

INTERMEDIATE

Paper 5

BUSINESS LAWS AND ETHICS

Study Notes

SYLLABUS 2022



The Institute of Cost Accountants of India
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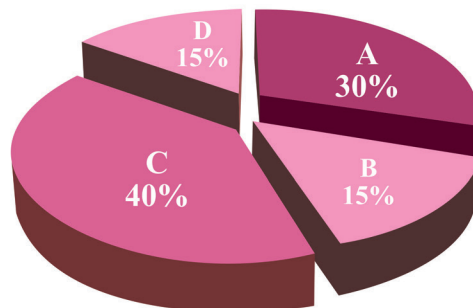
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PAPER 5: BUSINESS LAWS AND ETHICS

Syllabus Structure:

The syllabus in this paper comprises the following topics and study weightage:

Module No.	Module Description	Weight
Section A: Commercial Laws		30%
1	Introduction to Law and Legal System in India	5%
2	Indian Contracts Act, 1872	10%
3	Sale of Goods Act, 1930	5%
4	Negotiable Instruments Act, 1881	5%
5	Indian Partnership Act, 1932	5%
6	Limited Liability Partnership Act, 2008	
Section B: Industrial Laws		15%
7	Factories Act, 1948	10%
8	Payment of Gratuity Act, 1972	
9	Employees Provident Fund and Miscellaneous Provisions Act, 1952	
10	Employees State Insurance Act, 1948	
11	The Code on Wages, 2019	5%
Section C: Corporate Laws		40%
12	Companies Act, 2013	40%
Section D: Business Ethics		15%
13	Business Ethics and Emotional Intelligence	15%



Learning Environment

Subject Title	BUSINESS LAWS & ETHICS
Subject Code	BLE
Paper No.	05
Course Description	The subject deals with four core components namely business laws, industrial laws, corporate laws and ethics. Accordingly, it covers various commercial laws that govern business transactions and settlement procedures in entities and internal management in partnership organisations. It provides a wholistic view of various industrial laws having significant impact on business operations and decisions on employee compensation and work environment. The subject also offers a detailed understanding of legislation governing formation of a company, role of directors, operation and financial control as well as shareholders' rights. Finally, it introduces the concept of ethics and emotional intelligence and explains how they can complement laws in ensuring legitimate as well as responsible business dealings.
CMA Course Learning Objectives (CMLOs)	<ol style="list-style-type: none"> 1. Interpret and appreciate emerging national and global concerns affecting organizations and be in a state of readiness for business management. <ol style="list-style-type: none"> a. Identify emerging national and global forces responsible for enhanced/varied business challenges. b. Assess how far these forces pose threats to the status-quo and creating new opportunities. c. Find out ways and means to convert challenges into opportunities 2. Acquire skill sets for critical thinking, analyses and evaluations, comprehension, syntheses, and applications for optimization of sustainable goals. <ol style="list-style-type: none"> a. Be equipped with the appropriate tools for analyses of business risks and hurdles. b. Learn to apply tools and systems for evaluation of decision alternatives with a 360-degree approach. c. Develop solutions through critical thinking to optimize sustainable goals. 3. Develop an understanding of strategic, financial, cost and risk-enabled performance management in a dynamic business environment. <ol style="list-style-type: none"> a. Study the impacts of dynamic business environment on existing business strategies. b. Learn to adopt, adapt and innovate financial, cost and operating strategies to cope up with the dynamic business environment. c. Come up with strategies and tactics that create sustainable competitive advantages. 4. Learn to design the optimal approach for management of legal, institutional, regulatory and ESG frameworks, stakeholders' dynamics; monitoring, control, and reporting with application-oriented knowledge. <ol style="list-style-type: none"> a. Develop an understanding of the legal, institutional and regulatory and ESG frameworks within which a firm operates. b. Learn to articulate optimal responses to the changes in the above frameworks. c. Appreciate stakeholders' dynamics and expectations, and develop appropriate reporting mechanisms to address their concerns.

	<ol style="list-style-type: none"> 5. Prepare to adopt an integrated cross functional approach for decision management and execution with cost leadership, optimized value creations and deliveries. <ol style="list-style-type: none"> a. Acquire knowledge of cross functional tools for decision management. b. Take an industry specific approach towards cost optimization, and control to achieve sustainable cost leadership. c. Attain exclusive knowledge of data science and engineering to analyze and create value.
Subject Learning Objectives [SLOB(s)]	<ol style="list-style-type: none"> 1. To obtain application-oriented knowledge of certain commercial laws that define and design business transactions, guides the settlement procedure through negotiable instruments. (CMLO 4 a, b) 2. To gain detail knowledge of formation and management of partnership organisations including LLPs. (CMLO 4 a, c) 3. To gain an insight into various industrial laws that have significant bearing on an organisation’s effort to ensure a fair compensation and work environment to the employees. (CMLO 4 a, b) 4. To obtain in-depth knowledge about corporate legislations governing operational and financial considerations and the role and responsibilities of directors in this context. (CMLO 4 a, c) 5. To comprehend the dynamic complementary role of ethics in business decisions taken in a regulated environment. (CMLO 2c and 4c)
Subject Learning Outcome [SLOC(s)] and Application Skill [APS]	<ol style="list-style-type: none"> 1. To obtain application-oriented knowledge of certain commercial laws that define and design business transactions, guides the settlement procedure through negotiable instruments. (CMLO 4 a, b) 2. To gain detail knowledge of formation and management of partnership organisations including LLPs. (CMLO 4 a, c) 3. To gain an insight into various industrial laws that have significant bearing on an organisation’s effort to ensure a fair compensation and work environment to the employees. (CMLO 4 a, b) 4. To obtain in-depth knowledge about corporate legislations governing operational and financial considerations and the role and responsibilities of directors in this context. (CMLO 4 a, c) 5. To comprehend the dynamic complementary role of ethics in business decisions taken in a regulated environment. (CMLO 2c and 4c)
Subject Learning Outcome [SLOC(s)] and Application Skill [APS]	<p>SLOCs:</p> <ol style="list-style-type: none"> 1. Students will be able to ensure adherence to legal requirements relating to business transactions including settlements. 2. They will be able to identify the requirements of compliance with the maintainable work standards and minimum compensation norms. 3. They will become competent enough to comply with corporate legislations relating to operational and financial control. 4. They will be able to guide management in identifying the ethical issues that may emerge in response to a business decision. <p>APS</p> <ol style="list-style-type: none"> 1. Students will develop necessary skills to independently identify requirements for compliance, assist management in conducting legally sustainable operations and prepare various compliance reports to identify lapses in adhering to various statutes.

