



सत्यमेव जयते  
Government of India



# HANDBOOK FOR PARALEGAL VOLUNTEERS TRAINING



Prepared by:

**Committee for Legal Aid to Poor**

Bimaladevi Memorial Building

367, Markatnagar, Sector-6, Cuttack, Odisha

Telephone: 0671-2363980

Email: [info@clapindia.org](mailto:info@clapindia.org)

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## INTRODUCTION

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The Department of Justice (DOJ), Ministry of Law and Justice, Government of India is implementing a Project on “Access to Justice for Marginalized People (A2J)” with the support from the United Nations Development Programme (UNDP). The Project aims at strengthening access to justice by improving institutional capacities of key justice service providers to enable them to effectively serve the poor and disadvantaged on the one hand and by directly empowering the poor and disadvantaged people to seek and demand justice services. Initiated in 2006 on pilot basis, the A2J Project has entered into second phase for a period of five years between 2013 and 2018 by successfully completing its first phase from 2009 to 2012 during which 7000 paralegal volunteers were created along-with many other successes and knowledge products. Presently the project is being rolled out in eight States of India that includes Bihar, Chattisgarh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha, Rajasthan and Uttar Pradesh. There is a felt need of DOJ under A2J Project for capacity building, sensitization and skills enhancement of paralegal volunteers with respect to legal services works

As enunciated by the NALSA' scheme for paralegal volunteers and the National Legal Services Authority (Legal Aid Clinic) Regulations 2011, the paralegal volunteers are required to play the crucial role to build up linkage between common people and the legal services institutions by sensitizing and assisting the poor and marginalized people to get accesses to the legal services authorities. The need for paralegal volunteers has grown up in order to enable the Legal Services Authorities to reach at the bottom of communities. Comprehending the importance of paralegal volunteers to fill critical gap that exists between common people and the legal service institutions, the DOJ, NALSA and UNDP

have accorded priority to the capacity building of paralegal volunteers to improve their knowledge and skills for legal service works. Therefore, the capacity building training of paralegal volunteers has been taken up by the DOJ under the broad framework of A2J Project on the basic premise that training is must for paralegal volunteer to perform substantive legal works. Against this backdrop, UNDP had provided support to the Committee for Legal Aid to Poor (CLAP) to roll out paralegal volunteers' training programme in the State of Odisha to impart training to 300- paralegal volunteers, pre-identified by the State Legal Services Authorities. In this process, the facilitator's guide has been developed, tested by CLAP through series of paralegal volunteers training and validated by the SLSA, A2J project management team and subject experts through discussion, review or consultations. To supplement the facilitator's guide, CLAP has brought out this Handbook to provide resource materials for the use and reference of the learners as well as trainers of the paralegal volunteers training. The preparation of the Facilitator's Guide and the Handbook was done keeping in view the objectives of greater sensitization of laws and issues relating to marginalized people, and building capacities of paralegal volunteers to strengthen access of marginalized persons to justice system.

The handbook is designed to complement and supplement the facilitators' guide. The chapters of the handbook and the modules of the facilitator's guide are symmetrically structured. The Handbook is divided into chapters on line with the facilitator's guide to complement the technical sessions of the paralegal volunteers training. The Handbook provides detail description of various methodologies of the training as suggested in the facilitator's guide. The Handbook also provides a set of forms and template for registration, feedback collection, evaluation and reporting of the training.

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### Understanding the concept of Paralegal

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#### Who is Paralegal?

A Paralegal is a community-based person who volunteers to work in empowering people to assert and realize their rights and to provide legal assistance for the access of marginalized communities to the justice system. The need of the paralegals is emerged from the fact that key stakeholders such as lawyers and legal service institutions are not adequate enough to cater legal aid to people in writ large as they do not have grassroots network for community outreaching. Access to Justice of the marginalized people is major challenge in India which has staggering population of 120 billion. The greatest barriers to the Access to Justice for the Marginalized People are lack of legal awareness, inaccessibility of legal aid system and absence of support services at the community level. Therefore, the need of the Paralegals is very crucial as they certainly would fill up void at the community level. They shall act as intermediaries to bridge the gap between the common people and the Legal Services Institutions to remove the impediments in access to justice.

Paralegals need not be lawyer but they must know rudiments of basic law, legal process and legal system of the State. Therefore, paralegals are required to undergo with training in order to develop their legal knowledge and to understand methods for strategic application of law which may be in turn help them in dealing with disputes and legal matters to assist people to assert their rights and facilitating access of the marginalized communities to justice system. As paralegals are expected to impart awareness on laws and legal system, they must also have strong orientation on Alternative Dispute Resolution System so that they shall counsel the conflicting parties for amicable dispute settlement without resorting to litigation which may be time consuming and expensive. Considering the fact that paralegals are potentially engaged as a resource within the community to assist communities in accessing justice for the

realization of their rights, hence paralegals should have a good understanding of the human rights and its protection mechanisms.

There is a misconception among many that paralegals and lawyers are same. Many people also believe that difference between a paralegal and lawyer is not in kind but only in degree of their legal work. To put in affirmatively, a paralegal is not a lawyer. A paralegal neither assumes the status of a lawyer nor eligible for practice in court of law in representative capacity. Paralegal can provide legal first aid to enable any person in need of justice to get access to the justice system.

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A Paralegal is a community-based person who volunteers to work in empowering people to assert and realize their rights and to provide legal assistance for the access of marginalized communities to the justice system.

### **Difference between Lawyer and Paralegal**

|   |   |
|---|---|
| Lawyer is a person who is essentially to be graduated from Law School.  | A paralegal is someone who may have minimum educational qualification, but not necessarily to be graduated from Law School    |
| Legal education for lawyer is formal.   | Legal education for paralegal can be either formal or informal.   |
| Lawyer need to be registered under Bar Council for court practice.  | Paralegal does not require registration under any statutory body to carry out his/her legal works.                            |
| Lawyer must have prior knowledge on law before entering into the legal profession.  | Paralegal can gain legal knowledge thorough education, training or work experience which qualifies them to perform legal work |
| Lawyer can practice on his own in the court of law.   | Paralegal can only work under the supervision of a registered lawyer for the purpose of the court work                        |
| Lawyer can not only prepare legal documents like petition, contract, will etc and make interaction with clients, but also appear in court of law for its execution or legal action. | Paralegal may write up legal document only  |
| Lawyer conducts depositions in court of law   | Paralegal can sit for deposition  |
| Lawyer can give legal advice  | Any such attempt by paralegal is  |

## **Who can become paralegal?**

A paralegal is someone who can provide first legal aid to persons in need of justice. Therefore, a paralegal is an individual who have gained minimum legal knowledge of both substantive and procedural aspect of laws through education, training or work experience. Paralegals may be drawn from multiple groups irrespective of gender, community, religion, caste and economic status. Paralegal may be selected by the community among the community based leaders. Following persons may be eligible for paralegal.

- Teachers including retired teachers
- Retired government servant
- Students
- Anganwadi Workers.
- Law students
- Members of Civil Society Organization including NGOs and Voluntary Organizations
- Members of Community Based Organization including Women Self Help Groups (SHG), Mahila Mandal, Youth Clubs
- Community leaders
- Community volunteers

## **Qualities of a good paralegal**

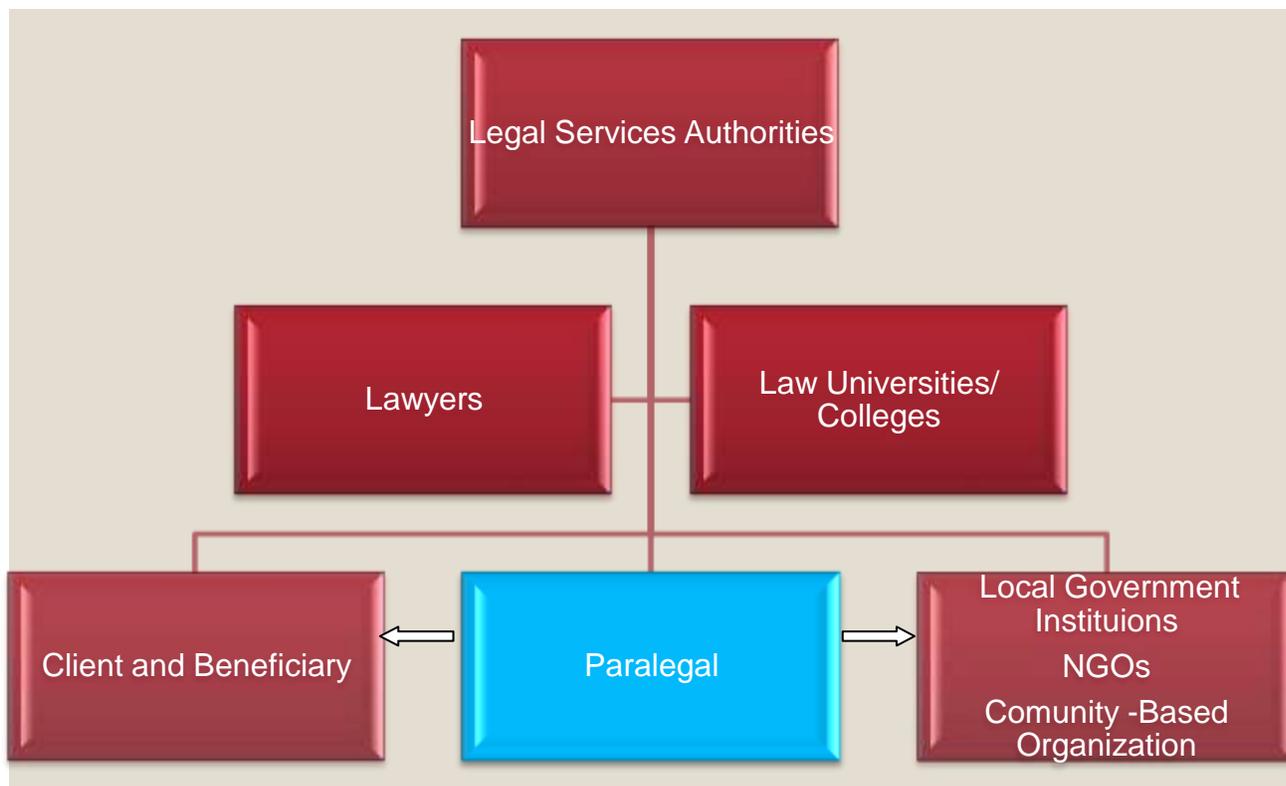


A good paralegal shall have following specific qualities. It is to be noted that some of these qualities are inherent but others could be acquired through training and experience.

- Patient
- Disciplined
- Open
- Dedicated
- Strong commitment
- Integrity
- Familiar with local custom
- Tactful
- Good character
- Humble
- Trustworthy

- Courageous
- Sociable
- Good listener
- Leadership ability
- Confidentiality
- Politeness
- Promptness
- Impartiality
- Passion for learning
- Good understanding of the problems of the local people and their environment
- Knowledge on laws and their enforcement procedures.
- Good communication skills
- Respect for human rights
- Compassion, empathy for the upliftment of marginalized people

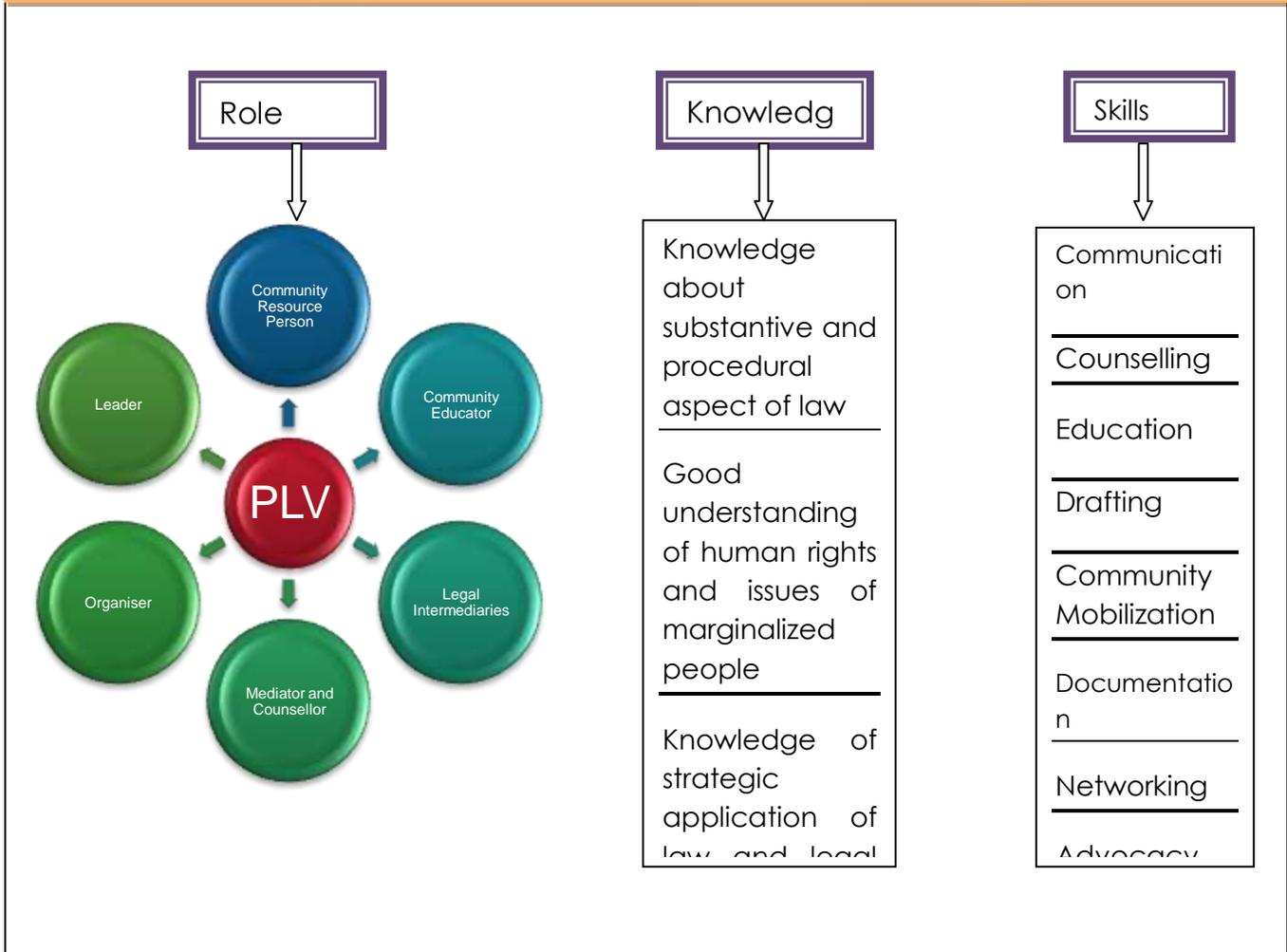
**Operational spheres for paralegal:** The most important work for paralegal volunteer to create access of the marginalized people to the legal services authorities by sensitizing or reaching out of legal service programmes to the common people. It is essentially required for the paralegals to work within and for the legal service system. The operational spheres for the paralegal can be viewed from the diagram given below.



### Skills Required for a Paralegal:

- Communication Skill
- Community Approach Skill
- Listening Skill
- Observation Skill
- Mediation, Counselling and Conciliation Skills
- Writing and Drafting Skill
- Reporting, Documentation and Record Keeping Skills
- Networking Skill
- Advocacy Skill

## Role, Knowledge and Skill of Paralegals



### Ethics for Paralegals

The National Legal Services Authority (NALSA) has developed a code of ethics which has binding effect for the LSA Paralegal Volunteers. The code of ethics is a set of standard norms to regulate the behaviour and work of the paralegals. It is mandatory for each paralegal trained to consistently obey and give respect to the code of ethics in their work for empowering, enabling and facilitating marginalized to the justice system.

- Honesty

- Confidentiality
- Non-Discrimination
- Respect to Human Rights
- Not to expect pecuniary benefits from clients

## **What shall Paralegals do?**

The duties for the paralegal have been delineated under the Scheme of PLV developed By NALSA. Therefore each of the trained paralegal is expected to perform the following duties with due diligence and strict compliance to the guidelines formulated by NALSA.

- To educate people, especially those belonging to weaker sections of the society, to enable them to assert and realize their rights.
- To make people aware of the nature of their disputes/issues/problems and inform them whom to approach to resolve the disputes.
- To keep watch on the transgression of law and acts of injustice in their area of operation and bring them immediately to the notice of LSA.
- To report violation of child rights.
- To assist DLSA for organizing legal awareness camps
- To provide information to people about the services of LSA.
- To generate awareness amongst people about benefits of settlements of disputes including pre-litigation stage through Lok Adalats, Conciliation, Mediation and Arbitration.
- To make people aware of the benefits of inexpensive settlement of dispute relating to Public Utility Services through Permanent Lok Adalat (PLA).

## **Role of Trained PLVs**

**For Legal aid :** Legal Aid Clinic has been established by the District Legal Services Authority to provide basic **legal services** to people on the lines of a primary health centre providing basic health services to the people. Legal aid clinics may be established in all villages or cluster of villages especially where people face geographical, social and other barriers for access to the legal services institutions. Every legal aid clinic has to be assisted by two paralegal volunteers. Legal aid clinic is required to provide legal services for solving legal problems and enabling people to get access to government sponsored socio-economic welfare schemes and social security schemes. The PLV shall provide legal service in such manifestation so that it would enable person to get access to the justice system. The role of PLV for legal aid is as follows:

- To refer any dispute to the Legal Services Authority if the matter is appropriate to be resolved through Alternative Dispute Resolution (ADR) mechanisms.
- To render assistance by giving legal advice, drafting representations and filling up of forms for the various benefits available under different government schemes, public distribution system and other social security schemes.
- To liaison with government officials, public authorities and other institutions for solving problems of the people.
- To accompany the persons seeking legal services for interacting with the government officials for solving the problems of such person.
- To provide referral service i.e. referring the matter in appropriate case to the Legal Services Authority for further action.
- 

**For Documentation and Record Keeping:**

The PLV shall record each and every matter of rendering service in legal aid clinics. The PLV must maintain a register for legal aid clinic in recording the matter in the following ways:

- Name and Address of the person seeking legal services.
- Name of the PLV who renders the services in the legal aid clinic
- Nature of the service sought

- Nature of the services rendered
- Remarks of the PLV
- Signature of person seeking legal services.

**For Research:**

- The PLV shall assist law students to conduct surveys for identifying the legal problems of the people

## **Envisaged Roles of Paralegal Volunteers**

### **Para-Legal Volunteers to work in the 'Front Offices' of the DLSA/TLSCs.**

The Secretary, DLSA or TLSC may depute one or more PLVs to operate the 'front offices' of the legal services institutions.

### **Para-Legal Volunteers to work in the 'Legal Aid Clinics' of the DLSA/TLSCs.**

The Secretary, DLSA or TLSC may depute PLVs in the Legal Aid Clinics set up under the National Legal Services Authority (Legal Aid Clinics) Regulations, 2011. The PLVs engaged in the Legal Aid Clinics shall function in such clinics in accordance with the provisions of the aforesaid regulations.

### **Para-Legal Volunteers to assist in the legal literacy classes and camps.**

The PLVs in consultation with the nearest legal services institutions shall organise micro-legal literacy camps in the area of their operation by organising legal literacy classes for small groups of persons including labourers, women, children members of SC/ST etc. It shall be the duty of the PLVs to distribute information booklets and other publications of the Legal Services Authorities during the legal literacy classes.

### **Resolving local disputes through ADR mechanism.**

The PLVs shall take efforts to bring the parties of the locality involved in disputes, to settlement, by using the machinery of Lok Adalat, Mediation or Conciliation at the District ADR Centers. If no District ADR Center has been set up in the District, the legal services institutions shall take steps for organising a suitable ADR mechanism like Lok Adalat, mediation, conciliation etc. in the village itself in coordination with the PLVs. The PLVs who bring such cases to the ADR process shall be entitled to receive the prescribed honorarium on the day when such proceedings are held.

### **Para-Legal Volunteers in Jails.**

#### 1. Communication Skills:

Whereas primary engagements of paralegals are with community people, they are bound to come across with persons of divisive categories of gender, age, education, social status, disability etc. It is required that paralegals must have communication skill to deal effectively and efficiently with the communities. Therefore, this session may be helpful to participants to learn about fundamental of communication, techniques of effective communication and how to mitigate communication hazards.

#### Fundamentals of communication

- a) **What is communication:** Communication is the transmission of information, ideas, and emotions etc by use of words or symbols. Communication is an art of conveying and/or receiving a message from one party to another, and effectively understanding what is being said and what was intended to be said. In simplest sense, communication is a way of building human relationship. Communication is bilateral as it requires minimum 2 persons for dialogue or conversation. Communication can become successful only when common understanding is developed between both Sender and Receiver in regard to information is sent and received.
- b) **Types of communication:** Communication may be of 2 types- Verbal and Non-verbal. Communication. Communication may be intra-personal/inter-personal and group/mass communication. Verbal communication is oral and it involves speaking, crying, laughing, listening. Mediums for verbal communication are of personal interaction, interface,

telephone, video conferencing. Verbal communication does not necessarily require face-to face interaction. On the other hand, non-verbal communication involves writing, art, body language, facial expression, postures. To divide further, communication can be Intentional/unintentional, conventional/uncommon, Linguistic/non-linguistic.

- c) **Elements of Communication process:** There must be minimum 4 elements for communication: the speaker, the speech, the channel, and the listener.



- d) **Communication and Information:** They are not similar concepts. Communication is not mere sending or receiving information in whatever form. Communication is a process whereas information is substance. Information can bring about a communication relationship.
- e) **Barriers to communication:** Communication is a system. Failure of system at any point can lead to miscommunication or distort. Barriers to communication can be located at any channel of communication and can be from any of the elements of effective communication i.e. sender, receiver, message or feedback.

While dealing with community, paralegals may face problems in communication. It can be physical barriers, attitudinal barriers, psychological barriers, linguistic barriers or cultural barriers. Paralegals must know that communication is the effective way for human relationship. Community people with whom paralegals will make contact may be unknown. Therefore, paralegals has to remember that communication is not an end in itself rather a means to achieve result. Communication may undergo with 3-stages. First is Impersonal Stage where persons have met for the first time. Second is Personal Stage where personal elements have come to conversation. Third is Intimate Stage where trust and self-belief is developed. Degree of intimacy depends upon the closeness of the relationship. Hence, paralegals must take re-guard of the following elements to minimize barriers in communication.

- Get close to the community people through personal intimacy.
- Don't take any personal prejudice or biased perception about the community/ person to whom you may come into contact.
- Listen words of the speaker with patience and care.
- Maintain flexibility in thought process while dealing different groups like women, children, persons with disability, older persons, victims of violence etc.
- Use simple words while in speaking.
- Give respect to speakers.

## **2. Listening Skills:**

Human being is possessed with two ears, but one mouth. It suggests that person should listen double to what he/ she speaks. Quality speaker must have good listening skills. Listening is a process of receiving and constructing meaning of the message of the speakers. Therefore, listening is more important than speaking. Without listening skills, it is hard to communicate effectively with others. Listening is an activity that most of us are not really taught how to do effectively because

it is considered as in-built capacity of a person. Listening is a process that has three basic steps<sup>1</sup>.

1. **Hearing:** Hearing means listening minutely what speaker is saying. If the listener can repeat the fact said by the speaker, then it is believed that recipient has rightly heard.
2. **Understanding:** The second step of listening involves proper understanding and internalization of message that is heard by the listener.
3. **Judging:** The next step for listener is to judge the rationality of speaker's statement/ message.

#### **Basic of effective listening:**

1. Listener should pay full attention to the person who is speaking. Do not distract your attention to the external factors.
2. Listener must control his/her stimulation even if the environment is his personal disliking.
3. Listener must be focused and open minded.
4. Listener should not make unnecessary interference when speaker is speaking. Allow speaker to finish before you begin to talk.
5. Listener must be more focused to the main ideas of the speaker.
6. While listening to speaker, it is necessary for listener not to focus on the personality, dress or any cultural habits of the speaker. Do not find fault with speakers' dress, voice, and manners.
7. Don't mentally argue with the speaker because it damages communication process and is more often lead to misunderstanding and conflicts.

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<sup>1</sup> <http://www.infoplease.com/homework/listeningskills>

### Methods for Improving Listening Skills:

- 1) **Waiting for your turn:** when it is your turn to listen, stop talking. Please remember that people can't do 2-things at a time.
- 2) **Identify with speakers:** You must put yourself in speaker's place. Try to understand what speaker tells.
- 3) **Ask meaningful and relevant questions:** When you ask question it will first fuels your own inters level. Secondly, it will encourage the speaker to expand his though process.
- 4) **Concentrate on what speaker says:** Focus your attention what speaker says and message delivered.
- 5) **Control your emotion and temper:** Uncontrolled emotions and temper can cause misunderstanding to speaker. If you allow your feelings to interfere your listening skill will die and your comprehension will be reduced.
- 6) **Look for areas of agreement:** Listening for areas of agreement for meaningful dialogue and also to make speaker comfortable.
- 7) **Listen main points:** Try to concentrate on main points of the speaker.
- 8) **Take notes:** Note taking can help you to concentrate on main points. Don't try to record every word, just get the main ideas.

### 3. Writing skill

Paralegals will often need to write complaint letters and petitions to facilitate clients' cases. You will need to develop good writing skills in order to be effective in your role. When writing letters, the paralegal must bear in mind the following principles:

- 1) Letters must be kept as simple and as brief as possible
- 2) Letters must be correctly addressed to the person to whom it is written
- 3) There must be a clear indication of the capacity in which they are written
- 4) There must be a clear indication of what is required from the recipient
- 5) Letters must be dated

- 6) Letters should include in its contents a request for a response from the person receiving the letter
- 7) Letters should be delivered quickly and as much as possible; proof of delivery) should be obtained.

#### **4.Record-keeping and documentation skills:**

You must be able to take and keep accurate records of clients' cases. They must be able to articulate who the party is, parties' issues, dates and times of meetings, advice given, steps taken, referral (if any), as well as monitor and document the entire process of the case.. Records kept should be brief and easy to read.

Another very important part of record keeping is documenting evidence in support of a victim's case. Documentation is not just about keeping a record of their statements. It could also involve, for instance, taking pictures of injuries sustained, and keeping copies of correspondence, etc.

