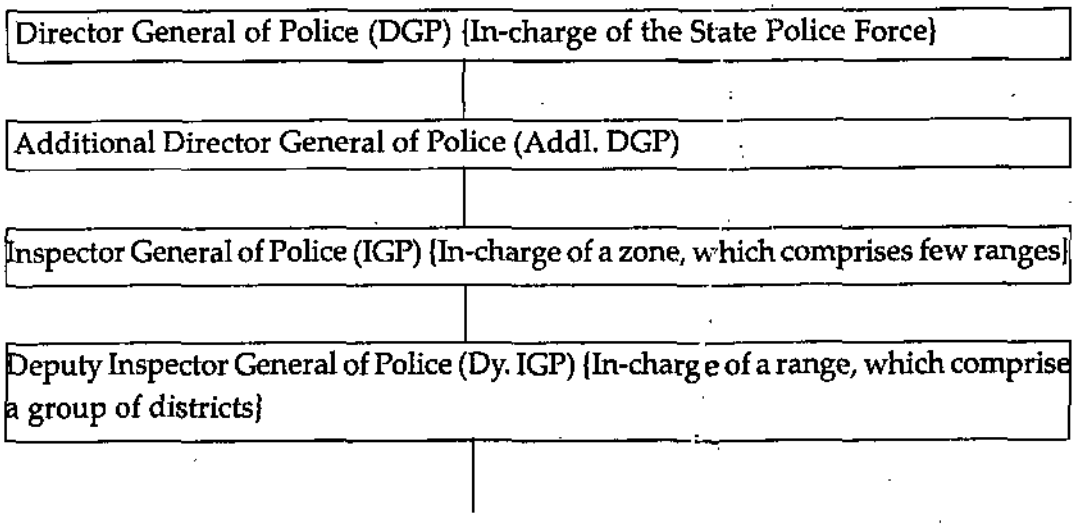
Every district is divided into sub-divisions. A sub-division is under the charge of an officer of the rank of ASP/ Dy.S.P. Every sub-division is further divided into a number of police stations, depending on its area, population and volume of crime. Between the police station and the subdivision, there are police circles in some states - each circle headed generally by an Inspector of Police.

The police station is the basic unit of police administration in a district. Under the Criminal Procedure Code, all crime has to be recorded at the police station and all preventive, investigative and law and order work is done from there. A police station is divided into a number of beats, which are assigned to constables for patrolling, surveillance, collection of intelligence etc. The officer in charge of a police station is an Inspector of Police, particularly in cities and metropolitan areas. Even in other places, the bigger police stations, in terms of area, population, crime or law and order problems, are placed under the charge of an Inspector of Police. In rural areas or smaller police stations, the officer in charge is usually a Sub-Inspector of Police.

### Reporting

The police have greater and speedier reach and the public to gain easier access to police help, police posts have been set up under police stations, particularly where the jurisdiction of the police station, in terms of area and population, is large.

***The Field Establishment of the Police Force***



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Senior Superintendent of Police (SSP) {In-charge of the bigger District}

Superintendent of police (SP) {In-charge of the District}

Additional Superintendent of Police (Addl. SP)

Assistant/ Deputy Superintendent of Police (ASP/ Dy. SP) {In-charge of a Sub-division in the district}

Inspector of Police {In-charge of a Police Station}

Sub-Inspector of Police (SI) {In-charge of a smaller Police Station}

Assistant Sub-Inspector of Police (ASI) {Staff of the Police Station}

Police Head Constable (HC) {Staff of the Police Station}

Police Constable {Staff of Police Station}

### *Organisation at Range Level*

Many States are too big to be administered effectively and 'efficiently from a central point. It is not possible for the Head of the police that is the police chief or the DGP/IGP to keep in touch with the functioning of the entire organisation. Therefore, the police organisation in a State is divided into ranges for operational convenience. This is above the district and below the State level. This broadly corresponds to the divisional set up about which we have discussed above. Deputy Inspector General of Police Heads each range. Each police range comprises a few districts. The number of districts in each range varies from 2 to 8 depending upon the size of the district, population, and importance of the district.

The DIG functions as a staff officer to the State police chief and as a line officer to the district police. His functions include periodic inspections, receiving and processing reports and returns from districts, and issuing instructions to the district police functionaries. A major function of the range DIG is to coordinate the activities of district police and also take measures for inter-district co-operation. He is personally responsible for the enforcement of discipline among the police personnel under his charge. He exercises power of transfer and discipline over

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certain categories of personnel. He keeps a watch on the crime situation in the district particularly over grave offences like dacoity, mltrder etc. He also exercises control ,over police funds. The range of DIG'S functions, thus, includes personnel management, budgetary control and coordination. He is responsible for the maintenance of efficiency and discipline of his staff. He ensures uniformity of procedure and securing co-operation between the police functioning in the districts within his range. He has to ensure harmonious relations between the police and the executive magistracy.

There are some criticisms about a range becoming a mere post office. It is criticised to be functionally superfluous. Some feel that inspite of range offices the workload of the State level offices has not been reduced and in fact it has been on the increase. The National Police Commission recommended that DIG of the range should play a positive role in functioning of the districts under his control. He should act as coordinating authority between districts in his range and with those of the adjacent ranges. It also recommended that hetshe should be a sensitive judge of public opinion and play an important role in planning and modernisation of the force. The commission felt that to be effective, the range of DIG should not have more than five districts under his control. It also recommended that for adequate supervision, territorial Inspector General of Police should be appointed in large States. They should not have more than 15 to 20 districts or 4-5 ranges under his charge. The Armed Battalions of the range should also be placed under the operational charge of the territorial IGP. They should be delegated administrative, financial, disciplinary and other power. This will reduce the workload on the DGP and enable him to concentrate on higher matters of policy and administration.

### *Organisation at District and Sub-District Level*

District is an important unit of the public administrative structutre in the country. Almost all the State Government offices are located in the district. In Police Administration also district plays a pivotal role. All the laws and rules passed by the police are transformed into action at this level. District Police Organisation is responsible for the effective maintenance of law and order and control of crime. Police Administration at the district level is carried out by the chief of the district police, called Superintendent of Police, who is responsible for the maintenance of law and order, and other law enforcement activities.

Technically, Superintendent of Police functions under the overall control of the Collector. He and his subordinate officers, in practice, enjoy operational autonomy in the discharge of their functions. The Collector as a District Magistrate is broadly responsible for preventive aspects; and the police is responsible for the control of crime, maintenance of law and order, etc. Police Administration below the district level is organised into divisions; divisions into circles; and circle into

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Police Stations. The organisation and working of Police Stations, marginally, varies between urban and rural areas.

District Police work under the Superintendent of Police. He is always a member of the Indian Police Service and wields a great amount of power and prestige in the district. He is accountable to the Head of the range police that is Deputy Inspector General of Police for the maintenance of law and order in his district. He is also responsible to the Director General of Police at the State Headquarters. The Superintendent of Police (S.P) is responsible for the efficiency, morale and discipline of the police force in the district. He collects information about various aspects from the entire district and communicates the same to the State Government along with his own assessment.

The Superintenden't of Police is primarily responsible for the maintenance of law and order, and prevention of crime. He is empowered to take preventive measures to ensure peace in the district. He has to make adequate police arrangements during fairs and festivals as well as elections and agitations. If he apprehends untoward situations, he can advise the Collector to promulgate prohibitory orders and even to clamp curfew. He controls crime by patrolling, investigating and taking preventive measures. He also supervises the operations of crime and special branches working under him. He has many personnel and organisational responsibilities like adequate supply of arms. vehicles. uniform etc. He also has responsibilities regarding matters of training, promotion and discipline of the staff, maintaining financial property etc. He is the link between police organisation and people's representatives at the district level. He maintains coordial and friendly relations with people. In the district where important urban centers are located, he has responsibilities of regulating traffic and receiving VIPs. Thus, the SP occupies a pivotal and a powerful position not only in the district police organisation but also in the District Administration itself. The Additional Superintendent of Police assists him. The later helps him in his day-today general administration. Deputy superintendents of Police, Circle Inspectors of Police, Sub-Inspectors of Police, Head Constablesand Police Constables assist him in the entjrcement of law and order at various levels. To assist him in undertaking his functions professionals and technical units are also placed at his disposal.

The organisation at the district level broadly consists of two wings namely the District Police Office (DPO) and the Field Organisation. The general administration of the entire police in the district is carried by the DPO. It works under the SP or ASP, who is in-charge of the office administration and also exercises general control t and supervision. The office administration is carried out by several sections like crime and statistics, crime bureau, audit and accounts, equipments and stores, etc.

The DPO can be considered as the secretariat of the police and the nerve centre of the Police Administration in the district. Generally, the accommodation

and facilities at the DPO are not adequate. One find ill-equipped and overstaffed office; insufficient accommodation; and inadequate lighting and ventilation in these offices.

To provide special assistance to the police, a number of field units function at the district level. The district armed reserve, the home guards, the women police, crime bureau, special branch finger print unit, dog squad, transport unit are some of the field units supporting the district Police Administration.

**Sub-division**

For operational convenience, the district police organisation is divided into a number of sub-divisions. Police sub-division is a unit where police work is coordinated and controlled. It is an intermediary link between police circles, Police Stations and the district police office. The police sub-division is under the charge of a Deputy Superintendent of Police or Additional Superintendent of Police. They are generally called Sub-Divisional Police Officers. The main work of the subrdivision is to look into law and order matters, and discipline among the police force and other related matters at the sub-divisional level. A number of reports and registers relating to crime, security and other administrative aspects are maintained in the Sub-divisional office. The Sub-Divisional Officers are responsible primarily for the maintenance of law and order and crime control; collection and communication of intelligence; submission of periodic reports to the Superintendent of Police, Inspection of Police Stations and Circle Offices. They also have an important p~rblic relations role to perform. They act as a link between the Superintendent of Police and the Sub-Inspectors and Inspectors.

**Circles**

Sub-Divisions are further divided into police circles, which is a link between Police Stations and sub-division. This is the third tier in the district police organisation. Sometimes, the police circles are coterminous with taluka; sometimes with blocks; and sometimes they may not be in conformity with either of them. As there are no rules governing the formation of police circles, they vary iri size from State to State and even in the State from circle to circle. The number of Police Stations in each police circle is determined on the basis of crime, population, area, topography, etc. Each circle may have 3 to 10 Police Stations. The Circle office facilitates smooth administration at the field level.

Inspector of Police is the Head of police circle. He is responsible for the maintenance of law and order, and control of crime. He has to promote discipline among the policemen. He guides, advises, and supervises the work of Police Stations and the men working there. He also investigates grave crimes with the assistance of supporting staff. As is the case with the divisional office, several registers and records are maintained at the circle level. They include communication register, case diary, circle information book, annual review of crime, crime charts, criminal intelligence file, etc.

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The Police Station is the lowest tier in the police organisation. It is here that the actual work of the police is undertaken. It is the basic and primary unit, which is responsible for the maintenance of Law and order, prevention and control of crime and protection of life and property of the community.

### *Duties and Responsibilities of the Police*

The Police Act of 1861 laid down the following duties for the police officers:

*(i)* Obey and execute all orders and warrants lawfully issued by any competent authority;

*(ii)* Collect and communicate intelligence affecting the public peace;

*(iii)* Prevent commission of offences and public nuisances;

*(iv)* Detect and bring offenders to justice; and

*(v)* Apprehend all persons whom he is legally authorised to apprehend and for whose apprehension sufficient ground exists.

The charter prescribed by the National Police Commission goes far beyond the 1861 charter, taking into account not only the changes which have occurred within the organisation during this period, but also in the sociopolitical environment in which the organisation is required to function. The NPC's Model Police Bill prescribes the following duties to the police officers :

*(i)* Promote and preserve public order;

*(ii)* Investigate crimes, apprehend the offenders where appropriate and participate in subsequent legal proceedings connected therewith;

*(iii)* Identify problems and situations that are likely to result in commission of crimes;

*(iv)* Reduce the opportunities for the commission of crimes through preventive patrol and other prescribed police measures;

*(v)* Aid and co-operate with other relevant agencies in implementing the prescribed measures for prevention of crimes;

*(vi)* Aid individuals who are in danger of physical harm;

*(vii)* Create and maintain a feeling of security in the community;

*(viii)* Facilitate orderly movement of people and vehicles;

*(ix)* Counsel and resolve conflicts and promote amity;

*(x)* Provide necessary services and afford relief to people in distress situations;

*(xi)* Collect intelligence relating to matters affecting public peace and crimes in general including social and economic offences, national integrity and security; and

*(xii)* Perform such other duties as may be enjoined on them by law for the time being in force.

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## CODE OF CONDUCT FOR THE POLICE

The code of conduct for the police in the country was adopted at the Conference of the Inspectors General of Police in 1960. This was later approved by the Government of India and circulated to all the State governments. The National Police Commission examined the subject and recommended changes in clause 12 of the earlier Code. The final Code as recommended by the NPC and accepted by the Government of India and circulated to all state governments is reproduced below:

1. The police must bear faithful allegiance to the Constitution of India and respect and uphold the rights of the citizens as guaranteed by it.
2. The police should not question the propriety of necessity of any law duly enacted. They should enforce the law firmly and impartially without fear or favour, malice or vindictiveness.
3. The police should recognise and respect the limitations of their powers and functions. They should not usurp or even seem to usurp the functions of the judiciary and sit in judgement on cases to avenge individuals and punish the guilty.
4. In securing the observance of law or in maintaining order, the police should as far as practicable, use the methods of persuation, advice and warning. When the application of force becomes inevitable, only the irreducible minimum of force required in the circumstances should be used.
5. The prime duty of the police is to prevent crime and disorder and the police must recognise that the test of their efficiency is the absence of both and not the visible evidence of police action in dealing with them.
6. The police must recognise that they are members of the public, with the only difference that in the interest of the society and on its behalf they are employed to give full time attention to duties which are normally incumbent on every citizen to perform.
7. The police should realise that the efficient performance of their duties will be dependent on the extent of ready cooperation that they receive from the public. This, in turn, will depend on their ability to secure public approval of their conduct and actions and to earn and retain public respect and confidence.
8. The police should always keep the welfare of the people in mind and be sympathetic and considerate towards them. They should always be ready to offer individual service and friendship and render necessary assistance to all without regard to their wealth and/or social standing.
9. The police should always place duty before self, should maintain calm in the face of danger, scorn or ridicule and should be ready to sacrifice their lives in protecting those of others.