Subject Learning Outcome (SLOC) and Application Skill (APS)	<p>SLOCs:</p> <ol style="list-style-type: none"> 1) Students will gain understanding about special contracts and their validity under Indian Contract Act, 1872 2) Students will be able to identify valid contracts and apply laws to fact situations for dispute settlement
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Module wise Mapping of SLOB(s)

Module No.	Topics and Sub-topics	Additional Resources (Research articles, case studies, blogs)	SLOB Mapped
Section A: Commercial Laws			
1	Introduction to Law and Legal System in India	http://www.barcouncilofindia.org/about/about-the-legal-profession/legal-education-in-the-united-kingdom/	To obtain an in-depth understanding of various commercial laws that define and design business transactions, guides the settlement procedure through negotiable instruments.
2	Indian Contracts Act, 1872	https://legislative.gov.in/sites/default/files/A1872-09.pdf	
3	Sale of Goods Act, 1930	https://legislative.gov.in/sites/default/files/A1930-3_0.pdf	
4	Negotiable Instruments Act, 1881	https://legislative.gov.in/sites/default/files/A1881-26.pdf	
5	Indian Partnership Act, 1932	https://www.mca.gov.in/Ministry/actsbills/pdf/Partnership_Act_1932.pdf	To gain detail knowledge of formation and management of partnership organisations including LLPs
6	Limited Liability Partnership Act, 2008	https://www.mca.gov.in/content/mca/global/en/acts-rules/llp-act-2008.html	
Section B: Industrial Laws			
7	Factories Act, 1948	https://labour.gov.in/sites/default/files/Factories_Act_1948.pdf	To gain an insight into various industrial laws that have significant bearing on an organisation's effort to ensure a fair compensation and work environment to the employees.
8	Payment of Gratuity Act, 1972	https://clc.gov.in/clc/sites/default/files/PaymentofGratuityAct.pdf	
9	Employees Provident Fund and Miscellaneous Provisions Act, 1952	https://www.epfindia.gov.in/site_docs/PDFs/Downloads_PDFs/EPFScheme.pdf	
10	Employees State Insurance Act, 1948	https://labour.gov.in/sites/default/files/TheEmployeesAct1948_0.pdf	
11	The Code on Wages, 2019	https://www.indiacode.nic.in/handle/123456789/15793?view_type=browse&sam_handle=123456789/1362	

Section C: Corporate Laws

12	Companies Act, 2013	https://www.mca.gov.in/content/mca/global/en/acts-rules/ebooks.html	To obtain in-depth knowledge about corporate legislations governing operational and financial considerations and the role and responsibilities of directors in this context.
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Section D: Business Ethics

13	Business Ethics and Emotional Intelligence	https://link.springer.com/article/10.1007/s10551-011-1158-5	To comprehend the dynamic complementary role of ethics in business decisions taken in a regulated environment.
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SECTION - A
COMMERCIAL LAWS

Introduction to Law and Legal System in India

1

This Module includes -

- 1.1 Introduction to The Constitution of India**
- 1.2 Fundamental Rights**
- 1.3 Sources of Law**
- 1.4 Primary and Subordinate Legislations**
- 1.5 Legislatives Processes in India**
- 1.6 Legal Methods including Judicial Alternative Dispute Resolution (ADR) Process in India**
- 1.7 Legal Terminology and Maxims**

Introduction to Law and Legal System in India

SLOB Mapped against the Module

To develop an understanding about the different legal maxims and terminologies, constitution of India and its related features.

Module Learning Objectives:

After studying this module, the students will be able to -

- ✦ To acquire knowledge of the various provisions dealing with fundamental rights, sources of law, legislative process in India and legal methods of dispute resolution.
- ✦ To develop an understanding about the different legal maxims and terminologies, constitution of India and its related features.

Introduction to The Constitution of India

1.1

The Indian Constitution is the lengthiest written Constitution which has a blend of rigidity and flexibility and has a federal system with unitary features. It mentions about the parliamentary form of Government and lays down that India shall have an independent judiciary. The constitution further provides for emergency provision structure and has many features that help in governance of our country.

Preamble:- The preamble to the constitution was adopted by constituent assembly and it reads as follows:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

Purpose of the Preamble:- The preamble to the constitution is a key to open the minds of the makers and shows the general purpose for which they made the several provisions in the constitution. Preamble serves the following purposes:

1. It discloses the source of the constitution.
2. It lays down the date of the commencement of the constitution.
3. It set out the rights and freedoms which the people of India wished to secure for themselves.
4. It declares the nature of the government

In the case of Kesavananda Bharti vs. State of Kerala, the Supreme Court has held that preamble is part of the constitution. Preamble is of extreme importance and the constitution should be read and interpreted in the light of grand and noble vision expressed in the preamble. However, the preamble is neither a source of power to legislature nor creates a prohibition upon the powers of legislature. It is not enforceable in courts of law.

Fundamental Rights

1.2

The aim of Fundamental Rights is that certain elementary rights such as right to life, liberty, freedom of speech and freedom of faith and so on should be regarded as inviolable under all circumstances and that the shifting majority in legislatures of the country should not have a free hand in interfering with fundamental rights. Fundamental right is called the Magna Carta of India.

In *E. P. Royappa v. State of Tamil Nadu* the new concept of equality in the following words – “Equality is a dynamic concept with many aspects and dimensions and it cannot be described, Cabined and confined” within traditional limits from a positivistic point of view, equality is antithesis to arbitrariness.

In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violated of Article 14. Exceptions to the equality before law- Article 361 of the Constitution permits the following exceptions to this rule –

- ◉ The President or the Governor of a State shall not be answerable to any court.
- ◉ No criminal proceeding whatsoever shall be instituted or continued against the President or a Governor in any court during his term of office.
- ◉ No Civil Proceeding in which relief is claimed against the President or the Governor of a state shall be instituted during his term of office in any Court in respect of any act done or purporting to be done by him in his personal capacity.

Prohibition of discrimination on certain grounds

Article 15(1) provides that the state shall not discriminate against any citizen on grounds only of:-

- ◉ Religion
- ◉ Race
- ◉ Caste
- ◉ Sex
- ◉ Place of birth or
- ◉ Any of them

Article 15 (2) provides that:- No citizen shall be on above grounds, subject to any disability, liability, restriction or condition with regard to:

- a) access to shops, public restaurants, hotels and places of public entertainment; or

- b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Exceptions:- Article 15 (3), (4) and (5) contain exceptions to the general principal laid down under Article 15 (1) and (2):-

Nothing in this article shall prevent the State from making any special provision for women and children.

Nothing in this article shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes.

Nothing in this article shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institution.

Article-16: Equality of opportunity in matters of public employment :-

- ⊙ There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- ⊙ No citizen shall, on grounds only of: religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
Exceptions:-
- ⊙ Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.
- ⊙ Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
- ⊙ Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.
- ⊙ Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Abolition of Untouchability “Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of “Untouchability” shall be an offence punishable in accordance with law. The term “Untouchability” is not defined under the Constitution. However, it refers to the social disabilities imposed on certain class of person by reason of their birth in certain caste. However, it does not cover social boycott of a few individuals.

Abolition of Titles:

- ⊙ No title, not being a military or academic distinction, shall be conferred by the State.
- ⊙ No citizen of India shall accept any title from any foreign State.

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

Right to Freedom Article 19 (1) defines six freedoms:-

- a) Freedom of speech and expression
- b) Freedom of Assembly
- c) Freedom to form Association
- d) Freedom of Movement
- e) Freedom to reside and to settle
- f) Freedom of Profession, occupation, trade or business.

These six freedoms are however not absolute, and subject to reasonable restrictions which are as follows:-

- i. Security of the State
- ii. Friendly relations with foreign states
- iii. Public order
- iv. Decency and Morality
- v. Contempt of Court
- vi. Defamation
- vii. Incitement to an offence
- viii. Sovereignty and Integrity of India

Meaning: 19 (1) (a)

- ◉ In *Prabhu Dutt vs. Union of India*: Supreme Court held that right to know news and information about the functioning of the Govt., is included in the freedom of Press.
- ◉ In *Union of India vs. Association for Democratic Reforms*: Supreme Court held that people have right to know about the candidate before voting. Thus, the law preventing the Election Commission from asking for a candidate's wealth, Assets, liabilities education and other such information is invalid.
- ◉ In *Tata Press Ltd. vs. M.T.N.L.* the Supreme Court held that commercial speech (Advertisement) is a part of freedom of speech and expression as per Article 19(1) (a).
- ◉ In *Union of India vs. Naveen Jindal*, the Court held that "Flying National Flag" is fundamental Right under Article 19(1) (a)
- ◉ Freedom of Silence – Right not to speak
- ◉ In *Bijoy Emmanuel vs. State of Kerala*: Freedom not to sing the national anthem, but not to disrespect it. Students belonging to the Apostle's creed Christians did not sing the national anthem as their religion prohibits glorification of anything else other than their God.