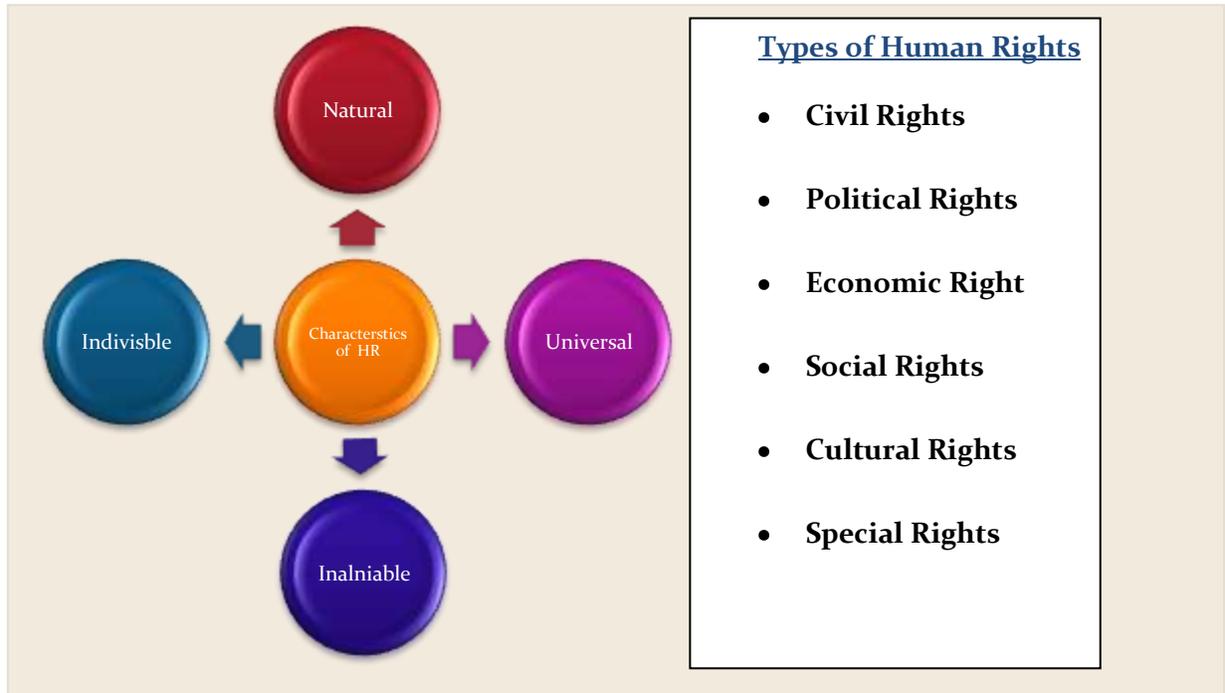
### Understanding Constitution of India

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Generally speaking 'rights' are those basic and inherent legal entitlements to which all human beings are entitled without any discrimination. Human rights emphasize the fact that all human beings are born free and equal in dignity and rights. Human rights are Universal, Inalienable, Natural, and Irreducible in character. Principles and Standards for human rights are set down by the Universal Declaration of Human Rights adopted by the United Nations on 10<sup>th</sup> December 1948. Rights of Indian citizens are recognized and guaranteed by the Constitutions of India and other supported legislation and statues. Rights entail individual as 'Right Holder' and State as 'Duty Bearer' to create condition for promotion and protection of human rights. This session may enable participants to understand various manifestations of human rights and provide an overview on rights guaranteed to Indian citizens.

#### **Human Rights:**

Rights are essential conditions for human life. Human Rights are fundamental and inalienable rights which enable a person to live in dignity. Rights need legal recognition by virtue international law or through constitutional law and other statutes of the Nation states. Human Rights are clearly spelt out in the International Bill of Human Rights which is the combination of the Universal Declaration of Human Rights (UDHR-1948), International Covenant for Civil and Political Rights (ICCPR-1966) and International Covenant for Economic, Social and Cultural Rights (ICESCR-1976) adopted by the General Assembly of the United Nations. At our country human rights provisions are embodied in the Constitution of India, particularly under Part-III & IV of the Constitution.



### Know the Human Rights Instruments adopted by UN

- Universal Declaration of Human Rights (1948)
- International Covenant for Civil and Political Rights(1966)
- International Covenant for Economic, Social and Cultural Rights (1976)
- Convention on the Elimination of All Forms of Discrimination Against Women (1979)
- Convention on the Rights of the Child (1989)
- Convention Against Torture and other Cruel Inhuman and Degrading Treatment or Punishment.
- Convention on the Rights of Persons with Disabilities' (2006)

### Human Right Approach:

Rights are conditions of human life without which person cannot live with dignity. Approach to human rights has made a paradigm shifts from Need-based

Approach to Right-based Approach across the World. The fundamental of right-based approach is that individual is right-holder and state is duty bearer. The right holder (individual) shall:

- have rights
- claim rights
- make duty bearers accountable
- have responsibility to respect to the right of others.

Conversely, the duty bearers ( state) shall:

- have responsibility to create conditions for rights.
- have accountability to protect and promote rights.

### **Basics of Indian Constitution**

The Constitution of India was framed by the Constituent Assembly. The Assembly was constituted in 1946 and it took 2 years 11 months and 18 days to draft the Constitution. The Chairman of the Constituent Assembly was Dr. Rajendra Prasad, the first President of independent India. Numbers of committees and sub-committees were formed to work upon different issues and procedures. The most important committee was the Drafting Committee chaired by the Dr. B.R Ambedkar. The Constitution was adopted on 26<sup>th</sup> November 1979 and enforced on 26<sup>th</sup> January 1950 and from that day India became a Republic. The day, on which the Constitution of India came into enforcement, i.e. January 26 1950 has been observed as Republic Day.

The Constitution of India is the highest law of our country. Every aspects of the governance including structure and functions of the government, the relations between the central government and the state governments, the rights and duties of the citizens are codified and governed by the Constitution. Our constitution is written one and it has 395 Articles divided over 22 Parts and 13 Schedules.

#### **a. Preamble:**

In the beginning of the Constitution there is a preamble. It sets out the main objective of the Constitution. It embodies in a solemn form all the ideals and aspiration of the people. It indicates that the Constitution comes from the people of India. It is the people of India who have adopted, enacted and given to themselves the Constitution. It carves out a detailed list of Fundamental Rights conferred on the people and citizen. The Preamble of the Constitution declares India to be a Sovereign, Socialist, Secular, Democratic, Republic. The following are the objectives which the Preamble secures to every citizen:

Justice – Social, economic and political;

Liberty – of thought, expression, belief, faith and worship;

Equality – of status and opportunity and to promote among them all;

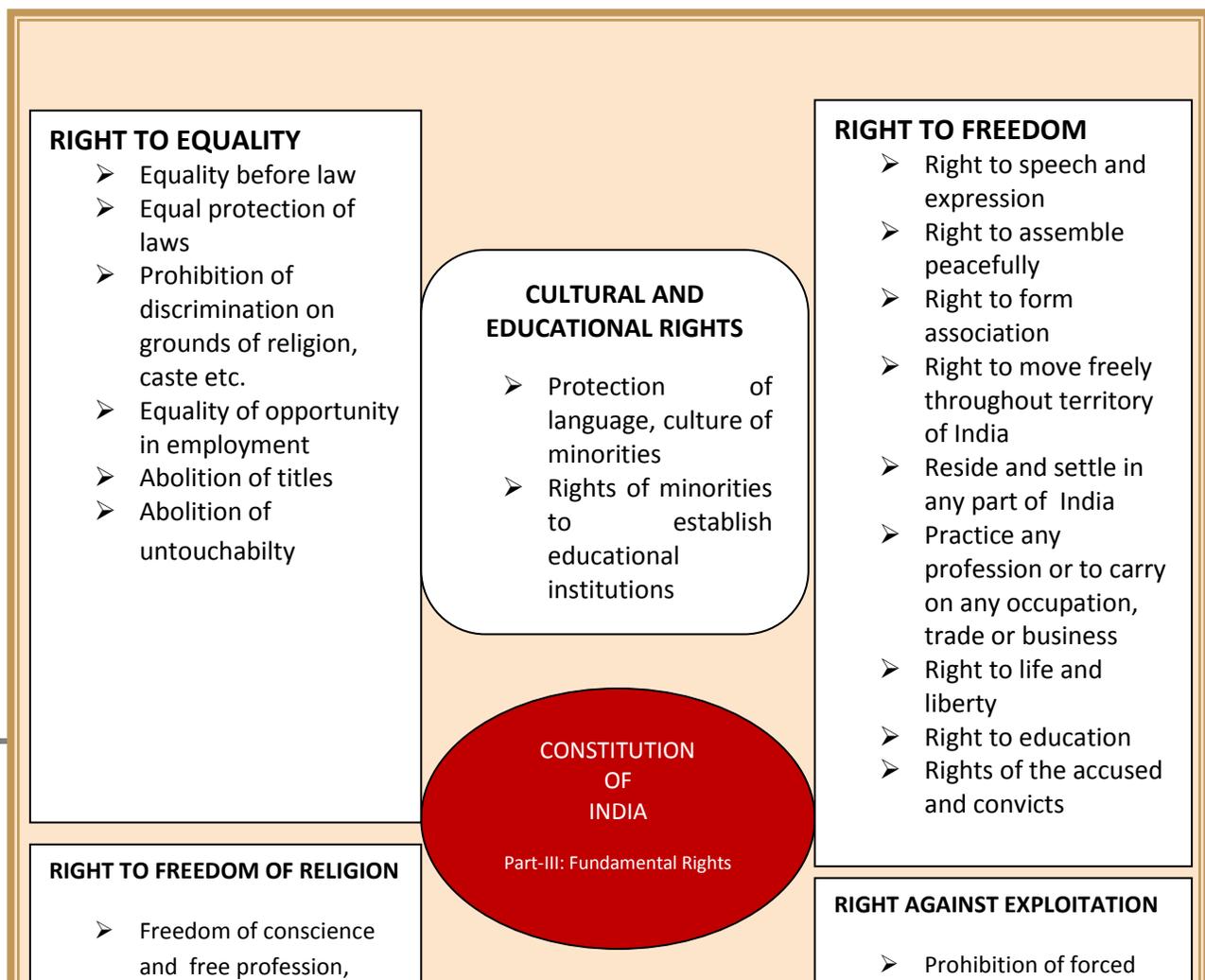
Fraternity – assuring the dignity of the individual and the unity and the integrity of the Nation.

### **b.Fundamental Rights:**

Fundamental Rights are soul of the Indian Constitution. The Constitution provides for six fundamental rights. These rights aim at individual liberty and provide security against arbitrary action by the government. The fundamental rights are justiciable and protected by the judiciary. Part-III covering from Article 12 to Article 35 of the Constitution secures fundamental rights for people of our country. Recognizing the fact that rights are enforced against the State rather than against another individual, the framers of the Constitution have provided definition of 'State' under Article 12 which is the beginning article of Part-III. The definition of State includes:

- the Government and Parliament of India- that include legislative and executive wings of the union;
- the Government and the Legislature of each of the States- that include legislative and executive wings of the state;
- all local or other authorities within the territory of India or under the control of the Government of India . Local authorities denote local self government including panchayats, municipalities etc.

Fundamental Rights embodied in Part-III of the Constitution are of six types. They are (i) right to equality, (ii) right to freedom, (iii) right against exploitation, (iv) right to freedom of religion, (v) cultural and educational rights, and (vi) right to constitutional remedies. It must be remembered that the fundamental rights are different from other rights available to us. While ordinary legal rights are protected and enforced by ordinary law, fundamental rights are protected and guaranteed by the constitution of the country. Ordinary rights may be changed by ordinary process of law making, but a fundamental right may be changed by amending the constitution itself. Judiciary has the powers and responsibility to protect fundamental rights from violations by actions of the government. Any action taken by the executive or law made by legislature shall be declared illegal by the judiciary if these violates the fundamental rights or restrict them in an unreasonable manner. However, fundamental rights are not absolute or unlimited rights. Government can put reasonable restrictions on the exercise of our fundamental rights.



### **Right to equality:**

The right to equality is contained under Article 14-18 of the Constitution. While Article 14 is a general provision that guarantees 'equality' to all persons, other articles such as 15,10,17 and 18 lays down specific aspects of equality.

**Equality before law and the Equal protection of the laws:**It is stated under Article-14 that 'the state shall not deny to any person equality before law or the equal protection of the laws within the territory of India'. Equality before law means no person is above the law. This can be understood from an example. *Police caught Harihar and Ashok separately as both of them had entered into the no-entry zones by violating traffic rules. While Harihar is a poor vegetable vendor, Ashok father is a son of a police officer of IG rank in Odisha. Both Harihar and Ashok are guilty of same offence. The police will not release Ashok just because he belongs to affluent family. Both Harihar and Ashok are equal in the eyes of law and will be penalized if offence is proved.*

Equal protection means right to equal treatment in similar circumstances both in the privileges or rights conferred and in the punishment or liabilities imposed. Thus the concept of equality as it exists in our constitution may be understood as 'equal treatment of equals and unequal treatment among unequal'.

**Non-Discrimination:** Article 15 of the Constitution lays down the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex place of birth or any of them. It also states that on the above-mentioned grounds, no citizen shall be subjected to any disability, liability, restriction or condition in accessing shops, public restaurants, hotels and places of public entertainment, and shall be prevented from using tanks, wells, bathing ghats, roads or places of public resort which are maintained by State funds or dedicated to the use of the general public.

*Examples:*

*Discrimination on the basis of religion: Suryapratap went to a market along- with his college friend. They wanted to have a cup of tea at the hotel of the market. The shopkeeper knew Suryapratap but asked the name of his friend to know his caste. As the shopkeeper came to know that the person accompanied Suryapratap was a Muslim, the shopkeeper served him tea in an use and throw glass, but served tea to Suryaparatap in a nice cup.*

*Discrimination on the basis of sex: An order is served to four newsreaders of a television channel that they would no longer read the news on screen. They are all women. The reason given is that they are above the age of forty-five. Two male newsreaders of the same age are not barred from presenting news.*

**Equality of Opportunity:**Article 16 prohibits any discrimination in public employment and provides for equality of opportunity for all citizens in matters relating to employment or appointment. It states that no citizen can be discriminated against or ineligible for any employment under the State on the grounds of religion, race, caste, sex, place of birth, residence or any of them. However, State is empowered to make reservation of appointment or posts in favour of any backward class of citizens. It must be remembered that a reservation policy is not seen as a violation of right to equality rather it is required for the fulfilment of the right to equality of opportunity.

**Right to equality of dignity and status:** The practice of untouchability is one of the crudest manifestations of inequality. This has been abolished under Article-17 of the Right to Equality which states that '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. Many laws such as the Protection of Civil Rights Act,1955, and the Schedule Castes & Schedule Tribes (Prevention of Atrocities) Act,1989 have been enacted with intention to punish people who treat others as untouchables. The Right to Equality also provides that the State shall confer no title on a person except those who excels themselves in military or academic field.

## Right to freedom

Equality and Liberty are two rights that are most essential to a democracy. Liberty means freedom of thought, expression and action. Article 19-22 of the Constitution of India contains right to freedom and personal liberty. Article 19 provides protection of certain rights regarding freedom of speech etc. Under Article 19 (1), all citizens have right-

- a) to freedom of speech of expression;
- b) to assemble peaceably and without arms;
- c) to form associations or unions;
- d) to move freely throughout the territory of India;
- e) to reside and settle in any part of the territory of India; and
- f) to practice any profession, or to carry on any occupation, trade or business.

We must know that the rights mentioned above are not absolute. Each of these is subject to restrictions imposed by the government. The table given below presents restriction and illustration of reasonable restrictions for right to freedom as enshrined under Article 19 (1).

| Right                                    | Grounds for reasonable restrictions  | Example   |
|--|--|---|
| Right to freedom of speech of expression | <ul style="list-style-type: none"><li>▪ Sovereignty and integrity of India;</li><li>▪ Security of the State;</li><li>▪ Friendly relation with other States;</li><li>▪ Public order, decency or morality; or</li><li>▪ In relation to the contempt of</li></ul> | Government may prevent any person to address public meeting/rally if that person makes an attempt to create communal clash between Hindus and |

|   |   |   |
|---|---|---|
|   | Court, defamation or incitement to an offence.  | Muslim communities by making inflammatory speech to incite people to fight.   |
| Right to assemble peacefully and without arms | <ul style="list-style-type: none"> <li>▪ Sovereignty and integrity of India;</li> <li>▪ Public order</li> </ul>             | A group of dalit people are assembled for having a rally against death of a dalit person in police custody. For the purpose of rally, they took due permission from the concerned authority. At the time of the rally the marchers had a heated exchange with police personnel. Some of the marchers threw stones at the police. In this situation, government can take action against the people who had assembled as their action would be unlawful and disruptive of public peace. |
| Right to form associations or unions          | <ul style="list-style-type: none"> <li>▪ Sovereignty and integrity of India;</li> <li>▪ Public order or morality</li> </ul> | An association formed to kill any person or to overthrow a state government by using  |

|   |  |   |
|---|--|---|
|   |  | arms would not be entitled to the protection of the Constitution and would be treated as illegal.   |
| Right to move freely throughout the territory of India<br><br>Right to reside or settle in any part of the territory of India | <ul style="list-style-type: none"> <li>▪ In the interest of the general public; or</li> <li>▪ For the protection of the interests of any Schedule Tribe</li> </ul> | State action to refrain any person from entering into an area in the interest of protection of tribal culture or practice would not be illegal. |
| Right to practice any profession, or to carry out on any occupation, trade or business  | <ul style="list-style-type: none"> <li>▪ In the interest of the general public</li> </ul>  | Government cannot be unreasonable if it specify qualifications for some posts or vacancies in particular profession.                            |

**Right of accused:** Our Constitution provides protection to the accused in respect of conviction for offences. The protection to the accused has been bestowed on the fundamental principle that a person who is alleged with any offence is presumed to be innocent unless he/she is found guilty by Court of Law. It is also necessary that person accused of any crime should get adequate opportunity to defend herself or himself. To ensure a fair trial in courts, the Constitution under Article 20 has provided three rights:-

- ❖ no law shall declare any action as illegal from retrospective effect.
- ❖ no person would be punished for the same offence more than once.
- ❖ no person shall be compelled to be a witness against himself.

**Right to life and personal security:** The foremost right for a human being is the right to freedom and personal liberty. **Article 21** of the Constitution of India speaks about protection of life and personal liberty. It states that no person shall be deprived of his or personal liberty except according to procedure established by law. This right is not confined to a guarantee against taking away of an individual's life but it has wider application. Various judgements of the Supreme Court have expanded the scope of the "Right to life and personal liberty' which includes:-

- Right to better standard of living;
- Right to shelter;
- Right to clean environment;
- Right to food;
- Right to work;
- Right to education;
- Right to livelihood;
- Right to hygienic conditions in the workplace;
- Right to travel abroad;
- Right to health;
- Right of prisoners;
- Right to legal aid;
- Right against custodial violence;
- Right to a fair and speedy trial.

By virtue of 86<sup>th</sup> Constitutional Amendment Act, 2002, Article 21 A has been incorporated in the constitution to guarantee right to education is a fundamental right. As State is mandated under **Article 21 A** to provide free and compulsory education for 6-14 years aged children, the Parliament of India enacted Right of Children to Free and Compulsory Education Act, 2009 to ensure universal and quality elementary education to all children.

**Right to protection against arrest and preventive detention:** Article 22 offers the right of protection against arrest and detention. The Article states that no one can be arrested without being told the grounds for such an arrest. If arrested, the person has right to defend himself by a lawyer of his choice. Also it is mandatory for the police to take that to the nearest within a period of 24 hours of such arrest excluding the time necessary for journey from the place of arrest to the Court of the Magistrate.

It must be understood that preventive detention means arrest of a person on the apprehension that he or she is likely to engage in unlawful activity. It means that if the government feels that a person can be threat to law and order or to the peace and security of the nation, it can detain or arrest such person. This preventive detention can be extended only for three months. After three months such a case is brought before an advisory board to review.

### **Right against exploitation**

In our country there are millions of people who are unprivileged or deprived. Owing to their socio-economic conditions, they are vulnerable to exploitation by their fellow human beings. Realizing the fact of vulnerability of people to exploitation, our Constitution recognizes right against exploitation. Article 23 provides prohibition of traffic in human beings and forced labour. Trafficking means buying and selling of human beings and using them as slaves. The Constitution recognizes traffic in human beings, beggar or any forms of forced labour is an offence punishable in accordance with law.

The Constitution under Article 24 forbids employment of children below the age of 14 years in factory or mine or in any other hazardous employment. With child labour being made illegal and right to education has become a fundamental right, the right against exploitation has become more meaningful.

### **Right to freedom of religion**

Article 25-28 is on right to freedom of religion. In India, everyone is free to choose a religion and practice that religion. Freedom of religion also includes the freedom of conscience. This means that a person may choose any religion or may choose not to follow any religion. Freedom of religion also includes the freedom to profess, follow and propagate any religion. It also includes freedom to manage religious affairs which means any religious group has right to establish, maintain and manage religious institutions; and own, acquire and administer property for such religious purpose. Freedom of religion is subject to certain limitations. The government can impose restrictions on the practice of freedom of religion in order to protect public order, morality and health.

### **Cultural and educational rights**

The Constitution provides cultural and educational rights. Article 29 is on protection of the minorities. Our Constitution gives every citizen the fundamental right to conserve language, script and culture. Our Constitution gives every citizen the fundamental right to get admission to any government or government-aided educational institutions on the grounds of religion, race, caste, language or any of them.

**Article 30 gives religious and linguistic minorities the fundamental right to establish and administer educational institutions of their choice.**

### **Right to constitutional remedies**

Article 32 provides remedies for enforcement of fundamental rights. Dr. B.R Ambedkar considered the right to constitutional remedies as the 'heart and soul' of the Constitution. It is so because this right gives a citizen the right to approach the Supreme Court or a High Court to get any of the fundamental rights restored in case of their violation. The Supreme Court and the High Courts can issue orders and give directions to the government for the enforcement of rights. The Courts can issue special orders known as 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 Part-III of the Constitution.

- ❖ **Habeas Corpus:** The writ of habeas corpus means that the court orders that the arrested person should be presented before the court. It can also order to set free an arrested person if the manner or grounds of arrest are not lawful or satisfactory.

*Example: A writ of Habeas Corpus can be filed in a High Court or in the Supreme Court if a person is arrested by the police and not produced before the Magistrate within 24 hours; or if the detained person is being tortured in police custody or if a prisoner is being tortured in the jail; or if police does not act upon the complaint to trace a person who is missing or kidnapped or abducted.*

- ❖ **Mandamus:** This writ is issued when the court finds that a particular office holder is not doing legal duty and thereby infringing on the right of an individual.

*Example: The Supreme Court or High Courts can issue mandamus to an authority directing it to perform a public duty imposed upon by the Constitution or by any other law in force for the time being in force.*

- ❖ **Prohibition:** This writ issued to stop any lower court from taking up a case which it has no power to take up and which affects fundamental rights of any individual.

*Example: The Supreme Court or High Court can issue this writ if any subordinate criminal court / civil courts or Tribunal or any quasi-judicial bodies is about to pass an order beyond their authority or jurisdiction.*

- ❖ **Quo Warranto:** This writ is issued to restrict a person from acting an office holder if court finds that the person is not legally entitled to hold such public office.

*Example: The Supreme Court or High Courts can issue this writ if any public authority holds office without de-jure authority.*

- ❖ **Certiorari:** Under this writ, the court orders a lower court or another authority to transfer a matter pending before it to the higher authority or court.

*Example: The Supreme Court or High Courts can issue this writ to subordinate court to expedite pending case or to give direction to government to change any investigative officer if court finds any prejudice with such investigative officer.*

From the analysis of constitutional remedies, it must be concluded that the Supreme Court and High Courts are the custodian of the fundamental rights. That means a person can move Supreme Court or High Courts for the enforcement of any fundamental rights or for protection in case of violation or transgression of any rights given under Part-III of the Constitution of India. Now we must understand three important things, i.e against which fundamental rights can be enforced, who can file petition to protect fundamental rights, and procedure to file writ.

### **1. Against whom can we enforce fundamental rights?**

Fundamental rights are pitted only against the “State” When a person wants to enforce his/her fundamental rights; it can be done against State<sup>2</sup> as defined in Article 12 of the Constitution.

### **2. Who can file a petition to protect fundamental rights?**

First it is the person whose right has been affected can file petition before the Supreme Court under Article 32 or in the concerned High Court under Article 226 of the Constitution. But a third party can also file writ when the person concerned is not able to file petition or when rights of the group of

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<sup>2</sup> The ‘State’ includes the Government and the Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

persons are violated by the action or non-intervention of the state. This is called as Public Interest Litigation (PIL)

### 3. What is the procedure to file writ?

The writ can be filed either in the Supreme Court or High Courts. Before filing writs, it is necessary on the part of the petitioner to bring the matter to the knowledge of the administration or any appropriate authority for redressal. When a petition is filed, the High Court or Supreme Court will listen to both parties and pass appropriate order in the nature of writs if court finds that government has indeed violated the fundamental rights of an individual by omission or commission of an action.



## Reflection of Universal Declaration of Human Rights in the Constitution of India

The UDHR was adopted and proclaimed by the General Assembly of the United Nations on 10<sup>th</sup> December 1948. India was one of the signatories to the declaration. During that period, the Constitution of India was in the process of final drafting. Part-III of the Constitution of India containing Article 12-36 provides certain fundamental rights, which are similar to some of the provisions of UDHR. The concomitant provisions in the Constitution of India with regard to UDHR are given below:

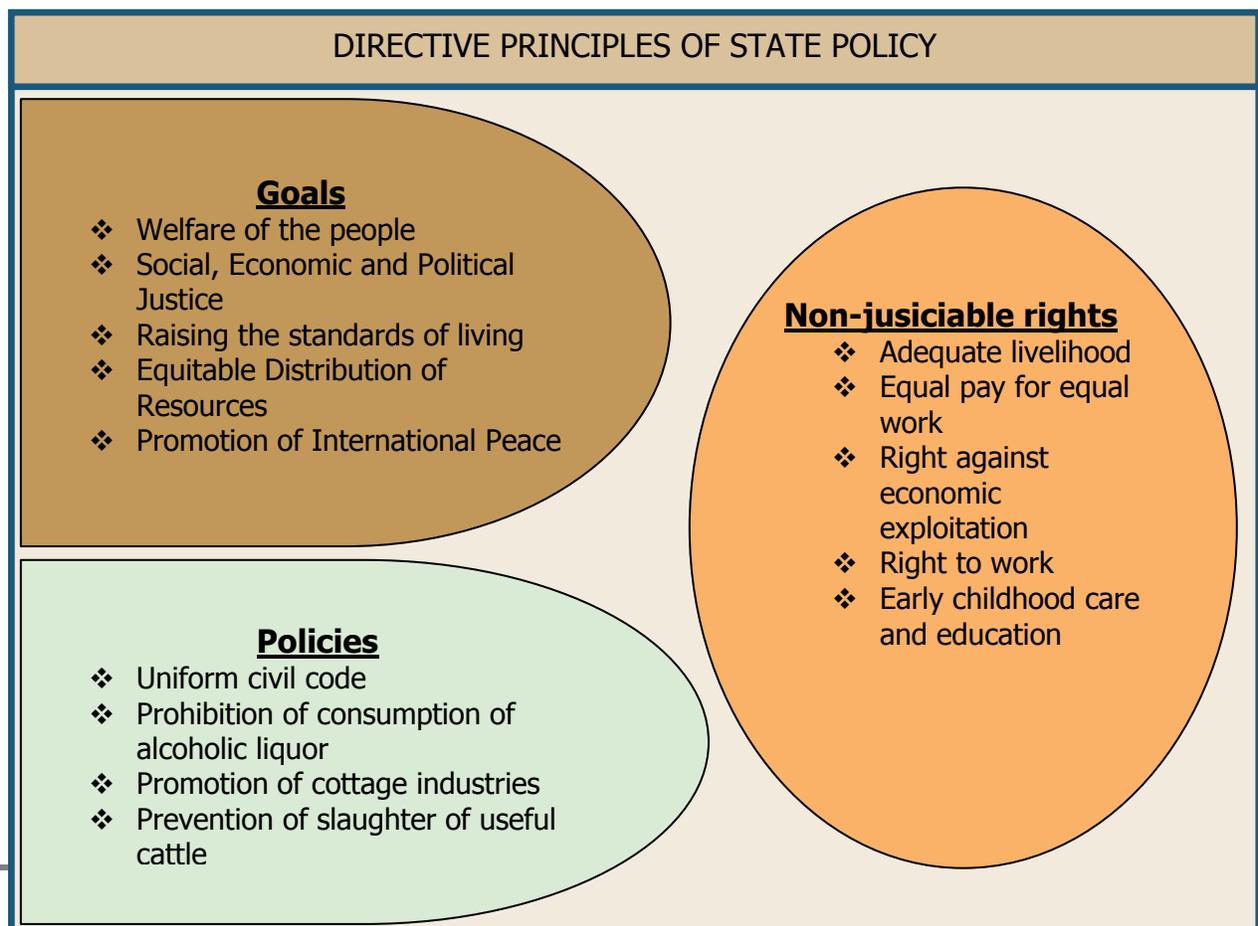
| <b>Name of the Right</b>                                | <b>Relevant Article of UDHR</b> | <b>Corresponding provisions in Constitution of India</b> |
|---|---------------------------------|--|
| <b>Equality before law</b>                              | Article-7                       | Article-14   |
| <b>Prohibition of discrimination</b>                    | Article-7                       | Article 15(1)  |
| <b>Equality of opportunity</b>                          | Article 21 (2)                  | Article 16(1)  |
| <b>Freedom of speech and expression</b>                 | Article 19                      | Article 19(1)(a)   |
| <b>Freedom of peaceful assembly</b>                     | Article 20(1)                   | Article 19(1) (b)  |
| <b>Right to form associations or unions</b>             | Article 23 (4)                  | Article 19 (1) (c )                                      |
| <b>Freedom of movement</b>                              | Article 13 (1)                  | Article 19 (1) (d)                                       |
| <b>Protection in respect of conviction for offences</b> | Article 11 (2)                  | Article 20 (1)   |
| <b>Protection of life and personal liberty</b>          | Article 9                       | Article 21   |
| <b>Protection of slavery &amp; forced labour</b>        | Article 4                       | Article 23   |

|   |            |                |
|---|------------|----------------|
| <b>Freedom of conscience and religion</b> | Article 18 | Article 25 (1) |
| <b>Remedy for enforcement of rights</b>   | Article 8  | Article 32     |

### c. Directive Principles of State Policy:

Part-IV of the Constitution lays down certain non-enforceable guidelines for the government called as Directive Principles of State Policy which aims at establishing economic and social democracy. The Directive Principles provide certain economic and social policies to be pursued by central and state government; and they impose certain obligation on the state to take positive action in certain directions to secure socio-economic welfare. Even though Directive Principles are in nature a guidelines for the State in formulating laws and policies, but they are fundamental in the governance of the country. The chapter on Directive Principles lists mainly three things:

- 1) the goals and objectives that we as a society should adopt;
- 2) certain rights that individuals should enjoy apart from the fundamental rights; and
- 3) certain policies that government should adopt.