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10. The police should always be courteous and wellmannered; they should be dependable and impartial; they should possess dignity and courage; and should cultivate character and the trust of the people.
11. Integrity of the highest order is the fundamental basis of the prestige of the police. Recognising this, the police must keep their private lives scrupulously clean, develop self-restraint and be truthful and honest in thought and deed, in both personal and official life, so that the public may regard them as exemplary citizens.
12. The police should recognise that their full utility to the State is best ensured only by maintaining a high standard of discipline, faithful performance of duties in accordance with law and implicit obedience to the lawful directions of commanding ranks and absolute loyalty to the force and by keeping themselves in the state of constant training and preparedness.
13. As members of a secular, democratic state the police should strive continually to rise above personal prejudices and promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities and to renounce practices derogatory to the dignity of women and disadvantaged segments of the society.

### *Statutes and Procedural Rules*

The Constitution requires pretrial detention to be as short as possible, and a number of statutory provisions implement this principle. Under the Code of Criminal Procedure, detention in police custody beyond the constitutional limit of 24 hours must be authorized by a magistrate. When the accused is initially produced before the magistrate, the magistrate must release the accused on bail unless it "appears that the investigation cannot be completed" within 24 hours and the accusation is well-founded – in which case the accused may be remanded to police custody for up to 15 days, although in principle remand is disfavored. Bail is meant to be the rule and continued detention the exception. For minor, so called "bailable" offenses, release on bail is available as of right, while for most serious or "non-bailable" offenses, the accused may be released on bail at the discretion of the court.

Before ordering remand to police custody, the magistrate must record the reasons for continued detention. Upon finding "adequate grounds" to do so, the magistrate may order detention beyond the fifteen day period for up to 60 days, or in a case involving a potential prison sentence of at least 10 years or the death penalty, for up to 90 days. This extended period of detention, however, must take place in judicial custody, rather than police custody.

The police must file with the magistrate a "charge sheet" setting forth the particulars of their allegations "without unnecessary delay." If the charge sheet is

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not filed upon expiration of the 60- or 90-day extended detention period, the individual must be released on bail, regardless of the seriousness of the offense alleged. However, if the charge sheet is filed before that period expires, and the magistrate decides to charge the accused, the decision to grant bail must be determined based on the contents of the charge sheet.

Indian law sharply limits the use of statements given to the police or while in police custody. Under the Indian Evidence Act, confessions made to police officers are inadmissible as substantive evidence against the accused, and confessions made to others while in police custody must be made in the immediate presence of a magistrate to be admissible. More generally, the Code of Criminal Procedure prohibits statements made to the police in the course of an investigation by any person, if reduced to writing, to be signed by the individual or used for any purpose during proceedings concerning the offense under investigation, except to impeach that person's subsequent testimony. These rules, which date to the colonial period, are intended to reduce the incentive for police to engage in torture and other coercive interrogation practices, in recognition that torture by the Indian police has been a longstanding problem. However, these limitations are not unqualified. If part of a confession or other statement given to the police leads to the discovery of admissible evidence, that portion of the statement may be admitted as corroborative evidence.

### *Arrest, Investigation and Bail*

The Constitution and laws guarantee a number of rights to citizens, even when they are arrested in criminal cases. It is important for citizen's to know the circumstances under which he/she can be arrested and what are rights during and after arrest.

Most of all, it says that the rights of each individual person have to be protected by law. No law can be made which takes away certain basic rights of any person. For instance, it says that nobody can be arrested and kept in custody without telling their offence. This means:

- To be arrested, there must be some offence committed under the existing law. No offence can be made up at somebody's will or fancy.
- To be arrested, the person must be told which offence he or she has committed.
- To be arrested certain other procedures must be followed. Only because someone wears a police uniform, doesn't mean they can do whatever they want. They can act only under the law.

**Who can make an Arrest?**

- A police officer may arrest a person either with or without a warrant depending on the nature and gravity of the offence.

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- Even a private person can arrest another person who in his presence commits a nonbailable, cognizable offence or is a proclaimed offender and then hand him over to the police. - (Sec 43, Cr.P.C.)

**What is Warrant ?**

Warrant is a document which is signed by magistrate. During the time of arrest police show it in non-cognizable office. The following ingredients make a warrant :

(1) The warrant must be in writing,
(2) It must bear the name and designation of executants,
(3) It must give full name and description of the person to be arrested,
(4) It must state the offence charged,
(5) It must be signed by the presiding officer, and
(6) It must bear the seal of the court.

**Who can be arrested without a warrant by the police?**

*Any person who:*

- Has been involved in a cognizable offence (theft, murder, rape, robbery etc) or is suspected to be so involved or against whom a complaint has been received of such involvement;
- Possesses any implement of housebreaking without valid excuse;
- Has been declared a proclaimed offender under law;
- Is in possession of stolen property;
- Obstructs a police officer in carrying out his/her duty;
- Has escaped or attempts to escape from lawful custody;
- Is suspected of being a deserter from any of the Armed Forces; and
- Is a suspect or a habitual offender and needs to be bound down for good behavior.

**What is accused rights during arrest?**

- To be informed of the grounds of arrest by the police. - (Art. 22 (1), Constitution)
- To meet and consult a lawyer of his choice. The arrested person can also but not throughout the interrogation period. - *(Art.22(1), Constitution; S.C. judgment D.K.Basu v. State of West Bengal)*

**What are duties of police an act of arrest?**

- To be released on bail when arrested for a bailable offence. It is the duty of the Police officer to inform him of his right to be released on bail. - (Sec. 50, Cr.P.C)

- To be produced before the nearest competent magistrate within 24 hours from the time of his arrest. This period excludes the time taken in journey. - (Art.22(2), Constitution; Sec: 57& 76, Cr. P.C)
- To inform his relative or friend about his arrest and the place of custody. It is the duty of the police to inform the arrested person of this right and also inform his relatives or friend about his arrest and detention. -*(S.C. Judgement D.K.Basu Vs. State of West Bengal)*
- Not to be ill-treated, abused or tortured while in custody during interrogation and investigation.
- Not to be subjected to more restraint than what is necessary to prevent his escape. - (Sec.49, Cr.P.C)

**Is it any Special Right for women and children during arrest ?**

Yes, law granted few special rights for women and children *i.e.,* :

*For women:*

- Every suspected women only searched by only female police in decent way; -(Sec 51 CrPC)
- In police police station female suspects must be kept in a separate lock-up, she should not be kept where male suspects kept. If separate lock up is not available in Police Station than female suspects transferred in nearest police station where seprate women lock up is available; -*(Supreme Court Judjement in Sheela Barse Vs State of Maharashtra)*
- Women cannot be taken to police station for interrogation. Interrogation only be done at their home in the presence of her relatives. In interrogation time if she needs or wants to consult lawyer then she can. This is her rights.
- If women arrested for a non-bailable offence and the offence is very serious in nature then the court can release her on bail. -(Sec 437, CrPC)

*For Children :*

- No child can be kept in police lock-up. -(J.J. Act, 1986)
- Children deal by trained 'Special Juvenile Police Unit' officer. -(Sec 63(1), J.J. Act, 2000)) .

**Is it any Right of accused for medical treatment/examination?**

- Every accused person can demand a medical examination of his body by a registered medical practitioner to disprove the commission of the offence alleged against him. It is the duty of the Magistrate to inform him of this right. - (Sec.54, Cr.P.C)
- At the time of examination, the injuries found on the body should be recorded. It is necessary to prepare an Inspection Memo after the examination is over and this Memo should be signed by the arrested person

and the police officer making the arrest. - *(S.C. Judgement D.K.Basu v. State of West Bengal)*

**Is it any duration/period for medical examination of arrested?**

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Yes, every arrested person has the right to be medically examined after every 48 hours during his detention in custody by a qualified and government-approved doctor. - *(S.C. Judgement D.K.Basu Vs. State of West Bengal)*

### *Right to Bail in India*

When someone is arrested, he/she is taken into custody. This means that he/she is not free to leave the scene. Without being arrested, he/she can be detained, however, or held for questioning for a short time if a police officer or other person believes he may be involved in a crime. For example, an officer may detain you if you are carrying a large box near a burglary site. You can also be detained by storekeepers if they suspect you have stolen something. Whether you are arrested or detained, you do not have to answer any questions except to give your name and address and show some identification if requested. The object of arrest and detention of the accessed person is primarily to secure his appearance at the trial and to ensure that in case he is found guilty he is available to receive the sentence. If his presence at the trial could be reasonable ensured otherwise than by his arrest and detention, it would be unjust and unfair to deprive the accused of his liberty during the pendency of the criminal proceedings against him. The provisions regarding the issue of summons or those relating to the arrest of the accessed person under a warrant or without a warrant or those relating to the release of the accessed at his trial but without unreasonable and unjustifiably interfering with his liberty.

In words of Krishna Iyer J. .. the subject of bail :

> " ..... belongs to the blurred area of criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of public treasury all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process."

Thus release on bail is crucial to the accused as the consequences of pre-trial detention are given. If release on bail is denied to the accessed it would mean that though he is presumed to be innocent till the guilt is proved beyond the reasonable doubt he would be subjected to the psychological and physical deprivation of jail life. The jail accessed loses his job and is prevented from contributing effectively to the preparation of his defense.

Therefore where there are no risks involved in the release of the arrested person it would be cruel and unjust, to deny him bail. The law bails " has to

dovetail two conflicting demands namely, on one hand, the requirements of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence. The presumption of innocence of an accused till he is found guilty".

In order to sub serve the above said objective, the Legislature in its wisdom has given precise directions for granting or granting bail.

**Why Bail?**

Before actually determining the place of bail within human rights framework as conferred by the Constitution, it is important to examine the object and meaning of bail, such that an analysis of these fundamental objects and change therein may reveal a change. The object detention of an accused person is primarily to secure her/his appearance at the time of trial and is available to receive sentence, in case found guilty. If his/her presence at the trial could be reasonably ensured other than by his arrest or detention, it would be unjust and unfair to deprive the accused of his liberty during pendency of criminal proceedings.

Thus it is important to note the relevant provisions enshrined in the Universal Declaration of Human Rights :

- Article 9- No one shall be subjected to arbitrary arrest, detention or exile.
- Article 10- Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.
- Article 11(1)- Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

There are thus several reasons which have been enumerated as to why bail ought to be allowed to prevent pre-trial detention

**Meaning of Bail**

Bail, in law, means procurement of release from prison of a person awaiting trial or an appeal, by the deposit of security to ensure his submission at the required time to legal authority.

> "Bail has been defined in the law lexicon as security for the appearance of the accused person on giving which he is released pending trial or investigation."

According to Black's Law Dictionary, what is contemplated by bail is to "procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court.".

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## Meaning of Bail in India

According to Criminal Procedure Code, 1973 (Cr.P.C. hereinafter), does not define bail, although the terms bailable offense and non-bailable offense have been defined in section 2(a) Cr.P.C. as follows: " Bailable offense means an offense which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being enforce, and non-bailable offense means any other offense". That schedule refers to all the offenses under the Indian Penal Code and puts them into bailable and on bailable categories. The analysis of the relevant provisions of the schedule would show that the basis of this categorization rests on diverse consideration. However, it can be generally stated that all serious offenses, i.e. offenses punishable with imprisonment for three years or more have seen considered as non bailable offenses. Further, Sections 436 to 450 set out the provisions for the grant of bail and bonds in criminal cases. The amount of security that is to be paid by the accused to secure his release has not been mentioned in the Cr.P.C. Thus, it is the discretion of the court to put a monetary cap on the bond.

Indian Courts however ,have greater discretion to grant or deny bail in the case of persons under criminal arrest, *e.g.*, it is usually refused when the accused is charged with homicide.

It must be further noted that a person accused of a bailable offenses is arrested or detained without warrant he has a right to be released on bail. But if the offense is non-bailable that does not mean that the person accused of such offense shall not be released on bail: but here in such case bail is not a matter of right, but only a privilege to be granted at the discretion of the court.

### *Provisions under the Code of Criminal Procedure, 1973*

The Code of Criminal Procedure, 1973, makes provisions for release of accused persons on bail. Section 436 of the Code provides for release on bail in cases of bailable offenses. Section 436 provides that when person not accused of a non-bailable offense is arrested or detained he can be detained as right to claim to be released on bail. The section covers all cases of person s accused of bailable of fences cases of persons though not accused of any offense but against whom security proceedings have been initiated under Chapter VIII of the Code and other cases of arrest and detention which are not in respect of any bailable offense.

This section entitles a person other than the accused of a non-bailable offense to be released on bail, it may be recalled that S. 50(2) makes it obligatory for a police officer arresting such a person without a warrant to inform him his right to be released on bail.

Section 436 (1) of the Code signifies that release on bail is a matter of right, or in other words, the officer-in-charge of a police station or any court does not have any discretion whatsoever to deny bail in such cases. The word " appear in this sub- clause is wide enough to include voluntary appearance of the person

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accused of an offense even where no summons or warrant has been issued against him. There is nothing in S. 436 to exclude voluntary appearance or to suggest that the appearance of the accused must be in the obedience of a process issued by the court. The surrender and the physical presence of the accused with the submission to the jurisdiction and order of the court is judicial custody, and the accused may be granted bail and released from such custody.

The right to be released on bail under S. 436(1) cannot be nullified indirectly by fixing too high amount of bond or bail-bond to be furnish by the person seeking bail. Section 440(1) provides the amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case, and shall not be excessive. Further S. 440(2) empowers the High Court or the Court of Sessions may direct that the bail required by a police officer or Magistrate be reduced.

Sub-section (2) of S. 436 makes a provision to effect that a person who absconds or has broken the condition of his bail bond when released on bail is a bailable case on a previous occasion, shall not as of right to be entitled to bail when brought before the court on any subsequent date even though the offense may be bailable.