Article 20 lays down Protection in respect of conviction for offences:

Ex-post facto law:

No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

Double jeopardy:

No person shall be prosecuted and punished for the same offence more than once. The protection under this clause is available only in proceedings before a court of law or a judicial tribunal. In other words, it is not available in proceedings before departmental or administrative authorities.

Self -Incrimination:

No person accused of any offence shall be compelled to be a witness against himself.

It extends to both oral and documentary evidence.

Therefore, where a person is accused of an offence, if compelled to be a witness, then such compulsion should not result in his giving evidence against himself.

Article 21 lays down Right to Life & Personal Liberty “No person shall be deprived of his life or personal liberty except according to Procedure established by law.”

In *Maneka Gandhi v. Union of India*. The Court has given the widest possible interpretation of personal liberty.

Right to life includes within its ambit the right to live with human dignity. The Supreme Court held that the right to life defines not only physical existence but the “quality of life.” This right is an inclusive right including the following:

- ◉ Right to Travel abroad. (*Satwant Singh v. Assistant Passport officer*)
- ◉ Right to livelihood. (*D.K.Yadav v. J.M.A Industries*)
- ◉ Right to Shelter. (*Chameli Singh v. State of U.P.*)
- ◉ Right to Privacy. (*R.Raja Gopal v. State of T.N.*)
- ◉ In *PUCL Vs. Union of India*, the S.C. held that telephone tapping is a serious invasion of an individual’s right to Privacy which is part of the right to life and personal liberty.
- ◉ Right to Health & Medical Assistance.
- ◉ Protection of Ecology and Environmental Pollution
- ◉ Right to education under Art. 21A
- ◉ Prisoner’s Right: The Court held that if the Prisoner died due to beating by Police Officer, his family is entitled to compensation.
- ◉ Right to free Legal Aid
- ◉ Right to speedy Trial
- ◉ Right Against Handcuffing
- ◉ Right against Delayed Execution

- ◉ Right to food
- ◉ Right to Marriage. (Lata Singh v. State of U.P.)
- ◉ Right to Reputation
- ◉ Right to Education-21A Article 21A declares that state shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the state may decide. Thus, this provision makes only elementary education a fundamental right and not higher or professional education.

Right against exploitation: Prohibition of traffic in human beings and forced labour:- Article 23 prohibits traffic in human beings and other similar forms of forced labour. This right is available to both citizens and non-citizens. It protects the individual not only against state but also against the private person. However, state may impose compulsory service for public purposes, which are: military service or social service.

Prohibition of employment of children in factories etc.:- Article 24 prohibits the employment of children below the age of 14 years in any factory, mine or other hazardous activities. But it does not prohibit their employment in any harmless innocent work.

Article 25 says that all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion. The implications of these are as follows:

- ◉ Freedom of conscience
- ◉ Right to profess
- ◉ Right to propagate
- ◉ Right to practice

Article 25 covers not only religious belief but also religious practices. This right is available to all person citizen as well as noncitizen.

As per **Article 26**, every religious denomination or any of its section shall have the following right:-

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

Article 27 lays down that no person shall be compelled to pay any taxes for the promotion or maintenance of any particular religion or religious denomination. In other words, the state should not spend the public money collected by way of tax for the promotion or maintenance of any particular religion. This provision prohibits only levy of tax and not a fees.

Article 28 provides that no religious instruction shall be provided in any educational institution wholly maintained out of state funds. However, this provision shall not apply to an educational institution administered by the state but established under any endowment or trust requiring imparting of religious instruction in such institution.

Article 29 says any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same. No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds

only of religion, race, caste, language or any of them.

Article 30 mentions about the Right of minorities to establish and administer educational institutions:

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

Article 32 mentions about the Right to Constitutional Remedies:

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

In some of the legal systems, court decisions are binding as law. On the basis of the above discussion, three major sources of law can be identified in any modern society are as follows:

- ◉ Custom
- ◉ Judicial precedent
- ◉ Legislation

Customs

A custom, to be valid, must be observed continuously for a very long time without any interruption. Further, a practice must be supported not only for a very long time, but it must also be supported by the opinion of the general public and morality. However, every custom need not become law.

For example, the Hindu Marriage Act, 1955 prohibits marriages which are within the prohibited degrees of relationship. However, the Act still permits marriages within the prohibited degree of relationship if there is a proven custom within a certain community. Custom can simply be explained as those long established practices or unwritten rules which have acquired binding or obligatory character. In ancient societies, custom was considered as one of the most important sources of law; In fact it was considered as the real source of law. With the passage of time and the advent of modern civilization, the importance of custom as a source of law diminished and other sources such as judicial precedents and legislation gained importance.

Legal custom may be further classified into the following two types:

Kinds of Customs:

- ◉ **General Customs:** These types of customs prevail throughout the territory of the State.
- ◉ **Local Customs:** Local customs are applicable to a part of the State, or a particular region of the country.
- ◉ **Conventional Customs:** Conventional customs are binding on the parties to an agreement. When two or more persons enter into an agreement related to a trade, it is presumed in law that they make the contract in accordance with established convention or usage of that trade. All customs cannot be accepted as sources of law, nor can all customs be recognized and enforced by the courts. The jurists and courts have laid down some essential tests for customs to be recognized as valid sources of law.

These tests are summarized as follows:

- ◉ **Antiquity:** In order to be legally valid customs should have been in existence for a long time, even beyond human memory. However, in India there is no such time limit for deciding the antiquity of the customs. The only condition is that those should have been in practice since time immemorial.
- ◉ **Continuous:** A custom to be valid should have been in continuous practice. It must have been enjoyed without any kind of interruption. Long intervals and disrupted practice of a custom raise doubts about

the validity of the same. Exercised as a matter of right: Custom must be enjoyed openly and with the knowledge of the community. It should not have been practiced secretly. A custom must be proved to be a matter of right. A mere doubtful exercise of a right is not sufficient to a claim as a valid custom.

- ◉ **Reasonableness:** A custom must conform to the norms of justice and public utility. A custom, to be valid, should be based on rationality and reason. If a custom is likely to cause more inconvenience and mischief than convenience, such a custom will not be valid.
- ◉ **Morality:** A custom which is immoral or opposed to public policy cannot be a valid custom. Courts have declared many customs as invalid as they were practiced for immoral purpose.

Bombay High Court in the case of Mathura Naikon vs. Esu Naekin, (1880) ILR 4 Bom 545) held that, the custom of adopting a girl for immoral purposes is illegal. It is imperative that a custom must not be opposed or contrary to legislation. Many customs have been abrogated by laws enacted by the legislative bodies in India.

For instance, the customary practice of child marriage has been declared as an offence. Similarly, adoption laws have been changed by legislation in India. Custom was the most important source of law in ancient India. Even the British initially adopted the policy of non-intervention in personal matters of Hindus and Muslims.