## **How are the Directive Principles of State Policy different from the Fundamental Rights?**

It is to be remembered that both Fundamental Rights and Directive Principles of State Policy are complementary to each other. Fundamental Rights restrain the government from doing certain things while Directive Principles of State Policy exhorts the government to do certain things. Fundamental Rights mainly protect the rights of individuals while Directive Principles ensure the well-being of the entire society. Whereas fundamental rights are enforceable, the directive principles are non-enforceable in a Court of law. It means that a person cannot approach the court in case the provisions of the directive principles are not fulfilled. Unlike the fundamental rights, court cannot declare any law void on the ground that it has transgressed the Directive Principles. In case of conflict between Fundamental Rights and Directive Principles, the fundamental rights will prevail.

## **What are the Directive Principles of State Policy under the Constitution?**

The Directive Principles of State Policy Chapter of the Indian Constitution envisages duty of the State to secure the following to ensure justice and equity in society.

- ❖ Adequate livelihood to each citizen, both men and women, equally.
- ❖ Ownership and control of the material resources of the community are distributed to best sub-serve the common good.
- ❖ The operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.
- ❖ Equal pay for equal work for both men and women.

- ❖ Protection of children against exploitation and abandonment and to ensure that they grow as healthy individuals. Also to ensure that the health and strength of the workers are not abused.
- ❖ Free legal aid to citizens through legislations to ensure that access to justice is not denied to them due to economic reasons or other disabilities.
- ❖ Support village panchayats and enable them to function as units of self-governance.
- ❖ Make effective provisions for securing the right to work, education and public assistance in cases of unemployment, old age, sickness and disablement and in other cases of underserved want.
- ❖ Secure just and humane conditions of work and maternity relief.
- ❖ Ensure to all workers a living wage and decent standard of living and full employment of leisure and social and cultural opportunities.
- ❖ Provide early childhood care and education for all children until they complete the age of six.
- ❖ Promote educational and economic interest of schedule castes, schedule tribes and protect them from social injustice and all forms of exploitation
- ❖ Raise the level of nutrition and standard of living
- ❖ Protect and improve the environment and safeguard the forests and wildlife of the country.
- ❖ Promote international peace and security, maintain good relations with other countries and foster respect for international law and treaty.

In conclusion it can be stated that the Constitution requires State to apply the principles laid down under Directive Principles in making laws. The government from time to time has enacted several laws to give effect to the directive principles. Some of the notable laws are Minimum Wages Act, Equal Remuneration Act, Maternity Benefit Act, Legal Services Authority Act, National Rural Employment Guarantee Act, Environment Protection Act etc.



**d. Fundamental Duties:**

Right and Duties are correlative. The Fundamental Duties are intended to serve as a constant reminder to every citizen that while the Constitution specifically conferred on them fundamental rights, it also requires the citizen to observe certain basic duties. The Fundamental Duties is given in Part-IV A of the Constitution in Article 51 (A). There are 11-numbers of Fundamental Duties given to the citizens. Every citizen of India shall have the duty-

- a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
- c) to uphold and protect the sovereignty, unity and integrity of India;
- d) to defend the country and render national services when called upon to do so;
- e) to promote harmony and spirit of common brotherhood amongst all people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- f) to value and preserve the rich heritage of our composite culture;
- g) to protect and improve the natural environment including forest, lakes, rivers and wildlife and to have compassion for living creatures;
- h) to develop scientific temper, humanism and the spirit of inquiry and reform;
- i) to safeguard public property and to abjure violence;
- j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement
- k) who is a parent or guardian to provide opportunities for education to his child or as the case may be, ward between the age of six and fourteen years.

### **Constitutional Safeguards and Protection to certain sections**

Taking note of the fact that certain communities in India were suffering from extreme social, educational, and economic backwardness arising out of age-

old social stratification, the framers of Constitution decided to incorporate special provisions for safeguarding the interests of such communities in order to accelerate their socio-economic development. The Constitution of India guarantees certain safeguards and protectionism to the weaker section of the people which includes Schedule Castes, Schedule Tribes, Backward Classes, and Minorities also. The Constitution of India speaks for Social, Educational & Cultural safeguards; Economic Safeguards; Political Safeguards and Service Safeguards; and Development & Protective safeguards for these communities.

### **a.Social, Educational and Cultural Safeguards**

- Article- 15(4) Article 15 (4) empowers State make special provision for the advancement for any socially and economically backward classes of citizens or for the Schedule Castes and the schedule Tribes.
- Article 29 (1): Any section of the citizens residing in the territory of India or any part thereof having distinct language, script or culture of its own shall have right to conserve the same (it includes minorities, schedule tribes)
- Article 46: State shall promote, with special care, the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes, and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.
- **Art. 350 A:-** State to provide adequate facilities for instruction in the mother tongue at the primary stage of education of children belonging to linguistic minority groups

### **b.Economic Safeguards**

- Clause(1) Article-244: The provisions of Fifth Schedule shall apply to the

administration & control of the Scheduled Areas and Scheduled Tribes in any State other than the states of Assam, Meghalaya, Mizoram and Tripura which are covered under Sixth Schedule, under Clause (2) of this Article.

- Article 275: Grants-in-aid by the Government of India to specified States for the purpose of promoting the welfare of the ST in that states and raising the level of administration of the Schedule Areas therein.

### c. Political Safeguards

- **Article 164(1):-** Provides for Tribal Affairs Ministers in Bihar, MP and Orissa;
- **Article. 330:-** Reservation of seats for SC & STs in the House of People
- **Article 332:** Reservation of seats for SC & ST in the Legislative Assemblies of the States
- **Article 334:-** 10 years period for reservation (*Amended several times to extend the period.*)
- **Article. 243 D:-** Reservation of seats in Panchayats for SC & ST.
- Article 243 T:- Reservation of seats for SC and ST in every Municipality.

### d. Service Safeguards

- Article 16(4) empowers the State to make provisions for the reservation of appointments or posts in favour of any backward class of citizen which, in the opinion of the state, is not adequately represented in the services under the State.
- Article 16 (4A) empowers the State to make provisions for reservation in the matters of promotion, with consequential seniority to any class or classes of posts in the services under the State in favour of the Schedule Castes, and Schedule Tribes.
- Article 335: The claims of the members of the Schedule Castes and the Schedule Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, on the making of

appointments to services and posts in connection with the affairs of the Union and of a State. The State is also empowered to make any provisions in favour of the members of SC & ST for relaxation in qualifying marks in any examination or lowering the standards of evaluation, for reservation in the matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

### **e. Development and Protective Safeguards**

- These safeguards are contained in the Directive Principles of State Policy of the Constitution and a specific provision in Article 46 which is a comprehensive provision comprising both the developmental and regulatory aspects. It reads that “The State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation”.
- **Article 17:** “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. To give effect to this Article, Parliament made an enactment viz., **Untouchability (Offences) Act, 1955**. To make the provisions of this Act more stringent, the Act was amended in 1976 and was also renamed as the **Protection of Civil Rights Act, 1955**. As provided under the Act, the Government of India also notified the Rules, viz, the PCR Rules, 1977, to carry out the provisions of this Act. As cases of atrocities on SCs/STs were not covered under the provisions of PCR Act, 1955, Parliament passed another important Act in 1989 for taking specific measures to prevent the atrocities. This Act known as the **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989**, became effective from 30-1-1990. For

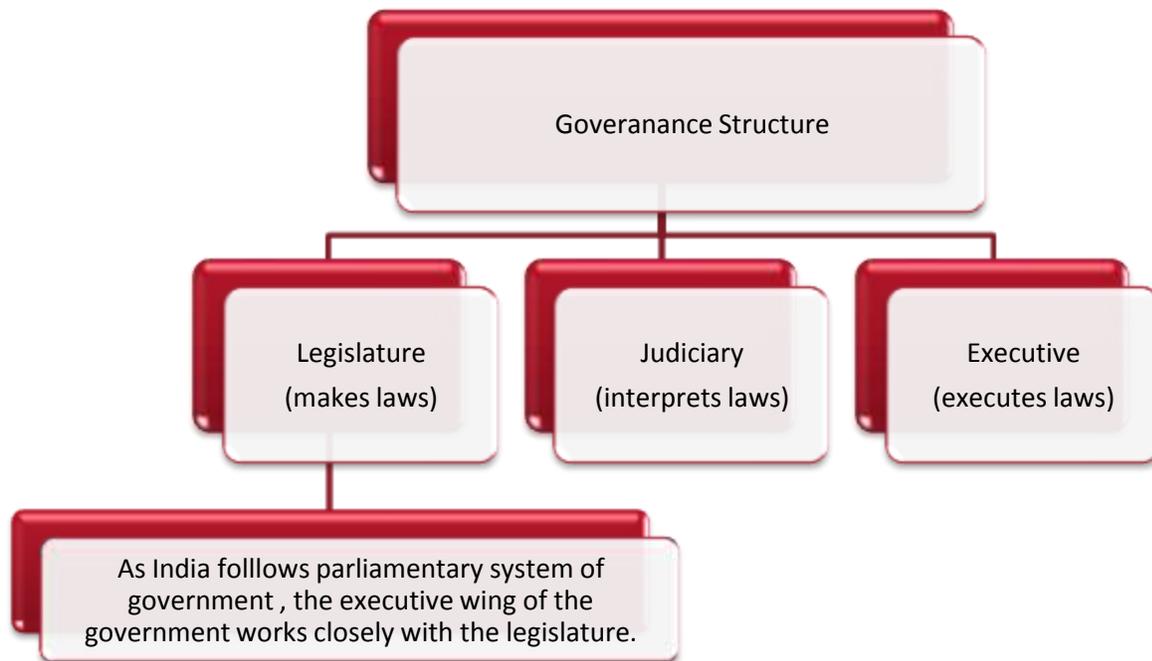
carrying out the provisions of this Act the Govt. of India have notified the SCs and STs (Prevention of Atrocities) Rules, 1995 on 31-3-1995.

## Chapter-4

### Understanding Access to Justice

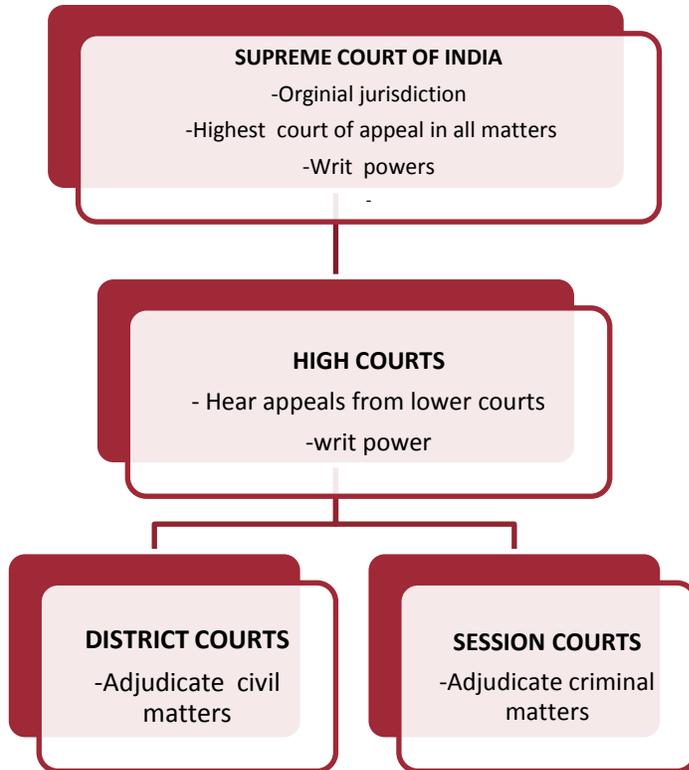
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India is a federal state with parliamentary system of government. The Constitution has devolved powers and responsibility between the Union (central government) and the States (state governments). The system of separation of powers among three wings of the government is followed in our country. The first wing of the government is the legislature which makes laws. Legislature at the central level is called Parliament which is bi-cameral consisting of Council of States (Rajya Sabha) and House of People (Lok Sabha). The legislature is bicameral (i.e the Legislative Council and the Legislative Assembly) in few states, whereas in many States the legislature is uni-cameral, i.e legislative assembly. The second wing is executive which is responsible for implementing laws made by the legislature. At the central level, executive authority is vested in the President of India but is actually exercised by the Prime-Minister. At the state level, the executive authority is vested in the Governor of the States, but is actually exercised by the Chief-Minister. The third wing of the government is the judiciary which interprets the law. The judiciary in India is unified and hierarchical with Supreme Court at the apex.



### . Judiciary in India:

The judiciary is a key constituent of the governance structure. The role of judiciary assumes great significance in a federal country like India where disputes are bound to occur not only between the individual and the states but also between centre and states, and between/among the constituent states. The judiciary has the important task of interpreting and adjudicating disputes and upholding the constitutional values. In India, the judiciary is hierarchical and integrated. At the top, the Supreme Court is the apex court of Indian Legal System which is situated at the National Capital of India, New Delhi. Below it there is High Court for each State or group of States. There are subordinated courts under High Court. There are also several tribunals and other judicial forum being created under special statutes including Administrative Tribunal, Motor Accident Claim Tribunal, Consumer Protection Forum, Industrial Tribunal, Electricity Tribunal, Ombudsman etc. Besides, there are administrative courts like Board of Revenue, Consolidation Commissioner, and Tahasils. There are also statutory commissions at the National and State level such as Human Rights Commission, Women Commission, Commission for Protection of Child Rights, Information Commission etc.



## Supreme Court

Article 124 (1) of the Constitution of India establishes Supreme Court. The Supreme Court enjoys powers of original jurisdiction, appellate jurisdiction and court of record. Under article-131, the supreme court has exclusive original jurisdiction to adjudicate dispute between central and state government (s); between central government and any state (s) on the one side and one or more states on the other; and between two or more states that involves any question of law on which the existence or extent of a legal right depends.

The Supreme Court is the highest court of appeal in constitutional, civil and criminal matters as well as appeal by Special Leave. In constitutional matter, an appeal lies in the Supreme Court from any judgement, decree or final order by the court in civil, criminal and other proceedings, if the High Court certifies that the case involves substantial question as to the interpretation of the Constitution (Article-132). In civil matters, an appeal lies in the Supreme Court from any judgement, decree or final civil order from the civil proceedings from any High Court, if the High Court certifies that the case involves substantial question of law of general importance; or in the opinion of the High Court it needs to be decided by Supreme Court (Article-133). In criminal matters, an appeal lies to the Supreme Court from High court:-

- if High Court has, on appeal, reversed an order of an acquittal of an accused and sentenced him to death (Article-134 (1) a). But no appeal lies to the Supreme Court if the High Court has reversed the order of conviction and acquits him.
- If the High Court has withdrawn a case from a trial from the lower court and sentenced the accused to death (Article-134 (1) b).
- If the High Court certifies that the case is fit for an appeal to the supreme court(Article-134 (1) c).
- If a High Court has on appeal reversed the order of the acquitted and sentenced accused to imprisonment for life or for a period not less than ten years.

- If a High Court has withdrawn a case from subordinate court, convicted the accused and sentence him to imprisonment for life or for a period of not less than ten years.

The Supreme Court is a court of record which means that its record has evidentiary value and cannot be questioned by any court. According to article-141, the law declared by the Supreme Court shall be binding on all courts within the territory of India.

Article 32 of the Constitution confers writ powers to the Supreme Court. The right to constitutional remedies is recognized as a fundamental right by the article-32 of the constitution. That means any person whose fundamental duties have been violated by the state actions, may approach the Supreme Court which is empowered to issue writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari* whichever may be appropriate for the enforcement of fundamental rights.

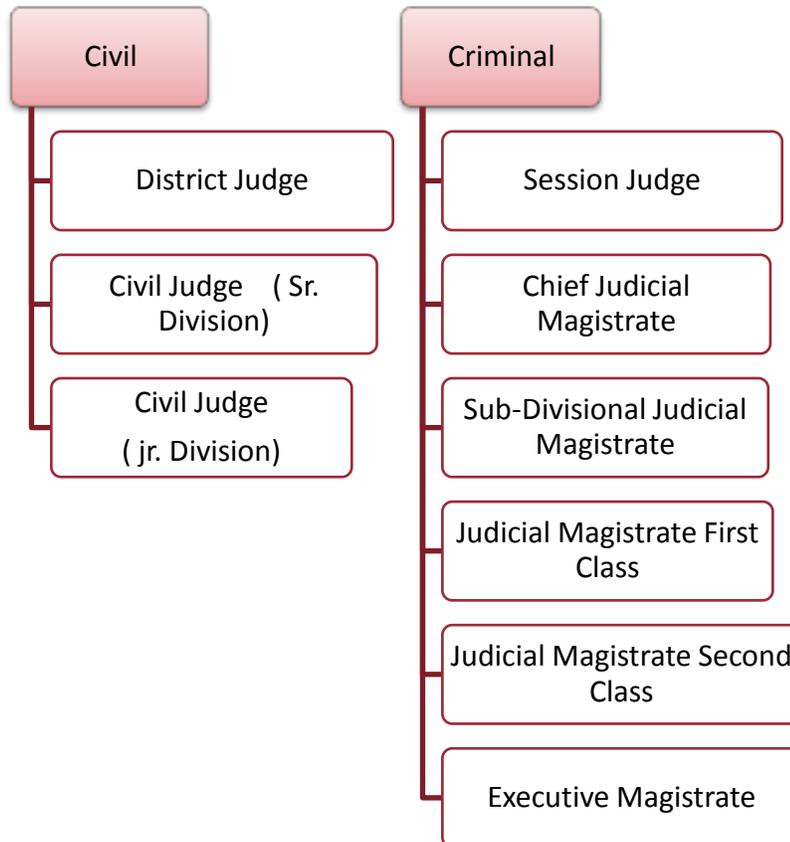
### **High Courts:**

Article 214 of the Constitution provided that there should be High Court for each state, However, the Parliament can establish, by law, a High Court for two or more states or for a state and a union territory. High Courts stand at the head of the judicial system at state level. Under article-226, the High Courts are empowered to issue directions, orders or writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari* for the enforcement of fundamental rights as guaranteed by part-III of the Constitution. Every High Court, under article-227, has power of superintendence over all courts and tribunals throughout the territory within which it has its jurisdiction. The High Courts can make general rules for the lower courts; prescribe forms for regulating the practice and proceedings for them; prescribe forms in which such courts should maintain their books, records, accounts and settle the fees of the sherrifs, clerks, advocates and pleaders. Under article-235, the High Courts have disciplinary jurisdiction over the subordinate courts.

### **Subordinate Courts:**

The Constitution under Article 233 -237 describes provisions for the subordinate courts in every state. Each state is divided into judicial districts presided over by

a "District and Session Judge". He is known as a 'District Judge' when he presides over a civil case and a 'Session Judge' when he presides over a criminal case. Below the District Judge, there are civil courts and criminal courts in different names in different states. In Odisha, the structure of subordinate courts is as follows:



On the civil side, below the Court of District Judge is the Court of Civil Judge Senior Division. This court decides civil cases of any valuation. Below this is the Court of Civil Judge Junior Division which decides civil matters up-to the pecuniary valuation of Rupees One Lakh.

On the criminal side, the Court of the Chief Judicial Magistrate stands below the Session Court and deals with the criminal matters that are punishable with up-to seven years of imprisonment. Then comes the Court of Judicial Magistrate which decides the criminal matters that are punishable with up-to five years imprisonment. A Judicial Magistrate First Class can order a sentence up-to three

years and fine up-to rupees up-to five thousand whereas a Second Class Magistrate can order a sentence up-to one year and fine up-to rupees three thousand.

The Executive Magistrate heads the executive branch having endowed with limited judicial powers. The Executive Magistrate cannot try cases or pass verdicts, but he has to order the dispersement of unlawful assembly and decide the manner of using police force for law and order. In Odisha, the executive magistrates are remained under the control of the Revenue Department. The kinds of executive magistrate exist in Odisha is as follows:

- District Magistrate: The collector of the district is endowed with the power of District Magistrate.
- Additional District Magistrate:
- Sub-Divisional Magistrate: The Sub-Collectors are appointed as the SDMs.
- Executive Magistrate: The Tahasildars are appointed as executive magistrate.

## **Human Rights Institutions**

The Parliament of India has enacted several legislations in establishing Human Rights Institutions. The Protection of Human Rights Act, 1993 established the National Human Rights Commissions and State Human Rights Commissions. Important specialised institutions to ensure protection and promotion of rights of specific groups such as women, minorities, children and other categories have been established through the enactment of specific legislations. The National Commission for Women, and the National Commission for Minorities have been established under separate legislations such as the National Commission for Women Act, 1990, and the National Commission for Minorities Act, 1992. The Commission for Protection of Child Rights Act, 2005 has established Child rights Commission at the national and state levels. The Commissions mentioned above are called as the statutory commissions because they have been established by virtue of the special statutes. The institutions like the National Commission for Schedule Castes and Schedule Tribes are called as

constitutional bodies as they have been established under Article 338 of the Constitution of India.

## Legal Services

The 42<sup>nd</sup> Constitutional Amendment Act of 1976 incorporated free legal aid by inserting Article-39 A in the Constitution of India to strengthen access to justice. As per the constitutional mandate, the State shall:

- a) Secure that the operation of the legal system promotes justice;
- b) Provide free legal aid by suitable legislation or scheme;
- c) Ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

With the object of providing legal aid, government enacted the Legal Services Authority Act, 1987 and other consequential regulation and schemes to provide legal services for the poor and marginalized people in free of cost. The statutory framework that regulates legal service programme in all across the country is as follows:

- The Legal Services Act, 1987
- The National Legal Services Authority Rules, 1996
- The Supreme Court Legal Services Committee Regulations, 1996 ( As amended in 2012)
- The Supreme Court Legal Service Committee Rules, 2000
- The Permanent Lok Adalat Rules, 2003
- The National Legal Services Authority (Lok Adalats) Regulations, 2009
- The National Legal Services Authority ( Free and Competent Legal Services) Regulations, 2010
- The National Legal Services Authority ( Legal Aid Clinics) Regulations, 2011
- Scheme to Provide Legal Services to the Middle Income Citizen
- Legal Services to the Workers in the Unorganized Sector Scheme, 2010
- Legal Services to the Mentally Ill persons and Person with Mental Disabilities' Scheme -2010.
- Schemes for Legal Services to the Victims of Disaster through Legal Services Authorities.

The provisions for legal aid are also contained in other statutes which are as follows:

|  |  |
|--|--|
| <p><b>Code of Criminal Procedure, 1973</b></p> | <p>It is mentioned under Section-304 of Civil Procedure Code that where in a trial before the Court of Session, the accused is not represented by a pleader and where it appears to the court that the accused has not sufficient means to engage a pleader; the court shall assign a pleader for his defence at the expenses of the State.</p> <p>It implies that when an accused is unrepresented by a pleader due to want of sufficient means to engage a pleader, the concerned court has authority to engage a pleader for his defence at state expenses.</p> |
| <p><b>Civil Procedure Code</b></p>             | <p>According to order XXXIII of the Civil Procedure code, on the application to sue as indigent person or his dependent is being granted the plaintiff shall not be liable to pay court fee and in case his is not represented by a pleader, the court may, if the circumstances of the case so require, assign a pleader to him. According to order XLIV, the free legal aid is provided in respect of appeals by indigent person.</p>  |
| <p><b>The Advocates Act, 1961</b></p>          | <p>A Bar council may constitute one or more legal aid committees to render legal services.</p>   |
| <p><b>The Bar Council</b></p>                  | <p>According to Sec 15 (2)(gb), a Bar Council may make</p>   |

**of India Act**

rules for the organisation of legal aid and advice to the poor, constitution and functions of committees and sub-committees for the purpose and description of proceedings in connection with which legal aid or advice may be given.

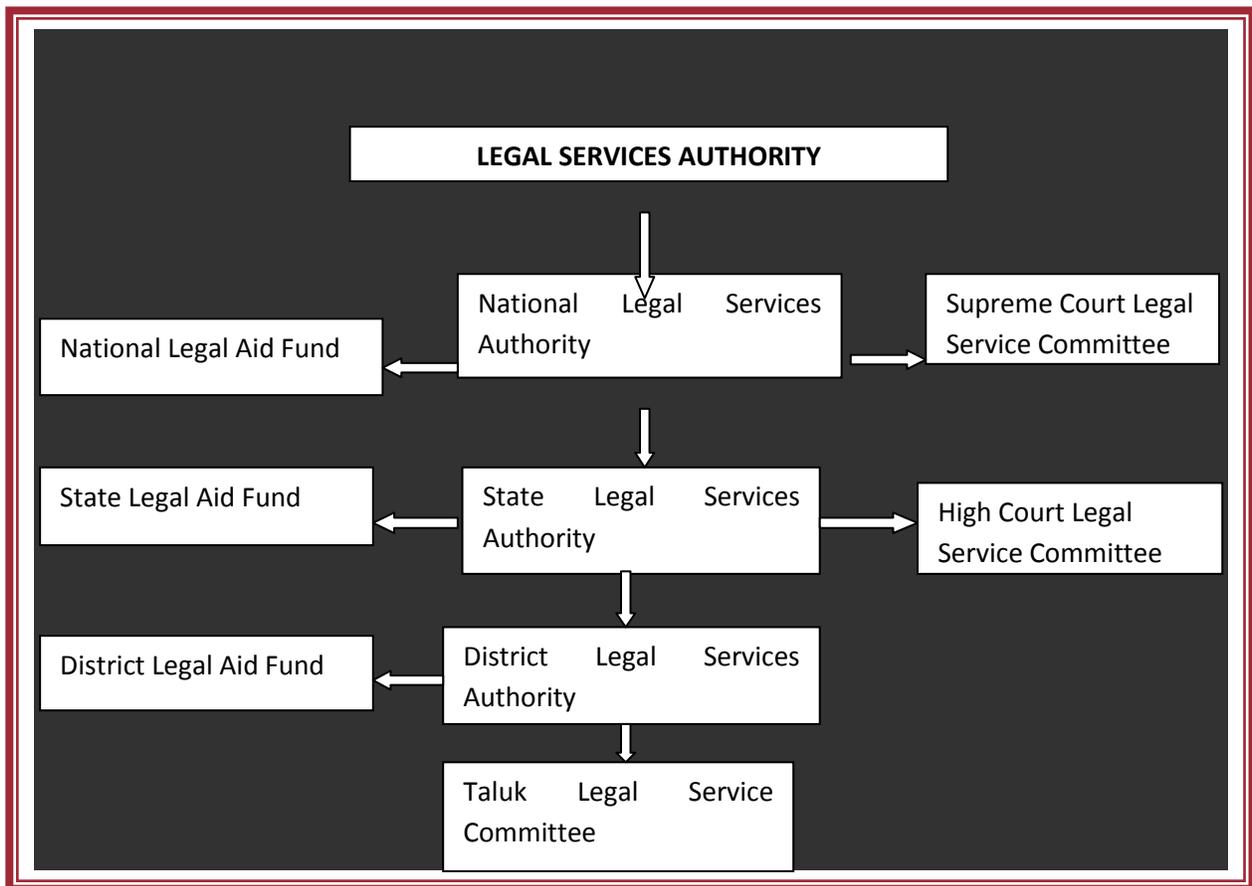
According to Bar Council Rules 'every Advocate shall in the practice of the profession of law bear in mind that any one genuinely in need of a lawyer is entitled to legal assistance even though he cannot pay for it fully or adequately and that within the limits of an Advocates economic condition, free legal assistance to the indigent and oppressed is one of the highest obligations an Advocate owes to society.