***In Maneka Gandhi v. Union of India [1978] 2 SCR 621***

The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. Otherwise, it would be difficult for the accused to secure his release even by executing a personal bond, it would be very harsh and oppressive if he is required to satisfy the court-and what is said in regard to the court must apply equally in relation to the police while granting bail-that he is solvent enough to pay the amount of the bond if he fails to appear at the trial and in consequence the bond is forfeited. The inquiry into the solvency of the accused can become a source of great harassment to him and often resulting denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond.

It also stated that there is a need to provide by an amendment of the penal law that if an accused willfully fails to appear incompliance with the promise contained in his personal bond, he shall be liable to penal action.

*J. Per Bhagwati & Koshal, JJ.* further observed that it is now high time that the State Government realized its responsibility to the people in the matter of administration of justice and set up more courts for the trial of cases.

***In Moti Ram & Others. v. State of M.P [1978] 4 SCC 47***

Urgent need for a clear and explicit provision in the Code of Criminal Procedure enabling the release, inappropriate cases, of an under trial prisoner on his bond without sureties and without any monetary obligation.

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Criminal courts today, are extremely unsatisfactory and needs drastic change. In the first place it is virtually impossible to translate risk of non-appearance by the accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the accused from fleeing is of doubtful validity. There are several considerations which deter an accused from running away from justice and risk of financial loss is only one of them and that too not a major one. In this case the court also pointed out the enlightened Bail Projects in the United States such as Manhattan Bail Project and D. C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the accused at the trial in quite a large number of cases. The Court laid down following guidelines, that determine whether the accused has his roots in the community which would deter him from fleeing, the Court should take into account the following factors concerning the accused:

1. The length of his residence in the community,
2 His employment status, history and his financial condition,
3. His family ties and relationships,
4 His reputation, character and monetary condition,
5. His prior criminal record including any record or prior release on recognizance or on bail,
6. The identity of responsible members of the community who would vouch for his reliability. The nature of the offense charged and the apparent probability of conviction and the likely sentence in so far as these factors are relevant to the risk of non appearance, and If the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible, be released on his personal bond.

Of course, if facts are brought to the notice of the court which go to show that having regard to the condition and background of the accused his previous record and the nature and circumstances of the offense, there may be a substantial risk of his non-appearance at the trial, as for example, where the accused is a notorious bad character or confirmed criminal or the offense is serious (these examples are only by way of illustration), the court may not release the accused on his personal bond and may insist on bail with sureties. But in the majority of cases, considerations like family ties and relationship, roots in the community, employment status etc. may prevail with the court in releasing the accused on his personal bond and particularly in cases where the offense is not grave and the accused is poor or belongs to a weaker section of the community, release on personal bond could, as far as possible, be preferred. But even while releasing the accused on personal bond it is necessary to caution the court that the amount of the bond which it.

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***Section 436A . Maximum period for which an under trial prisoner can be detained***

The new provision Section 436Awas introduced in order to solve the problems of undertrials' who were languishing in jails as they will now be given an opportunity to be set free instead of endlessly waiting for their trial to take place. This move has been made due to a faulty criminal justice system and provides a makeshift method of providing justice and relief to undertrial prisoners. This seems to suggest that the Legislature and the Government have accepted the existence of the faulty system and their inability to do anything about it. For this purpose section 436 A was inserted.

According to S. 436-A, a person who has undergone detention for a period extending upto half of the maximum period of imprisonment imposed for a particular offense, shall be released on her/his personal bond with or without sureties. The procedure provided is that the Court has to hear the Public Prosecutor and give its decision with reasons in writing. The Court may release the applicant, or if not satisfied may order for the continued detention of the applicant. However, no prisoner can be detained for a period longer than the maximum period of imprisonment provided. The exception to the section is that it is not applicable to offenders who have been sentenced to death.

Moving onto the demerits of the provisions itself, S. 436-A gives discretion to the Court to set the prisoner free or to make him/her continue imprisonment. There is no mention of any applications having to be filed under the section. The first part of the section states that any prisoner who has served more than half the term of his/her imprisonment 'shall' be released. However, the proviso puts a restriction on the mandatory provision by giving discretionary powers to the courts. This raises questions regarding the implementation of the provision. There is every chance that a prisoner may be sent back to jail to serve a period longer than the half term of his/her sentence. Till the Judges give their written reasons for the same, one will not know on what grounds a continuation of the term can be ordered as the section does not provide any guidelines. Will the undertrial prisoner continue to serve term till the maximum period of the

**Granting of Bail with conditions**

Section 437 of the Code provides for release on bail in cases of non-bailable offenses. In such cases, bail is not a matter of right. Court has sufficient discretion to deny or to grant bail. First Schedule to the Code provides the list of bailable and non-bailable offenses. Further cases often arise under S. 437, where though the court regards the case as fit for the grant of bail, it regards imposition of certain conditions as necessary in the circumstances. To meet this need sub-section (3) of S. 437 provides:

When a person accused or suspected of the commission of an offense punishable with imprisonment which may extend to seven years or more or of an offense

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under Chapter VI, Chapter XVI or Chapter XVII of the Indian Penal Code (45 of 1860) or abatement of, or conspiracy or attempt to commit, any such offense, is released on bail under sub-section (1), the Court may impose any condition which the Court considers necessary :

*(a)* In order to ensure that such person shall attend in accordance with the conditions of the bond executed under this Chapter, or

*(b)* In order to ensure that such person shall not commit an offence similar to the offence of which he is accused or of the commission of which he is suspected, or

*(c)* Otherwise in the interests of Justice.

It will be noticed that :

(1) The power to impose conditions has been given to the court and not to any police officer;

(2) The power to impose conditions can only be exercised :

*(i)* Where the offence is punishable with the imprisonment which may extend to seven years or more or

*(ii)* Where the offence is one under Chapter VI (Offences against the State), Chapter XVI (offences against the human body), or Chapter XVII (offences against the property) of I.P.C, or

*(iii)* Where the offence is one of the abetment of or conspiracy to or attempt to commit any such offence as mentioned above in (i) and (ii).

**Cancellation of Bail**

According to S. 437(5) any court which has released a person on bail under (1) or sub sec (2) of S. 437 may if considers it necessary so to do, direct that such person be arrested and committed to custody.

The power to cancel bail has been given to the court and not to a police officer. Secondly, the court which granted the bail can alone cancel it. The bail granted by a police officer cannot be cancelled by the court of a magistrate. For cancellation of bail in such a situation, the powers of the High Court or Court of Session under S. 439 will have to invoked. Rejection of bail when bails applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable cases than to cancel a bail granted in such case. Cancellation of bail necessary involves the review of a decision already made and can large be permitted only if, by reason of supervening circumstances it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. However, bail granted illegal or improperly by a wrong arbitrary exercise of judicial discretion can be cancelled even if there is absence of supervening circumstances. If there is no material to prove that the accused abused his freedom court may not cancel the bail.

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*In Public Prosecutor v. George Williams1951 Mad 1042*

The Madras High Court pointed out five cases where a person granted bail may have the bail cancelled and be recommitted to jail:

*(a)* Where the person on bail, during the period of the bail, commits the very same offence for which is being tried or has been convicted, and thereby proves his utter unfitness to be on bail;

*(b)* If he hampers the investigation as will be the case if he, when on bail; forcibly prevents the search of place under his control for the corpus delicti or other incriminating things;

*(c)* If he tampers with the evidence, as by intimidating the prosecution witness, interfering with scene of the offence in order to remove traces or proofs of crime, etc.

*(d)* If he runs away to a foreign country, or goes underground, or beyond the control of his sureties; and

*(e)* If he commits acts of violence, in revenge, against the police and the prosecution witnessed & those who have booked him or are trying to book him.

**Right to Bail and Article 21's Right to Personal Liberty**

The right to bail is concomitant of the accusatorial system, which favours a bail system that ordinarily enables a person to stay out of jail until a trial has found him/her guilty. In India, bail or release on personal recognizance is available as a right in bailable offences not punishable with death or life imprisonment and only to women and children in non-bailable offences punishable with death or life imprisonment. The right of police to oppose bail, the absence of legal aid for the poor and the right to speedy reduce to vanishing point the classification of offences into bailable and non-bailable and make the prolonged incarceration of the poor inevitable during the pendency of investigation by the police and trial by a court.

The fact that under trials formed 80 percent of Bihar's prison population, their period of imprisonment ranging from a dew months to ten years; some cases wherein the period of imprisonment of the under trials exceeded the period of imprisonment prescribed for the offences they were charged with- these appalling outrages were brought before the Supreme Court in *Hussainara Khatoon v. State of Bihar AIR 1979 SC 1360.*

Justice Bhagwati found that these unfortunate under trials languished in prisons not because they were guilty but because they were too poor to afford a bail. In *Mantoo Majumdar v. State of Bihar AIR 1980 SC 846* the Apex Court once again upheld the under trials right to personal liberty and ordered the release of the petitioners on their own bond and without sureties as they had spent six years awaiting their trial, in prison. The court deplored the delay in police

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investigation and the mechanical operation of the remand process by the magistrates insensitive to the personal liberty of the under trials, remanded by them to prison. The Court deplored the delay in police investigation and the mechanical operation of the remand process by the magistrates insensitive to the personal liberty of under trials, and the magistrate failure to monitor the detention of the under trials remanded by them to prison.

The travails of illegal detainees languishing in prisons, who were uniformed, or too poor to avail of, their right bail under section 167 Cr.P.C. was further brought to light in letters written to Justice Bhagwati by the Hazaribagh Free Legal Aid Committee in *Veena Sethi v. State of Bihar (1982) 2 SCC 583*. The court recognized the inequitable operation of the law and condemned it- "The rule of law does not exist merely for those who have the means to fight for their rights and very often for perpetuation of status quo... but it exist also for the poor and the downtrodden... and it is solemn duty of the court to protect and uphold the basic human rights of the weaker section of the society. Thus having discussed various hardships of pre-trial detention caused, due to unaffordability of bail and unawareness of their right to bail, to under trials and as such violation of their right to personal liberty and speedy trial under Article 21 as well as the obligation of the court to ensure such right. It becomes imperative to discuss the right to bail and its nexus to the right of free legal aid to ensure the former under the Constitution- in order to sensitize the rule of law of bail to the demands of the majority of poor and to make human rights of the weaker sections a reality.

**Right to Bail and Right to Free Legal Aid :— Articles 21 and 22 Read with Article 39A**

Article 21 of the Constitution is said to enshrine the most important human rights in criminal jurisprudence. The Supreme Court had for almost 27 years after the enactment of the Constitution taken the view that this Article merely embodied a facet of the Dicey on concept of the rule of law that no one can deprived of his life and personal liberty by the executive action unsupported by law. If there was a law which provided some sort of procedure, it was enough to deprive a person of his life and personal liberty.

In the Indian Constitution there is no specifically enumerated constitutional right to legal aid for an accused person. Article 22(1) does provide that no person who is arrested shall be denied the right to consult and to be defended by legal practitioner of his choice, but according to the interpretation placed on this provision by the Supreme Court *Janardhan Reddy v. State of Hyderabad, AIR 1951 SC 227*. in this provision does not carry with it the right to be provided the services of legal practitioners at state cost. Also Article 39-A introduced in 1976 enacts a mandate that the state shall provide free legal service by suitable legislations or schemes or any other way, to ensure that opportunities for justice are not denied to any citizen by reason of economic or other disabilities - this

however remains a Directive Principle of State Policy which while laying down an obligation on the State does not lay down an obligation enforceable in Court of law and does not confer a constitutional right on the accused to secure free legal assistance.

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However the Supreme Court filled up this constitutional gap through creative judicial interpretation of Article 21 following Maneka Gandhi's case. The Supreme Court held in *M.H. Hoskot v. State of Maharashtra a AIR 1978 SC 1548* Hussainara Khatoon's case that a procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would, therefore go through the trial without legal assistance cannot be regarded as reasonable, fair and just. It is essential ingredient of reasonable, fair and just procedure guaranteed under Article 21 that a prisoner who is to seek his liberation through the court process should have legal services made available to him.

The right to free legal assistance is an essential element of any reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21.

Thus the Supreme Court spelt out the right to legal aid in criminal proceeding within the language of Article 21 and held that this is :

> "a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer."

It is indisputable that an unnecessarily prolonged detention in prison of under trials before being brought to trial is an affront to all civilized norms of human liberty and any meaningful concept of individual liberty which forms the bedrock of a civilized legal system must view with distress patently long periods of imprisonment before persons awaiting trial can receive the attention of the administration of justice. Thus the law of bails must continue to allow for sufficient discretion, in all cases, to prevent a miscarriage of justice and to give way to the humanization of criminal justice system and to sensitize the same to the needs of those who must otherwise be condemned to languish in prisons for no more fault other than their inability to pay for legal counsel to advise them on bail matters or to furnish the bail amount itself.

While concluding, it seems desirable to draw attention to the absence of an explicit provision in the Code of Criminal Procedure enabling the release, in appropriate cases, of an under trial prisoner on his bond without sureties and without any monetary obligation. There is urgent need for a clear provision. Undeniably, the thousands of under trial prisoners lodged in Indian prisons today include many who are unable to secure their release before trial because of their

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inability to produce sufficient financial guarantee for their appearance. Where that is the only reason for their continued incarceration, there may be good ground for complaining of invidious discrimination. The more so under a constitutional system which promises social equality and social justice to all of its citizens. The deprivation of liberty for the reason of financial poverty only is an incongruous element in a society aspiring to the achievement of these constitutional objectives. There are sufficient guarantees for appearance in the host of considerations to which reference has been made earlier and, it seems to me, our law-makers would take an important step-in defence of individual liberty if appropriate provision as made in the statute for non-financial releases.

## 4.3 PROSECUTION

With 'law and justice' being a State subject, there is no uniformity in the structure of public prosecution in India. In a large number of States the boundary between the investigation agency and the prosecution is blurred. This adversely affects the impartiality of the PP since the police could control the prosecution. In a few States where the prosecution is headed by a senior police officer, the boundary completely collapses. This system continues presently in Uttar Pradesh and Tamilnadu, despite doubts about its legality in light of a number of Supreme Court rulings as also the upcoming CrPC Amendments, 2005.