At the same time, it is important to note that customs were not uniform or universal throughout the country. Some regions of the country had their own customs and usages. After independence, the importance of custom has definitely diminished as a source of law and judicial precedent, and legislation has gained a more significant place. A large part of Indian law, especially personal laws, however, are still governed by the customs.

Judicial Precedent as a Source of Law:

In simple words, judicial precedent refers to previously decided judgments of the superior courts, such as the High Courts and the Supreme Court, which judges are bound to follow. This binding character of the previously decided cases is important, considering the hierarchy of the courts established by the legal systems of a particular country. In the case of India, this hierarchy has been established by the Constitution of India.

Judicial precedent is an important source of law, but it is neither as modern as legislation nor is it as old as custom. It is an important feature of the English legal system as well as of other common law countries which follow the English legal system. In most of the developed legal systems, judiciary is considered to be an important organ of the State. In modern societies, rights are generally conferred on the citizens by legislation and the main function of the judiciary is to adjudicate upon these rights. The judges decide those matters on the basis of the legislation and prevailing custom but while doing so, they also play a creative role by interpreting the law. By this exercise, they lay down new principles and rules which are generally binding on lower courts within a legal system.

1. **Supreme Court (SC):** became the supreme judicial authority and a streamlined system of courts was established. Supreme Court: Binding on all courts in India, not bound by its own decisions, or decisions of Privy Council or Federal Court - AIR 1991 SC 2176
2. **High Courts:** Binding on all courts within its own jurisdiction Only persuasive value for courts outside its own jurisdiction. In case of conflict with decision of same court and bench of equal strength, referred to a higher bench. Decisions of Privy Council and federal court are binding as long as they do not conflict with decisions of SC.
3. **Lower Courts:** Bound to follow decisions of higher courts in its own state, in preference to High Courts of other states.

Judicial decisions can be divided into following two parts:

1. **Ratio decidendi:** ‘Ratio decidendi’ refers to the binding part of a judgment. ‘Ratio decidendi’ literally

means reasons for the decision. It is considered as the general principle which is deduced by the courts from the facts of a particular case. It becomes generally binding on the lower courts in future cases involving similar questions of law.

2. **Obiter dicta:** An ‘obiter dictum’ refers to parts of judicial decisions which are general observations of the judge and do not have any binding authority. However, obiter of a higher judiciary is given due consideration by lower courts and has persuasive value. Having considered the various aspects of the precedent i.e. ratio and obiter, it is clear that the system of precedent is based on the hierarchy of courts.

Legislation as a Source of Law:

In modern times, legislation is considered as the most important source of law. The term ‘legislation’ is derived from the Latin word legis which means ‘law’ and latum which means “to make” or “set”. Therefore, the word ‘legislation’ means the ‘making of law’. The importance of legislation as a source of law can be measured from the fact that it is backed by the authority of the sovereign, and it is directly enacted and recognised by the State. The expression ‘legislation’ has been used in various senses. It includes every method of law-making. In the strict sense it means laws enacted by the sovereign or any other person or institution authorised by him. The chart below explains the types of legislation: The kinds of legislation can be explained as follows:

- i) **Primary Legislation:** When the laws are directly enacted by the sovereign, it is considered as supreme legislation. One of the features of Supreme legislation is that, no other authority except the sovereign itself can control or check it. The laws enacted by the British Parliament fall in this category, as the British Parliament is considered as sovereign. The law enacted by the Indian Parliament also falls in the same category. However in India, powers of the Parliament are regulated and controlled by the Constitution, through the laws enacted by it are not under the control of any other legislative body.
- ii) **Subordinate Legislation:** Subordinate legislation is a legislation which is made by any authority which is subordinate to the supreme or sovereign authority. It is enacted under the delegated authority of the sovereign. The origin, validity, existence and continuance of such legislation totally depends on the will of the sovereign authority. Subordinate legislation further can be classified into the following types:-
 - a) **Local laws:** In some countries, local bodies are recognized and conferred with the law-making powers. They are entitled to make bye-laws in their respective jurisdictions. In India, local bodies like Panchayats and Municipal Corporations have been recognized by the Constitution through the 73rd and 74th Constitutional amendments. The rules and bye-laws enacted by them are examples of local laws.
 - b) **Laws made by the Executive:** Laws are supposed to be enacted by the sovereign and the sovereignty may be vested in one authority or it may be distributed among the various organs of the State. In most of the modern States, sovereignty is generally divided among the three organs of the State.

The three organs of the State namely legislature, executive and judiciary are vested with three different functions. The prime responsibility of law-making vests with the legislature, while the executive is vested with the responsibility to implement the laws enacted by the legislature. However, the legislature delegates some of its law-making powers to executive organs which are also termed delegated legislation. Delegated legislation is also a class of subordinate legislation. In welfare and modern states, the amount of legislation has increased manifold and it is not possible for legislative bodies to go through all the details of law. Therefore, it deals with only a fundamental part of the legislation and wide discretion has been given to the executive to fill the gaps. This increasing tendency of delegated legislation has been criticized. However, delegated legislation is resorted to, on account of reasons like paucity of time, technicalities of law and emergencies. Therefore, delegated legislation is sometimes considered as a necessary evil.

Primary and Subordinate Legislations

1.4

Primarily legislation is an act that has been passed by the Parliament. Whereas, subordinate legislation is the legislation made by an authority subordinate to the legislature. Subordinate legislation is that which is made under the authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority. Most of the enactments provide for the powers for making rules, regulations, bye-laws or other statutory instruments which are exercised by the specified subordinate authorities. Such legislation is to be made within the framework of the powers so delegated by the legislature and is, therefore, known as delegated or subordinate legislation.

The need and importance of subordinate legislation have been underlined by the Supreme Court in the Gwalior Rayon Mills Mfg. (Wing.) Co. Ltd. vs. Asstt. Commissioner of Sales Tax and Others (All India Reporter 1974 SC 1660 (1667) as:

Most of the modern socio-economic legislations passed by the legislature lay down the guiding principles and the legislative policy. The legislatures because of limitation imposed upon by the time factor hardly go into matters of detail. Provision is, therefore, made for delegated legislation to obtain flexibility, elasticity, expedition and opportunity for experimentation. The practice of empowering the executive to make subordinate legislation within a prescribed sphere has evolved out of practical necessity and pragmatic needs of a modern welfare State.

The legislature lays down the policy and purpose of the legislation and leaves it to the executive, experts and technocrats to provide for working details within the framework of the enactment by way of rules, regulations, bye-laws or other statutory instruments. That is why, delegated legislation is increasingly assuming an important role in the process of law-making, comprising an important component of legislation. Powers have also been conferred under various provisions of the Constitution of India on the different functionaries to frame rules, regulations or schemes dealing with various aspects.

Delegated legislation under such delegated powers is ancillary and cannot, by its very nature, replace or modify the parent law. Indian democracy is said to rest on the acclaimed four pillars and these are the legislature, the executive, the judiciary, and the press. These pillars are empowered by the constitution not to interfere in the matters of others. As per the Constitution, the legislative has legislative powers and the Executive has the power to execute the laws. Similarly, the Judiciary has the power to resolve dispute. There are multifarious functions that have to be performed by the Legislature in welfare states and therefore there is a need to delegate rule-making power to other authorities. They have limited themselves to policy matters and have left a large volume of area to the Executive to make rules to carry out the purposes of the Legislature. In such types of situations, the system of delegated legislation comes to our mind. Therefore, the need for delegation is necessary and is sought to be justified on the ground of flexibility, adaptability and speed.