**Legal Services Authority:**

Article 39 A of the Constitution envisages state's responsibility of creating a system of free legal aid so that economic or social or any other disability is not a barrier for a person for access to justice. For the realization of constitutional mandate, the Legal Services Authorities Act, 1987 has been enacted to create a decentralized system of legal aid in India. The Legal Services Authority has been established by the government at the central, state, district and taluk levels. At the central level is the National Legal Services Authority that decides national policies and programmes for legal aid. Each State has a State Legal Services Authority that implements the national policies and also designs programmes for state and establishes, supervises and monitors district and taluk level legal service.

The legal services authority at the national level and state level is consisted of patron-in chief, executive chairman and the member secretary. For National Legal Services Authority, the patron in chief is the Chief Justice of India and patron –in-chief for State Legal Services Authority is the chief justice of the High Court of the concerned state. The senior most judge of the Supreme Court and High Courts is designated as the Executive Chairman of the Legal Services

Authority at the national and the state level. Below the chairman is the Member Secretary both at the national and state level who performs the functions of the legal services authority. At the district level, legal services authority is chaired by the District Judge and next to him is the Secretary who performs the functions of the District Legal Services Authority. A fund is set up at the central, state and district levels to ensure that authority has necessary finances to carry out the programme.



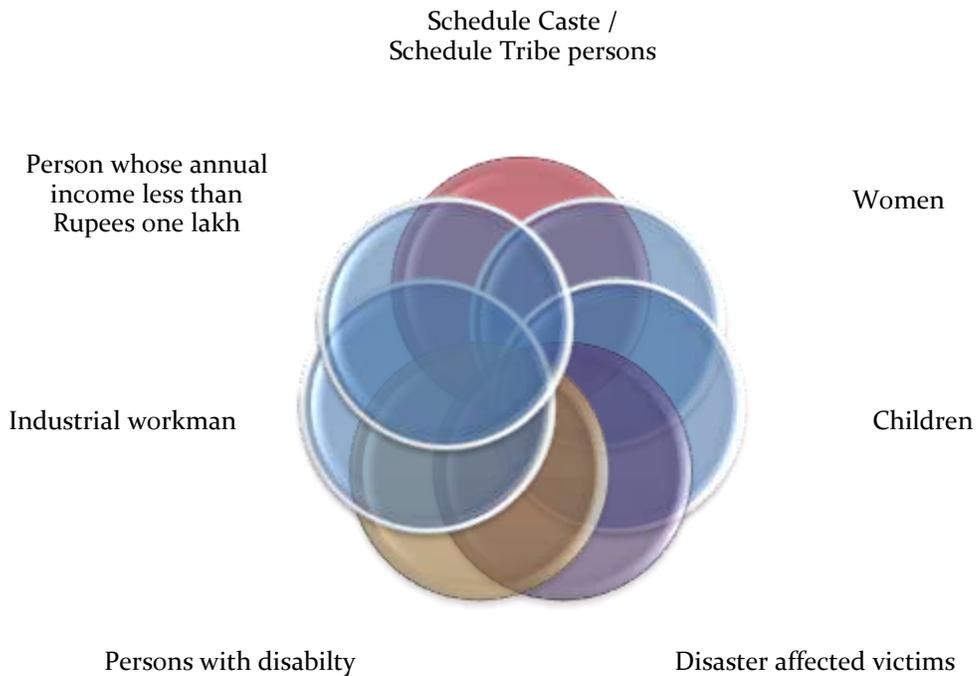
### Functions of Legal Services Authority

- **Legal Service:** Formulate policies and schemes for the purpose of making legal services available under the provisions of the law.

- **Legal Literacy:** Organize regular legal awareness programmes and legal aid clinic to educate people about the rights, benefits and privileges guaranteed by social welfare legislations and other enactments as well as other administrative programmes and measures. It can develop and promote clinical legal education programmes at the universities, law colleges and other institutions.
- **Alternative Dispute Resolution:** Encourage and facilitate the parties to settle disputes by way of negotiation, arbitration and conciliation.
- **Legal Research:** undertake and promote research in the field of legal services.
- **Lok Adalats:** Organize Lok Adalats to promote expeditious and cost-effective dispute settlement.

**Who is eligible for free legal aid:** The following persons are eligible for legal aid under this law.

- a. a member of a Scheduled Caste or Scheduled Tribe;
- b. a victim of trafficking in human beings or begar as referred to in article 23 of the Constitution;
- c. a woman or child;
- d. a mentally ill or otherwise disabled person;
- e. a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or
- f. an industrial workman; or
- g. in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956, (104 of 1956) or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986, (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or
- h. person whose annual income less than one lakh rupees in supreme court /High court matter.



**What types of legal service can be rendered:** Any person who is eligible for legal aid under this Act can obtain legal service **in** the conduct of any case (case includes a suit or proceedings) or other legal proceedings before any court (court includes Civil, Criminal, Revenue, Tribunals any other body having judicial or quasi-judicial functions) and advice on any legal matter. Any person entitled for legal aid can obtain legal services in the following modes:

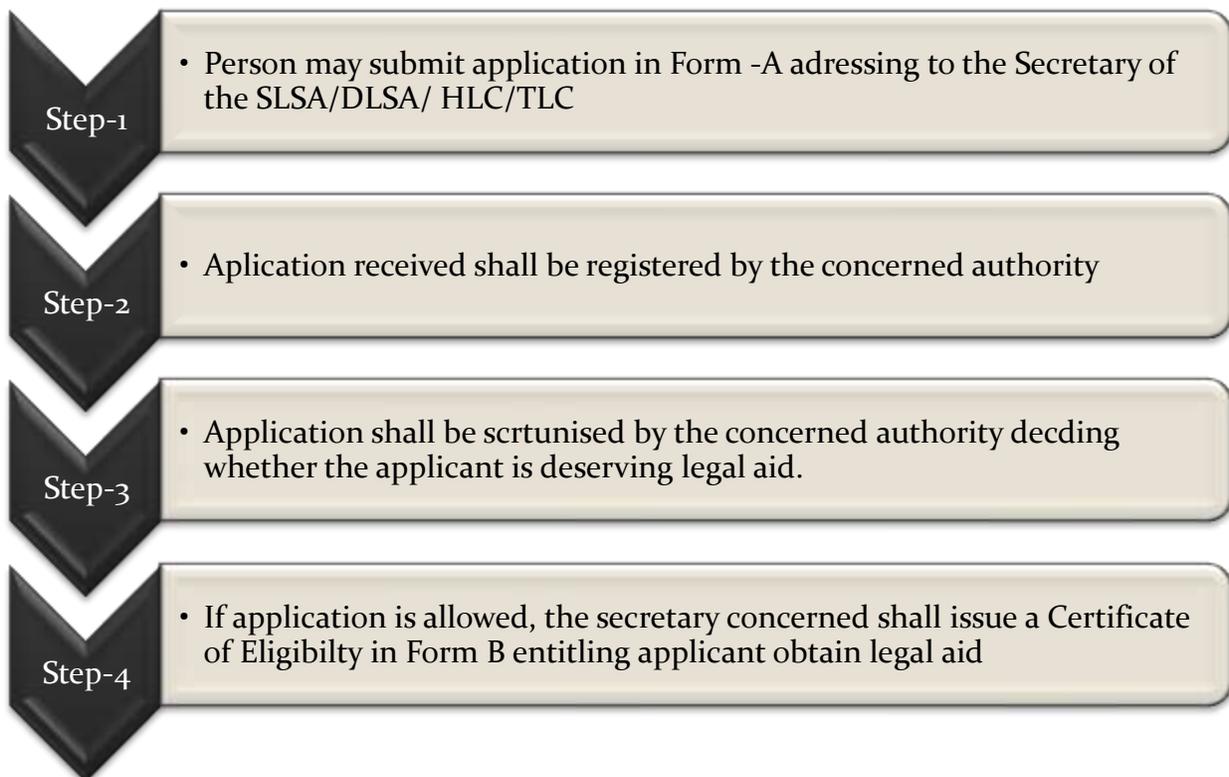
- Payment of the Court fees, process fees, expenses of witnesses and all other charges payable or incurred in connection with any legal proceedings;
- Representation by a legal practitioner in legal proceedings.
- Supply of certified copies of judgements, orders, notes of evidence and other documents in legal proceedings.
- Preparation of appeal paper Book, including printing and translation of documents, in legal proceedings.
- Drafting of legal documents.

### Prohibition of Legal Aid:

Legal aid is disentitled to person in the following types of cases.

- Proceeding in defamation
- Proceeding in malicious prosecution
- Proceeding in election matter
- Offence punishable with fine only
- Proceeding in respect of economic offences and offences against social laws.
- Proceeding in a representative or official capacity
- Proceeding where interest of the person is not likely to be prejudiced on account of proper representation.

### Procedures for legal aid:



### **How to apply for legal services:**

- Application is to be made in prescribed form (Form-I) in English or any local language. The application must contain a summary of the grievance for which legal service is sought in separate sheet. An application without Form-I may also be entertained if reasonably explains the fact to enable the applicant to seek legal services.
- Application may be submitted in hand or sent by post, e-mail etc to the Legal Services Authority.
- The applicant shall give an affidavit mentioning therein that he/she falls under the categories of person entitled to free legal services under section 12 of the Legal Services Authority Act of 1986. The affidavit may be prepared on plain paper with the seal and signature of person attesting it. The affidavit may be signed before a judge, magistrate, notary public, MP, MLA, elected representative of local bodies, gazetted officer, and government school teacher.

### **LOK ADALAT**

The literal meaning of 'Lok Adalat' is People's Court. Lok Adalat is governed by the Legal Services Authorities Act, 1987 and the National Legal Services Authorities (Lok Adalat) Regulation, 2009. One of the key functions of the Legal Services Authority is to conduct Lok Adalats whereby any pending cases relating to following matters can be taken up for adjudication through mutual consent of the disputing parties.

- Civil or revenue cases
- Mutation of land cases
- Matrimonial and family disputes
- Insurance claims
- Accident claims
- Debt claims
- Electricity cases
- Compoundable criminal cases

➤ Pre-litigation dispute

The matters relating to divorce and criminal cases cannot be taken up for Lokadalat<sup>3</sup>.

### **How is case brought to Lok Adalat?**

A case can come to Lok Adalat for hearing under the following circumstances.

- Case is pending before any court
- Parties are agreed
- One of the parties makes an application to the court
- Court is satisfied that there are chances of settlement and either or both parties agree to it.
- If the dispute is at pre-litigation stage, then the matter can be taken up on the application of the either party.<sup>4</sup>

### **Procedure for determination of case by Lok Adalat**

It is to be remembered that before the Court decides to transfer the case to the Lok Adalat, it is the responsibility of the court to give a reasonable opportunity to both the parties to present their case either for or against such decision of the court. Once the case is transferred to the Lok Adalat, the presiding judge will hear both the parties and persuade parties to arrive at a compromise or settlement. If the parties agree to a compromise or a settlement, the Lok Adalat shall proceed to give a decision based upon the principles of justice, equity, fair play and other legal principles. The decision of the Lok Adalat is called an award which shall be final and binding on all the parties. No appeal shall lie to any court against the award passed by the Lok Adalat. Where parties could not arrive at a compromise or settlement, the Lok Adalat shall return the record of the case to the court and shall advice the parties to seek remedy in the Court.

### **Permanent Lok Adalat**

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<sup>3</sup> Regulation 10 (2) of the National Legal Services Authority ( Lok Adalats) Regulations, 2009.;

<sup>4</sup> Section 20 (2) of LSA Act, 1987

The Legal Services Authority is empowered under this Act to establish Permanent Lok Adalat (PLA) to promote pre-litigation conciliation and settlement for any dispute relating to '*public utility services*' that includes:

- a. Transport service for carriage of passengers or goods by air, road or water;  
or
- b. Postal, telegraph or telephone service; or
- c. Supply of power, light or water to the public by any establishment; or
- d. System of public conservancy or sanitation; or
- e. Service in hospital or discrepancy; or
- f. Insurance service.

**Dispute Settlement Procedure:**

- Any party to a dispute shall make an application to the PLA for the settlement of dispute. Dispute that may come up to PLA must be in pre-litigation stage; dispute is compoundable in nature; and value of the compensation shall not exceed rupees ten lakh.
- The PLA, on receipt of the application from one party, shall direct other disputing party to file a written statement mentioning therein facts and nature of the disputes, points or issues in such dispute, evidence in support of the points relied upon.
- Any party may be required to file additional statements on the direction of the PLA, if necessary.
- The PLA shall conduct conciliation proceedings to assist the parties to reach at the amicable settlement of the dispute. In case the parties reach at an agreement on the settlement of the dispute, then PLA shall pass an award on the basis upon the settlement agreement made by the disputing parties.
- Where the parties fail to reach at an agreement, PLA shall decide the dispute if the dispute does not relate to any offence.
- Every award of the PLA shall be deemed to be a decree of a Civil Court and shall be final and binding on all the parties.



### Understanding Criminal Justice System

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Law is of 2- categories namely Civil and Criminal Law. Again laws are also of two types- substantive and procedural laws. The substantive law, may be in the form of common law or statute law, defines various principles relating to rights and liabilities. One example of substantive law is Indian Penal Code, 1860 which defines various offences punishable under criminal law. On the other hand, procedural law prescribes the practice, procedure and machinery for the enforcement of those rights and liabilities. To put in simple way, the procedural law is concerned with enforcement of those rights and liabilities in accordance with principles of substantive law. The Code of Civil Procedure, 1908, The Limitations Act, 1963, The Code of Criminal Procedure, 1973, and Indian Evidence Act, 1872 are of the examples of procedural law relating to the practice in civil and criminal matters.

The Criminal Procedure Code of 1973 provides the machinery for the detecting of crime, apprehension of suspected criminals, collection of evidence, determination of the guilt or innocence of the suspected person, and the imposition of suitable punishment on the guilty person. In addition, the Code also deals with prevention of offences (Sections 106-124, 129-132, and 144-153), maintenance of wives, children and parents (Sections 125-128), and public nuisances (Section 133-143).

The Criminal Procedure Code also controls and regulates the working of the machinery set up for the investigation and trial of offences. Criminal procedure also includes the law of Evidence, governed by the Indian Evidence Act 1872. It's most important principles are-

- i. Evidence must be confined to facts in issue.
- ii. Hearsay evidence is no evidence.
- iii. Best and reliable evidence must be given in all cases.

## **Concept of crime**

Understanding of the meaning of the word 'crime' is the central importance for the study of criminal jurisprudence. Let us start this session with views and analysis of the concept in the Dictionary meaning and by the Philosophers. The crime is defined by the Oxford English Dictionary as '*an act punishable by law as forbidden by the statute or injurious to the public welfare*'. Sir James Stephen in History of Criminal Law(1883) described crime as "*some act or omission in respect of which legal punishment may be inflicted*'. According to Blackstone, *crime is an act done in violation of public rights and duties*. According to Austin, '*a wrong which is pursued at the discretion of the injured party or his representatives is a civil injury; an offence which is pursued by the sovereign and his subordinates is a crime*'. In law crime is defined as those acts or omissions which are proscribed by the law.

The meaning of the word "crime" may be better understood by the proper analysis of crimes as defined in the Indian Penal Code of 1860. The chief elements necessary to constitute a crime are carefully defined by the IPC. These general elements are as follows:

- 1) Human being: the act must have been done by the human being.
- 2) Evil intent on the part of such human being. It means that act in itself does not make a man guilty unless his intentions were so.
- 3) Willed action: An act committed or omitted in furtherance of such intent
- 4) The resultant of evil consequence
- 5) Knowledge about the harmful consequence of such action.

The element of evil intent is indicated by the use of words Intentionally, Knowingly, Voluntarily, Dishonestly, Fraudulently, Maliciously, Malignantly, Corruptly, Recklessly, Negligently and so on.



### Protection to the accused:

The Constitution of India and Criminal Procedure Code has provided protection for the person (s) alleged with the criminal offences.

- a) **Doctrine of double jeopardy:** It means no person can be punished more than once for the same offence. This protection is given to the accused by Article 20 (2) of the Constitution of India and u/s 300 (1) of Code of Criminal Procedure of 1973. Article-20 (2) speaks that no person shall be prosecuted and punished for the same offence more than once. As per section 300 (1) of Cr.Pc, a person once convicted or acquitted cannot be

tried for the same offence. In order to get benefit of double jeopardy, it is necessary for the accused person to establish three things<sup>5</sup>, viz;

1. He had been tried by a court of competent jurisdiction;
2. He is convicted or acquitted of that offence; and
3. Conviction or acquittal is in force

However, the dismissal of a complaint or the discharge of the accused is not an acquittal for the purpose of this Section.

- b) **Presumption of innocence:** The legal maxim '*a man is presumed innocent until he is proved guilty*' has been well accepted by the criminal law in India. The burden of proving the guilt of the accused lies on the prosecution.
- c) **Doctrine of self-incrimination:** The accused enjoys the immunity from giving self-incriminating evidence. This guarantee is provided by Article-20(3) of the Constitution of India which says '*no person accused of an offence be compelled to be a witness against himself*'. A number of protections against self-incrimination is provided to the accused u/s 313 of Cr.PC. *The accused shall not render himself liable to punishment by refusing to answer questions or by false answers to them at the time of inquiry or trial.*
- d) **Right to legal aid:** Article 22 (1) of the Constitution guarantees to every accused right to consult and be defended by a legal practitioner of his choice. This right is further expanded in Section 303 & 304 of Cr. PC which recognizes that accused has a right to be defended by lawyer of his choice but also right to legal aid where the accused is not a person with sufficient means.
- e) **Protection against illegal arrest, detention and custodial death:** The Supreme Court of India prescribes guidelines for such protection. The police must do 3-things at the time of arrest of any accused person;
  - 1) Inform to the family/relatives of the arrestee about his arrest.
  - 2) Inform the arrested person of his right

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<sup>5</sup> AIR, 1970 S.C, 962

3) Make an entry in the diary as to who was informed of his arrest.

### **Criminal justice system**

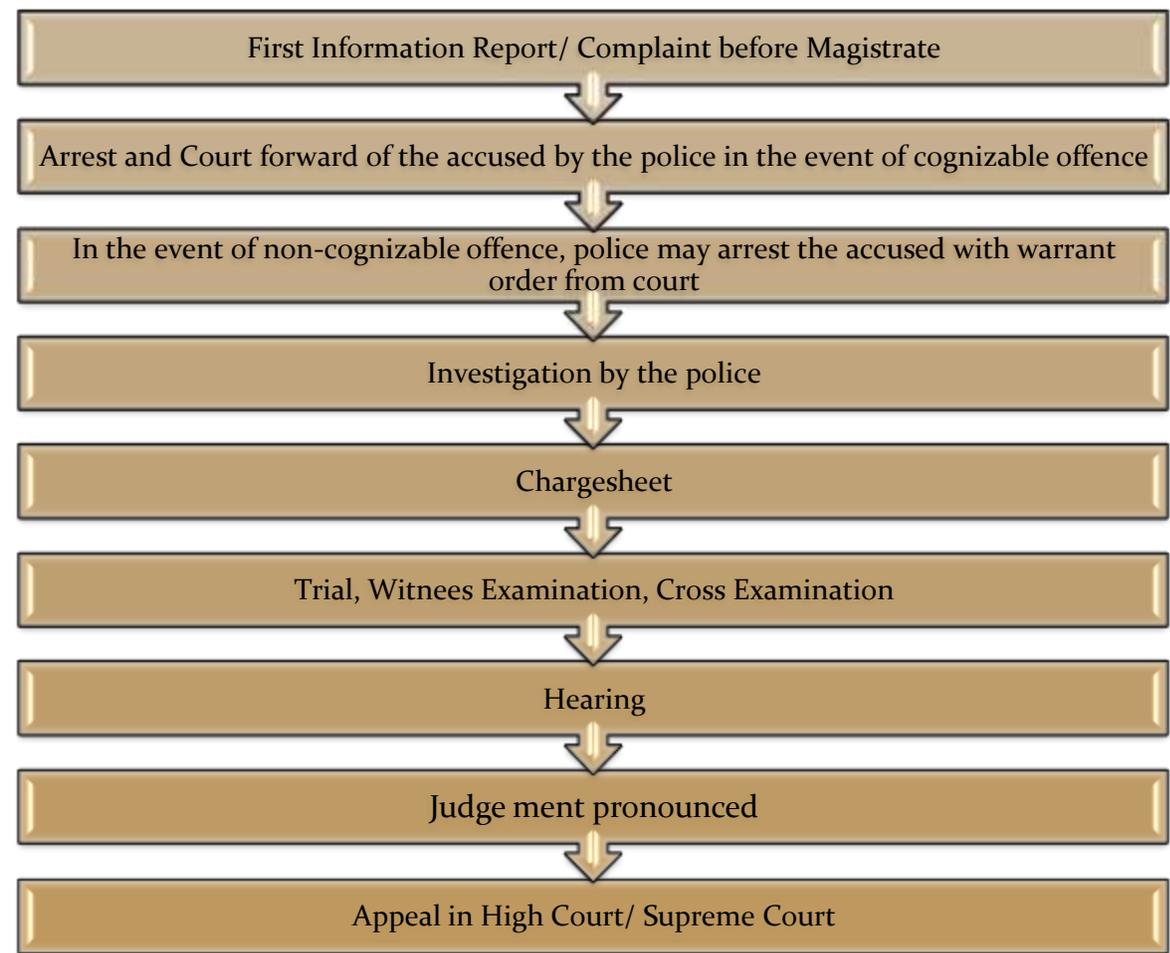
The Supreme Court of India is highest court of appeal in all cases including the criminal matters. For the better appreciation of participants, the facilitator may make a presentation in explaining the structure of the criminal justice system in Odisha and jurisdiction of the respective courts in admission and trial of criminal cases.



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### **Steps in criminal procedure**

The criminal procedure law sets out steps in criminal justice administration such as receiving information about crime, interrogation, arrest, remand, bail, recording evidence at investigation, charge sheet, taking cognizance by courts, framing of charges, summoning witness, evidence recording, hearing arguments, judgment, passing of sentences, and appeal



## **Offences**

Offences are broadly classified into two types- Cognizable and Non-cognizable offence. Cognizable offence means an offence in which a police officer may arrest the accused without warrant. On the other hand, non-cognizable offence means an offence in which police has no authority to arrest without warrant. Generally speaking, non cognizable offences are more or less considered as private criminal wrongs. Therefore the investigation into such cases is not the responsibility of the police, unless otherwise directed by a magistrate. The aggrieved private individual can however; approach a magistrate with a complaint and magistrate may take necessary steps for trial of the offender.

Initiation of a criminal proceeding against non cognizable offence is through a complaint not FIR. However, according to S. 155 of CrPC, if a person gives information regarding occurrence of a non cognizable offence to the officer in charge of a police station, he would reduce the complaint in writing and give a copy thereof to the complainant free of cost. The officer shall then refer such informant to the appropriate magistrate having jurisdiction. No police officer can investigate a non-cognizable case unless he obtains prior permission of a Magistrate having power to try such case.

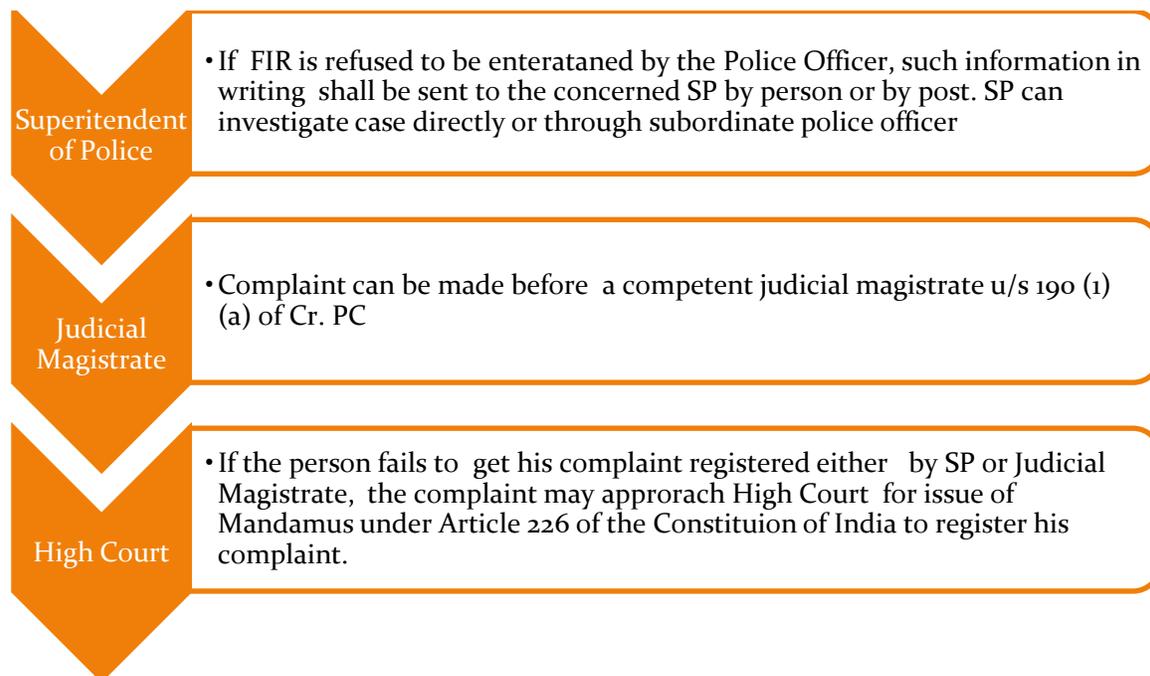
## **First Information Report**

FIR stands for 'First Information Report'. It is a common understanding that 'complaint' and FIR is same. However in terms of statutory interpretation, there is difference between complaint and FIR. The term 'complaint' is defined in CrPC as any allegation made orally or in writing to a Magistrate that some person known or unknown has committed an offence with a view to taking action under this code. A person report to the Magistrate u/s 2(d) of Cr.PC for commission of cognizable or non-cognizable offence is treated as 'Complaint'. The FIR can be made only of cognizable offence to the police. FIR is a pre-requisite for the police to begin investigation of a cognizable offence.