Although the Law Commission in 1958 had recommended the setting up of a directorate of prosecution (DOP) with its own cadre such a recommendation was not adopted in the Criminal Procedure Code of 1973. Therefore while some States have created the DOP, others have not (Arunachal Pradesh, Mizoram and Gujarat). Furthermore, in States which have DOPs too, there are differences. In Goa, the DOP covers the High Court, Sessions Courts and the Magistrate's Courts. In Delhi, Karnataka, Himachal Pradesh and Orissa, the DOP excludes the High Courts. In a number of other States including Andhra Pradesh, Tamilnadu, Uttar Pradesh and Uttaranchal, the DOP extends only to Magistrate's Courts and Session and High Courts are excluded and prosecutors are appointed on tenure.

The impartiality of the PP is directly dependent upon who controls the prosecution agency (DOP or otherwise). For instance, in Arunachal Pradesh and Mizoram the prosecutors function directly under the police. In some other States the DOP is headed by a Police officer. In a large number of States the DOP is controlled by the Home Department (which also controls the police) while in Goa and Karnataka; it is the Law Department which controls the DOP. The appointment of prosecutors is also important, as this is an area where the executive can exercise its influence over the justice system. Although there are a number of rules and requirements for the appointment of PPs, these are often overridden by the executive who would much rather have their preferred choice as 'ad-hoc' appointees.

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## THE ROLE OF THE PUBLIC PROSECUTOR

The present criminal justice system is based on the principle that any crime committed by an individual is a crime against the societal order. The prosecution and punishment for the crime is therefore the responsibility of the state, and not that of the victim of the crime. It has been argued that this responsibility - where the state acts on behalf of the victims - limits the scope for vengeance and revenge. Such prosecution, on behalf of the state (and therefore society) is performed by a public prosecutor (PP) appointed by the State. The PP is required to play an impartial and neutral role and prosecute all persons who have been charge-sheeted by the police. However given the power-play discussed previously, and the vast political and economic forces that influence the government, it is obvious that the PP faces tremendous pressure, not only from the state but also powerful elites who attempt to influence the prosecution.

Although the PP is appointed by the State, the prosecutor's sole aim is not seek a conviction. A number of court judgements have emphasised that the PP is a 'minister of justice' who should place before the court all evidence in the PP's possession, whether in favour of or against the accused. This is seen as proper prosecution, as opposed to single-minded persecution in seeking a conviction regardless of the evidence.

## PROSECUTION AND THE POLICE

Various courts have held that the prosecution and the police are completely different agencies and neither should control the other. Simply put, the prosecution cannot be part of the investigation and the police cannot direct or be part of the prosecution. During the investigation stage, and till the filing of charge-sheet, the investigating agency is in control of the proceedings. Once the charge-sheet has been filed in the court, the PP takes over. However given that both are to play complementary roles in the justice system, it is clear that there needs to be an effective and efficient working relationship between the two agencies, e.g. the advice of the PP can and should be sought by the police before filing the charge-sheet. This working relationship, however, cannot be an argument for control of the prosecution by the police - a situation that existed till 1973 when the Criminal Procedure Code was amended.

Prior to independence there was no requirement for the PP to be a lawyer, and the posts were generally held by police officers. This system worked in a colonial state where the prosecutors were crucial in suppressing and criminalising the struggle for independence. Various reports of the Law Commission in 1958 and 1969 recommended the setting up of an independent prosecution agency. While this was not completely heeded by the Government, in the new CrPC *w.e.f* April 1974, the PP was required to be an advocate with a minimum of seven years practice.

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The end of the practice of police-prosecutors also led to a landmark judgement by the Allahabad High Court in *Jai Pal Singh Naresh v. State of Uttar Pradesh (1976 CrLJ 32)*. In this case the Court quashed a UP government order placing the Assistant PPs under the administrative and disciplinary control of the Superintendent of Police and the Inspector General of Police. The Court observed that the very aim of creating prosecutors outside the police was to ensure independence and this could not be achieved if the police retained such control of the prosecutors. This was subsequently endorsed by the Supreme Court in *SB Shahane v. State of Maharashtra (AIR 1995 SC 1628)*.

Not all, however, were happy with the changes brought about. A number of reports of the state Police Commissions and the fourth National Police Commission argued that independence of the prosecution reduced the power of the police and led to a decline of convictions. Similar arguments have also been made by recent reports on the prosecution system in Orissa and West Bengal. The infamous Malimath Committee, set up by the NDA government to overhaul the justice system, also recommended that the DOP be headed by a senior police official.

Prosecutors themselves, on the other hand, do not appear to support moves to place the agency under the control of the police. It is clear that there is a need for more effective co-ordination between the two agencies for the smooth functioning of the justice system. However the blurring of the line between coordination and control, while convenient for the police, is harmful to the functioning of the justice system in general.

### *Prosecution and the Executive*

The prosecution agency also faces pressure from the executive in a number of ways. An extreme case is Arunachal Pradesh, where the question of autonomy and independence of the prosecution is redundant as there is not even the constitutionally required separation between the executive and the judiciary. For instance the Deputy Commissioner is also the Ex Officio District and Sessions Judge.

In other States where the judiciary and executive are independent of each other, appointment, security of posts and tenure are methods by which the executive seeks to control the prosecution. Even where the appointments made are not 'ad-hoc', there are a number of ways in which the executive can ensure that the prosecution is reliant on it. Vigilance on administrative issues relating to appointment and security of posts as also the nature of the posts - tenure or cadre, is therefore a crucial tool in protecting the autonomy and independence of the prosecution.

The relationship between the investigation, prosecution and the executive received the Supreme Court's attention in the Jain Hawala case *(Vineet Narrain v.*

*Union of India, 1998 (1) SCC 226).* In this case the bureaucrat-politician-criminal nexus had used all means necessary to thwart the investigation and prosecution of corruption cases by the Central Bureau of Investigation. The Court monitored the progress of these cases and passed detailed directions on the functioning of various agencies involved and even warned the minister in charge to avoid interfering with the investigation and prosecution.

Political interference can also take a more direct form - ensuring withdrawal of cases. Under Section 321 CrPC the public prosecutor has the power to withdraw a case at any time before the judgement is pronounced. There is no clear indication in the CrPC however as to how this power is to be exercised. Case law has indicated that while the power to withdraw can be exercised by the PP only on the request of the State government or complainant, the decision whether to withdraw or not is only that of the PP and cannot be delegated to any other - including the State government.

Prosecutors, police officers and defence lawyers however insist that in reality, the PP has no role in deciding on withdrawal of the case and it is the executive that decides on the withdrawal. Given the control of the executive over the security of the posts, it is obvious that the PP has little defence against the executive. An excellent example is the withdrawal of criminal charges in the Bhopal gas leak case. In that instance the Union of India arrived at a settlement with the Union Carbide Corporation under the aegis of the Chief Justice of India. It is unlikely that there was any independent 'application of mind' by the PP in charge of the criminal case before withdrawal from the prosecution.

The role played by the executive in thwarting prosecution following communal violence situations too has raised concern. For instance, after the 1984 anti-sikh carnage in Delhi, the Congress government was unwilling to appoint lawyers with integrity and experience to prosecute those cases. The role of the Shiv Sena-BJP government after the 1992-93 Bombay riots too is damning. Only cases registered against Muslim rioters proceeded at great speed with no witnesses turning hostile. In almost all other cases, especially those where policemen were charged, there was no interest amongst the prosecution and the executive. In one case where the former Commissioner of Police of Mumbai was the accused, the Magistrate pulled up the prosecutor on the ground that he was representing the prosecution and the accused at the same time.

Any doubt of executive interference was removed after cases relating to the 2002 genocide in Gujarat came up in courts in the State. While the Supreme Court has taken notice of some of the blatant irregularities in some of the cases, other cases from Gujarat are languishing. In the prominent Best Bakery case, the Supreme Court unprecedentedly ordered a retrial in Maharashtra virtually indicting the BJP government in Gujarat for interference in cases.

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Another area where the executive exerts influence on the PP is in filing appeals and revisions. Here again the PP is supposed to take direction from the executive and then apply an independent mind. However in practice the decision is taken completely by the executive with the PP only playing a forwarding role.

### *Special Public Prosecutors*

Section 25(8) of the CrPC provides that the Central or State government may appoint a special public prosecutor (SPP) for any case or class of cases. Provisions for appointment of SPPs are also found in special legislation like the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

The appointment of a special public prosecutor is a vexatious issue. It is often said that because of this provision the executive has little interest in reforming and improving the prosecution system as a whole. In politically sensitive and important cases where the executive needs a conviction to take place, it appoints a leading lawyer as SPP, instead of relying on the poorly paid and often leaky prosecution that it has created. Thus it is no surprise that regular prosecutors - whether cadre or tenure, display considerable resentment against appointment of SPPs. They argue that if the prosecution was given proper facilities, training and incentives there would be no need to hire lawyers from outside the prosecution agency.

While the system of appointment of SPPs plays a negative role for the development of prosecution agencies of the whole, in the present position SPPs also offer a small space for human rights activists to lobby. Thus in important cases of communal violence etc. activists have sought the appointment of progressive lawyers as SPPs. Similarly in cases where violations have been carried out by police or other security personnel or where the accused are close to the state machinery, the appointment of SPPs has been a consistent demand from the human rights community.

## 4.4 COURTS

The Judiciary of India is an independent body and is separate from the Executive and Legislative bodies of the Indian Government. The judicial system of India is stratified into various levels. At the apex is the Supreme Court, which is followed by High Courts at the state level, District Courts at the district level and Lok Adalats at the Village and Panchayat Level. The judiciary of India takes care of maintenance of law and order in the country along with solving problems related to civil and criminal offences.

The judiciary system that is followed in India is based on the British Legal System that was prevalent in the country during pre-independence era. Very few amendments have been made in the judicial system of the country.

The District Courts in India take care of judicial matters at the district level. Headed by a judge, these courts are administratively and judicially controlled by the High Courts of the respective states, to which the district belongs. There are many secondary courts also at this level, which work under the District Courts. There is a court of the Civil Judge as well as a court of the Chief Judicial Magistrate. While the former takes care of the civil cases, the latter looks into criminal cases and offences.

The Chief Judicial Magistrate is endowed with the responsibility of deciding critical cases. He or she has the power of punishing the accused by imprisonment for a maximum of 7 years. The independence of the judiciary even at the district level needs a special mention. There is a strong bar in each district court that ensures proper decisions are made in the cases that come to these courts. The major problem that is faced by the district courts in India is that numerous cases get piled up day after day and as a result there is inordinate delay in the decisions of the court.

**Composition of District courts**

The highest court in each district is that of the District and Sessions Judge. This is the principal court of original civil jurisdiction besides High Court of the State and which derives its jurisdiction in civil matters primarily from the code of civil procedure. The district court is also a court of Sessions when it exercises its jurisdiction on criminal matters under Code of Criminal procedure. The district court is presided over by one District Judge appointed by the state Government. In addition to the district judge there may be number of Additional District Judges and Assistant District Judges depending on the workload. The Additional District Judge and the court presided have equvivalent jurisdiction as the District Judge and his district court.

However, the district judge has supervisory control over Additional and Assistant District Judges, including decisions on allocation of work among them. The District and Sessions judge is often referred to as "district judge" when he presides over civil matters and "sessions judge" when he presides over criminal matters. Being the highest judge at district level, the District Judge also enjoys the power to manage the state funds allocated for the development of judiciary in the district.

The district judge is also called "Metropolitan session judge" when he is presiding over a district court in a city which is designated "Metropolitan area" by the state Government. Other courts subordinated to district court in the Metropolitan area are also referred to with "metropolitan" prefixed to the usual designation. An area is designated a metropolitan area by the concerned state Government if population of the area exceeds one million.

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Appointment of district judge and other Additional and Assistant district judges is done by the state Government in consultation with the High court of the state. A minimum of seven years of practise as a lawyer at bar is a necessary qualification. Upon a written examination and oral interview by a committee of High court judges, the appointment of district judges is notified by the state Government. This is referred to as direct recruitment. District judges are also appointed by way of elevation of judges from courts subordinate to district courts provided they fulfill the minimum years of service.

A district judge or Additional judge may be removed from his office by the state Government in consultation with the High court. The next level of ascendancy for a district judge who served sufficient number of years is the post of High court judge. High court Judges are usually appointed from a pool of advocates practising at the Bar of the High court and District Judges who served for sufficient number of years. By virtue of his office a district judge often occupies privileged position in the district alongside administrative heads of the district like the collector (not to be confused with postal stamp collector).

### Jurisdiction

The District Court or Additional District court exercises jurisdiction both on original and appellate side in civil and criminal matters arising in the District. The territorial and pecuniary jurisdiction in civil matters is usually set in concerned state enactments on the subject of civil courts. On the criminal side jurisdiction is almost exclusively derived from code of criminal procedure. This code sets the maximum sentence which a district court may award which currently is capital punishment.

The court exercises appellate jurisdiction over all subordinate courts in the district on both civil and criminal matters. These subordinate courts usually consist of a Junior Civil Judge court, Principal Junior civil Judge court, Senior civil judge court (often called sub court)in the order of ascendancy on the civil side and the Judicial Magistrate Court of IInd Class, Judicial Magistrate Court of Ist class, Chief Judicial Magistrate Court in the order of ascendancy on the criminal side.

Certain matters on criminal or civil side cannot be tried by a court inferior in jurisdiction to a district court if the particular enactment makes a provision to the effect. This gives the District Court original jurisdiction in such matters.

Appeals from the district courts lie to the High court of the concerned state.

### *High Courts*

There are High Courts in almost all the states of India and the Union Territories. The High Courts work under the Supreme Court in the country. These courts are vested with lot of power. They decide on both civil as well as criminal cases. Most of the cases that are handled by the High Courts of the country are passed on from the district or lower courts.