Legislative Processes in India

1.5

Every country is governed by a set of rules and laws. The importance of laws and ancillary rules is to maintain a semblance of order in the society so as to regulate the behaviour of various entities within it. Every decision relating to citizenship to voting age, to how a country will be run in various aspects is all done through various laws, be it central or state laws. Law serves many purposes, such as, maintaining order, resolving disputes, ensuring safety and guaranteeing enforcement of rights of citizens. Laws are binding on all people residing in a country in addition to the organizations and Government alike. The primary source of law is our constitution and every law either central act or state act or any other local act is made according to this important source of law. No law in the country can be inconsistent with the Constitution of India. The constitution lays down the framework for procedures, powers, and duties of government institutions and sets out fundamental rights and duties of citizens along with directive principles of state policy. The constitution mentions that India is a secular, sovereign, socialist and democratic republic and ensures its citizens justice, liberty, equality among other things. The Constitution can never be overridden by any institution in India.

The Government of India has many ministries that cater to various sectors that are in charge of putting forth proposals involving major policies that is of national importance. These major policy proposals are usually in line with the goals of the Government that gets elected to power. Therefore, before a bill is produced at the Parliament, detailed study and survey is undertaken by the relevant ministry and its ancillary departments. The study relates to social and financial cost, benefit and the key challenges that are required to be settled before and after the legislation comes into force.

There are different stages that a law goes through before it gets passed and acquires binding effect.

In pre-drafting stages, first comes the formulation of legislative proposal. The concerned ministry makes the legislative proposal only after consulting with interested and effective stakeholders from financial and administrative point of view. Concerned ministry also mentions the necessity of the legislation in the proposal and all other incidental matters. The pre-legislative consultation policy was adopted pursuant to the decision by a committee headed by the Cabinet Secretary on 10th January 2014. In this the concerned Ministry/department will have to publish the proposed legislation with explanatory note either on the internet or through other means. Such details will then be kept in the public domain for at least 30 days. If a piece of legislation affects a particular group of people, it has to be published in a manner so it reaches the concerned affected people. The feedback from the stakeholders shall then be taken into consideration while drafting the bill.

The concerned ministry then refers the matter to Ministry of Law and Justice for advice as to its practicability from legal and constitutional point of view. The Ministry of Law and Justice at this point only advice about the necessity and desirability of such legislation in the light of existing law and also constitutional validity of the proposal without going into the merits.

After the aforementioned consultation, the concerned ministry sends all relevant documents to Ministry of

Law & Justice with office memorandum.

The Ministry of Law & Justice (Legislative Department) then prepares the draft bill on receipt of the proposal after getting clearance from the department of the legal affairs.

Once the draft is prepared by the Ministry of Law & Justice and is accepted after scrutiny done by the concerned ministry, a note to the cabinet secretary is sent for placing the draft bill before the cabinet for its consideration and subsequent approval.

After the approval of the draft, the concerned ministry examines the decision of the cabinet for any necessary changes suggested which would then be sent to the Ministry of Law and Justice with the comment of the cabinet for making the said changes. After the approval of the draft, if no suggestion is given by the cabinet then the concerned ministry makes the statement of object and reason relating to the bill, to be signed by the Ministry of Law and Justice.

To enable the ministry of parliamentary affair to draw up the legislative programme of the session, complete details of the bill proposed to be introduced during a session will be sent at least one month before the commencement of the session.

Under Articles 109 read with 110 (1) & 117 (1) of the Indian Constitution, a money bill is to be introduced first in the House of People. In case of other type of bill, the house in which they have to be introduced will be decided by in consultation with ministry of parliamentary affairs.

Article 107: Provisions as to introduction and passing of Bills-

1. Subject to the provisions of articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.
2. Subject to the provisions of articles 108 and 109, a Bill shall not be deemed to have been passed by the Houses of Parliament unless it has been agreed to by both Houses, either without amendment or with such amendments only as are agreed to by both Houses.
3. A Bill pending in Parliament shall not lapse by reason of the prorogation of the Houses.
4. A Bill pending in the Council of States which has not been passed by the House of the People shall not lapse on a dissolution of the House of the People.
5. A Bill which is pending in the House of the People, or which having been passed by the House of the People is pending in the Council of States, shall, subject to the provisions of article 108, lapse on a dissolution of the House of the People.

Article 108: Joint sitting of both Houses in certain cases-

1. If after a Bill has been passed by one House and transmitted to the other House-
 - a) the Bill is rejected by the other House; or
 - b) the Houses have finally disagreed as to the amendments to be made in the Bill; or
 - c) more than six months elapse from the date of the reception of the Bill by the other House without the Bill being passed by it, the President may, unless the Bill has elapsed by reason of a dissolution of the House of the People, notify to the Houses by message if they are sitting or by public notification if they are not sitting, his intention to summon them to meet in a joint sitting for the purpose of deliberating and voting on the Bill:

Provided that nothing in this clause shall apply to a Money Bill.

2. In reckoning any such period of six months as is referred to in clause (1), no account shall be taken of any period during which the House referred to in sub-clause (c) of that clause is prorogued or adjourned for more than four consecutive days.
3. Where the President has under clause (1) notified his intention of summoning the Houses to meet in a joint sitting, neither House shall proceed further with the Bill, but the President may at any time after the date of his notification summon the Houses to meet in a joint sitting for the purpose specified in the notification and, if he does so, the Houses shall meet accordingly.
4. If at the joint sitting of the two Houses the Bill, with such amendments, if any, as are agreed to in joint sitting, is passed by a majority of the total number of members of both Houses present and voting, it shall be deemed for the purposes of this Constitution to have been passed by both Houses:

Provided that at a joint sitting-

- a) if the Bill, having been passed by one House, has not been passed by the other House with amendments and returned to the House in which it originated, no amendment shall be proposed to the Bill other than such amendments (if any) as are made necessary by the delay in the passage of the Bill;
- b) if the Bill has been so passed and returned, only such amendments as aforesaid shall be proposed to the Bill and such other amendments as are relevant to the matters with respect to which the Houses have not agreed;

and the decision of the person presiding as to the amendments which are admissible under this clause shall be final.

5. A joint sitting may be held under this article and a Bill passed thereat, notwithstanding that a dissolution of the House of the People has intervened since the President notified his intention to summon the Houses to meet therein.

Article 109: Special procedure in respect of Money Bills-

1. A Money Bill shall not be introduced in the Council of States.
2. After a Money Bill has been passed by the House of the People it shall be transmitted to the Council of States for its recommendations and the Council of States shall within a period of fourteen days from the date of its receipt of the Bill return the Bill to the House of the People with its recommendations and the House of the People may thereupon either accept or reject all or any of the recommendations of the Council of States.
3. If the House of the People accepts any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses with the amendments recommended by the Council of States and accepted by the House of the People.
4. If the House of the People does not accept any of the recommendations of the Council of States, the Money Bill shall be deemed to have been passed by both Houses in the form in which it was passed by the House of the People without any of the amendments recommended by the Council of States.
5. If a Money Bill passed by the House of the People and transmitted to the Council of States for its recommendations is not returned to the House of the People within the said period of fourteen days, it shall be deemed to have been passed by both Houses at the expiration of the said period in the form in which it was passed by the House of the People.