The Facilitator shall explain following points in delivering the presentation on FIR.

- a) **Who can lodge FIR:** An aggrieved person or on his behalf someone else who has information about occurrence of crime may lodge complaint including FIR of a cognizable offence.
- b) **Where can FIR be lodged:** FIR can be lodged at local police station where cause of action is made.
- c) **How can FIR be lodged:** Information to cognizable offence may be given to officer-in-charge of the Police Station either in writing or orally. The information given in writing must also be signed by the informant. Oral information must be reduced to writing and read over to the informant and shall be signed by the informant.
- d) **How is FIR written:** It is to be noted that FIR is not an encyclopaedia to encapsulate all the information. But ideally an FIR must contain the following information.
- *Name, address and signature of the informant*
  - *Name, numbers address and identity of the perpetrators. The body structure of the perpetrators may be given where the perpetrator (s) is unknown or could not be visible due to darkness or other circumstances.*
  - *Date and time of the offence.*
  - *Nature of the assault, injuries, any weapons used, modes of the crime*
  - *Name (s) of witness if any person has witnessed that incidence*
  - *Specification to the loss incurred to the victims/informant such as physical injury, mental loss, loss of property and assist. In theft case, FIR must contain type and value of property stolen and list thereof.*
- e) **What next to FIR:** A person who has lodged FIR must ensure that crime number and case laws are noted in the FIR by the Police Station. Informant must obtain the copy of the FIR.
- f) **What next if FIR is not entertained by the Police Station:** There are other ways whereby a complaint can be lodged if FIR is not registered. Complaint can be filed before other authorities as follows:

It is to be remembered that when information is given orally, the police must read out the FIR to the person. The person whose FIR is recorded must sign on the FIR or put his thumb mark. **Never put a signature or thumb mark on a blank paper or document** even if the police, lawyer or anyone else asks you to, because later anything can be written on that paper and it will be treated as written by you. The person signing it must take care that the FIR is recorded according to what he has told the police.



### **Arrest and Detention**

Arrest and Detention is an important stage in investigation of crimes. Arrest means a curtailment of personal liberty, for legal purposes. It is also for preventing a person from having free movement by applying the authority under law. The police are empowered to arrest a person in both cognizable and non-cognizable case as per the procedure established by Cr. PC. Other than Police, Cr.Pc also authorizes following person to arrest under certain circumstances.

- A magistrate u/s 44 Cr. P.C.
- A military officer u/s 130 and 131 Cr. P.C.
- A private person without warrant u/s 43 Cr. P.C., with warrant u/s 72 and 73, under order of a Police officer u/s 37 and under order of a magistrate u/s 37 and 44 Cr. P.C. and also 60 (1) Cr. P.C.





Police can arrest a person without a warrant. But they must strictly follow the procedure of arrest. The procedure for arrest must be according to **Sections 41 – 60 CrPC**. The Supreme Court has also laid down certain rules from time to time, which are part of the law and must be followed.

- Whenever a person is accused of or suspected to be involved in a cognizable offence, the police can arrest him, that is, take him in their custody.
- A person who is being arrested must be told of the grounds of arrest at the time of being arrested.
- The police can make an arrest only in full uniform, nameplate, etc.
- If a person is accompanying the police willingly, then no restraint can be used. Even otherwise, minimum restraint can be used for taking an arrested person who is resisting arrest.
- The police must prepare an Arrest Memo at the time of arrest or as soon as they enter the police station. In this arrest memo they must mention the

name of the accused, the offence for which he is arrested, the date and time of arrest and the place from where he has been arrested.

- The arrest memo must be signed by two independent witnesses such as family members, neighbours or other persons from the locality. Accompanying policemen are not independent witnesses.
- If the arrested person wants, the police must record his physical condition.
- The family has a right to accompany the arrested person to the police station. **Remember: the police station is a public place and no-one can be stopped from entering it.**
- The arrest must be recorded at the police station in a special register and the District Control Room must be informed about it.
- An arrested person must be produced before a Magistrate within 24 hours of the arrest. This is compulsory and no excuse can be made for not producing. Serious action will be taken against the police if an arrested person is not produced within 24 hours. This is why, recording the date and time of arrest correctly is absolutely essential.
- The time taken for travel to court is not included in the twenty four hours, but there are no holidays for producing a person.

Beating or torture in police custody is a serious offence. Policemen can be removed from service and can also go to jail for doing this.

- If someone is taken by the police but is neither released before twenty four hours nor produced before a Magistrate, you must immediately inform the Magistrate who will order the police station or other place to be searched.
- If someone disappears from police custody or is kept in custody without recording the arrest, you can also make a petition straight to the High Court, who will order the local police to produce the person before them.
- If you are arrested but not taken to a Magistrate within 24 hours, you must inform the Magistrate about the correct date of your arrest when you are produced before him. Sometimes the Police enter the wrong date and time

on the Arrest papers which they show to the Magistrate. Sometimes there are lots of cases and the Magistrate is not able to question each produced person separately. So you must yourself speak up and let the Magistrate know the truth.

- After Magistrate may either remand you to police custody for further investigation or send you to judicial custody (jail).
- An arrested person may be searched by the police but in a decent manner

***Remember police is responsible for the wellbeing and safety of an arrested person. If you suspect torture of any person in police custody, report it to the Magistrate or write a letter to the Legal Services Authority or directly to the High Court/Supreme Court.***

#### **Search of an arrested person: (Section 51, Cr P C)**

- The police officer making the arrest can search the arrested person.
- The police officer can take and keep in safe custody any articles from the arrested person. The police officer cannot make the arrested person give up the clothes worn by him.
- The police officer must make a list of the things taken from the person and give a receipt for them to that person.
- A female person arrested can be searched only by a female police officer or by another female, and with strict regard to decency.

#### **Interrogation**

After an arrest is made and as part of the investigation the police have the right to question or interrogate any person suspected of the alleged offence. During interrogation:

- The police officer cannot use any force on the person and cannot compel him to say anything that may go against him during the trial
- The person can even ask for his lawyer to be present with him during the questioning. However the lawyer may not be allowed to remain present throughout
- Any statement made by the arrested person must be made voluntarily and the police should preferably read it back to the person
- If the person wants to make a confession it has to be made before a magistrate and not before the police. Confessions made before the police are not treated as evidence in court

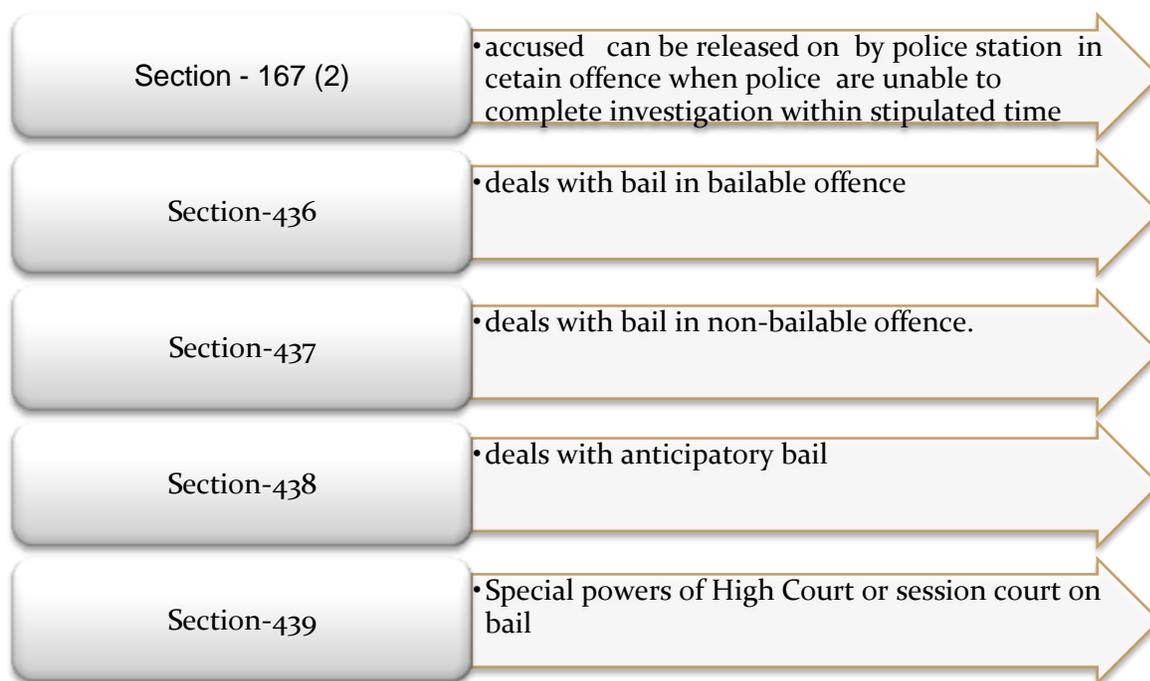
## Reference: D. K Basu Guidelines

The Supreme Court of India in D.K Basu vs. State of Bengal (1997) has laid down the following guidelines for the police who are to investigation and policing.

- The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations. The particulars of all such police personnel who handle interrogation of the arrestee must be recorded in a register
- That the police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.
- A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock up, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
- The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest
- The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained
- An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the police officials in whose custody the arrestee is.
- The arrestee should, where he so requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time. The 'Inspection Memo' must be signed both by the arrestee and the police officer effecting the arrest and its copy provided to the arrestee.
- The arrestee should be subjected to medical examination by the trained doctor every 48 hours during his detention in custody by a doctor on the panel of approved doctors appointed by Director, Health Services of the concerned State or Union Territory, Director, Health Services should prepare such a panel for all Tehsils and Districts as well
- Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.
- The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.
- A police control room should be provided at all district and State headquarters where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest, within 12 hours of effecting the arrest and at the police control room it should be displayed on a conspicuous notice board.

## **Bail:**

Bail has not been defined under the Criminal Procedure Code, 1973. It has been defined in the Law Lexicon as 'security for the appearance of the accused person, on giving, he is released pending trial or investigation'. For the purpose of the bail, offences are classified into 2-categories – bailable and non-bailable offence. The Code of Criminal Procedure deals with bail under different conditions. Let us make a brief discussion hereby to the provisions of Cr PC in the matters of bail.



- **Bail in Bailable Offences:** Bail is the right for the accused. Police can grant bail if the accused is prepared to give bail bond. At the investigation stage, Magistrate can grant bail on bail bond.
- **Bails in Non-bailable offence:** Here bail is a matter of judicial discretion. In granting or refusing bail, courts generally takes into consideration the following points.

- a) Nature of the accusation;
- b) Nature of the evidence in support of the accusation
- c) Severity of the punishment if conviction will entail;
- d) Previous criminal antecedents of the accused
- e) Danger of offence being repeated;
- f) Danger of tampering evidence or witness
- g) Larger interest of the public

*Illustration: Zahir was arrested for hiding a person in his house who had committed a murder. The police took him to the police station, where his uncle went along and took bail for Zahir. Zahir came home. This means:*

- The offence which Zahir is accused of is 'bailable'. That means, Zahir was asked to sign a Bail Bond, his uncle gave a surety of Rs.1000/- and also signed the bond. Then Zahir was free to go home.
- Giving a surety of a certain amount does not mean paying money in cash. It only means taking the responsibility for a person to appear for the proceedings. If Zahir doesn't appear, his uncle will have to pay Rs.1000/- to the government.

*Illustration: Suresh is arrested in a case of rioting and murder. Suresh did not get bail from the police station. He applied to the district judge for bail, but was refused. This is because:*

- Although rioting is a bailable offence, murder is not. Suresh cannot get bail at the police station even by promising a high sum of money.
- The judge will see several things like: the seriousness of the offence, the chances that the accused will interfere with the investigation-such as threaten witnesses, etc.
- The judge can give bail in non-bailable offences and can put down certain conditions such as that the accused cannot leave the town, or will not enter certain areas of the village, etc.

- If the police do not complete their investigation within 60 days for offences not punishable with death or life imprisonment, then a person gets a right to get bail. For offences punishable with death or life imprisonment, this period is 90 days.
- If a person is refused bail, he can appeal to a higher court.

### **Compensation for Victims**

Section 357 (A) inserted in Cr. PC by virtue of Criminal Procedure (Amendment) Act of 2009 provides compensation of the victims. It is necessitated under the law that every State Government in co-ordination with the Central Government shall prepare a Scheme for providing funds for the purpose of the compensation of the victims or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation. Compensation can be made under 2-circumstances.

- 1) One is on the order of the trial court. If the trial court at the conclusion of the trial is satisfied that compensation granted to the victim u/s 357 is not for rehabilitation of the victim, court may make recommendation. On the recommendation of the court, the State Legal Services Authority shall decide the quantum of compensation to be awarded from the scheme.
- 2) Second is when offender is not traced or identified, but victim is identified. The victim or his dependents make an application to the State or District Legal Service Authority for award of compensation.

It is important that PLVs must be sensitized about the scheme for Relief and Rehabilitation of the Victims of Rape, 2005. The facilitator shall keep the PLVs abreast the following points.

1. **Who can make application:** Application for the relief and rehabilitation can be made by a victim or her legal heir or any person/voluntary organization.
2. **Whom to make application:** Application shall be made to District Board for Financial Relief and Rehabilitation.
3. **Documents to be submitted with application:** (i) medical certificate where application is made by the victim or any person on behalf of the victim (ii) death

certificate of the victim where application is made by her legal heir; and (iii) copy of FIR/ complaint.

4. **Compensation:** Interim relief of Rs.20,000/- within period of 3 weeks from the date of the receipt of the application, or /and lump sum compensation amount of maximum Rs.2,00,000/-.

#### 5. Parameters for determination of relief and rehabilitation

| <b>A. where death results as a consequence of rape</b>   | <b>B. in other case</b>  |
|--|--|
| -Rs.1,00,000/- in case victim was non-earning member or Rs.2,00,000/- to earning member if post mortem establishes a prima-facie case. | -type and severity of bodily injury<br>-expenditure incurred for medical treatment<br>-expenditure consequential on pregnancy<br>-expenditure incurred for vocational training towards self-employment<br>-expenses incurred for alternative accomodation<br>- expenses necessary for court trial<br>-special consideration if victim is a child or mentally challenged person |

## **The Odisha Victim Compensation Scheme, 2012<sup>6</sup>**

- 1) There is a scheme called the Odisha Victim Compensation Scheme, 2012 for providing funds for the purpose of compensation to the victims who have suffered loss or injury as a result of the crime and require rehabilitation.
- 2) There is a Victim Compensation Fund from which compensation shall be paid.
- 3) The fund is operated by the Secretary, State Legal Services Authority.
- 4) Compensation is provided to: (a) victim, (b) the dependants of the victim in case of his/her death, (c) the member(s) of the family of the victim who have suffered atrocity resulting by the crime, and (d) member (s) who have been visited with a scar.
- 5) FIR is a must to avail assistance.
- 6) To be eligible for compensation, the victim has to satisfy that he/she has not been compensated for the loss or injury from any other government scheme or insurance company or any other institution; and the loss or injury sustained by him/her has substantial loss to his/her family.
- 7) The District Legal Services Authority for concerned district shall deal applications, consider claims, decide the quantum of compensation, provide financial assistance and support services.
- 8) The victims covered under the Motor Vehicle Act or the SC and ST (Prevention of Atrocities) Act and the Protection of Civil Rights Act are not covered under this scheme.
- 9) The claims by the victim shall be entertained within a period of twelve months from the date of the crime.
- 10) Appeal against the denial of compensation by the District Legal Services Authority shall lie before the State Legal Services Authority within a period of ninety days.
- 11) Apart from FIR, other documents essentially required to avail financial assistance are as follows:-

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<sup>6</sup> The Odisha Victim Compensation Scheme, 2012 (published in the Odisha Gazette on the 25<sup>th</sup> July 2012) read with Notification No.49915 dated 27.12.2012 and Notification No. 21390 dated 13.6.2013 by Home Department , Government of Odisha

| Particular of loss or injury   | Maximum limit of compensation (in Rupees)                                  | Document required   |
|--|--|---|
| Loss of life   | Rs.1,50,000/- (for earning member)<br>Rs.75,000/- (for non-earning member) |   |
| Loss of any limb or part of body resulting 80% or above disability including acid attack                 | Rs.1,00,00/- (for earning member)<br>Rs.50,000/- (for non-earning member)  | Certificate from CDMO/SDMO  |
| Loss of any limb or part of body resulting disability of 40% & above but below 80% including acid attack | Rs.40,000/-  |   |
| Loss of any limb or part of body resulting below 40% disability  | Rs.10,000/-  |   |
| Loss or injury causing severe mental agony to women and child victims in case like Human Trafficking     | Rs.10,000/-  |   |
| Simple injury to child victim  | Rs.10,000/-  |   |
| Rape   | Rs.1,50,000/-  | Report of the CDMO/SDMO<br>Report of the Investigating Police Officer |
| Penetrative sexual assault and Aggravated sexual assault in case of child victims                        | Rs.1,50,000/-  |   |

|   |             |  |
|---|-------------|--|
| Sexual assault and Aggravated sexual assault in case of child victims | Rs.50,000/- |  |
| Sexual harassment of child and using child for pornographic purposes  | Rs.20,000/- | Report of the Investigating Police Officer |

## Chapter-6

### Violence against Women

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#### Understanding gender violence

Gender can be seen as the full range of personality traits, attitudes, feelings, values, behaviours and activities that society ascribes to the two sexes on a differential basis. Gender determines what is expected, allowed and valued in a woman or a man in a given context. Sex refers to the biological/physiological differences between women and men that are universal and fixed. Sex and gender are often seen as same but they are not.

|     |        |
|-----|--------|
| Sex | Gender |
|-----|--------|

|   |  |
|---|--|
| <ul style="list-style-type: none"> <li>➤ Biological</li> <li>➤ Nature made</li> <li>➤ Constant</li> <li>➤ Individual</li> <li>➤ Non-hierarchical</li> <li>➤ Unchangeable</li> </ul> | <ul style="list-style-type: none"> <li>➤ Socio-cultural construct</li> <li>➤ Society made</li> <li>➤ Variable</li> <li>➤ Systematic</li> <li>➤ Hierarchical</li> <li>➤ Changeable</li> </ul> |
|---|--|

## Domestic Violence

Domestic Violence is a form of gender violence intended at subordinating women. Domestic Violence is perhaps most universal, yet one of the most invisible forms of violence against women. The Protection of Women from Domestic Violence Act, 2005 has defined the violence against women in domestic relationship in an extensive manner and that too in conformity with the United Nations Framework of CEDAW to which India is a signatory state. Domestic Violence is any act or conduct of a person which harms or injures or endangers the health, safety or well-being of the 'aggrieved person' which includes Physical abuse, Sexual abuse, Verbal and emotional abuse, Economic abuse; Which causes harassment, harms or injures a person with a view to coerce her or anyone related to her to meet an unlawful demand for dowry or property; or Which has the effect of threatening the aggrieved person or anyone related to that person; or Injures or causes physical or mental harm to the aggrieved person.

The PWDV Act was enacted with the objective of providing effective protection to women who are victims of violence within the family. The law not only gives specific rights to women who are victims but also establishes a new mechanism

to access and implement these rights. Any woman who is or has been in a domestic relationship with a man and lives or has lived with him in a shared household and is/ has been subjected to domestic violence can access the law. Any person including the Aggrieved Party may make complain before the Protection Officer, Service Provider, Police, Magistrate. One of the most important features of the Act is the woman's right to secure housing. The Act provides for the woman's right to reside in the matrimonial or shared household, whether or not she has any title or rights in the household. This right is secured by a residence order, which is passed by a court. The best thing of PWDVA Act is Interim Protection to the victim, Counseling, Camera Proceedings, Woman right to reside in a shared household.

### **Who can use the law?**

- A Woman
- In a domestic relationship with a man
- Living in a shared household
- Treated with violence.

**What is domestic violence?** Domestic Violence is defined under the law as an act of omission and commission, in a domestic relationship, purportedly causes threat to the security and life of the woman and intended towards physical, sexual, emotional, and economic Abuse. Harassment by way of unlawful dowry demands to the woman or her relatives would also be covered under this definition.

**What is Domestic Relationship?** 'Domestic Relationship' is defined under the Act as persons living together at any point of time, in shared household, as a joint family. It may be broadly classified as relationship by blood; relationship by marriage; relationship by martial relation, love, affinity; and relationship by adoption.

**Nature of Violence:** Domestic Violence includes physical, sexual, verbal, emotional and economic abuse.

- **Physical Violence** is any act or conduct that causes bodily pain, harm, or danger to life, limb, or health or impairs the health or development of the woman and includes assault, criminal intimidation and criminal force.
- **Sexual Abuse** includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates dignity of woman. Example: Forced sexual intercourse, Forced to watch pornography, Forcing a woman to have sex with another, Forceful sexual intercourse when woman is unwell.
- **Verbal and Emotional Abuse:** includes insults, ridicule, humiliation, name calling and insults and ridicule specially with regard to not having a child or a male child: and repeated threats to cause physical pain to any person in whom the woman aggrieved is interested.
- **Economic Abuse:** Is where the woman is not given money for household necessities for her and the children, for house rent etc. It also includes where the Streedhan is taken away, disposal of household effects, any alienation of assets whether moveable or immovable, valuables, shares, securities, bonds and the like or any other property in which the woman has an interest or is entitled to use by virtue of the domestic relationship.

**Enforcement Agencies under PWDV Act:**

- Judiciary
- Police
- Protection Officer
- Service Providers.

**Who can file a complaint?** An Aggrieved Woman herself or any person who has reason to believe that an incidence of domestic violence has been, or is being or is likely to be committed can file complaint.

**Against whom can a complaint be filed?** A case or an application under this Act can be filed against a man with whom the woman has lived or is living. A woman living in a relationship of marriage may also file a complaint against relative of the husband or the male partner who has harassed her or treated her with violence.

**Reliefs to be made for Woman:** The purpose of the Act is to provide a woman her reliefs in situation of violence. Upon the application for reliefs sought by the woman, the court can pass the order of as such for the relief and consideration to the rights of the woman in the family.

- Right to reside in a shared household: The woman cannot be evicted, thrown out or excluded from the shared household by the respondent without procedure established by law.
- Protection Orders
- Residence orders
- Monetary reliefs
- Custody orders
- Compensation orders

### **Sexual Assault- Rape**

Special protection to women is a constitutional imperative in India. Despite enactment of gender-specific laws, affirmative policies and protective measures, women have been facing violence in all spheres of life. Women have faced multiple violence which are manifested in different forms starting from female foeticide by selective abortion, domestic violence, sexual assault to most

heinous crimes like rape. Crimes against Women can be broadly classified under two categories. One is Crimes under the Indian Penal Code, which is covered in this unit. Other is Crimes under the Special laws.

The crimes broadly covered under the IPC are as such –(i) Rape (Sec. 376); (ii) Kidnapping & Abduction ( Sec. 363-373); Homicide for Dowry & Dowry Deaths (sec.302/304 B); Torture(498 A); Molestation(Sec- 354); Sexual Harassment-Eve Teasing (Sec. 509); Importation of girls (sec-366-B).

Women are the victims of sexual offences irrespective of ages and at all locations ranging from homes to the workplace to custodial institutions and public places. The extreme offence is rape. Many sexual offences have gone unreported due to social stigma for the woman once she is identified as victim of sexual offence, police inaction, and delayed justice system.

| Offence   | IPC section | Ingredients of offence   |
|---|-------------|--|
| Assault to outrage modesty                                      | 354         | <ul style="list-style-type: none"> <li>• Assault must be on women</li> <li>• Assaulted with force</li> <li>• Intention of the accused to outrage her modesty</li> </ul>                            |
| Rape  | 375         | <ul style="list-style-type: none"> <li>• Accused committed sexual intercourse with a woman</li> <li>• Sexual intercourse against her will or without her consent</li> </ul>                        |
| Kidnapping, abducting, or inducing woman to compel her marriage | 366         | <ul style="list-style-type: none"> <li>• Accused kidnapped a woman</li> <li>• Accused has intention to force or seduce woman for sexual intercourse</li> <li>• Accused has intention of</li> </ul> |

|  |         |  |
|--|---------|--|
|  |         | criminal intimidation.   |
| Marrying again during lifetime of spouse                 | 494     | <ul style="list-style-type: none"> <li>• Accused has already been married</li> <li>• Marriage was valid</li> <li>• Spouse is alive</li> <li>• Accused married again</li> </ul>   |
| Cruelty against woman by husband or relatives of husband | 498 A   | <ul style="list-style-type: none"> <li>• Woman was married</li> <li>• Woman was subjected to cruelty</li> <li>• Accused must be husband or any relation of her husband</li> <li>• Cruelty is indented to drive woman to commit suicide, or cause danger to her life.</li> <li>• Accused has intention to coerce woman to meet unlawful demand</li> </ul> |
| Dowry death  | 304 (B) | <ul style="list-style-type: none"> <li>• Death caused by burns or bodily injury or other than normal circumstances.</li> <li>• Death of the woman within seven years of marriage</li> <li>• Woman was subjected to cruelty by her husband or any relative of her husband</li> <li>• Accused has intention of</li> </ul>                                  |

|  |  |  |
|--|--|--|
|  |  | <p>dowry behind cruelty or harassment.</p> <ul style="list-style-type: none"> <li>• Commission of Cruelty or harassment soon before the death</li> </ul> |
|--|--|--|

**Definition of Rape:**

As defined u/s 375 of the Indian Penal Code, a man is said to 'commit' rape if he-

- a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other or any other person; or
- b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of the body of such woman or makes her to do so with him or any other person; or
- d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person

under the circumstances falling under any of the following seven description.

- 1) Against her will
- 2) Without her consent
- 3) With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt
- 4) With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- 5) With her consent when,, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

## **Sexual Harassment at Workplace**

Sexual Harassment is a criminal offence. There was no common legal definition to "sexual harassment" either in IPC or any international legal instrument until it was defined in the UN General Recommendation 19 to the CEDAW that interprets sexual harassment as 'such unwelcome sexually determined behaviour as physical contact and advance, sexually coloured remarks, showing pornography and sexual demand whether by words or actions'.

The definition of Sexual Harassment in Indian context has been defined by the Supreme Court in a landmark case Vishaka V. State of Rajasthan which stated that the sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances; a demand or request for sexual favours; sexually coloured remarks, showing pornography; or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

The Apex Court took the incident sexual harassment at workplace with serious concern. In Vishaka V. State of Rajasthan and others, the Supreme Court of India laid down the norms and guidelines to be followed by the employers for tackling the incidents of sexual harassment of women at workplace and other institutions. The guidelines issued by the Supreme Court also suggested to setting up of a complaints redress forum in all work places and amendment of the disciplinary / conduct rules governing employees by incorporating the norms and guidelines.

In 2013, the Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Act wherein 'sexual harassment' has been defined to include any one or more of the following unwelcome acts of behaviour whether directly or by implication:<sup>7</sup>

- i. physical contact and advances; or
- ii. a demand or request for sexual favours; or

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<sup>7</sup> Section 2 (n)

- iii. making sexually coloured remarks; or
- iv. showing pornography; or
- v. any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

In addition to the above, the following act or behaviour occurs against any woman at the workplace can be amounted to sexual harassment:-<sup>8</sup>

- i. implied or explicit promise of preferential treatment in her employment; or
- ii. implied or explicit threat of detrimental treatment in her employment; or
- iii. implied or explicit threat about her present or future employment status; or
- iv. interference with her work or creating an intimidating or offensive or hostile work environment for her; or
- v. humiliating treatment likely to affect her health or safety.

Any complaint of sexual harassment at workplace shall be lodged in the Internal Committee or the Local Committee constituted under the Act in writing within a period of three months from the date of incident. The complaint may be made by the aggrieved woman. Where the aggrieved woman is unable to make complaint on account of her physical incapacity, a complaint may be filed by-

- a) her relative or friend; or
- b) her co-worker; or
- c) an officer of the National Commission for Women or State Women Commission; or
- d) any person who has knowledge of the incident with the written consent of the aggrieved woman.