The judges of the High Courts are appointed by the President of India, in consultation with the Chief justice of India and the Governor of the state. The Chief Justice heads each of the High Courts in India. The numbers of judges vary from one court to other depending on the area that the High Court covers and the number of cases that it handles. There are also High Courts that serve more than one Indian state or Union Territory. Each of these courts have original and appellate jurisdiction under them. Summons can also be issued by the High Court. Revenue matters are dealt by original jurisdiction, while an eminent jury handles original criminal cases.

Established in the year 1862, the Calcutta High Court is the oldest court in India. Apart from this, there are 18 total High Courts in the country, some of which are Bombay High Court, Delhi High Court, Chattisgarh High Court, Gujarat High Court, Jharkhand High Court, Madras High Court, Patna High Court and Sikkim High Court.

**Jurisdiction of a High Court**

A High Court is the highest court of appeal; both in civil and criminal cases, in the State. It also enjoys original jurisdiction in some matters.

***Original Jurisdiction:*** Every High Court has original jurisdiction in regard to admiralty, will, divorce, marriage, company, contempt of court and certain revenue cases. Every High Court is empowered to issue directions, orders or writs, particularly the writs of habeas corpus, mandamus, prohibition, certiorari and quo warranto for the enforcement of any of the Fundamental Rights.

***Appellate Jurisdiction:*** It hears appeals against the judgments of Subordinate Courts. In criminal cases, if a Sessions Judge awards death sentence, an appeal lies to the High Court. In civil cases, appellate jurisdiction extends to all such cases which involve an amount exceeding Rupees 5,00,000/- It also hears cases relating to patent and designs, succession, land acquisition, insolvency and guardianship.

**Transfer of Certain cases to the High Court**

If a High Court feels that a case pending in a Subordinate Court, involves a substantial question of law, it may withdraw the case and may either dispose off the case itself or determine the said question of law and return the case to the court from which it was withdrawn for final decision.

A High Court has the right of superintendence over all other courts subordinate to it, both in judicial and administrative matters. It can make rules relating to the appointment, demotion, promotion and leave of absence for the officers of the district courts and other lower courts.

The High Court, thus, plays a very important role in the judicial matters pertaining to the State. But it is not the highest court of appeal. There could be an appeal against its judgment to the Supreme Court even in subjects included in the State list.

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## THE SUPREME COURT OF INDIA

The Supreme Court is the highest judicial body in India. The Supreme Court came into power on 28th January 1950; just two days after the Constitution of India came to effect. In the initial stages, it had its office in a part of the Parliament House. The Supreme Court is endowed with many duties and responsibilities. The biggest responsibility is that it is the highest court of appeal and is also the protector of the Constitution in the country.

The Chief Justice of India and 25 other judges make up the Supreme Court of India. The appointments are done directly by the President of India. There are certain criteria that have to be fulfilled by the advocates to become a judge of the Supreme Court. Being a citizen of India is one of the most important criteria. Apart from this, the person has to have an experience of minimum five years as a judge in the High Court or any other two courts one after another. He should also be a prominent jurist as per the President of the country, so that he can take up responsibilities well. The Chief Justice is also consulted at the time of appointment of the judges in the Supreme Court.

The Judges of the Supreme Court are free to exercise their power as and when required. The process of removal of the Supreme Court judges is quite an interesting but lengthy process. An order from the President is mandatory in case of removal of the judges. A two-thirds majority has to be obtained from both the houses for the removal of the judges.

The jurisdiction of the Supreme Court is divided into original jurisdiction, advisory jurisdiction and appellate jurisdiction. Original jurisdiction is required when there is a dispute between the Government and the states of India or any one state of India. The Supreme Court can also enforce fundamental Rights according to the Article 32 of the Constitution of India.

The appellate jurisdiction is mentioned in Articles 132(1), 133(1) or 134 of the Constitution. The decision of the High Court can be questioned in the Supreme Court of the country. One can appeal to the Supreme Court, if he or she is not satisfied with the decision of the High Court. The Supreme Court has the provision of accepting or rejecting the case at its own discretion. There are also provisions of pardoning criminals and canceling their lifetime imprisonment or death sentence by the Supreme Court.

Apart from the original and appellate jurisdiction of the Supreme Court, there is an advisory jurisdiction that needs special mention. There are many cases that are directly referred by the President of India and the Supreme Court has to look into those matters. This provision is mentioned in Article 143 of the Indian Constitution.

The Supreme Court in India acts as an independent body and is free from any outer control. The contempt of law court in India is a punishable offence and the Supreme Court takes care of this immaculately.

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### Original Jurisdiction

The Supreme Court hears directly any dispute, (i) between the Government of India and one or more States, (ii) between the Government of India and any State or States on one side and one or more States on the other or (iii) between two or more States. Such a dispute should, however, involve some question of law or fact on which the existence or extent of a legal right depends. The treaties concluded between the Centre and the princely states are excluded from the Court's original jurisdiction.

### Appellate Jurisdiction

The Supreme Court hears appeals against the judgement of a High Court: In certain cases where a High Court certifies, in a civil or criminal case, that the case involves a substantial question of law as to the interpretation of the Constitution or where the Supreme Court grants special leave for such an appeal.

In civil case where a High court certifies that the case involves a substantial question of law of general importance and in the opinion of the High Court the said question needs to be decided by the Supreme Court. In criminal cases where the High Court has, on appeal; reversed an order of acquittal and sentenced the accused to death or where the High Court has transferred the case from subordinate court to itself, and then convicted the accused and sentenced him to death and where the High Court certifies that the case is a fit one for appeal to the Supreme Court.

### Advisory Jurisdiction

If at any time it appears to the President that a question of law or fact has arisen or is likely to arise which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it he may refer the question to the Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereupon. However, this advice of the Court is binding neither on the President nor on the parties affected by the opinion.

### Judicial Independence

The Constitution seeks to ensure the independence of Supreme Court Judges in various ways. Judges are generally appointed on the basis of seniority and not on political preference. A Judge of the Supreme Court cannot be removed from office except by an order of the President passed after an address in each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of members present and voting, and presented to the President in the same Session for such removal on the ground of proved misbehaviour or incapacity. The salary and allowances of a judge of the Supreme Court cannot be reduced after appointment. A person who has been a Judge of the Supreme Court is debarred from practising in any court of law or before any other authority in India.

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***Powers to Punish Contempt***

Under Articles 129 and 142 of the Constitution the Supreme Court has been vested with power to punish anyone for contempt of any law court in India including itself. The Supreme Court performed an unprecedented action when it directed a sitting Minister of the state of Maharashtra, Swaroop Singh Naik, to be jailed for 1 month on a charge of contempt of court on 12 May 2006. This was the first time that a serving Minister was ever jailed.

## 4.5 JUVENILE JUSTICE SYSTEM IN INDIA

A staggering 30 million children in India belonged to families living in conditions of extreme distress and deprivation. Violence against girls, child labour, children living on the streets, trafficking, violence in schools and violence in conflict situations have all been reportedly on the rise. The need for specific instrumentality for children stems from these pressing situations.

Juvenile justice policy in India is largely governed by the constitutional mandate given under Article 15 that guarantees special attention to children through necessary and special laws and policies that safeguard their rights. The Right to equality, protection of life and personal liberty and the right against exploitation is enshrined in Articles 14, 15, 16, 17, 21, 23 and 24. The Constitution of India recognizes the vulnerable position of children and their right to protection.

The course of events concerning juvenile justice in this country was equally influenced by several international developments. It primarily includes the UN Convention of the Rights of the Child (UNCRC) 1989, the UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) 1985 Driven by constitutional guarantees for protecting children as well as recognizing international concern for child, the Indian state has made numerous arrangements in this direction. To give effect child protection, a number of laws were brought in. The Ministry of Women and Child Development has been instrumental in this direction and it has particularly catered to children in crisis situation such as street children, children who have been abused, abandoned children, orphaned children, children in conflict with the law, and children affected by conflict or disasters, etc.

The official stand on child protection is marked by many programmes, in keeping with the current developments, is visible in the approach of the Ministry of Women and Child Development. The National Plan of Action for Children 2005 articulated the rights agenda for the development of children.

The existing mechanism of child protection at official level mainly include the following programmes:

- Juvenile Justice Act
- Integrated Programme for Street Children
- CHILDLINE Service

- Shishu Greh Scheme
- Scheme for Working Children in Need of Care and Protection
- Rajiv Gandhi National Creche Scheme for the Children of Working Mothers
- Scheme to Combat the Trafficking of women and Children for Commercial Sexual Exploitation
- Central Adoption resource Agency (CARA)
- National Child Labour Project (NCLP) for the rehabilitation of child labour

In addition to the above, the Ministry has just released its draft scheme 'The Integrated Child Protection'. This scheme envisages a holistic approach to combat the issues affecting children. In order to reach out to all children, in particular to those in difficult circumstances, the Ministry of Women and Child Development proposes to combine its existing child protection schemes under one centrally sponsored scheme titled Integrated Child Protection Scheme (ICPS). The proposed ICPS brings together multiple vertical schemes under one comprehensive child protection programme and integrates interventions for protecting children and preventing harm.

### *Juvenile Justice Act*

The Juvenile Justice (Care and Protection of Children) Act, 2000 is more in line with the recent thinking and the emerging need of the treatment and handling of juveniles. The objective of this legislation is to ensure the care, protection and development needs of the children who are either neglected or have come into conflict with law constituting delinquency.

The status of implementation of JJ Act has been notified on the website of the Ministry of Child and Family Welfare. The information columns of different states show their progress mainly about establishment of various institutions as per provisions of this Act. While this information merely gives a very primary idea about basic preparation made in these states, it definitely does not provide any clue about the quality and effectiveness of the enforcement of this Act. Even at the Ministerial level the state of implementation of juvenile justice was not found satisfactory. It is stated ".....these policies and legislations for children have on the whole suffered from weak implementation, owing to scant attention to issues of child protection, resulting in scarce resources, minimal infrastructure, and inadequate services to address protection problems."

### *Critique*

The juvenile justice system in India is an offshoot of the criminal justice system. Because of this, its approach towards children has always been marked by the tension between the protective approach of juvenile justice and the traditional approach of dealing with crime. The J J act does not perceive the

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delinquency or the issue of children exploitation in holistic terms. Resultantly, this law does not emerge as progressive legislation. Its emphasis, tough it seems in obvious terms, is not towards solving the problem of child. The institutional set up suggested in the law seems, at best, interventionist, and not essentially professional.

**Imbalances & Irritants**

In certain states, there are observed some differences in treatment and other procedure relating to case. This hampers the uniformity on national level. The JJ Act prescribes for the creation of different institution for custody, adjudication and trial and treatment of juveniles. The non-setting up of such institutions in the states is a major set back to the successful implementation of JJ Act. A major irritant in the effectiveness of this law remained the unconcerned and apathetic attitudes of the officials associated with this law.

The lack of training in handling the affairs relating to children on the part of such officials is found to be a decisive factor. Considerable failures in implementing this law also stems from the lack of coordination amongst various institutions involved in the process. The financial crunch in the institutions involved is also cited as a factor discouraging the progress of implementation of this law. The career growth of the staff involved in the implementation of this Act has also to do with the fate of this Act.

**Bottlenecks**

1. The act fails to express the minimum age, below which the Act would not be applicable. The definition of juvenile delinquency provides very little scope for pettyacts to be dealt within the community.
2. There is no concept of parental responsibility in generating situations ripe for delinquency under this Act. In many cases, the parents place the children in situations where their exploitation and abuse become imminent.
3. The education, training and recreation of children, who are in observation homes, have not been provided for. Besides, basic or school education, even higher education and training of these children should be considered in this Act.
4. The Act fails to provide for procedural guarantees like right to counsel and right to speedy trial
5. The Act does not take into account the orders and directions of the Supreme Court.
6. It empowers the Juvenile Justice Board to give a child in adoption; even though, it is the Child Welfare Committee that deals with children in need of care and protection. The Act is silent on inter-country adoption. There is no linkage between the Juvenile Justice Act 2000 and the other

legal provisions relating to children, for instance child labor, primary education, sexual abuse, adoption, disabilities and health.

7. Juvenile Justice thrives under the shadow of the adult criminal justice agencies and institutions (like the police). Moreover, the juvenile Justice adjudicatory cadres are drawn from the pool of the magistrates from the state.

The Act does not cast any obligation on the part of the state. A rights based perspective, is a missing dimension in this law. In its present shape, child protection becomes more of charity than a commitment. Protection of such children is not seen as a right but as charity or welfare.

The Juvenile Justice Act does not have specific provisions ensuring services for children relating to education, health, legal and social. In the absence of any mechanism of identification of juvenile in need of care and protection, the reach of this law becomes restricted. Addressing to the requirement of such children needs a regular coordination amongst parallel government agencies working in the similar areas. This lack of coordination and convergence of programmes defies the core objective for juvenile justice policy. The J.J.Act does not have any provisions, which could ensure the continuous supervision, monitoring and evaluation of the functioning of juvenile justice system as a whole.

The coverage of the act is quite limited and a large number of children technically fall away from the preview of this law. The resources and infrastructure required for the effective implementation of this law is hardly proportionate to the population and geographical regions covered under it.

Children caught in the system are often helpless with very little redressal. The children effected by the problems like HIV/ AIDS, drug abuse, militancy, disaster etc. do not have any redressal under this law. Similarly the concomitant issues like child marriage, female feticide, street children, working children too fall away from being covered in it.

The lack of institutional infrastructure and trained manpower in the states has blunted the whole objective of this legislation. The requirement of constitution of Child Welfare Committees and Juvenile Justice board is largely remain unfulfilled resulting in the delay of disposal of cases.

The problem of enforcement of this law is also characterized by the lack of support services to vulnerable families, which becomes a major factor in turning their children into delinquency. The J.J. Act has got relatively greater emphasis on institutional setup as compared to non-institutional services. The facilities and services in the institutions in different states are found to be varying and lacking and there is no yardstick to standardize them. There is a dearth of services and programmes to the children of special needs.

There is no index of performance measurement of the institutions in the area of juvenile justice. Therefore, there is no way of knowing the quality of performance of these segments of juvenile justice.