Article 111: Assent to Bills-

When a Bill has been passed by the Houses of Parliament, it shall be presented to the President, and the President shall declare either that he assents to the Bill, or that he withholds assent therefrom:

Provided that the President may, as soon as possible after the presentation to him of a Bill for assent, return the Bill if it is not a Money Bill to the Houses with a message requesting that they will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message, and when a Bill is so returned, the Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the Houses with or without amendment and presented to the President for assent, the President shall not withhold assent therefrom.

After the assent of the President, the Ministry of Law & Justice publishes the Act in Gazette of India Extraordinary, forwards the copies to the all-state government for publication in their official gazette, get copies of the act in printed form for sale to the General Public.

Legal Methods including Judicial Alternative Dispute Resolution (ADR) Process in India

1.6

There are many ways in which disputes can be resolved and grievances redressed. Whenever there is a lawful agreement between parties that bind both of them with certain duties and obligations, in cases they get breached, a dispute resolution body, either a court or a tribunal can be approached. However, the law has also provided for resolving disputes through mechanisms that do not involve courts or litigations. These methods may include arbitration, mediation, conciliation, negotiation and others. In older times nations used to resolve disputes through warfare, but as nations got more civilized and various conventions and treaties came into effect, different means of resolution of disputes came into emergence. These aforementioned procedures of dispute resolution can be categorized into two broad heads, such as, adjudicative processes and consensual processes. In adjudicative processes, a judge or an arbitrator decides the case and determines the rights and obligations of the parties. Whereas in consensual processes, parties themselves attempt to reach an agreement with or without the help of a third party mediator. Provisions of dispute resolution clauses are imperative in trade and commerce, especially in treaties and contracts. Without these provisions protecting one's rights in property or contract becomes difficult.

The most common form of judicial dispute resolution is litigation. Litigation is initiated when one party files suit against another. The proceedings are very formal and are governed by rules, such as rules of evidence and procedure, which are established by the legislature. Outcomes are decided by impartial judges, based on the factual questions of the case and the applicable law. The verdict of the court is binding; however, both parties have the right to appeal the judgment to a higher court. Judicial dispute resolution is typically adversarial in nature, for example, involving opposing parties or opposing interests seeking an outcome most favourable to their position. Many parties opt for other means of dispute resolution which are more private and quicker, even though it may entail spending more money than what could have been required in cases of litigation.

Methods of dispute resolution that do not involve litigation through courts generally are classified under alternative dispute resolution (ADR) methods. ADR generally depends on agreement by the parties to use ADR processes, either before or after a dispute has arisen. ADR has experienced steadily increasing acceptance and utilization because of a perception of greater flexibility and speedy resolution of disputes, among other perceived advantages.

Alternative Dispute Resolution is a term used to describe several different modes of resolving legal disputes other than filing law suits and get timely justice. The Courts are backlogged with dockets resulting in delay of a year or more for the parties to have their cases heard and decided. To solve this problem of delayed justice ADR Mechanism has been developed in response thereof. Its methods can help the parties to resolve their disputes at their own terms expeditiously.

Alternative dispute redressal techniques can be employed in several categories of disputes, especially civil, commercial, industrial and family disputes. The term "Alternative Disputes Resolution" takes in its fold, various

modes of settlement including, Lok Adalats, arbitration conciliation and Mediation

It was suggested by the Law Commission of India that the Court may require attendance of any party to the suit or proceedings to appear in person with a view to arriving at an amicable settlement of dispute between the parties and make attempts to settle the dispute between the parties amicably.

Section 89 of the Civil Procedure Code lays down:

1. **Settlement of disputes outside the court:** Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:
 - a) arbitration;
 - b) conciliation;
 - c) judicial settlement including settlement through Lok Adalat; or
 - d) mediation
2. **Where a dispute has been referred:**
 - a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;
 - b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall apply in respect of the dispute so referred to the Lok Adalat;
 - c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;
 - d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.”

The Code of Civil Procedure (Amendment) Act, 1999 by which Section 89 was amended into the Code also amended a new Section 16 in the Court Fees Act, 1870 which states the following:

Refund of fee: Where the court refers the parties to the suit to any one of the modes of settlement of dispute referred to in Section 89 of the Code of Civil Procedure, 1908 the plaintiff shall be entitled to a certificate from the court authorizing him to receive back from the Collector, the full amount of the fee paid in respect of such plaint.

Arbitration

Arbitration, a form of alternative dispute resolution (ADR), is a technique for the resolution of disputes outside the courts, where the parties to a dispute refer it to one or more arbitrators, by whose decision they agree to be bound. It is a resolution technique in which a third party reviews the evidence in the case and imposes a decision that is legally binding for both sides and enforceable. There are limited rights of review and appeal of arbitration awards. Arbitration is not the same as judicial proceedings or any other kind of alternate dispute resolution method. Arbitration can be either voluntary or mandatory. It can be referred to by the courts also.

The advantages of arbitration can be summarized as follows:

- a) It is often faster than litigation in Court
- b) Arbitral proceedings and an arbitral award are generally non-public, and can be made confidential
- c) If the subject matter of the dispute is highly technical, arbitrators with an appropriate degree of expertise can be appointed as one cannot choose judge in litigation.

The Arbitration and Conciliation Act, 1996 lays down provisions relating to arbitration and conciliation procedures. Without an arbitration agreement, usually recourse to arbitration does not happen.

Section 7 Arbitration agreement:

1. In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
2. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
3. An arbitration agreement shall be in writing.
4. An arbitration agreement is in writing if it is contained in:
 - a) a document signed by the parties;
 - b) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or
 - c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
5. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Section 8 Power to refer parties to arbitration where there is an arbitration agreement:

1. A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.
2. The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

3. Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

The method of appointing arbitrators is also mentioned within the Act.

Section 10 Number of arbitrators:

1. The parties are free to determine the number of arbitrators, provided that such number shall not be an even number.
2. Failing the determination referred to in sub-section (1), the arbitral tribunal shall consist of a sole arbitrator.

Section 11 Appointment of arbitrators:

1. A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.
2. Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.
3. Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.
4. If the appointment procedure in sub-section (3) applies and:
 - a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or
 - b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment, the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court;
5. Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court.
6. Where, under an appointment procedure agreed upon by the parties,
 - a) a party fails to act as required under that procedure; or
 - b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
 - c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request [the Supreme Court or, as the case may be, the High Court or any person or institution designated by such Court] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
 - (6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.
 - (6B) The designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.
7. A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub-section (6) to the Supreme Court or, as the case may be, the High Court or the person or institution designated by such Court is final

and no appeal including Letters Patent Appeal shall lie against such decision.

Conciliation

Conciliation is an alternative dispute resolution process whereby the parties to a dispute use a conciliator, who meets with the parties separately in order to resolve their differences. They do this by interpreting issues, providing technical assistance, exploring potential solutions and bringing about a negotiated settlement. Conciliation is voluntary where the parties involved agree and choose to resolve their differences by conciliation. The process is flexible, allowing parties to define the time, structure and content of the conciliation proceedings. These proceedings are not public. The conciliator when proposing a settlement, takes into account the legal, commercial and financial positions of the parties. The conciliator is usually a trained and qualified neutral person who facilitates negotiations between disputing parties. Conciliation involves discussions among the parties and the conciliator with an aim to explore sustainable and equitable resolutions by targeting the existent issues involved in the dispute and creating options for a settlement that are acceptable to all parties. The process is risk free and not binding on the parties till they arrive at and sign the agreement. According to procedure, usually one conciliator is appointed to resolve the dispute between the parties. The parties can appoint the sole conciliator by mutual consent. There is no bar to the appointment of two or more conciliators. In conciliation proceedings with three conciliators, each party appoints one conciliator. The third conciliator is appointed by the parties by mutual consent. Unlike arbitration where the third arbitrator is called the Presiding Arbitrator, the third conciliator is not so. The conciliator is supposed to be impartial and conduct the conciliation proceedings in an impartial manner. He is guided by the principles of objectivity, fairness and justice, and by the usage of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties. The conciliator is not bound by the rules of procedure and evidence. The conciliator does not give any award or order. If no consensus could be arrived at between the parties and the conciliation proceedings fail, the parties can then resort to arbitration.