Where the aggrieved woman is unable to make a complaint on account of her mental incapacity, a complaint may be filed by-

- a) her relative or friend; or

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<sup>8</sup> Section 3 (2)

- b) a special educator; or
- c) a qualified psychiatrist or psychologist; or
- d) the guardian or authority under whose care she is receiving treatment or care; or
- e) any person who has knowledge of the incident jointly with her relative or friend or a special educator or qualified psychiatrist or psychologist, or guardian or authority under whose care she is receiving treatment or care.

Where the aggrieved woman for any other reason is unable to make a complaint, a complaint may be filed by any person who has knowledge of the incident, with her written consent.

Where the aggrieved woman is dead, a complaint may be filed by any person who has knowledge of the incident with the written consent of her legal heir.

This Act provides protection against sexual harassment of women at workplace<sup>9</sup> which includes:-

- Any department, organization, undertaking, establishment, office etc which is established, owned, controlled or financed by the government.
- Any private sector organization
- Hospitals or nursing homes.
- Any sports institute
- Any place visited by the employees arising out of or during the course of employment including transportation provided by the employer for undertaking such journey.
- A dwelling place or a house

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<sup>9</sup> Section 2 (o)



**Who is child?:** Child is a person who has not attained the age of 18 years unless under national law , majority is attained earlier ( Article-1 of UNCRC). This child means:

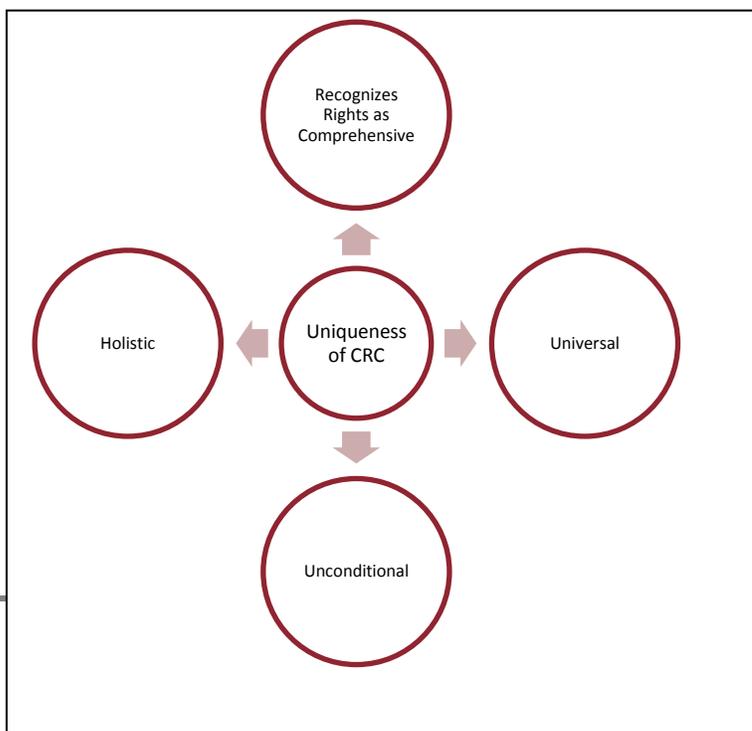
1. a person; and
2. whose age is below 18 years?

**What is Convention on the Rights of the Child?** CRC is the international instrument for child rights, adopted by the General Assembly of the United Nations on 20<sup>th</sup> November 1989. CRC is embodied with 54 Articles. Principles and Substance for child rights are covered in Article 1-41. Mechanisms required for monitoring the implementation of CRC by the State Parties are dealt in Article 42-54. Government of India ratified CRC on 11 December 1992; hence India is a State Party of CRC.

#### Why is Convention needed?

The rationale behind adoption of CRC is based upon certain objectives as follows:

- a) Development of child is uniquely crucial.
- b) Children are more vulnerable than adults.



- c) Voices of the children are unheard or ignored as they have no vote and influence power.
- d) Children are particularly vulnerable to abuse and exploitation.
- e) Children are generally perceived as parents' property and miniature of adult.

**Principles of CRC:** The Conventions is laid upon four core principles, viz.

1. **Best Interest of the Child** should be the primary consideration in all action taken in respect for the child.
2. **Non-discrimination**
3. **Survival and Development** for realization of fullest potential in every respect including their personalities, talents and abilities.
4. **Respect for the views of the child** to allow children as active participants in matters affecting their lives and to be free to express their opinions.

**Classification of Rights:** For better understanding rights under CRC may be categorized under four heads- Right to Survival, Protection, Development, and Participation.

| Survival  | Protection   | Development   | Participation  |
|---|--|---|--|
| <ul style="list-style-type: none"> <li>• Right to life</li> <li>• Health</li> <li>• Nutrition</li> <li>• Family &amp; parental care</li> <li>• Right to identity</li> </ul> | <ul style="list-style-type: none"> <li>• Right against abuse, exploitation</li> <li>• Special protection to children in conflict with law, victim of disaster</li> </ul> | <ul style="list-style-type: none"> <li>• Right to education, play, leisure, and cultural activities</li> <li>• Access to information</li> </ul> | <ul style="list-style-type: none"> <li>• Freedom of speech and expression</li> <li>• create association</li> </ul> |

| Child defined in Indian laws                          |                                       |   |
|---|---------------------------------------|---|
| Purpose   | Age                                   | Title of Law  |
| Administration of juvenile crimes (Conflict with law) | 18 years                              | Juvenile Justice ( Care and Protection of Children) Act, 2000 |
| Marriage  | 21 years for boy<br>18 years for girl | Child Marriage Prohibition Act,2005                           |

|                    |          |  |
|--------------------|----------|--|
| Employment         | 14 years | Child Labour (Prohibition and Regulation) Act, 1986      |
| Education          | 14 years | Right of Children to Free and Compulsory Act, 2009       |
| Domestic violence  | 18 years | Protection of Women against Domestic Violence Act        |
| Child sexual abuse | 18 years | The Protection of Children from Sexual Offences Act,2012 |

### **Laws in India relating to children**

- *The Registration of Births and Deaths Act, 1969*
- *The Child Labour (Prohibition and Regulation) Act, 1986*
- *The Infant Milk Substitute, Feeding Bottles and Infant Foods (Regulation of Production, Supply and Distribution) Act, 1992 (as amended in 2003)*
- *The Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (as amended in 2003)*
- *The Juvenile Justice (Care and Protection of Children) Act, 200 (JJ Amendment Act, 2006)*
- *The Protection of Domestic Violence Act, 2005*
- *The Commission for Protection of Child Rights Act, 2005*
- *The Prohibition of Child Marriage Act, 2006*
- *The Unorganized Workers Social Security Act, 2008*
- *The Maternity Benefits (Amendment) Act, 2008*
- *The Right of Children to Free and Compulsory Education Act, 2009*
- *The Protection of Children from Sexual Offences Act, 2012*

### **Policy in India relating to children**

- *The National Policy for Children 1974*
- *The National Policy for Education, 1986*

- *National Child Labour Policy, 1987*
- *The National Population Policy, 2000*
- *The National Health Policy, 2002*
- *The National Charter for Children 2003*
- *The National Plan of Action for Children 2005*
- *The National Policy for Persons with Disabilities, 2006*
- *The National Policy for ECCE, 2012*

## **LAWS RELATING TO PROTECTION OF CHILDREN**

The Constitution of India provides for the protection of the children. To mention Article-15(3) of the Constitution empowers to make positive discrimination in making special measures for the children. Article-24 prohibits employment of children below 14 years. Article-39(f) directs state to make policy so that childhood and youth are protected against exploitation and against moral and material abandonment. Deriving sanction from the Constitution of India and in compliance to the provisions of CRC, Government of India has enacted number of legislations that provide legal framework to the protection of children against exploitation, abuse and discrimination. Following laws are covered under this chapter.

- 1) The Protection of Children from Sexual Offences Act, 2012
- 2) The Juvenile Justice (Care and Protection of Children) Act, 2000
- 3) The Child Labour ( Prohibition and Regulation) Act, 1986

### **Law on Protection of Children from Sexual Offence**

**Child Abuse constitutes all forms of physical, and of emotional ill treatment, sexual abuse, neglect or negligent treatment or commercial or other exploitation, resulting in actual or potential harm to child's health, survival, development, or dignity in the context of a relationship of responsibility, trust or power ( World Health Organization)**

### **The Protection of Children from Sexual Offences Act**

The Protection of Children from Sexual Offences Act, 2012 has been enacted to strengthen the legal provisions for the protection of children from sexual abuse and exploitation. This is the first enabling legal framework to address the issue of sexual offences against children which has not been covered under the Indian Penal Code. The IPC does not adequately and expressively cover all types of sexual offences against children as a result of which the perpetrators have remained scot-free or gone with lesser punishment. In order to overcome the inadequacies in existing criminal jurisprudence, the Protection of Children from Sexual Offences Act has been enacted which envisages protection to all children below the age of 18 years from the offences of sexual assault, sexual harassment and pornography. The highlighted features of this law is for establishment of special courts; paramount importance to the best interest of the child in judicial process; child friendly procedures for reporting, evidence recording, investigation and trial of offences ; stringent punishment as per the gravity of the offence; relief and rehabilitation of the child. The Act defines different forms of sexual assaults and also prescribes punishment for different sexual assault, procedures for recording statements of the child, right of the child to take assistance of legal practitioners.

#### **Key provisions of POCSO Act**

**1. Who is a child?**

- Child means any person below the age of 18 years. It included both the gender.

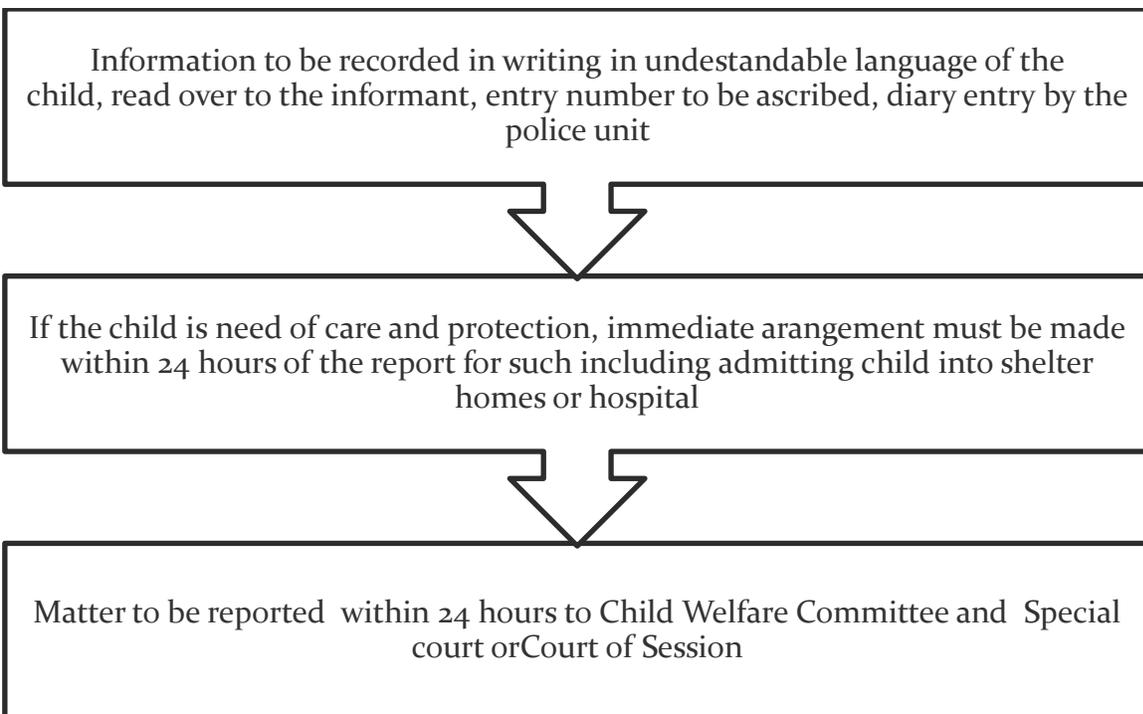
**2. What constitutes offence**

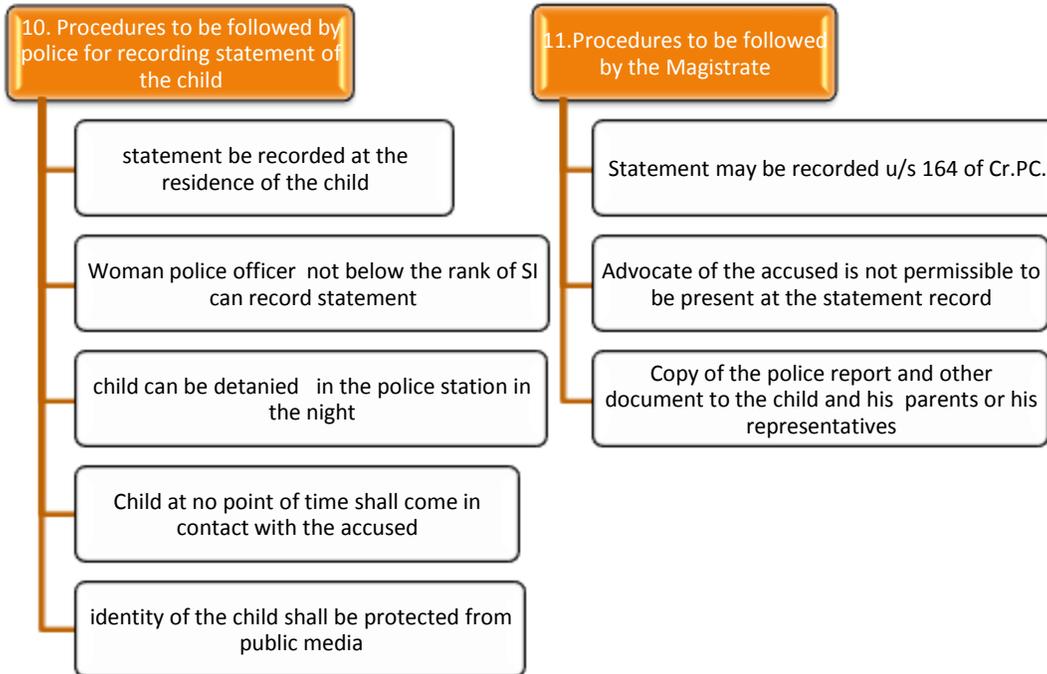
- Sexual assault

|                                  |   |
|----------------------------------|---|
| <b>under the law</b>             | <ul style="list-style-type: none"> <li>• Sexual harassment</li> <li>• Using child for pornography</li> </ul>  |
| <b>3. Who can be punished?</b>   | <ul style="list-style-type: none"> <li>• A person is said to commit sexual assault or sexual harassment upon the child.</li> <li>• A person abet an offence- (1) instigate any person to do that offence, (2) engages with other person(s) in any conspiracy to do that offence, and (3) intentionally aids by any act or omission for doing that offence.</li> <li>• A person who ever uses a child in any form of media for pornographic purpose.</li> </ul>  |
| <b>4 Forms of sexual offence</b> | <ul style="list-style-type: none"> <li>• Penetrative Sexual Assault</li> <li>• Aggravated penetrative sexual assault</li> <li>• Aggravated sexual assault</li> <li>• Sexual harassment</li> </ul>   |
| <b>5. Punishment</b>             | <ul style="list-style-type: none"> <li>• Minimum 7 years imprisonment extendable to life imprisonment and fine for offence of penetrative sexual assault</li> <li>• Rigorous imprisonment for minimum 10 years extendable to life imprisonment with fine for aggravated penetrative sexual assault.</li> <li>• Minimum 5 years imprisonment extendable to seven years and fine for offence of aggravated sexual assault</li> <li>• Imprisonment for maximum 3 years and fine for sexual harassment.</li> <li>• Imprisonment for maximum 5 years and fine for using child for pornographic purpose.</li> <li>• Imprisonment for maximum six months for person who fails to report such offence.</li> </ul> |

|   |   |
|---|---|
| <b>6. Who can make compliant?</b>       | <ul style="list-style-type: none"> <li>• Child himself/ herself; or</li> <li>• Any person</li> </ul>  |
| <b>7. When can be complaint lodged?</b> | <ul style="list-style-type: none"> <li>• Aftermath of the offence ( offence has been committed); or</li> <li>• Before the occurrence of commission of offence on the apprehension that an offence is likely to be committed.</li> </ul> |
| <b>8. Where to report the offence?</b>  | <ul style="list-style-type: none"> <li>• Special Juvenile Police Unit</li> <li>• Local police</li> </ul>  |

**9. Next step by police on information of offence is reported?**

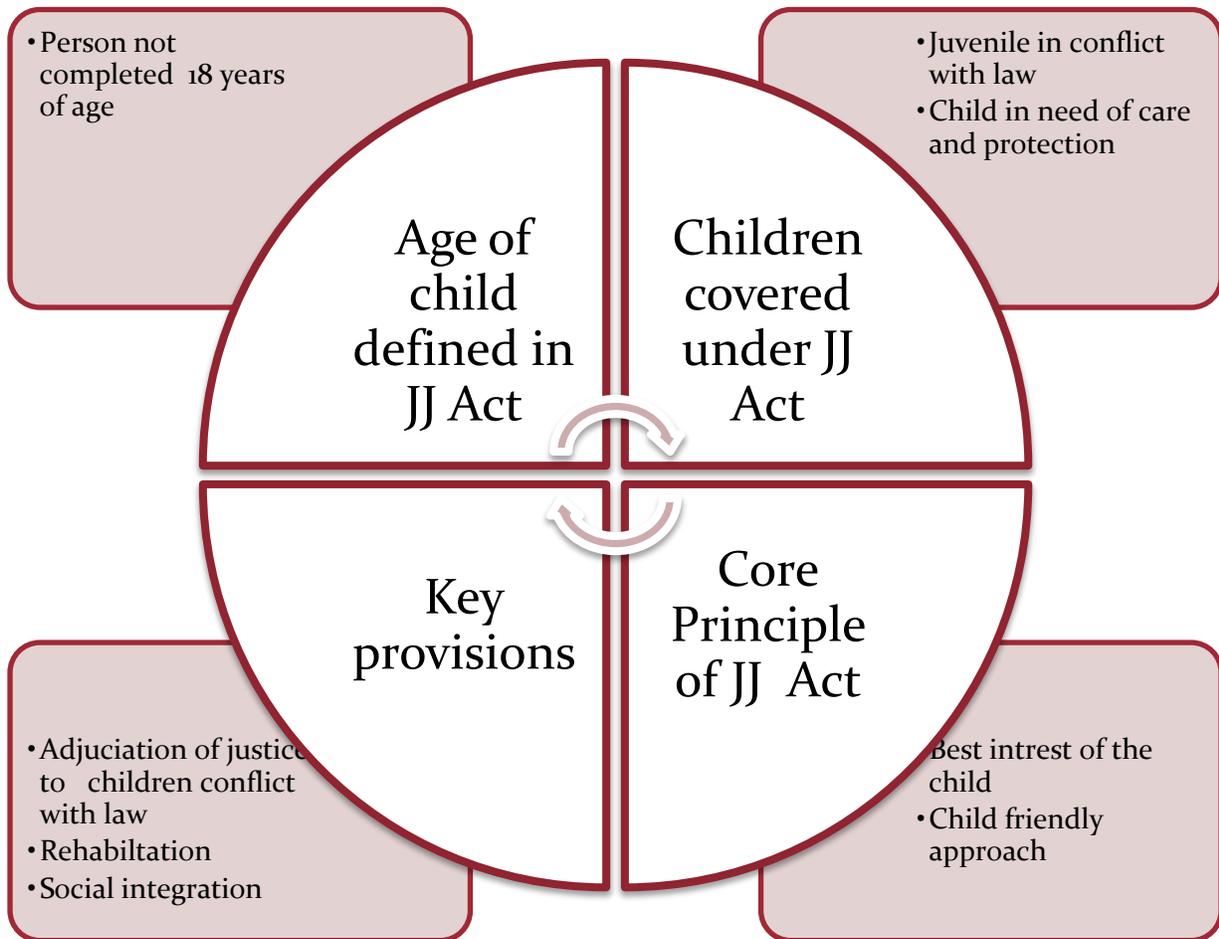




## 12. Assistance for the child:

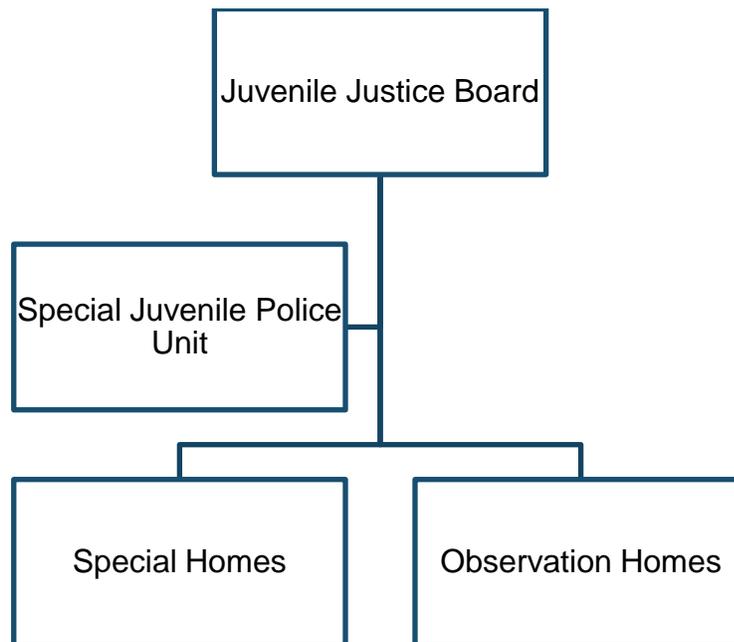
- Child has right to take assistance of legal practitioners. The family or guardian of the child is entitled to the assistance of a legal counsel of their choice. Legal Services Authorities can provide lawyer to them.
- Child can take assistance from professional and experts engaged by State Government under this Act during pre-trial and trial stage.

The Parliament of India enacted **The Juvenile Justice (Care and Protection of Children) Act, 2000** in conformity with the principles of UN CRC. The JJ Act provides provision for the care, protection, treatment, development and rehabilitation for Children in Need of Care and Protection and lays down procedures for administration of justice for the Children in Conflict with Law and their rehabilitation also. The Act contemplates two distinct kinds of proceedings for 2-categories of children, i.e. Children in Conflict with Law and Children in Need of Care and Protection. The Juvenile Justice Board is the competent authority to deal exclusively with all proceedings relating to Children in Conflict with Law. The Child Welfare Committee has authority to deal the matter relating to Children in Need of Care and Protection and to pass order for the care, protection, treatment, development and rehabilitation of such children. The JJ Act is based on the 3-key principles such as (i) adjudication and disposition of matters relating to conflict with law in the premises of child friendly approach and best interest of the child (ii) Rehabilitation and resettlement of juvenile in conflict with law, and (iii) Rehabilitation and Social Integration of child in need of care and protection

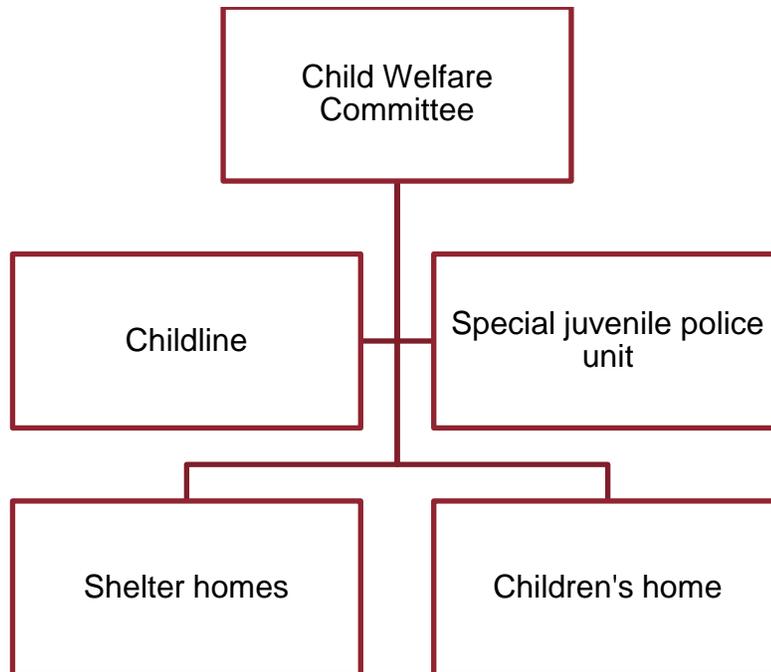


## Institutional Structure of JJ Act

### (i) For children in conflict with law



### (ii) For children in need of care and Protection



### Key provisions for Children in Conflict with Law

- Any person below the age 18 years who is alleged with any offence shall be produced before the Juvenile Justice Board.
- When a Juvenile is apprehended by the police for any offence, the police or SJPU as the case may be must produce the juvenile before the JJB within a period of 24 hours excluding the time necessary for journey.
- Where a juvenile is arrested or apprehended, the police officer must immediately give inform to the parents or guardians of the juvenile.
- A juvenile in conflict with law shall under no circumstances be placed in a police lock-up or lodged in a jail.
- Age of the juvenile is determined on the date of the commission of the offence.
- Whenever a juvenile is produced in any Court other than the JJB and it is found that such person is a juvenile on the date of the offence, , such court shall forward the juvenile to JJB for passing appropriate order.
- Any juvenile produced before the JJB shall be released on bail no matter whether the juvenile is accused of a bailable or non-bailable offence.

However, bail can be denied when Board believes with reason that the release is likely to bring him in association with any known criminal or endangers him or that his release would defeat the ends of justice.

- In the event of bail is not granted, the juvenile shall be placed in the observation homes.
- Inquiry to the charge of offence of a juvenile must be completed within a period of four months from the date of its commencement.
- No juvenile in conflict with law shall be sentenced to death, or sentence to imprisonment or committed to prison in default of payment of fine or default of furnishing security.
- If offence of the juvenile is found proved, the Board may sent the juvenile to Special Home for a maximum period of 3 years.

### **Case Study: Determination of Age**

Three persons named Abhisek, Ratan, and Kailash (changed name) were accused with offences of punishable u/s 302 of IPC. The incident took place on 19.10.2008 and accused were arrested on 10.11.2008. They were remanded to judicial custody as bail was not granted. One of the accused named Kailsah filed an application before CJM u/s 6 & 7 of the Juvenile Justice (care and protection of children) Act 2000 claiming that he was an juvenile on the date of the incident. He stated that his date of birth is 22.10.1990, hence on the date of incident he was 17 years 11 months 27 days. He produced HSC mark-sheet to substantiate his contention. Therefore he claimed that the criminal court had no jurisdiction to entertain this case against him and that must be referred to JJB and he be granted bail.