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There are number of incidences violating the procedure of handling of juveniles by the police. Infact the indifference of police towards this law is most disappointing feature. The basic idea of this law has not been internalize by the police due to insufficient training and orientation. The instances of bringing the age of juvenile into adult range while writing the FIR by the police are often heard. Handcuffing and keeping the juvenile in police lockup is not unusual.

The basic idea of juvenile justice was to reintegrate the child into family and society. This needs a proper network of rehabilitation and after care services. Unfortunately, this arrangement is almost nonexistent. The current juvenile justice policy does not have a preventive approach. The delinquency prone situations are increasing but there is no substantial mechanism to check it.

## 4.6 CORRECTION

Offenders are then turned over to the correctional authorities, from the court system after the accused has been found guilty. Like all other aspects of criminal justice, the administration of punishment has taken many different forms throughout history. Early on, when civilizations lacked the resources necessary to construct and maintain prisons, exile and execution were the primary forms of punishment. Historically shame punishments and exile have also been used as forms of censure.

The most publicly visible form of punishment in the modern era is the prison. Prisons may serve as detention centers for prisoners after trial. For containment of the accused, jails are used. Early prisons were used primarily to sequester criminals and little thought was given to living conditions within their walls.

Punishment (in the form of prison time) may serve a variety of purposes. First, and most obviously, the incarceration of criminals removes them from the general population and inhibits their ability to perpetrate further crimes. Many societies also view prison terms as a form of revenge or retribution, and any harm or discomfort the prisoner suffers is "payback" for the harm they caused their victims. A new goal of prison punishments is to offer criminals a chance to be rehabilitated. Many modern prisons offer schooling or job training to prisoners as a chance to learn a vocation and thereby earn a legitimate living when they are returned to society. Religious institutions also have a presence in many prisons, with the goal of teaching ethics and instilling a sense of morality in the prisoners. If a prisoner is released before his time is served, he is released as a parole. This means that they are released, but the restrictions are greater than that of someone on probation.

There are numerous other forms of punishment which are commonly used in conjunction with or in place of prison terms. Monetary fines are one of the oldest forms of punishment still used today. These fines may be paid to the state

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or to the victims as a form of reparation. Probation and house arrest are also sanctions which seek to limit a person's mobility and his or her opportunities to commit crimes without actually placing them in a prison setting. Furthermore, many jurisdictions may require some form of public or community service as a form of reparations for lesser offenses.

Execution or capital punishment is still used around the world. Its use is one of the most heavily debated aspects of the criminal justice system. Some societies are willing to use executions as a form of political control, or for relatively minor misdeeds. Other societies reserve execution for only the most sinister and brutal offenses. Others still have outlawed the practice entirely, believing the use of execution to be excessively cruel or hypocritical.

### *Jail*

A prison is a place in which people are physically confined and, usually, deprived of a range of personal freedoms. Other terms are penitentiary, correctional facility, and jail, although in the India "jail" and "prison" usually refer to different subtypes of correctional facility. Jails are conventionally institutions which form part of the criminal justice system of a county and house both inmates awaiting trial and convicted misdemeanants. Imprisonment or incarceration is a legal penalty that may be imposed by the state for the commission of a crime.

A criminal suspect who has been charged with or is likely to be charged with criminal offense may be held on remand in prison if he is denied or unable to meet conditions of bail, or is unable or unwilling to post bail. A criminal defendant may also be held in prison while awaiting trial or a trial verdict. If found guilty, a defendant will be convicted and may receive a custodial sentence requiring imprisonment.

As well as convicted or suspected criminals, prisons may be used for internment of those not charged with a crime. Prisons may also be used as a tool of political repression to detain political prisoners, prisoners of conscience, and "enemies of the state", particularly by authoritarian regimes. In times of war or conflict, prisoners of war may also be detained in prisons. A prison system is the organizational arrangement of the provision and operation of prisons, and depending on their nature, may invoke a corrections system. Although people have been imprisoned throughout history, they have also regularly been able to perform prison escapes.

### *Function*

The constitution assigns the custody and correction of criminals to the states and territories. Day-to-day administration of prisoners rests on principles incorporated in the Prisons Act of 1894, the Prisoners Act of 1900, and the Transfer of Prisoners Act of 1950. An inspector general of prisons administers prison affairs in each state and territory.

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By the prevailing standards of society, prison conditions are often adequate. Some prison administrators concede that the prevailing conditions of poverty in Indian society contribute to recidivism because a prison sentence guarantees minimal levels of food, clothing, and shelter. Despite this overall view, India's prisons are seriously overcrowded, prisoners are given better or worse treatment according to the nature of their crime and class status, sanitary conditions are poor, and punishments for misbehavior while incarcerated have been known to be particularly onerous.

Prison conditions vary from state to state. The more prosperous states have better facilities and attempt rehabilitation programs; the poorer ones can afford only the most bare and primitive accommodations. Women prisoners are mostly incarcerated in segregated areas of men's prisons. Conditions for holding prisoners also vary according to classification. India retains a system set up during the colonial period that mandates different treatment for different categories of prisoners. Under this system, foreigners, individuals held for political reasons, and prisoners of high caste and class are segregated from lower-class prisoners and given better treatment. This treatment includes larger or less-crowded cells, access to books and newspapers, and more and better food. Despite laws that mandate egalitarian treatment of Dalits, members of Scheduled Tribes, and members of the so-called Backward Classes, a rigid class system that circumvents the spirit of these laws exists within the prison system.

The press and human rights groups periodically raise the subject of prison conditions, including problems of overcrowding, the plight of prisoners detained for long periods while awaiting trial, and the proper treatment of women and juvenile prisoners (children are often incarcerated with their parents). Reports have also surfaced alleging that torture, beatings, rape, sexual abuse, and unexplained suicides occur on many occasions in police stations and prisons. Because of a shortage of mental institutions, numerous "non-criminal lunatics" are imprisoned, often under conditions worse than those afforded criminals. The government concedes that problems exist, but insists that its attempts at prison reform have suffered from a paucity of resources.

## SUMMARY

- A criminal justice system is a set of legal and social institutions for enforcing the criminal law in accordance with a defined set of procedural rules and limitations.
- Superintendence over the police force in the state is exercised by the State Government. The head of the police force in the state is the Director General of Police (DGP), who is responsible to the state government for the administration of the police force in the state and for advising the government on police matters.

- Police Administration at the district level is carried out by the chief of the district police, called Superintendent of Police, who is responsible for the maintenance of law and order, and other law enforcement activities.
- Bail, in law, means procurement of release from prison of a person awaiting trial or an appeal, by the deposit of security to ensure his submission at the required time to legal authority.
- The present criminal justice system is based on the principle that any crime committed by an individual is a crime against the societal order. The prosecution and punishment for the crime is therefore the responsibility of the state, and not that of the victim of the crime.
- The Judiciary of India is an independent body and is separate from the Executive and Legislative bodies of the Indian Government. The judicial system of India is stratified into various levels. At the apex is the Supreme Court, which is followed by High Courts at the state level, District Courts at the district level.

## REVIEW QUESTIONS

1. Discuss the process of criminal justice system.
2. What is the structure of police administration in India?
3. What is the role of public prosecutor in prosecution?
4. Why is bail relevant? Explain.
5. What is the role of judiciary in criminal justice system of India?

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# UNIT– V

# LEGAL AID

## STRUCTURE



*LEARNING OBJECTIVES*

After going through this unit, students will be able to :

- know the concept and history of legal aid;
- discuss the importance and schemes of legal aid;
- explain the concept, historical background and importance of public interest litigation.

## 5.1 INTRODUCTION

Most liberal democracies consider that it is necessary to provide some level of legal aid to persons otherwise unable to afford legal representation. To fail to do so would deprive such persons of access to the court system. Alternately, they would be at a disadvantage in situations in which the state or a wealthy individual took them to court. This would violate the principles of equality before the law and due process under the rule of law.

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A number of delivery models for legal aid have emerged. In a "staff attorney" model, lawyers are employed on salary solely to provide legal assistance to qualifying low-income clients, similar to staff doctors in a public hospital. In a "judicare" model, private lawyers and law firms are paid to handle cases from eligible clients alongside cases from fee-paying clients. The "community legal clinic" model comprises non-profit clinics serving a particular community through a broad range of legal services (*e.g.*, representation, education, law reform) and provided by both lawyers and non-lawyers, similar to community health clinics.

## 5.2 CONCEPT OF LEGAL AID

Conventionally, 'Legal Aid' has been taken too mean the organized effort of the bar council, the community and the government to provide the services of lawyers free, or for a token charge, to persons who cannot afford the usual exorbitant fees. Inability to consult or to be represented by a lawyer may amount to the same thing as being deprived of the security of law. Rawls first principle of justice is that each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberties for all. In the context of our Constitutional demands and State obligations Legal aid has assumed a more positive and dynamic role which should include strategic and preventive services. Relieving 'Legal Poverty' – the incapacity of many people to make full use of law and its institutions – has now been accepted as a function of a 'Welfare State'. Apart from the social, economic and political requirements on which the claim of legal aid rests, its now recently recognized as a constitutional imperative arising from Articles 14[2], 21[3], 22[4](1), 39-A[5] of The Constitution of India.

Legal Aid is a movement that envisages that the poor have easy access to courts and other government agencies. It implies that the decisions rendered are fair and just taking account of the rights and disabilities of parties. The focus of legal aid is on distributive justice, effective implementation of welfare benefits and elimination of social structural discrimination against the poor. It was taking these mandatory provisions of The Constitution of India in mind that the Parliament passed The Legal Services Authorities Act, 1987.

This Act, as amended with effect from 12.6.2002, now provides for decision even on merits, by the Presiding Officers of the Permanent Lok Adalats constituted by the State Legal Services Authority, of those matters which relate to "public utility services", which have been duly defined in the Act.

Today we find that the law of supply and demand operates in all its naked fury in the legal profession. There is practically no limit of the fees that a lawyer may charge his client. This directly leads to inequality in the quality of legal representation as between the rich and the poor. Not only would there be

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inequality in the competence of legal representation which would be available to the rich by reason of their superior financial resources.

## 5.3 HISTORY OF LEGAL AID IN INDIA

The earliest Legal Aid movement appears to be of the year 1851 when some enactment was introduced in France for providing legal assistance to the indigent. In Britain, the history of the organized efforts on the part of the State to provide legal services to the poor and needy dates back to 1944, when Lord Chancellor, Viscount Simon appointed the Rushcliffe Committee to enquire about the facilities existing in England and Wales for giving legal advice to the poor and to make recommendations as appear to be desirable for ensuring that persons in need of legal advice are provided the same by the State. Since 1952, the Government of India also took the initiative to addressing to the question of legal aid for the poor and indigent in various Ministerial Law Conferences and Commissions. In 1960, some guidelines were drawn up by the Government of India for legal aid schemes.

Legal Aid Schemes were floated through Legal Aid Boards, Societies and Law Departments in various States in the Country. In 1980, a National Committee was constituted, under the Chairmanship of Honorable. Mr. Justice P.N. Bhagwati then a Judge of the Supreme Court of India to oversee and supervise legal aid programs throughout the country. This Committee came to be known as CILAS (Committee for Implementing Legal Aid Schemes) and started monitoring legal aid activities throughout the country. The introduction of Lok Adalats added a new chapter to the Justice Dispensation System of this country and succeeded in providing a supplementary forum to the litigants for conciliatory settlement of their disputes. The year 1987, proved to be very significant in Legal Aid history, as the "Legal Services Authorities Act" was enacted to give a statutory base to legal aid programs throughout the country and bring about a uniform pattern. This Act was finally enforced on 9th of November, 1995 after certain amendments were introduced therein by the Amendment Act of 1994. Honorable Mr. Justice R.N. Mishra the then Chief Justice of India played a key role in the enforcement of the Act.

***Legal Aid Provisions in the Constitution:***

Article 39A - Equal Justice and Free Legal Aid. – "The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislations or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities."

The Constitution of India under Article 39-A mandates for free legal aid to the poor and weaker sections of society. The Legal Services Authorities Act, 1987, as amended by the Act of 1994 which came into force on 9th November 1995, aims at establishing a nation-wide network for providing free and comprehensive

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legal services to the weaker sections. It makes it obligatory for the State to ensure equality before law and a legal system which promotes justice on a basis of equal opportunity to all. Legal aid strives to ensure that constitutional pledge is fulfilled in its letter and spirit and equal justice is made available to the poor, downtrodden and weaker sections of the society.

The Legal Services Authority Act, 1987 was enacted to effectuate the constitutional mandates enshrined under Articles 14 and 39-A of the Constitution of India. The object is to provide 'Access to Justice for all' so that justice is not denied to citizens by reason of economic or other disabilities. However in order to enable the citizens to avail the opportunities under the Act in respect of grant of free legal aid, it is necessary that they are made aware of their rights.

By the Constitutional 42nd Amendment Act of 1976, a new provision was incorporated in the Constitution under Article 39-A, for providing free Legal Aid and enhancing the concept of equal justice found a place in our constitution Article 39-A which was incorporated under part IV-Directive Principles of State Policy reads as under :

> "Equal justice and free legal aid-The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities".

Legal aid reasoned in the Act— "The Court has been approached by an organization deeply engaged in rendering social and judicial services for securing justice and equal opportunity to the needy. They have approached the Court for mandamising the State to carry out the objectives and obligation of Article 39-A of the Constitution of India as well as the mandate of the Act, introduced with tall claims. The Court held that the petitioner are entitled to ask the High Court to issue directions sought for in the writ petition for proper implementation of the provisions of the Act and to carry out the purposes of the Act in true sense and spirit and not to scuttle it by resort to any pretences and/or treat the constitutional directives as an empty slogan."

With the object of providing free legal aid, the Government of India had, by a resolution dated 26th September, 1980 appointed a Committee known as "Committee for Implementing Legal Aid Schemes" (CILAS) under the chairmanship of Chief. Justice P.N. Bhagwati to monitor and implement legal aid programs on a uniform basis in all the States and Union Territories. 'CILAS' evolved a model scheme for legal aid programs applicable throughout the country by which several legal aid and advice Boards were set up in the States and Union Territories.