Mediation:

Dispute settlement through mediation is a voluntary and relatively informal process of dispute resolution. It includes a party centric approach where a neutral third party assists the parties in amicably resolving their disputes by using specified communication and negotiation techniques. Involvement of parties in the control over the whole process is peculiar to this dispute resolution method. The mediator only acts as a facilitator in helping the parties to reach a negotiated settlement of their dispute. The mediator makes no decisions or awards. In the mediation process, each side meets with an experienced neutral mediator. The session begins with each side describing the problem and the resolution they desire which is ameliorated by conducting separate and joint meetings culminating finally in an agreement of both parties.

The advantages of the mediation are that the agreement which is that of the parties themselves; the dispute is quickly resolved without great stress and expenditure; the relationship between the parties are preserved; and the confidentiality is maintained.

Lok Adalats:

Lok Adalats or people's courts have been established by the government to settle disputes by way of compromise or conciliation. This is another way of alternate dispute resolution that has been provided for. It is a judicial institution and a dispute settlement agency developed by the people themselves for social justice based on settlement or compromise reached through systematic negotiations. Lok-Adalats accept even cases pending in the regular courts within their jurisdiction. Section 89 of the Civil Procedure Code also provides for referring disputes to Lok Adalat wherein provisions of the Legal Services Authorities Act, 1987 gets applied.

Legal Terminology and Maxims

1.7

A legal maxim is an established principle or proposition of law or a legal policy usually stated in Latin. These principles are used in Courts to denote the application of certain laws. Such principles do not have the authority of law but when Courts apply the maxims in deciding issues of law or the legislature incorporates such maxims while framing laws, they have the force of law.

- ◉ Ab Initio – From the beginning.
- ◉ Actionable per se – The very act is punishable, and no proof of damage is required.
- ◉ Actio personalis moritur cum persona – A personal right of action dies with the person. In other sense, if he dies, the right to sue is gone.
- ◉ Actori incumbit onus probandi – The burden of proof is on the plaintiff.
- ◉ Actus me invito factus non est mens actus – An act done by me against my will is not my act. Read with section 94 of IPC.
- ◉ Actus non facit reum nisi mens sit rea – An act does not make one guilty unless it is accompanied by a guilty mind.
- ◉ Actus reus – Guilty act.
- ◉ Actus Reus Non Facit Reum Nisi Mens Sit Rea – Conviction of a crime requires proof of a criminal act and intent. Or an act does not make a defendant guilty without a guilty mind. Or an act does not constitute guilt unless done with a guilty intention.
- ◉ Ad hoc – For the particular end or case at hand.
- ◉ Alibi – At another place, elsewhere.
- ◉ Amicus Curiae – A friend of court or member of the Bar who is appointed to assist the court.
- ◉ Ante Litem Motam – Before suit brought; before controversy instituted, or spoken before a lawsuit is brought.
- ◉ Assentio mentium – The meeting of minds, i.e. mutual assents.
- ◉ Audi alteram partem – No man shall be condemned unheard.

- ◉ Bona fide – In good faith.
- ◉ Bona vacantia – Goods without an owner.
- ◉ Boni iudicis est ampliare jurisdictionem – It is the part of a good judge to enlarge his jurisdiction, i.e. remedial authority.
- ◉ Caveat – A caution registered with the public court to indicate to the officials that they are not to act in the matter mentioned in the caveat without first giving notice to the caveator.
- ◉ Caveat actor – Let the doer beware.
- ◉ Caveat emptor – Let the buyer beware.
- ◉ Caveat venditor -Let the seller beware.
- ◉ Certiorari – A writ by which orders passed by an inferior court is quashed.
- ◉ Communis hostis omnium – They are common enemies of all. The common enemy of everyone.
- ◉ Corpus – Body.
- ◉ Corpus delicti – The facts and circumstances constituting a crime and Concrete evidence of a crime, such as a corpse (dead body).
- ◉ Damnum sine injuria – Damages without injuries.
- ◉ De facto – In fact.
- ◉ De jure – By law.
- ◉ De minimis – About minimal things.
- ◉ De Minimis Non Curat Lex – The law does not govern trifles (unimportant things). Or law is not concerned with small or insignificant things/matters.
- ◉ De novo – To make something anew.
- ◉ Dictum – Statement of law made by the judge in the course of the decision but not necessary to the decision itself.
- ◉ Doli capax – Capable of forming necessary intent to commit a crime.
- ◉ Doli incapax – Incapable of crime. Or incapable of forming the intent to commit a crime.
- ◉ Detinue – Tort of wrongfully holding goods that belong to someone else.
- ◉ Donatio mortis causa – Gift because of death. Or a future gift given in expectation of the donor's imminent death and only delivered upon the donor's death.
- ◉ Estoppel – Prevented from denying.
- ◉ Ex gratia – As favour.

- ◉ Ex officio – Because of an office held.
- ◉ Ex parte – Proceedings in the absence of the other party.
- ◉ Ex post facto – Out of the aftermath. Or after the fact.
- ◉ Factum probans – Relevant fact.
- ◉ Fraus est celare fraudem – It is a fraud to conceal a fraud.
- ◉ Functus officio – No longer having power or jurisdiction.
- ◉ Furiosi nulla voluntas est – Mentally impaired or mentally incapable persons cannot validly sign a will, contract, or form the frame of mind necessary to commit a crime. Or a person with mental illness has no free will.
- ◉ Furiosis furore suo puiner – A madman is best punished by his own madness.
- ◉ Furiosis nulla voluntas est – A madman has no will.
- ◉ Habeas corpus – A writ to have the body of a person to be brought in before the judge.
- ◉ Ignorantia facit doth excusat, Ignorance juris non-excusat – Ignorance of fact is an excuse, but ignorance of the law is no excuse.
- ◉ Ignorantia juris non excusat – Ignorance of law is not an excuse..
- ◉ Injuria sine damnum – Injury without damage.
- ◉ Ipso facto – By the mere fact.
- ◉ In promptu – In readiness.
- ◉ In lieu of – Instead of.
- ◉ In personam – A proceeding in which relief I sought against a specific person.
- ◉ Innuendo – Spoken words that are defamatory because they have a double meaning.
- ◉ In status quo – In the present state.
- ◉ Inter alia – Among other things.
- ◉ Inter vivos – Between living people
- ◉ Jus cogens or ius cogens – Compelling law.
- ◉ Jus in personam – Right against a specific person.
- ◉ Jus in rem – Right against the world at large.
- ◉ Jus naturale – Natural law. Or in other words, a system of law based on fundamental ideas of right and wrong that is natural law.