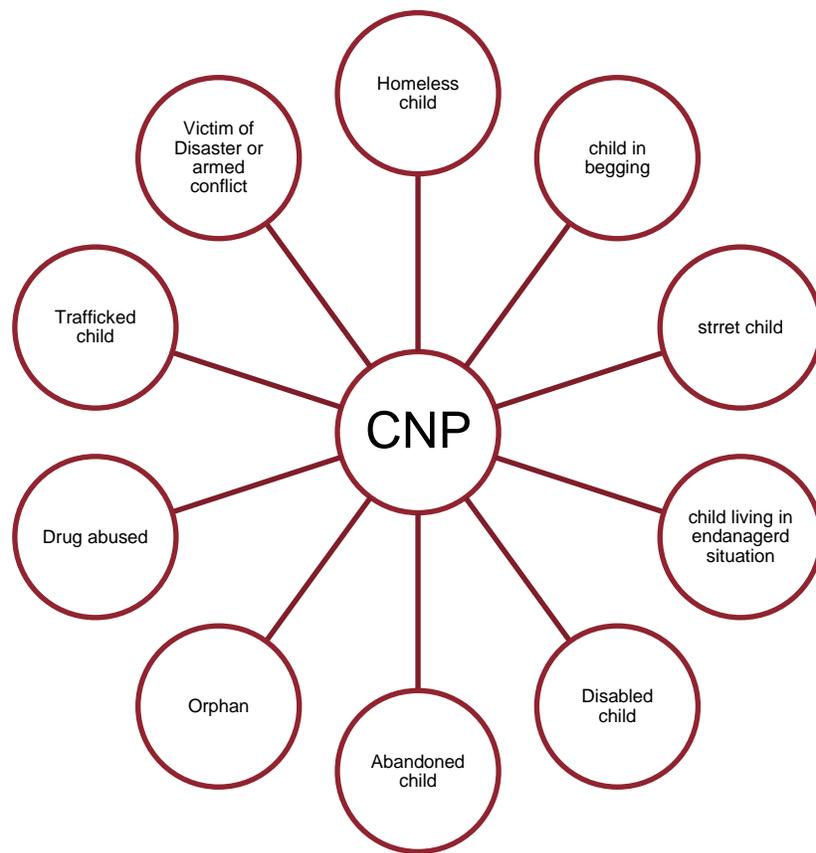
An objection to the claim of his juvenility was raised by the widow of the victim by stating that the age the accused Kailash is over 21 years. The CJM Court ordered for ossification test for determination of age. The report exhibited that the age would be more than 20 years due to presence of all 32 teeth including all wisdom teeth with Kailash. Relying on the ossification test report, CJM took the view that appellant was more than 18 years of age on the date of incident. Being aggrieved with the order of CJM, the Appellant filed a Criminal Appeal before the First Additional Session Judge. On perusal of records, Additional Session Judge observed that date of birth entered in School Register was based on birth date mentioned in the Horoscope which appears to be recently made. Therefore the appeal was dismissed. Aggrieved by the same, the Appellant approached the High Court. The High Court confirmed order passed by the CJM and Additional Session Judge stating that appellant had failed to establish his onus that his age was below 18 years of age on the date of the incident.

Then the Appellant moved Supreme Court against the order of High Court. The Supreme Court set aside the order on the observation which is as follows:

- The manner in which the CJM, Additional Session Judge Court and High Court have dealt with the claim of juvenility have not properly understood the scope, meaning and content of the JJ Act.
- The Court examined the question of juvenility as if it was conducting a criminal trial or inquiry under the code.
- The Admission Register in the school in which the candidate first attended is a relevant piece of evidence of the date birth.
- The Appellant has successfully established his juvenility on the date of occurrence of the crime.

The Supreme Court found the appellant was a juvenile on the date of the incident, therefore sentence awarded by the Session Court was set aside. High Court was directed to place the records before JJB. As the appellant has already undergone the maximum

## Child in Need of Care and Protection



### **Key provisions for Children in Need of Care and Protection**

- Any child in need of care and protection has to be produced before CWC.
- Pending inquiry by the CWC, such child shall be sent to Children's home.
- Any inquiry to be completed within four months.
- Social integration of the child has to be taken care on the direction of the CWC . Social integration shall be carried out alternatively by (i) Adoption (ii) Foster Care, (iii) Sponsorship, (iv) sending the child to an after-care organization.

## Law on Protection of child labour

It is important to know that prohibition of children for work employment is a constitutional imperative for the Union and State Governments of India. Article-24 of the Constitution of India says 'no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. The Parliament of India enacted **The Child Labour (Prohibition and Regulation) Act, 1986** providing prohibition of children in employments for work in 16-hazardous occupations and 65 numbers of processes listed in Schedule II of the Child Labour (Prohibition and Regulation) Act. Whoever employs any child or permits any child to work in contravention to this law is punishable.

Key Provisions of the Child Labour (Prohibition and Regulation) Act of 1986:

- **Who is prohibited?** : Any person who has not completed the age of 14 years is not allowed to be employed or permitted to work in the prohibited occupations and processes.
- **Who can lodge complaint and where:** A complaint for commission of an offence under this Act can be filed in the Court of Competent Jurisdiction (SDJM) by the following person
  - a) Any person
  - b) Police officer
  - c) Labour Inspector
- **How can be the age of child determined in the event of dispute to age:** Age of the child is determined on the basis of certificate to the age such as birth certificate or school certificate. In the absence of such certificate, the certificate issued by the prescribed medical authority shall be taken as conclusive evidence to the age of the child to whom it relates.
- **Who can be penalized:** The following act of omission or commission is punishable under this law. The following person can be penalized if their act of omission or commission is contrary or in compliance to this law.
  - 1) A person who employs the child to work
  - 2) A person who permits the child to work
  - 3) Whoever does not comply with the mandates of the law such as maintenance of register, display of notice etc?

- **Penalties:**

- a) **For person who employs or permits any child to work:** Minimum imprisonment of 3 months extendable to one year with fine of Rs.10,000/- which may extend to Rs.20,000/-.
- b) **For person who commits second offence:** Minimum imprisonment of six months extendable to two years.
- c) For person who does not comply provision of law in its establishment: Imprisonment of one month with fine which may extend to Rs.10, 000/-.

# Family Law: Marriage, Divorce and Related Issues

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### A. MARRIAGE

Family starts with marriage; hence institution of marriage is regarded as the central idea of Family Law of every community. Marriage whether sacrament or contract, confers status of husband and wife on parties to marriage. For valid marriage, a most system of law, two conditions are necessary: (1) parties must have age and capacity to marry, and (2) parties must undergo necessary ceremony and rites of marriage.

#### **Marriage in Hindu Laws:**

Marriage among Hindus is regulated under the Hindu Marriage Act, 1955 and Customary Practices. Among eight forms of marriages prevalent under Ancient Hindu Law, only 3 of these are recognized as valid form of marriage under the Hindu Marriage Act, 1955, viz. *Brahma*, *Gandharva* and *Asura*. Hindu Marriage is solemnized in either of the 2 following ways.

1. **Shastric ceremonies and rites:** *Kanyadan*, *Panigrhan*, *Vivahhoma* and *Saptapadi* are four shastric ceremonies. Of these four, *Saptapadi* is absolutely necessary for all Hindus.
2. Customary ceremony and rites which prevail in the caste and community to which one of the parties or both belongs.

( Explanation: What is solemnization?: It means to celebrate marriage with proper ceremonies with an intention that parties should be considered to be married ( *Margarti Palai v. Savita Palai*, 2010, OLR. 45.) Section 114 of Evidence Act lays down that where independent of solemnization of

marriage is not available, it will be presumed to be a valid marriage by continuous cohabitation between parties unless contrary is proved.)

**Conditions for marriage:** Any person who fulfils the following conditions can solemnize marriage.

- a) No living spouse at the time of marriage
- b) Capacity of giving valid consent.
- c) Not unsound in mind
- d) Not suffering from mental disorder
- e) Completed 21 years age for bridegroom and 18 years of bride.
- f) Does not belong to prohibited relationship, unless custom permits
- g) Not in sapinds to other party, unless and otherwise custom permits.

**What is Void Marriage?:** Void marriage is no marriage. Marriage can be void on either of the following 3-grounds:

1. That the time of the marriage, either party has spouse living. It may be called on condition of a bigamous marriage.
2. The parties are sapindas to each other.
3. The parties are within the prohibited degree of relationship.

**What is voidable marriage?:** Marriage can be voidable on following four grounds.

- i. Inability of the respondent to consummate the marriage on account of his/her impotency.
- ii. Respondent's incapacity to consent his/her suffering from a mental disorder.
- iii. Concealment of pre-marriage pregnancy by the respondent
- iv. Consent of the petitioner being obtained by fraud or force.

| <b>Void marriage</b>  | <b>Voidable marriage</b>   |
|---|--|
| Void marriage is no-marriage  | Voidable marriage is treated marriage between party                                    |
| Void marriage does not recognize status of parties as Husband and Wife.             | Voidable marriage remains valid and binding  |
| For void marriage, Court may merely pass a decree for declaring marriage is void.   | Voidable Marriage is annulled by the decree of the court.                              |
| Parties to the void marriage may perform another marriage without getting a decree. | Voidable marriage will remain a valid marriage till the decree annulling it is passed. |

**Children of Void and Voidable Marriage:** The established principle is that children of annulled voidable marriages and children of void marriage are legitimate children. However the position of children as to inheritance is that the children of annulled voidable marriage and void marriages are heirs to their parents alone. Therefore they are not entitled to inherit property of their father's parents.

**Jurisdiction of Courts:** Every petition under the Hindu Marriage Act shall be presented before the District Court under whose civil jurisdiction-

- a. the marriage was solemnized, or
- b. the respondents at the time of the presentation of the petition resides, or
- c. the parties to the marriage last resided, or
- d. in case the wife is the petitioner, where she is residing on the date of presentation of petition.

Marriage called Nikah in the Mohammedan Law is not a sacrament like the Hindu form of marriage, but a civil contract. Marriage is made two persons of opposite sexes with the object of legalizing sexual intercourse, procreation and legitimation of children and preservation of human race. All rights and duties in a marriage arise immediately after the marriage is completed.

Even though all Mohammedians who are governed by the Mohammedan Law have a right to marry but they have to fulfill essential conditions for validity of a marriage. Muslim male is allowed to have four wives at a time, but a female can have only one husband at a time. The essentials for valid marriage are as follows:

**1.Proposal and acceptance:** For valid marriage, the words of proposal and acceptance must be uttered by both the parties or their representatives in the presence and hearing of each other and also of witnesses. The whole process of proposal and acceptance must be completed at one meeting. On the contrary marriage can be invalid if a proposal is made at one meeting and acceptance of it in another meeting. Any consent obtained by coercion or fraud from any of the contracting parties would make the marriage invalid.

**2.Capacity or marriage contract:** Any Mohammedan male or female who is of sound mind and has attained the **age of puberty is competent to enter into the contract of marriage.** An insane or a minor can also enter into the contract of marriage by their guardians. The following person successively has right to contract to give minor in marriage.

1. Father
2. Parental grandfather
3. Brother and other male relations on the father's side
4. Mother
5. Maternal uncle or aunt
6. State.

**3.Conditions in the agreement:** A valid marriage must have stipulated conditions of agreement.

| <b>Kinds of Marriage</b>  |   |  |
|---|---|--|
| Void (Batil) Marriage   | Invalid ( Fasid) Marriage   | Valid (Sahih) Marriage   |
| <ul style="list-style-type: none"> <li>• Marriage contracted in violation of absolute impediments is void.</li> <li>• Void marriage is permanently void and can never become valid.</li> <li>• Void marriage does not create any civil rights and obligations between wife and husband.</li> <li>• Sexual intercourse is unlawful and children born of such union are illegitimate</li> </ul> | <ul style="list-style-type: none"> <li>• When impediments are relative and temporary, the marriage is invalid.</li> <li>• Invalid marriage can become valid if impediments are cured.</li> <li>• Legal obligations can be ensued provided marriage has been consummated.</li> <li>• Children born out of marriage are legitimate.</li> <li>• Marriage can be dissolved by a single declaration on either side.</li> <li>• Parties are not entitled to inherit.</li> </ul> | <ul style="list-style-type: none"> <li>• Valid marriage entails all the legal consequence of marriage.</li> <li>• Rights of inheritance accrue for the parties.</li> </ul> |

**Prohibition of marriage:** There are certain circumstances under which marriage is not permissible. Marriage made against the prohibitions is void.

1. Absolute or permanent incapacity

1.1: Consanguinity:

1.2: Affinity

1.3: Fosterage

2. Relative or temporary incapacity

2.1: Unlawful conjunction

2.2: Polygamy or marrying a fifth wife

2.3: Absence of proper witness

2.4: difference of religion

2.5: woman undergoing iddat

### 3. Miscellaneous Prohibition

3.1: on ground of divorce

3.2: on ground of supervient illegality

3.3; on the ground of equality

3.4: on ground of pilgrimage

3.5: on ground of pregnancy

## **B.MAINTENANCE**

Law on Maintenance assumes legal responsibility of a family to provide care and support to other members who is dependent for maintenance, as defined under the law. Obligation for maintenance arises out of biological relationship, marriage, adoption, and live-in relationship.

### **Maintenance under Hindu Law:**

The Hindu law of maintenance is to be understood in three dimensions, viz. (1) personal obligation to maintain certain relations, (2) obligation of a person to maintain the dependants of another whose property has devolved on him, and (3) obligation of the joint family to maintain its members. The law relating to maintenance for Hindus has been codified by the Hindu Adoption and Maintenance Act, 1956.

1. Maintenance as a Personal obligation includes (a) his wife, (b) children, and (3) aged parents. A wife's right to maintenance may arise in three circumstances;

- i. when the wife lives with her husband.
- ii. when the wife lives separate from her husband, (not under a decree of the court), and
- iii. when the wife lives separately under a decree of the court (judicial separation) or when marriage is dissolved. It is noted that a Hindu wife is not entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.

A Hindu during his/her lifetime has obligation to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

**Dependants; The following persons are dependants of a Hindu male or female** includes:

- i. father
- ii. mother
- iii. Widow
- iv. Minor legitimate son
- v. Minor illegitimate son
- vi. Minor legitimate unmarried daughter
- vii. Minor illegitimate unmarried daughter

- viii. Widowed daughter
- ix. Son's widow
- x. Grandson's widow
- xi. Son's unmarried daughter
- xii. Grandson's unmarried daughter
- xiii. Son's son's minor son

Quantum of maintenance for wife , children and aged or infirm parents is decided upon the following considerations:

- 1) Position of status of parties;
- 2) Reasonable wants of the claimant;
- 3) If the claimant is living separately, whether the claimant is justified in doing so;
- 4) Value of the claimant property and any income derived from such property;
- 5) Number of persons entitled to be maintained

**For dependant, the quantum of maintenance is decided on following consideration.**

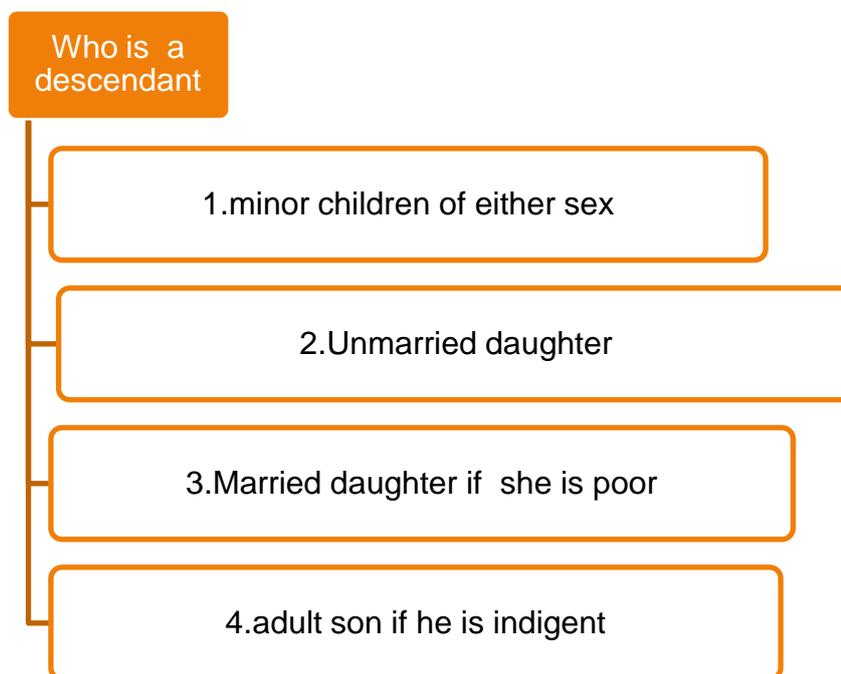
- a) The net value of the estate of the deceased after providing for the payment of his debts;
- b) The provision, if any, made under a will of the deceased, in respect of the dependent;
- c) The degree of relationship between the dependent and the deceased;
- d) The past relationship between the dependant and the deceased;
- e) The value of the property of the dependant and the deceased;
- f) Value of the property of the dependant and any income derived from such property; and
- g) The number of dependents entitled to maintenance.

**Law governing maintenance of Muslim:**

A Muslim woman may seek maintenance as per the law as follows:

- 1.The Muslim Women (Protection of Rights on Divorce) Act, 1986.
- 2.Criminal Procedure Code ( Section 125- 128)

As per Muslim Personal Law, a Mohammedan is under an obligation to maintain his descendants, ascendants, and wife. The obligation of maintenance for a Mohammedan can arise only if the claimant has no means to maintain him or herself. But in the case of maintenance of wife, a man is bound to maintain his wife irrespective of the fact that wife has sound financial position or husband is not in a position to maintain her.



**Ascendants:** A child of either gender, whether adult or minor, who has sufficient property is responsible to provide maintenance to his parents. Unlike Sunni Law, the children governed by Shia Law do not have compulsory obligation to maintain their parents if the parents are capable of earning. The grand-children have liability to provide maintenance to their grand-parents in case that person has no children to maintain or the children are indigent.

**Wife:** The right of wife for maintenance is absolute. However, under certain circumstances wife is not entitled to maintenance.

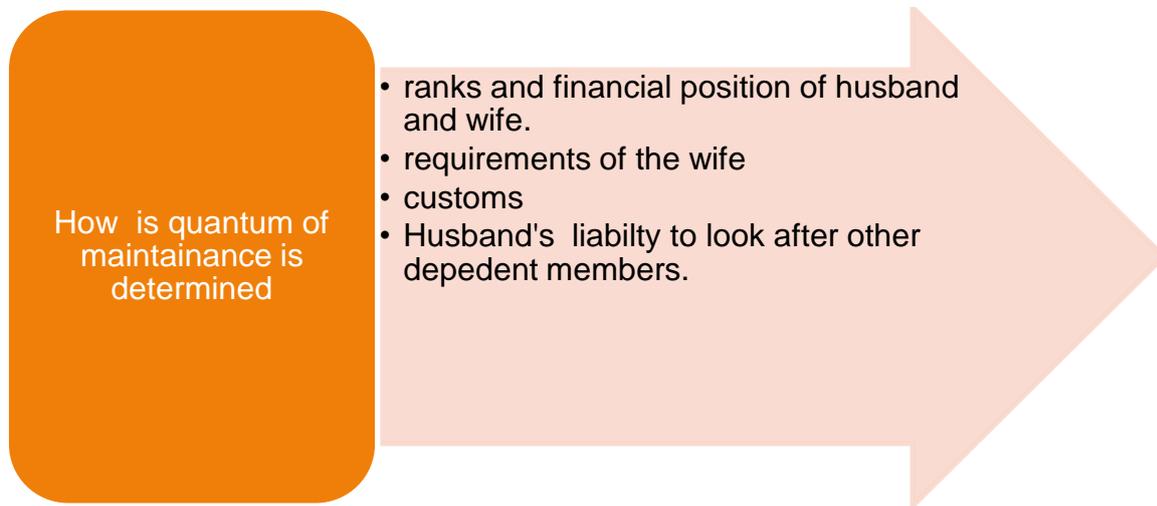
Wife is not entitled to maintenance when she:

- a) abandons conjugal domicile without any valid cause
- b) refuses access to her husband without any valid cause
- c) disobeys the reasonable commands of her husband
- d) refuses to live with her husband without any lawful excuse
- e) is imprisoned.
- f) has eloped with somebody
- g) remains minor for which marriage can not be consummated.
- h) deserts her husband voluntarily
- i) makes an agreement of desertion on the second marriage of her husband.

**Divorced wife:** As per the Muslim Women (Protection of Rights on Divorce) Act of 1986, a divorced wife is entitled to maintenance for period of Iddat only by her former husband. Unlike the Hanif law, a pregnant divorced woman of Shia community is entitled to receive maintenance till the delivery even if it goes beyond the Iddat period. The divorced wife is entitled to obtain maintenance from her former husband for children born to her before or after her divorce for a period of 2 years from the respective dates of birth of such children. The divorced wife is entitled to obtain all the properties given to her before or after or at the time of marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

**Maintenance after dissolution of marriage:** The marriage may be dissolved either by death or divorce or apostacy. The law relating to maintenance during these three circumstances is different.

- i. When marriage is dissolved by death, the wife is not entitled to maintenance.
- ii. When marriage is dissolved by divorce, the wife is entitled to maintenance during the period of iddat.
- iii. When marriage is dissolved on the ground of misconduct by the wife, she is not entitled to maintenance.



**Maintenance u/s 125 of CrPC:** Notwithstanding anything contained in Mohammedan law, it is to be remembered that the provision of 125 of CrPC can be invoked by Muslim women to seek maintenance from her husband and others. It has been held by the Supreme Court of India that a muslim woman can invoke provisions of Section 125 of CrPC against her sons for maintenance, even though maintenance claim is pending against the husband under Muslim Woman Act of 1986.<sup>10</sup>

<sup>10</sup> Makiur Rahaman V. Mohila Bibi, 2002 Cr LJ 1751 (Call).

## **C.DIVORCE**

Divorce is the dissolution of the legal relationship of marriage where the spouses will cease to be husband and wife. Divorce can be sought only on grounds recognized by the law. Divorce for Hindus is regulated by the Hindu Marriage Act, 1956, for Muslims by Muslim Personal law, the Dissolution of Muslim Marriage Act, 1939, for Christians by The Divorce Act, 1869.

### **Divorce in Hindu Law:**

As per u/s 10 of the Hindu Marriage Act, 1956, only married Hindus either husband or the wife can ask for judicial separation. Section 13 of the Hindu Marriage Act spells out the grounds and the procedure for seeking divorce. The grounds for divorce is

- a. Adultery
- b. Cruelty
- c. Desertion
- d. Conversion to other religion
- e. Incurably of unsound mind or suffering from mental disorder
- f. Incurably leprosy
- g. Venereal diseases
- h. Renunciation of the world by entering a religious order
- i. Disappearance for seven years
- j. Non-resumption of cohabitation after judicial separation or restitution.

### **Divorce ( Talaq) in Muslim Law:**

As per the Muslim (personal) law, dissolution of marriage may take place on any one of the following events:

- 1) Apostasy
- 2) Death of either party
- 3) Divorce
- 4) Option for repudiation
- 5) Cancellation of irregular marriage

Under Muslim Personal Law, only married Muslims either husband or wife can ask for dissolution of marriage. Divorce is one form of marriage dissolution. Divorce can be effected through either process as follows:

- a) Talaq
- b) Khula (redemption)
- c) Mubarat (Mutual release)
- d) Ila (vow of continence)
- e) Zihar (Injuries assimilation)
- f) Lian (mutual implication)
- g) Judicial divorce.

For this purpose of PLVs, this module has covered only 2 forms of divorce, i.e. Talaq and Judicial divorce.

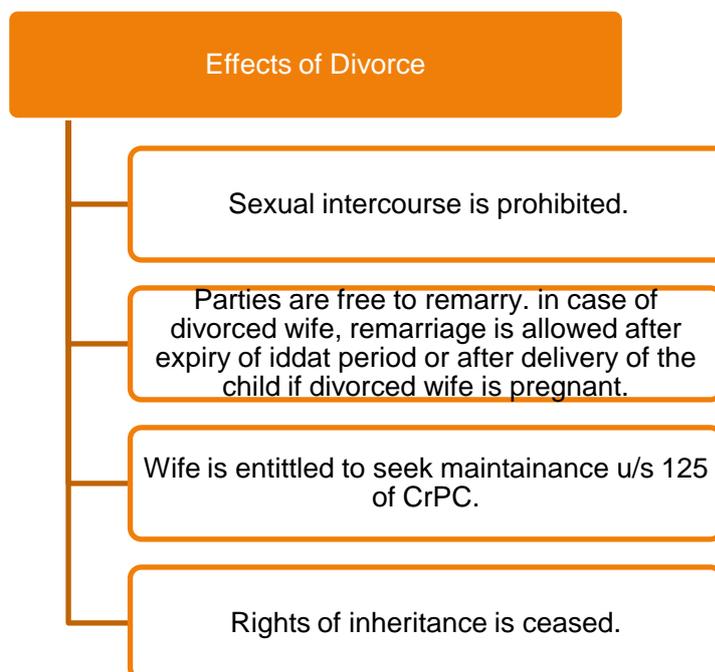
**Talaq:** A Muslim marriage can be dissolved by divorce or talaq, either with or without recourse to the Court. A talaq can be made orally (by spoken words), and by written document (talaqnama).

**Judicial divorce:** A Mohammedan marriage may be dissolved at the instances of the wife, by a decree of the court in accordance with the provisions of the Dissolution of Marriage Act of 1939. A Muslim woman can obtain a divorce on the following grounds:

- a. The whereabouts of her husband have not been known for a period of four years.
- b. The husband has not provided for her maintenance and she has been neglected for two years.
- c. The husband has been sentenced to imprisonment for a period of seven years or upwards.
- d. Her husband has failed in performing his marital obligations for three years.
- e. Her husband is impotent.

- f. If the girl is married before fifteen and decides to end the relationship before she turns eighteen.
- g. The husband indulges in acts of cruelty.
- h. Husbands' insanity.
- i. Husband is suffering from leprosy or venereal disease

Parties to the divorce have ceased their rights and obligations when divorce becomes final, irrevocable or complete.



**Distinction between Separation and Divorce:**

Separation is a situation where a husband and wife stay away from each other for a given period either because they have agreed (separation by agreement) or because the court has ordered the separation( judicial separation). The Hindu Marriage Act is silent about separation by agreement. However, judicial separation is different from divorce. Judicial separation

does not end a marriage, but only suspends certain rights of the husband and wife. Divorce is the permanent ending of a marriage. By virtue of divorce, marriage comes to an end and parties cease to be husband and wife. There remain no bonds between them except for maintenance and alimony. After divorce, parties are free to remarry. On the other hand, judicial separation merely suspends marital rights, but husband and wife are still considered to be married. Neither can marry another person during the separation.

### Property Rights of Women

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Right to property denotes authority on the possession and management of the property by a person to whom that property belongs. Property can be immovable like land and house or moveable like money, furniture and other things which can be moved from place to place on personal desire. Immoveable property can be owned in two ways- by succession (inheritance) or by self acquisition (purchase/gift). In India the law of succession is regulated by the personal laws just like marriage and divorce. In other words, the law governing succession is based on the religion that the person follows. Hindus follows the Hindu Succession Act, Muslim follows Muslim law and all other religious group who are married under the Special Marriage Act follow the Indian Succession Act.

The law of succession in India is considered personal law, therefore just like marriage and divorce, the law governing succession is based on the religion that the person follows, Hindus follow the Hindu Succession Act, Muslims follow Muslim Law and all other religious groups and people who are married under the secular special Marriage Act follow the Indian Succession Act.

#### Succession

##### among Hindus:

Women's right to property in Hindu law has been a contentious issue. Over the years the position of women with respect to their property rights has slowly changed.

- Under Hindu law, prior to 1937 a women did not have the right to own property; she did not have the right to any property except her *Stridhan*.
- In 1937 a law called the Hindu Women's Right to property Act was passed. This law made it possible for a woman to

have limited interest in property, apart from her *Stridhan*. This meant that when a man died, his property would go to his widow so that she could maintain herself from her husband's property. She had a limited right of ownership in property, which meant that she could not own it completely, but she could use the property to take care of herself until she died or until she remarried.