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Legal aid is an essential part of the Administration of Justice. "Access to Justice for all" is the motto of the Authority. The goal is to secure justice to the weaker sections of the society, particularly to the poor, downtrodden, socially backward, women, children, handicapped etc. but steps are needed to be taken to ensure that nobody is deprived of an opportunity to seek justice merely for want of funds or lack of knowledge.

The National Legal Services Authority is a statutory body which has been set up for implementing and monitoring legal aid programs in the country. The Supreme Court Legal Services Committee has also been constituted under the Act. In every High Court also, The High Court Legal Services Committees are being established to provide free legal aid to the eligible persons in legal matters coming before the High Courts. The Legal Services Authorities Act, 1987 also provides for constitution of the State Legal Services Committees, High Court Legal Services Committees, District Legal Services Committees and Taluk Legal Services Committees.

According to Section 2(1) (a) of the Act, legal aid can be provided to a person for a 'case' which includes a suit or any proceeding before a court. Section 2(1) (a) defines the 'court' as a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions. As per Section 2(1)(c) 'legal service' includes the rendering of any service in the conduct of any case or other legal proceeding before any court or other authority or tribunal and the giving of advice on any legal matter.

Legal Services Authorities after examining the eligibility criteria of an applicant and the existence of a prima facie case in his favour provide him counsel at State expense, pay the required Court Fee in the matter and bear all incidental expenses in connection with the case. The person to whom legal aid is provided is not called upon to spend anything on the litigation once it is supported by a Legal Services Authority.

Under The Legal Services Authorities Act, 1987 every citizen whose annual income does not exceed Rs 9,000 is eligible for free legal aid in cases before subordinate courts and high courts. In cases before the Supreme Court, the limit is Rs 12,000. This limit can be increased by the state governments. Limitation as to the income does not apply in the case of persons belonging to the scheduled castes, scheduled tribes, women, children, handicapped, etc.

***Lok Adalats:***

Lok Adalats are judicial bodies set up for the purpose of facilitating peaceful resolution of disputes between the litigating parties. They have the powers of an ordinary civil court, like summoning, examining evidence etc. Its orders are like any court orders, but the parties cannot appeal against such orders. Lok Adalats can resolve all matters, except criminal cases that are non-compoundable. Either

one or both the parties to litigation can make an application to the court for transferring the case to a lok adalat. Where no compromise or settlement is made by the lok adalat, such a case is transferred to the court and that court deals with the litigation from the stage the lok adalat had reached.

Lok Adalats have proved to be an effective mechanism for resolution of disputes through conciliatory methods. Up to 31 December 1997, about 17633 Lok Adalats have been held in different parts of the country where about 68.86 lakh cases were settled. In about 349710 motor vehicles accident claims cases, compensation amounting to over 1,160.07 crore rupees were awarded. Under the Legal Services Authorities Act, Lok Adalat has been given the status of a Civil Court and every award made by Lok Adalat is final and binding on all parties and no appeal lies to any court against its award. Under Chapter VI-A of the Legal Services Authorities Act, 1987, there is the provision of Lok Adalats. Up to December 2004, over 2 lakh 52 thousand Lok Adalats have been organized which have settled over 1 crore 74 lakh cases. For more effective use of provisions of this act, the conference will deliberate on the feasibility of setting up permanent Lok Adalats in the states.

The constitution of the Committee for the Implementation of Legal Aid Schemes (CILAS) in 1980 was a major step in institutionalizing legal aid. The Legal Services-Authorities Act, 1987, displaced the 'CILAS' and introduced a hierarchy of judicial and administrative agencies. The 'LSAA' began to be enforced only eight years later, under the directions of the Supreme Court. It led to the constitution of the National Legal Services Authority (NALSA) at the Centre and a State Legal Services Authority in the States to give effect to its directions.

## 5.4 LEGAL AID SCHEMES AND NATIONAL LEGAL SERVICES AUTHORITY (NALSA)

The National Legal Services Authority is a statutory body which has been set up for implementing and monitoring legal aid programs in the country. The legal aid program adopted by 'NALSA' include promoting of legal literacy, setting up of legal aid clinics in universities and law colleges, training of paralegals, and holding of legal aid camps and Lok Adalats. National Legal Services Authority is the apex body constituted to lay down policies and principles for making legal services available under the provisions of the Act and to frame most effective and economical schemes for legal services. It also disburses funds and grants to State Legal Services Authorities and NGOs for implementing legal aid schemes and programs.

National Legal Services Authority was constituted on 5th December, 1995. His Lordship Hon. Dr. Justice A.S. Anand, Judge, Supreme Court of India took over as the Executive Chairman of National Legal Services Authority on 17the July, 1997. Soon after assuming the office, His Lordship initiated steps for making

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the National Legal Services Authority functional. The first Member Secretary of the authority joined in December, 1997 and by January, 1998 the other officers and staff were also appointed. By February, 1998 the office of National Legal Services Authority became properly functional for the first time. A nationwide network has been envisaged under the Act for providing legal aid and assistance.

National Legal Services Authority was constituted on 5th December, 1995. According to Section 3 (1) under the Chapter II of the Act[8], the Central Government is instructed to constitute a body at the National level known as the National Legal Services Authority, to exercise powers and perform functions conferred on it or assigned to it under the Act. His Lordship Hon. Dr. Justice A.S. Anand, Judge, of The Supreme Court of India took over as the Executive Chairman of National Legal Services Authority on 17the July, 1997. Soon after assuming the office, His Lordship initiated steps for making the National Legal Services Authority functional. The first Member Secretary of the authority joined in December, 1997 and by January, 1998 the other officers and staff were also appointed. By February, 1998 the office of National Legal Services Authority became properly functional for the first time.

'NALSA' has also called upon State Legal Services Authorities to set up legal aid cells in jails so that the prisoners lodged therein are provided prompt and efficient legal aid to which they are entitled by virtue of section 12 of Legal Services Authorities Act, 1987. The Government has sanctioned Rs 4 crores as grant-in-aid for 'NALSA' for 1998-99 for allocating funds to the State, District authorities, etc. The 'NALSA' is also monitoring and evaluating the implementation of the legal aid programs in the country. Up to December 1997 about 23.88 lakh persons were benefited through court-oriented legal aid programs provided by the State Legal Aid and Advice Boards/ State Legal Services Authorities. Of them, 3.73 lakh persons belonged to the scheduled castes, about 2.14 lakh to the scheduled tribes, 240485 were women and 8578 were children.

### *Supreme Court Legal Services Committee*

The Supreme Court Legal Services Committee has been enacted under the Legal Services Authorities Act, 1987 for the effective rendering of justice in the apex court. If a person belongs to the poor section of the society having annual income of less than Rs. 18,000/- or belongs to Scheduled Caste or Scheduled Tribe, a victim of natural calamity, is a woman or a child or a mentally ill or otherwise disabled person or an industrial workman, or is in custody including custody in protective home, he/she is entitled to get free legal aid from the Supreme Court Legal Aid Committee. The aid so granted by the Committee includes cost of preparation of the matter and all applications connected therewith, in addition to providing an Advocate for preparing and arguing the case. Any person desirous of availing legal service through the Committee has to make an application to the

Secretary and hand over all necessary documents concerning his case to it. The Committee after ascertaining the eligibility of the person provides necessary legal aid to him/her.

Persons belonging to middle income group i.e. with income above Rs. 18000/- but under Rs. 120000/- per annum are eligible to get legal aid from the Supreme Court Middle Income Group Society, on nominal payments.

*TALUK LEGAL SERVICES COMMITTEE*

Sections 11-A and 11-B were inserted by the Act 59 of 1994 whereby provisions relating to Taluk Legal Services were added in the Legal Services Authorities Act, 1987.The Taluk Legal Services Committee work under the rules made by the different States. Relating to its composition, conditions of services in certain States, additional functions have also been assigned, e.g. in Andhra Pradesh where the functions are subject to superintendence of the District and the State Authority. Apart from the abovementioned four-tier machinery the Legal Services Authorities Act also provides for the Supreme Court Legal Services Committee to perform functions as may be determined by the Central Authority and State Authority respectively.

## 5.5 PROBLEMS IN LEGAL AID

The growing litigation, delay in disposal, pendency in ordinary law courts are the reasons for the growth and popularity of this ancient but innovative alternative dispute resolution machinery. The Supreme Court of India, while giving effect to Article 39-A, has held in several cases that right to speedy justice and free legal aid is part of Article 21.

The new responsibilities of the Bench and the Bar must be assessed in the context of mass discontent and the dynamic rule of law as its answer. The Judiciary is a reverenced institution. Our judicial tryst with social destiny can only be redeemed by a spread out and institutionalized legal services project adjusted to the conditions of our society.

It is also clear in the highly stratified Indian Society that the sources of poverty is not merely an economic phenomenon and it is linked up with a variety of complex social relationships aggravated by long period of colonial rule. Any program for using the law in at least reducing the effects of poverty will, therefore, necessarily require knowledge on who, the poor are, what their problems are, and how they are related to the exiting law and legal services.

The following points could be taken into consideration for development of this concept in its essence:

1. Review of the working of Legal Aid System.
2. Review of the Alternative dispute Resolution System in the country.
3. Up gradation of Judicial Infrastructure, including computerization, and

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4. Up gradation of Judicial Manpower.

The focus of Legal Aid is on distributive justice, effective implementation of welfare benefits and elimination of social and structural discrimination against the poor. It works in accordance with the Legal Services Authorities Act, 1987 which act as the guideline of the rendering of free justice.

It will be interesting to know the special problems of the rural poor and the urban poor separately and also to find how they compare with the legal problems of the non-poor living in rural and urban India. An efficient organization of a legal services delivery system may have to take account of all these differences in legal needs of the poor and design the program accordingly.

Except sketchy impressionistic references in the reports of the various legal aid committees, there has been a very little attention given to the analysis of the legal problems of the poor at the academic, official or professional level.

The discomfort of the bureaucracy arising out of the policing role of legal aid is understandable. In a Welfare State, the Government cannot be made available for litigation against itself to vindicate the legal rights of the poor. The criticism that legal aid litigation, aims at law reform thereby making the judiciary usurps the functions of the legislature is illogical and does not carry conviction in common law jurisprudence.

## 5.6 PUBLIC INTEREST LITIGATION

In Indian law, public interest litigation means litigation for the protection of the public interest. It is litigation introduced in a court of law, not by the aggrieved party but by the court itself or by any other private party. It is not necessary, for the exercise of the court's jurisdiction, that the person who is the victim of the violation of his or her right should personally approach the court. Public interest litigation is the power given to the public by courts through judicial activism.

Such cases may occur when the victim does not have the necessary resources to commence litigation or his freedom to move court has been suppressed or encroached upon. The court can itself take cognisance of the matter and proceed suo motu or cases can commence on the petition of any public-spirited individual.

Before the introduction of Public Interest Litigation (PIL) in India, the courts were inaccessible to the illiterate and poor people of our country. The high cost of justice and long court proceedings made it near impossible for the ordinary people to get justice. Besides, earlier in case of the violation of the rights of the poor people, no third party could file litigation on behalf of them. With the arrival of the PIL, however, the courts have become accessible to the disadvantaged people also. Even if these people do not complain about the violation of their rights, a third party can take up their issues and file legal petition before the courts.

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## WHAT IS PIL?

Public Interest Litigation means a legal action initiated in a court of law regarding a matter which relates to or is connected with the interest of the public. Public means an individual, body of individuals or the masses in general. Its purpose is to provide justice to the ordinary people. It has been devised for those people who are unable to approach the court on their own because of their deprived conditions, *i.e.*, illiteracy, poverty, social and economic backwardness, lack of awareness. Public Interest Litigation is a new feature in Indians judicial system. In our country it came into being during the late 1970s and the 1980s. The term 'PIL' was first used by Justice V.K. Krishna Iyer and Justice P.N. Bhagwati in a judgement. The PIL for the first time originated in USA in the 1960s. Lawyers and the people who were sensitive to the cause of the under-privileged groups in U.S.A initiated this procedure.

The PIL can be filed by a third party if the constitutional rights of an individual or group of individuals are violated. In such case the individual or groups of individuals is not able to move court personally for justice because of poverty, helplessness, lack of awareness or socially and economically disadvantaged conditions. The petitioner of the PIL does not file it for personal gain or private profit. Hefshe does not file it for political or other oblique motivation.

The PIL can also be filed by a petitioner by writing a letter to the court. The jurisdiction of judgement relating to the letter-petitions is known as "epistolary jurisdiction". This term was first used by Justice V.R. lyer and Justice P.N. Bhagwati when they introduced the term "PIL"

### Factors Giving Rise to PIL

The PIL started in India as a result of the feeling by some of tbe Supreme Court judges that mainly the rich and politically powerful people could take the help of cburt of law in India. The ordinary people, illiterate, socially, educationally and economically disadvantaged could not approach the court of law. The high cost, complicated and slow legal procèdure made it still more difficult for them to approach the court of law. It is assumed that PIL will contribute towards the radical changes in society, if it could help in enforcing the fundamental rights of weak and poor people.

## DISTINCTION BETWEEN PUBLIC AND PRIVATE INTEREST LITIGATION

The PIL is different from the conventional litigation. The petitioner in the PIL may be a third party, which is not personally involved in the dispute, while in the conventional petition the petitioner is one of the two parties involved in the dispute. The PIL deals with the issues of general interest, On the other hand, the conventional litigation deals with one of the parties in a dispute; it is private interest litigation. The PIL is essentially co-operative or collaborative effort on the part of petitioner.

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### FEATURES OF PIL

Commentrators have emphasised eight identifying features of PIL which distinguishes it from traditional litigation. These are :

*(i)* In PIL the scope of the law suit is consciously shaped by the court and parties, rather than being limited by a specific past event.

*(ii)* The party structure is sprawling and amorphous, rather than limited to individual adversaries.

*(iii)* The fact inquiry resembles the kind of inquiry taken into current problems by legislative bodies, rather than a simple investigation of past historical events.