- ◉ Jus Necessitatis – It means a person’s right to do what is required for which no threat of legal punishment is a dissuasion.
- ◉ Jus non scriptum – Customary law.
- ◉ Jus scriptum – Written law.
- ◉ Jus – Law or right.
- ◉ Justitia nemini neganda est – Justice is to be denied to nobody.
- ◉ Jus soli – Right of soil.
- ◉ Jus sanguinis – Right of blood or descent.
- ◉ Lex non a rege est violanda – The law must not be violated even by the king.
- ◉ Locus standi – Right of a party to an action to appear and be heard by the court.
- ◉ Mala fide – In bad faith.
- ◉ Mandamus – ‘We command’. A writ of command issued by a higher court to government and public authority to compel the performance of public duty.
- ◉ Mens rea – Guilty mind.
- ◉ Misnomer – A wrong or inaccurate name or term.
- ◉ Modus operandi – Way of working. Or mode of operation.
- ◉ Modus Vivendi – Way of living.
- ◉ Mutatis Mutandis – With the necessary changes having been made. Or with the respective differences having been considered.
- ◉ Nemo bis punitur pro eodem delicto – Nobody can be twice punished for the same offence.
- ◉ Nemo debet bis vexari pro una et eadem causa – It means no man shall be punished twice for the same offence.
- ◉ Nemo debet esse judex in propria causa or Nemo judex in causa sua or Nemo judex in sua causa – Nobody can be the judge in his own case.
- ◉ Nemo moriturus praesumitur mentire – A man will not meet his maker (God) with a lie in his mouth. Or, in other words, ‘no man at the point of death is presumed to lie.’ This maxim is related to dying declaration.
- ◉ Nemo Potest esse tenens et dominus – Nobody can be both a landlord and a tenant of the same property.
- ◉ Nolle prosequi – A formal notice of abandonment by a plaintiff or prosecutor of all or part of a suit.
- ◉ Novation – Transaction in which a new contract is agreed by all parties to replace an existing contract.
- ◉ Nullum crimen sine lege, nulla poena sine lege – There must be no crime or punishment except in accordance

with fixed, predetermined law.

- ◉ Non Sequitur – A statement (such as a response) that does not follow logically from or is not clearly related to anything previously said.
- ◉ Obiter dictum – Things said by the way. It is generally used in law to refer to a non-binding opinion made by a judge. It does not act as a precedent.
- ◉ Onus probandi – Burden of proof.
- ◉ Pacta Sunt Servanda – Agreements must be kept.
- ◉ Pari passu – With an equal step. At par.
- ◉ Per curiam (decision or opinion) – By the court. In other words, the decision is made by the court (or at least, a majority of the court) acting collectively.
- ◉ Per se – By itself.
- ◉ Persona non grata – A person who is unacceptable or unwelcome.
- ◉ Prima facie – At first sight. Or on the face of it.
- ◉ Alimony – A husband's (or wife's) provision for a spouse after separation or divorce; maintenance.
- ◉ Per curiam – By a court.
- ◉ Quantum meruit – What one has earned. Or the amount he deserves.
- ◉ Qui facit per alium, facit per se – He who acts through another acts himself.
- ◉ Quid pro quo – Something for something.
- ◉ Qui sentit commodum, sentire debet et onus – It means he who receives advantage must also bear the burden.
- ◉ Quo warranto – By what authority. A writ calling upon one to show under what authority he holds or claims a public office.
- ◉ Quod necessitas non habet legem or Necessitas non habet legem – Necessity knows no law.
- ◉ Ratio decidendi – Principle or reason underlying a court judgement. Or the rule of law on which a judicial decision is based.
- ◉ Respondeat superior – Let the master answer. For example, there are circumstances when an employer is liable for acts of employees performed within the course of their employment.
- ◉ Res ipsa loquitur – The thing speaks for itself.
- ◉ Res Judicata – A matter already judged.
- ◉ Res Judicata Pro Veritate Accipitur – It means that a judicial decision must be accepted as correct.

- ◉ Rex non protest peccare – The king can do no wrong.
- ◉ Salus populi est suprema lex – The welfare of the people is the supreme law.
- ◉ Status quo – State of things as they are now.
- ◉ Sine die – indefinitely
- ◉ Sine qua non – “Without which nothing”. An essential condition. A thing that is absolutely necessary. Basically a component of an argument that, if debunked, causes the entire argument to crumble.
- ◉ Suo Motu – On its own motion.
- ◉ Uberrima fides (sometimes uberrimae fidei) – Utmost good faith.
- ◉ Ubi jus ibi remedium – Where there is a right, there is a remedy.
- ◉ Veto – Ban or order not to allow something to become law, even if it has been passed by a parliament.
- ◉ Vice versa – Reverse position.
- ◉ Vis major – Act of God.
- ◉ Volenti non fit injuria – Damage suffered by consent gives no cause of action. Or harm caused with consent cannot be considered an injury.
- ◉ Vox populi – Voice of the people. Or the opinion of the majority of the people.
- ◉ Waiver – Voluntarily giving up or removing the conditions.

EXERCISE

⊙ **Multiple Choice Question:**

1. Right to Property is a:

a) Fundamental Right	b) Fundamental Duty
c) Constitutional Right	d) None of the above
2. The Constitution of India describes India as:

a) A federation	b) Quasi-federal
c) A Union of states	d) None of the above
3. Constitution is the:

a) Law of the land	b) Administrative Law of the land
c) Constitutional Law of the land	d) None of the above
4. On which date was the Constitution of India adopted by Constituent Assembly?

a) August 15, 1947	b) January 26, 1950
c) November 26, 1949	d) January 30, 1948
5. What is the chief source of legal authority in India?

a) People	b) Constitution of India
c) Parliament	d) President of India

⊙ **State TRUE or FALSE**

1. Fundamental rights are not enforceable in the court of law in India.
2. Freedom of speech is an unfettered right and cannot be curtailed under any circumstances.
3. Custom is a source of law.
4. India's Constitution is the longest Constitution in the world.
5. Right to Equality is a fundamental right.
6. Secularism is a feature enshrined in the Preamble.

⊙ **Fill in the blanks**

1. The _____ is an exception to equality before law.
2. Indian Constitution permits discrimination on _____
3. Fundamental Rights in Indian Constitution is based on _____
4. Right to Property is a _____ right
5. _____, mediation, negotiation and conciliation are alternate dispute resolution methods.

⊙ **Short Essay Type Questions**

1. Discuss the concept of primary and secondary legislation.

2. What are the objectives of the Preamble?
3. Write short notes on-
 - (a) Conciliation & Mediation
 - (b) Subordinate Legislation

◉ **Essay Type Questions**

1. Explain judicial precedents as a source of law.
2. Elaborate on the concept of alternate dispute resolution
3. Explain how fundamental rights guarantee equality?
4. Explain how customs are a source of law?

◉ **Unsolved Cases**

1. A has been accused of theft by his employer. He was tried in a court but got acquitted. However, the employer found new evidence about A being the thief and instituted another case in the Court. Can A be tried again according to the fundamental rights that the Indian Constitution guarantees him?
2. A works for a certain political party and is notorious for making hate speeches against a certain religious community which often leads to communal riots pursuant to his inciting speeches. A was asked not to speak at a congregation which was to be held publicly. Is A's freedom to speech impeded?

Answer:

Multiple Choice Question

1. c; 2. c; 3. a; 4. c; 5. b.

State TRUE or FALSE

1. False; 2. False; 3. True; 4. True; 5. True; 6. True.

Fill in the blanks

1. President; 2. Nothing/no ground; 3. USA constitution; 4. Constitutional; 5. Arbitration