*(iv)* Relief is often prospective, flexible and remedial having a broad impact on many persons, rather than limited to compensation for a past wrong given only to a party to the lawsuit.

*(v)* The relief is often negotiated by the parties rather than imposed by the court.

*(vi)* The judgement does not end the court's involvement but requires a continuing administiative judicial role.

*(vii)* The judge plays an active role in organising and shaping the litigation and is not passive.

*(viii)* The subject matter of the law suit is a 'grievance' about public policy and is not a private suit.

## 5.7 MANNER OF TAKING COGNIZANCE

### LETTERS AND TELEGRAMS

The courts, with the aim of enabling even the poor and disadvantaged to seek judicial redressal of their grievances, have dispensed with procedural formalities to such an extent that they have even accepted letters, post cards and telegrams, addressed to judges, the court, or the Legal Aid Committees, as writ petitions and have taken appropriate action.

The Supreme Court in *Bandhua Mukti Morcha Vs. Union of India (AIR 1984 SC 802)* justified such a novel approach on the ground that Article 32 (1) of the Constitution conferred a right to move the Supreme Court, for the enforcement of fundamental rights by 'any appropriate proceedings'. The Court held that there was no limitation with regard to the kind of proceedings envisaged in Art. 32 (1) except that they must be appropriate and the appropriateness would have to be judged in the light of the purpose for which the proceedings is to be started, namely, the enforcement of hndamental rights.

In this case, Bandhua Mukti Morcha, an organisation dedicated to the cause of release of bonded labourers in the country, wrote a letter to the Supreme Court

detailing the inhuman conditions under which bonded labourers were forced to work in quarries. The Supreme Court treated this as a writ petition.

The Court also held that when a person, acting bonafide, moved the court for the enforcement of the fundamental rights of disadvantaged classes who would not do so themselves on account of poverty, the court would be justified in treating such letter as a writ petition.

### *Suo Moto*

Even if nobody files a petition before the court, in case there is violation of the rights of people, the court can initiate the proceedings own its own by simply taking not of it either through newspaper or through any other source. Such practice is called suo moto. This clearly represents a drastic departure from the traditional conception of the role of a judge. However, instances of this nature are few.

*In P.K. Mantiyam V. Regional Provident Fund Commission (1983 Gujarat Law Reporter)*, a judge of the Gujarat High Court treated a letter to the editor in a newspaper, which gave details as to how a widow had not been paid her husband's Provedent Fund even two years after his death, as writ petition. In another case a judge of the Punjab and Harayana High Court suo moto reduced the sentence awarded to several Bihari labourers for travelling in a train without tickets.

In this context, the courts have expanded their role and have gone beyond their traditional mandate, to frame policies in certain matters and have even involved themselves in the process of administration.

The courts have also been forced to intervene to ensure executive accountability and protection of constitutional rights. This is most clearly seen in the various judgements on prisoners' rights. In fact, it was in this field that the first PIL cases were field. Subsequently, the courts have expanded the scope of PIL to encompass various other fields.

## 5.8 RELAXATION OF OTHER PROCEDURAL RULES

Besides locus standi, the Courts have relaxed other rules of procedure. In *Forward Construction Co. Vs. Prabhat Mandal (AIR of SC 391)*, the Supreme Court, while dealing with the question of *Res judicata* in a PIL, held that the principle would apply to a PIL but it must be proved that the previous litigation was a PIL and not one relating to a private grievance.

It has to be a bonafide likigation in respect of a right which is common and is agitated in common with others. The court held that the onus of proving the want of bonafides in respect oGthe previous litigation, would be on the party seeking to avoid the decision.

## 5.9 SCOPE OF PIL

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### *Consumer Protection*

PILs have been used to enforce consumer rights in several cases. In *National Consumer Protection Samiti Vs. Gujarat Housing Board (Special Civil Application 5285/89)* a consumer organisation filed a case against the Gujarat Housing Board, on behalf of the residents of a particular colony, questioning the hike in the service charges for the supply of water, drainage, streetlights etc. In *Vadara Sahev Grahak Mandal Vs. The General Manager, Western Railway, (Special Civil Application No. 7910/1990)* the court admitted a PIL filed by a consumer organisation praying that the Railways be directed to assist the petitioner in collecting and analysing food samples from railway stalls. The court permitted the organisation to collect and test the samples.

In *CUTS Vs. Bank of Baroda (Vol 2, 1989-90 MRTP Reports, P. 93)* a complaint was filed on behalf of the customers of a bank seeking compensation for a period during which the Bank's business remained suspended. The commission directed the RBI to provide alternative service in future when the business was suspended. In *Common Cause Vs. Drug Controller, (Vo1.3, 1990-91, MRTP Reports)* the Commission issued directions to the Ministry of Health to appoint an expert committee to ensure safety and quality of intravenous fluids.

*S. Mittal Vs. State of U.P. (1989 (3) SSC 233)* a voluntary organisation organised an eye camp where a surgical team operated on 88 patients who subsequently became blind due to the negligence of the doctors. The matter was brought to the notice of the Supreme Court by way of a PIL. The court ordered compensation for the victims. In *Dr Shivarao wagle Vs. VOI (1988 (2) SCC 155),* the petitioner moved the court for a direction to restrain the government from releasing 7500 cartons of imported Irish butter on the grounds that it was contaminated. The court appointed an expert committee which concluded that the product was harmless and the court declined to issue directions to the government as sought.

The courts have also entertained PILs for consumer protection against the government. In *CERS Vs. Ahmedabad Municipal Corporation (Vol2, 1989 MRTP Reports, p 340)* the Courts examined the question whether the Municipal Corporation could be made to pay compensation for its negligence in failing to clear garbage, which resulted in an epidemic. In *CUTS Vs. (Vo12, 1989-90 MRTP Reports, P34)* the courts entertained a petition against government ration shops which supplied adulterated oil, resulting in death of the consumer.

The Courts have also interfered in commercial matters through PILs. In *CERS Vs. IICM.* Directions were given to rectify a misleading advertisement and publish the corrected version. In *SCR Vs. Colgate (Vol. 2 1989-90 MRTP Reports),*

it was held that the announcement of a prize contest for the promotion of sales was an unfair trade.

*LABOUR LAW*

This is another area where the judiciary has adopted a highly activist role.

In *PUDR Vs. UOI (AIR 1982 SC 1473)* the petitioners alleged that in the course of the construction work connected with the Asiad projects, the-contractors had violated numerous labour laws. The Supreme Court took a serious, view of the matter and issued appropriate directions. In many other cases, the courts issued directions to ensure that workers were paid the minimum wages at least.

In *Surinder Singh Vs. PWD, (1986 (1) SCALE 83)* the Court directed the government to pay labourers working for years on daily wages similar to that paid to permanent employees doing identical work.

The Courts have also in numerous cases dealt with the issue of bonded labour.

## 5.10 WHO IS ENTITLED TO FILE PIL (PUBLIC INTEREST LITIGNTION)

The right of a person to file a suit or conduct a litigation in a court of law is known as 'Locus Standi'. The locus standi for PIL has been liberalised in relation to the traditional view on the locus standi. The traditional view on the locus standi for a specific legal action is that it would be available only to that person or class who has suffered a legal injury by reason of violation of his legal right or a right legally protected. But in case of the PIL, the court has adopted a liberal stance. In *C.K. Shenoy Vs. Udipi Municipality, (AIR 1974 SC 2177)*, the Supreme Court dispensed with the requirement of a specific injury suffered by a person when litigating on behalf of a class, and held that the absence of a specific injury on his part, would not deprive him of locus standi. The courts further clarified that when a petitioner litigates on behalf of a class, of which he is a member, he would not have to show that the grievance suffered by him was in any way over and above that suffered by the others. *(Subbarao Vs. Government of A.P., AIR 1968 AP 98)*. The court, in *Brij. Raj Pershad Vs. Seethamma (AIR 1983 AP 118)*, further diluted the requirement of a legal right when it held that the residents of a locality who were making an unauthorised use of corporation lands, had the locus standi to challenge its transfer, as long as they had a bonafide grievance.

In *ABSK Sangh Vs. Union of India (AIR 1981 SC 298)*, the Supreme Court held that in the light of the broad based and people oriented processual jurisprudence, concepts like 'cause of action', 'person aggrieved' and individual litigation were becoming obsolete. In *S.P. Gupta Vs. Union of India (AIR 1982 SC 149)*, the Supreme Court held that when a public wrong or public injury was caused by an act or an omission of the state or a public authority, which is contrary

to the Constitution or the law, any member of the public, acting bonafide and having sufficient interest, can maintain an action for redressal of such public wrong or public injury.

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However, a person is not entitled to file PIL, if he/she lacks sufficient public interest, acts for self gain or personal profit, involves in political activities or has rnalafied intention.

## 5.11 TYPES OF PIL

There are two types of PILs :

*(i)* Representative Social Action and

*(ii)* Citizen Social Action

### *Representative Social Action*

This is a form of PIL whereby any member of the public can seek judicial redressal for a legal wrong caused to a person or a determinate class of persons who by reason of poverty, or socially and economically disadvantaged position, is unable to approach the court. In such case, the petitioner is accorded locus standi to sue as the representative 'of other person or group).

The early PIL cases like *Hussainara Khatoon Vs. State of Bihar, (AIR 1979 SC I360, Sunil Batra Vs. Delhi Admin AIR 1980 SC 1579, Mukti Morcha Vs. VOI (AIR 1984 SC 802),* were cases of this nature, where the Court accorded locus standi to a person or seek judical redressal on behalf of another person or class when such person or class was unable to do so, by themselves.

### *Citizen Social Action*

The cases under this category represent a shift from the traditional view of the courts being a forum to enforce individual rights. The Supreme Court in *S.P. Gupta Vs Union of India, (1982 SC 149)* held that any member ofrhe public with sufficient interest could assert 'a diffuse, collective and meta-individual right'.

In a PIL, under this category a Petitioner sues not as a representative of a class, but as a member of the public to whom a public duty is owed. Hence, the aim of this category of PIL is not to improve access to justice for the poor unlike a Representative Social Action, but to vindicate rights' that are diffused among the public to be enforced, though no traditional individual right exists.

In *S.P. Gupta's case (Air 1982 SC 149)* which dealt with the transfer of judges, the Supreme Court upheld the Petitioners contention that there existed a public interest in assuring the freedom of the judiciary from political influence. The Court held that the potential injury was the loss of faith in the rule of law and a concurrent loss of confidence in democratic institutions of Government.

Public interest litigations of this nature have also been resorted to in matters involving environmental issues.

## 5.12 ADVANTAGES AND DISADVANTAGES OF PIL

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*ADVANTAGES*

The first and foremost advantage of PIL is access to a National Forum of decision making and power by those who were until now voiceless and invisible.

The relaxation of procedural formalities has gone a long way in ensuring that the poor have access to justice. The relaxation of the rule of locus standi has resulted in representative action where a person or a group, with a sufficient interest in a particular cause, litigates on behalf of a large number of others who cannot afford the cost of litigation. PIL has also given the court an opportunity to address important issues in areas like environmental protection, consumer protection etc., which affect a large number of people. The acceptance of even letters and telegrams by the courts, as PILs, reduces the cost of such litigation and also encourages public spirited individuals and groups to bring to the notice of the court any situation which requires the Courts interference.

The appointing of commissions by the courts as fact finding bodies to check into the allegation made in the petition has established a new mode of proof. These commission reports have formed the basis of direction of the court in cases complaining of violation of rights. The monitoring by the Court of the implelnentation of the directions at periodic intervals to ensure compliance, enable the vindication of rights in practice. The monitoring function has also often been vestedin vigilance bodies with participation of Social Action Groups.

*DISADVANTAGES*

There is always the possibility that the instrument of PIL may be misused by a person purportedly litigating in the public interest.

The popularity of PIL, has resulted in a large number of such cases being filed which add to the already considerable backlog and which also require the court to spend a lot of time in dealing with issues which should more appropriately be dealt with by the executive or the legislature. Besides, considering the nature of the cases involved, the orders of the court are not easily enforceable, thereby requiring the petitioners to approach the court again for subsequent direction.

## 5.13 HOW TO BUILD UP A CASE?

After indentifying an issue for litigation it is important to construct the issue strategically before presenting it to the courts. Only then will the courts be able to appreciate the public interest in the issue.

*STEPS FOR BUILDING UP CASE*

Once an issue is identified as requiring legal intervention the following steps ought to be taken :

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(i) A fact file ought to be constructed. This can be done by tracing all the past and present statistics and information connected to the issue locally as well as out of the area concerned to help draw a parallel.

(ii) A careful analysis of the fact file ought to be done with the help of resource persons who are fully conversant with the issue either academically or technically. If the issue involves any change in land use or development it might be better to visit the site and take photographs or record the status in any other manner.

(iii) Research is a very basic requirement of the public interest litigation. Unless the facts and figures are accurate the motives of the public interest litigant may be questioned. Therefore every public interest litigation should be backed methods of research on issue.

The following methods of research may be adopted -

(a) References to books, articles, research papers, and official data in the gazette and other government publications.

(b) Consultations with experts and academics in government department and nongovernment department and non-government agencies on the issue.

(c) Consultations with lawyers.

(d) Analysis of press reports.

## SUMMARY

- Conventionally, 'Legal Aid' has been taken too mean the organized effort of the bar council, the community and the government to provide the services of lawyers free, or for a token charge, to persons who cannot afford the usual exorbitant fees.
- The earliest Legal Aid movement appears to be of the year 1851 when some enactment was introduced in France for providing legal assistance to the indigent.
- Legal Aid Schemes were floated through Legal Aid Boards, Societies and Law Departments in various States in the Country. In 1980, a National Committee was constituted, under the Chairmanship of Honorable.
- Public Interest Litigation means a legal action initiated in a court of law regarding a matter which relates to or is connected with the interest of the public. Public means an individual, body of individuals or the masses in general.
- In Indian law, public interest litigation means litigation for the protection of the public interest. It is litigation introduced in a court of law, not by the aggrieved party but by the court itself or by any other private party.