- In 1956, the Hindu Succession Act was passed. This law improved the position of women to a great extent. Now, a woman has the right to own property completely. She is an absolute and full owner and the law also gave the woman an equal share in the property of her husband. She could get the same share in the property as her children would get.
- BUT, even these developments were not sufficient for women, because under the fundamental principle of Hindu law, men got a share in their ancestral property by birth, but women only got a share in their father's self-acquired or husband's property. So, men not only had a share in the ancestral property, but they also got a share in the father's property. Women on the other hand did not get a share in the ancestral property by birth; they only got a share in the property of their dead father or husband. This position is unequal.
- In order to correct this inequality several states amended the Hindu succession Act so that women in their states had the same and equal right to property as men. Andhra Pradesh made this change in 1985. Tamil Nadu in 1989, Maharashtra and Karnataka in 1994. So now in these states a woman has a right in ancestral property from birth, and she can ask for partitions of ancestral property etc.

- In 2005, after looking at the developments and progress made by these four states, twenty years after the women in Andhra Pradesh got equal right to property, the Government of India introduced in parliament a legislation to amend the Hindu Succession Act, to give equal property rights to women from birth. On August 16, 2005 the Rajya Sabha passed this law and women across the country now have equal right to property. The Hindu succession (amendment) Act. 2005 (39 of 2005) came into force from September 9, 2005.

The Hindu Succession Act from Sections 8-13 lays down the order of succession when Hindu male dies intestate. It must be remembered that the very first step in the direction to hold right on succession is to ascertain whether any 'Will' has been made by the testators. In case there is no will, the property will pass on to the person as per the following order.

- a) First, to Class-I heir who include spouse, children and mother of the deceased.
- b) Secondly, in the absence of Class I heir it would pass onto Class-II heirs comprising of father, grandchildren and sibling.
- c) Thirdly, if there is no heir of Class- I or II, then it would pass on to 'agnate' of the deceased
- d) Lastly, if there is no agnate, then it would pass on to 'cognates' of the deceased.

Class-I includes:

- 1) Adopted children ( son /daughter)
- 2) Children born of void or voidable marriage
- 3) Widow (more than one widow) of the deceased.
- 4) Widow of the predeceased son if she has not remarried before the death of intestate
- 5) Daughter ( married/unmarried)
- 6) Mother including adoptive mother.

Heir in Class-II includes

- a) Father including the adoptive father

- b) Brothers including half brothers ( half –brother means son of the same father but different mother)
- c) Sisters

**'Agnates'** means relationship between persons either by blood or by adoption entirely through males. A person is said to be a **'cognate'** of another if two are related by blood or adoption but not wholly through males

**Illustration:**

1. Sasanka, a Hindu, died leaving behind his widow, two sons, son of a pre-deceased son, widow of another predeceased daughter, two daughters, and a son of a pre-deceased daughter. As in this case, all the heirs have under the category of Class-I Schedule, they will inherit the property of the deceased simultaneously.
2. Monohar, a Hindu and a bachelor in life, died. He had one sister who married. But Monohar was taken care by son of his elder brother who is died. Even if both of them have come under Class-II heir, but sister being an heir in Entry II of Class-II shall get all the property as She will be preferred over the brother's son who is an heir under Entry IV of Class -II.

### **What is coparcenary /joint family or ancestral property?**

In order to understand Hindu property law it is important to be familiar with a few terms. In ancient times the Hindu family was seen as one unit which consisted of several family members. The head of the family is known as *Karta*. This concept of a joint family and *Karta* developed in order to ensure that property remained within one family and with people who had the same blood. This concept has carried on into modern times. Today, even if people no longer live in joint family, the concept of joint family property still continues. The words ancestral property, joint family property or coparcenary property, all mean the same thing. A joint family essentially means a man, his wife his unmarried daughters, his male descendants, their wives and unmarried daughters.

Coparcenary or joint family or ancestral property means the property that belongs to the group of people called the coparceners.

### **What is self – acquired property?**

Self-acquired property is the property which an individual has created or which has been inherited from someone other than his/her father or a gift received from someone.

Example:

- Salary earned by a person from a job
- Property received by way of a prize or scholarship
- If Venkaiah received property from his mother's father, this would be his self-acquired property
- When Suman's father died he gave Suman a house which was part of his self-acquired property. This house will be Suman's self-acquired property and will not form part of the joint family property.

### **What are the property rights of a woman under Indian Laws?**

A woman has several rights depending on who she is – as a married daughter, as an unmarried daughter, as a widow, as a widowed daughter-in-law, as a sister and as mother.

- Today a Hindu daughter is considered a coparcener and thus enjoys the right to ancestral property by birth.
- Right to maintenance under Section 125 Cr.P.C.
- Right to maintenance under Section 18 of the Hindu Adoption and Maintenance Act.
- Right to maintenance under Section 25 of the Hindu Marriage Act.
- Right to maintenance can be claimed by widowed daughter-in-law under Section 19 of the Hindu Adoption and Maintenance Act.
- Right to residence ( a daughter has the right of reside in her father's house if she is unmarried, deserted by or separated from her husband, or is a widow)
- Right to *Stridhan*.
- Right to a share in husband's property and father's property.

### **How is property distributed under the Hindu succession Act?**

The rules for distribution of the property of a Hindu male are different from the rules for distribution of property of a Hindu female.

#### **Distribution of property of a Hindu male**

##### **Self – acquired property**

- If a Hindu man has written a will then his self – acquired property will be divided as per the will.
- If there is no will then the property will be distributed;
- Firstly, among his class I heirs;
- Secondly, if there are no class I heirs, the property will be distributed to class II heirs;
- Thirdly, if there are no Class II heirs then the property will be distributed among the agnates of the deceased person.

Agnate refers to two people who are related by blood or adoption wholly through males;

- Lastly, if there is no agnate, the property will be distributed among the cognates of the deceased. Cognate is a relation between two people either by blood or adoption but not through males.

### **Ancestral property**

- When a Hindu male dies leaving behind an interest in his ancestral property his interest in the property will be distributed among surviving coparceners by the rule of survivorship.
- But, if the male dies leaving behind any female relative mentioned in the list in Class I heirs or any male relative mentioned in Class I heirs who can claim through a female relative, in this case the property will devolve either through testamentary /intestate succession as per the Hindu Succession Act.
- For the purpose of this section the share of the Hindu male in the property would be the share that would have been allotted to him had there been a partition at the time of his death.
- The share of the pre-deceased son or a pre-deceased daughter shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter.
- The share of the pre-deceased child-of a pre deceased child –of a pre-deceased son or of a pre-deceased daughter –shall be allotted to the child of such pre-deceased child of the pre-deceased daughter.

### **Principles for distributing property among Class I heirs**

- Widow gets one share;
- The sons, daughters and mother get one share each;

- Heirs of each branch of a pre-deceased son or daughter get one share each;
- The property is distributed such that the widow of the pre-deceased son and the children all get one share each;
- The children of a pre-deceased daughter get equal portions.

### **Principles for distributing property among Class II heirs**

There are nine entries under Class II heirs. Property must be shared equally among people mentioned in each entry. It will only be possible to move from one entry to the next if there are no heirs alive who are mentioned in that entry.

Example:

*The first entry under Class II heirs is the father. If the father of the deceased is alive then the property will go to him. However, if the father is dead then the property must be shared equally between the persons mentioned in entry II. Only if none of the persons mentioned in entry II are alive will the property go to those persons mentioned in entry III etc.*

### **Distribution of the Property of Hindu female**

#### **Self-acquired property**

*If there is a will the property will be distributed as per the conditions laid down in the will. In case there is no will the property will devolve in the following manner:*

- Firstly, to sons and daughters) including children of pre-deceased sons and daughters) and the husband.
- If there is no one from the above category then secondly, to the heirs of the husband.
- If there is no one from the second category then thirdly, to the mother and father.
- If there is no one from the third category then fourthly, to the heirs of the father.
- If there is no one from the fourth category, then last to the heirs of the mother.

But, if the Hindu female inherited property from her mother or father and she has no sons or daughters or any grandchildren then this property will go to the heirs of her father.

If the Hindu female inherited property from her husband or her father in law and if she dies without leaving behind a son, daughter or any grandchildren, then the property will go to the heirs of the husband.

The reason behind this rule is to ensure that the property goes back to the source from where it came in case the woman does not leave behind any children or grandchildren.

## Succession in Mohammedan Law:

It is important to note that Mohammedan Law of succession is primarily based on pre-Islamic customary law of succession. Under Mohammedan Law, all the properties are devolved by succession, hence the rights of inheritance comes into existence only on the death of the ancestor. Unlike Hindu Law where all persons who have some interest in property are necessary parties, the Muslim laws has defined who are heirs and successors.

| Who are heirs and sucesors   | Person disqualified sucesor on the ground of   |
|--|--|
| <ul style="list-style-type: none"><li>• Heirs affilated by marriage,,, blood or consanguity</li><li>• acknowledged kinsman</li><li>• universal legatee</li></ul> | <ul style="list-style-type: none"><li>• homicide</li><li>• slavery</li><li>• difference of religion</li><li>• difference of allegiance</li></ul> |

## **Difference of inheritance between Sunni and Shia law**

As per the Sunni Law, when a Mohammedan dies, three essentials things to be decided for determination of succession to his estate.

- 1) First is who are possible heirs and successors. Person entitled for this purpose are of 2-categories-(i) relations by marriage and blood, and (ii) unrelated successor.
- 2) Second is actual heirs or successors. All possible heirs can not succeed at one and same time. This is decided by order of succession.
- 3) Third is allocation of share to actual heirs. The first step is for determination of heritable property. After the death of a Muslim, his properties are utilized for the payment of funeral expenses, debts and other legacies. The property remained after such utilization is called 'heritable property' which is available to the legal heirs for inheritance.

Under Shia law, the succession is devolved upon 2-categories of heirs.

1. One is heirs by consanguinity, that is blood relationship which is again subdivided three classes as follows:

|           |   |
|-----------|---|
| Class-I   | i. Parents<br>ii. Children or other lineal descendants        |
| Class-II  | i. Grandparents<br>ii. Brothers and sisters                   |
| Class-III | i. Paternal uncles and aunts<br>ii. Maternal uncles and aunts |

2. Heirs by special cause include heir by marriage and heir by special relationship.

### **Frequently Asked Questions:**

#### **1.Can a Muslim person who is married under the Special Marriage Act, 1954 inherit under Muslim law?**

When a Muslim person marries under the Special Marriage Act, 1954, his property will not be governed by Muslim Law. It will be governed under the provisions of the Indian Succession Act, 1925.

#### **2.Do Muslim women in India have rights to property?**

Under Muslim Law in India, women are entitled to property. All schools of Islamic Law recognize that women have a right to inheritance in immovable property, even though this is still unequal to the rights that Muslim men have. The share of the male is usually double that of the female. The justification has been made on the basis that the female heir is entitled to maintenance and mehr from her husband. Muslim women can gain property through mainly three means:

- **Succession**
- **mehr or dower: and**
- **hiba or gifts.**

### **3.What are the main principles in Hanafi or Sunni Law of Inheritance?**

Under hanafi Law of inheritance there are three classes of heirs. These are:

- **Sharers:** Those who are entitled to a prescribed share of the inheritance. The sharers will get their prescribed share in the property after the funeral expenses, debts and legacies have been paid off. The share that each person gets depends on the context of the situation and the relation of each sharer to the propositus. Under Hanafi law the sharers have traditionally been male. However after the Islamic reforms, women too have been included as Koranic heirs though their share is usually half that of males.
- **Residuaries:** If there are no sharers or there has been a residue of property left after filing the share that the sharers are entitled to, then the remaining property or the whole property will be given to the residuaries. If there is residue left and there is no residuary, then the residue is returned to the sharers. This is called "return" or radd. Neither the husband nor the wife is entitled to the radd if there are any other heirs.
- **Distant kindred:** If there is no sharers or residuaries then the property is divided amongst distant kindred. These are again classified into four categories of people who are related to the deceased by blood.
- **There are also successors who are unrelated by blood. These are:**
  - **Successor by contract:** if there is a default in sharers, residuaries and distant kindred then the inheritance devolves upon the "Successor by Contract". This is a person who gains the right to inherit the property of the deceased on the consideration of an undertaking given by him to pay any fine or ransom to which the deceased may have become liable.

- Acknowledge kinsmen: This is a person who is not related by blood but in whose favour the deceased made an acknowledgement of kinship, not through himself, but through another.
  - Universal legatee: this is a person to whom the deceased has left his whole property through a will.
- 
- Escheat: On the failure of all heirs and successors that have been specified, the property of the deceased Sunni Muslim escheats to the government.
  - Step-children: Step-children do not inherit from step-parents and vice versa.
  - Illegitimate child: An illegitimate child is considered to be the child of its mother only and stands to inherit from the mother and her relative. They can also inherit from the child. But it has been held that an illegitimate son cannot inherit from a legitimate son.
  - Missing person: When a Muslim person has been missing for seven years the burden of proving that he is alive is on the person that affirms that the man is alive. This is when the persons who would naturally have heard of him when he was alive have not seen or heard from him in seven years.

#### 4. What are the main principles in Shia Law of Inheritance?

Under the Shia Law of inheritance heirs are divided into two groups. These are:

- Heirs by consanguinity: **There are three classes of such heirs and inheritance has been prioritized as given below. These are:**
  1. Parents, children and other lineal descendents.
  2. Grandparents (True and False), brothers and sisters and their descendents.
  3. Paternal and maternal uncles and aunts of the deceased and of his parents and grandparents.
- Heirs by marriage: The husband or wife is never excluded from succession. The husband or the wife inherits property along with the nearest heirs who are related by blood. The wife usually gets half of what is entitled to the husband.
- Categories of inheritors: Unlike Hanafi, the heirs under Shia Law of Inheritance are divided under sharers and residuaries. They do not have classification for distant kindred. There are nine sharers (husband, wife, father, mother, daughter, uterine brother, uterine sister, full sister, consanguine sister). The remaining are the residuaries.
- Distribution of property: If the deceased leaves only one heir, then the heir gets all the succession. In the case of the heir being the wife, then as per older view, she is entitled only to  $\frac{1}{4}$  of the inheritance and the remaining will go to the government. In case the deceased leaves two or more heirs, the first step will be to assign the husband's or the wife's share. The remaining estate will be given to successors as per rules that have been laid down.
- Doctrine of Return (Radd): If there is a residue left and there are no residuaries, then the remaining inheritance is given to the sharers as per each one's share in the succession. The husband and wife are not entitled to a return or radd.
- Escheat: If there are no natural heirs, then the estate of the deceased escheats to the Government.
- Eldest son: The eldest son, if of sound mind, is exclusively entitled to the wearing of the father's apparel, his Koran, sword and ring.

- Illegitimate child: An illegitimate child does not inherit at all, even from his mother or her relations, nor do they inherit from him.

### Unorganized Workers' Rights in Labour Laws

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Labour law is the body of laws, regulations and orders which address the legal rights and obligations of the workmen and their organizations. Labour laws also called as employment laws are of two broad categories. First, collective labour law relates to tripartite relationship between employee, employer and union. Second, individual labour concerns employees' right at work through the contract for work. The law relating to labour and employment is also called as industrial law in India. Like many other legislations, the history of labour legislation is interwoven with history of colonial administration in India. The legislations enacted by the British were primarily intended to protect colonial trades rather than welfare of the labourers. One such example is Factories Act of 1883. Even though the Factories Act laid down protective provisions for workers like stipulation of eight hours of work, abolition of child labour, restriction of women in night employment and introduction overtime wages for work beyond eight hours, but the hidden intention behind that legislation was to increase the cost of India's production, particularly the cost of textile production, in order to sell Manchester's product textile item in Indian market at a lower price as against the indigenous product of India. Another piece of example was Trade Dispute Act, 1929 which restrained the rights of strike and lock outs. The laws promulgated by the British government in India underwent substantial modification in laws enacted in post-independence period wherein the paradigm has been shifted for workers' participation, minimum wages, fair working conditions, dispute adjudication by fair principles. The labour laws in post-independence India have been formulated on the basis of constitutional mandate and on the principles of international convention or declaration on workers' rights.

#### PROVISIONS UNDER INDIAN CONSTITUTION ON WORKERS RIGHT

The Constitution of India recognizes dignity of human labour and provides protection to safeguard the interests of the labourers. The rights and entitlements for labourers are embodied in fundamental rights (Part-III) and Directive Principles of State Policy (Part-IV) chapter of the Constitution of India. The Constitution provides:

- a) for equal opportunity for all citizens in matters of employment (article-16);
- b) right to practice any profession, or to carry out on any occupation (article -19 g);
- c) prohibition of forced labour (article-23)
- d) prohibition for employment of children below the age of fourteen years ( article-24);
- e) equal wages for equal work for both men and women (article- 39 d)
- f) for securing the health and strength of employees ( article-39 e);
- g) that the tender age of children are not absurd (article-39 f);
- h) that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength (article-39 e)
- i) for just and humane conditions of work and maternity relief are provide; (article-42)and
- j) that the government shall take steps, by suitable legislation or in any other way, to secure the participation of employee in the management of undertakings, establishments or other organizations engaged in any industry (article-43 A).

Labour is a subject matter of concurrent list. Therefore both the union and state government are competent to make laws on labour matters. However, central government is only competent to make laws in the matters of mines, mineral development, oil refinery. The labour laws available in India can be categorized in four classifications such as:

- 1) Labour laws enacted and enforced by the central government such as Employee's State Insurance Act, 1948; the Mines Act, 1957.
- 2) Labour laws enacted by the central government but enforced by both central and state governments like Equal Remuneration Act, 1976; the Child Labour (Prohibition and Regulation Act, 1986).
- 3) Labour laws enacted by central government but enforced by the state governments like the Factories Act, 1948; the Motor Transport Workers Act, 1961.
- 4) Labour laws enacted and enforced by the state governments for their respective states like the Building and Other Construction Workers (Regulation of Employment Conditions of Service Act, 1996.

## **TYPES OF LABOUR LAWS**

Labour laws enacted in India are of different in nature depending upon the employment of workman in organized (formal) or unorganized (informal) sectors and relating to issues like wages, employment conditions, leave, beneficial entitlements, health, safety etc. There are around seventy Acts and Rules on the matters relating to labour and vast numbers of notification under various Acts by the central and state governments. It is certainly a challenging task to remember all laws and rules relating industrial and labour laws. A list of key labour laws is hereunder provided in broad classification so that it would be convenient for readers to easily understand labour laws.

### **I. Laws related to Industrial Relations such as:**

- Trade Unions Act, 1926
- Industrial Disputes Act, 1947.

### **II. Laws related to Wages such as:**

- Payment of Wages Act, 1936

- Minimum Wages Act, 1948
- Payment of Bonus Act, 1965.
- **Working Journalists (Fixation of Rates of Wages) Act, 1958**

**III. Laws related to Working Hours, Conditions of Service and Employment such as:**

- Factories Act, 1948.
- Plantation Labour Act, 1951.
- Mines Act, 1952.
- Motor Transport Workers Act, 1961.
- Beedi & Cigar Workers (Conditions of Employment) Act, 1966.
- Contract Labour (Regulation & Abolition) Act, 1970.
- Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979.
- Building & Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996.
- Cine-Workers and Cinema Theatre Workers (Regulation of Employment) Act, 1981
- Dock Workers (Regulation of Employment) Act, 1948
- Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993
- Private Security Agencies (Regulation) Act, 2005

**IV. Laws related to Equality and Empowerment of Women such as:**

- Maternity Benefit Act, 1961
- Equal Remuneration Act, 1976.

**V. Laws related to Deprived and Disadvantaged Sections of the Society such as:**

- Bonded Labour System (Abolition) Act, 1976
- Child Labour (Prohibition & Regulation) Act, 1986

## **VI. Laws related to Social Security such as:**

- Workmen's Compensation Act, 1923.
- Employees' State Insurance Act, 1948.
- Employees' Provident Fund & Miscellaneous Provisions Act, 1952.
- Payment of Gratuity Act, 1972.
- Employers' Liability Act, 1938
- Beedi Workers Welfare Fund Act, 1976
- Cine Workers Welfare Fund Act, 1981
- Iron Ore Mines, Manganese Ore Mines and Chrome Ore Mines Labour Welfare Fund Act, 1976
- Limestone and Dolomite Mines Labour Welfare Fund Act, 1972
- Mica Mines Labour Welfare Fund Act, 1946

## **VII. Laws related to holidays**

- The Weekly Holidays Act, 1942
- The National and Festival Holidays Act, 1963

It must be noted here that laws, rules and regulations connected with labour matters are numerous. It is difficult to cover all labour related legislations in one training session. Therefore, this session provides information of selective labour laws so that learners/readers would be able to understand fundamentals of labour laws, to develop an insight into the wage laws and get knowledge on security schemes for workers in unorganized sectors. An overview of the following laws will be offered in this session.

- The Industrial Disputes Act, 1947
- Minimum Wages Act, 1948
- Workmen's Compensation Act, 1923
- Unorganized Workers Welfare and Security Act, 2008
- The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979

## THE INDUSTRIAL DISPUTES ACT, 1947:

This law lays down certain safeguard for workers and provisions for investigation and settlement of industrial disputes. Key provisions of the Act are as follows:

- Defines industry, industrial dispute, layoff, lockout, retrenchment, trade union, strike, wages, workman etc.
- Provides machinery for investigating and settling disputes through works committees, conciliation officers, board of conciliation, court of enquiry, labour courts, tribunals and voluntary arbitration.
- Reference of dispute for adjudication.
- Awards of labour courts and tribunals.
- Payment of wages to workers pending proceedings in High Courts.
- Right of appeal
- Settlements in outside conciliation
- Protection of workmen
- Strike and lockouts procedures
- Lay-off compensation
- Retrenchment compensation
- Compensation in case of transfer of undertakings.
- Closure procedures
- Unfair labour practices
- Penalties
- Obligation and rights of employees

### Glimpse of the Industrial Disputes Act, 1947

The Act contains 40 sections divided into seven chapters.

- Chapter-I deals with the title, definition etc.
- Chapter-II contains various authorities under the Act such as Conciliation Officer, Labour Courts, and Tribunals.
- Chapter-III contains the main scheme of the Act such as reference of disputes to labour courts and industrial tribunals.
- Chapter-IV lays down the procedure, power and duties of the authorities constituted under the Act.
- Chapter-V contains provisions to prohibit strikes and lockouts, declaration of strikes and lockouts as illegal and provision relating to layoff and retrenchment and closure.

**What is industry?** Industry means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen. Thus, industry has attained wider meaning that covers from small shop to big steel companies, except domestic employment.

**What is industrial dispute?** It means any dispute or difference between employers and employees, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or with the terms of employment or with the conditions of labour, of any person. Simply speaking, an industrial dispute means any dispute arises between the employer and the employee in the event of dismissal or discharge of the employee from service for any reason (s) by the employee.

**Who is a workman?** Workman means any person employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work in relation to industrial works. Workman also include apprentice. However, any person who is employed mainly in managerial or administrative capacity is not covered under the definition of workman for the purpose of this Act.

**When to refer dispute?** Disputes of following nature can be referred by the appropriate government to Boards, Courts or Tribunals.

- When a dispute arises with the workers' union
- When there is a plan to change employment conditions.
- When there is retrenchment of workmen.
- When undertaking is being transferred.
- On closure of an establishment
- On reopening establishment

**Know key provisions and procedures:**

**1. Strikes and lock-outs:** Strikes and lock-outs in any public utility service are restricted. No workman shall go on strike without giving notice of strike to the employer within six weeks before striking; within 14 days of giving such notice; during the pendency of any conciliation proceeding; and seven days after the conclusion of such conciliation proceeding. Employer is also prohibited from making lock-out any of his workmen without noticing him within six weeks before locking out; within fourteen days of serving such notice; during the pendency of the conciliation preceding and seven days after the conclusion of such proceedings. Public Utility Service includes:

- railway service
- transport service by air
- port or dock service
- service concerning with safety of the workmen of any industrial establishment
- postal, telegraph or telephone service
- service in any industry that supplies power, light or water to the public
- public conservancy or sanitation service
- any industry specified in the first schedule may be declared as public utility service by the notification of government for the purpose of public emergency or public interest.

The Act also lays down general prohibition of strikes and lock outs by the workman or employer of any industrial establishment during the pendency of conciliation or arbitration before Board, Tribunal or Court.

**2. Compensation:** The Act lays down compensation to workmen in case of transfer of ownership or management of any undertaking either by the agreement or by the operation of law. Any workman is entitled for compensation provided he or she has been in continuous service for not less than one year in that undertaking before such transfer. Compensation is not allowed for such workman whose service remains uninterrupted by such transfer; terms and conditions of service is unchanged due to such transfer. The Act prescribes lay off compensation to the workman at the rate of 50% of total or basic wages and DA for a period of lay off up-to

maximum 45 days in a year. However, lay off compensation is not allowed for workman if:

- a) he refuses to accept any alternative employment in the same establishment from which he has been laid off;
- b) he does not present himself for work at the establishment at the appointed time during normal working hours at least once a day;
- c) such laying off is due to strike or slowing down of production on the part of the workmen in another part of the establishment.

**3. Compensation against retrenchment:** The Act lays down conditions precedent to retrenchment of workmen. Any workman who has been in continuous service for minimum one year cannot be retrenched without giving him notice prior to three months of such retrenchment, and unless prior permission from appropriate government is obtained. In case of retrenchment, the retrenched workman is entitled for compensation at the rate of 15 days average pay for every completed year of continuous service.

**4. Offences and Penalties:** Cognizance of any offence punishable under this Act shall be taken up by the court not inferior to that of a Judicial Magistrate First Class or Metropolitan Magistrate only on the complaint made by the authority of the government.

| Section       | Offence  | Penalty   |
|---------------|--|---|
| Section-25 Q  | Lay off or retrenchment without prior permission | Employer shall be punishable with imprisonment up to one month and/or fine up-to Rs.1000/-<br><br>Workman is entitled to all benefits as if they had not been laid off. |
| Section-25 –R | Illegal closure- closing                         | Employer shall be punishable with   |

|                |  |   |
|----------------|--|---|
| (1)            | down an undertaking without complying procedure established by law | imprisonment up-to 6 month and / or<br>fine up-to Rs. 5000/-.<br><br>Workman entitled to all benefits as if<br>there had not been any closure |
| Section-25 U   | Committing unfair labour practice                                  | Imprisonment upto 6 months and / or<br>fine up-to Rs. 3000/-  |
| Section 26 (1) | Illegal strikes by a workman that Act                              | Imprisonment for 1 month and / or<br>fine up-to Rs. 50/-.   |
| Section 26 (2) | Illegal lockout  | Imprisonment for 1 month and / or<br>fine up-to Rs. 1000/-  |
| Section 27     | Instigation for illegal strikes or lock-outs                       | Imprisonment for 6 month and / or<br>fine up-to Rs. 1000/-.   |
| Section 28     | Giving financial aid to illegal strikes or lock outs               | Imprisonment for 6 month and / or<br>fine up-to Rs. 1000.   |

|                |   |  |
|----------------|---|--|
| Section-29     | Breach of settlement or award   | Imprisonment for 6 month and / or Fine up-to Rs.1000/-   |
| Section 30     | Disclosing confidential information   | Imprisonment for 6 month and / or Fine up-to Rs. 1000.   |
| Section-30 A   | Closure without 60 days notice  | Imprisonment for 6 month and / or fine Rs. 5000.         |
| Section 31 (1) | Contravention of Section 33 pertaining to change of conditions of service during pendency of dispute etc. | Imprisonment for 6 month and / or fine up-to Rs. 1000/-. |

**Where can be disputes adjudicated?** The Act has empowered various authorities created by this law and court to settle down industrial disputes. They are-

- **Works Committee:** The committee has to be established in any industrial establishment having one hundred or more workmen. The committee shall have duty to promote measures for securing and preserving amity and good relationship between the employer and workmen.
- **Conciliation Officers** who have duty of mediating in and promoting the settlement of industrial disputes.
- **Boards of Conciliation** can be constituted by the government as per occasion for promoting settlement of industrial dispute.

- **Labour Courts** for adjudication of industrial dispute relating to any matter specified in the second schedule. There are three Labour Courts in Odisha each at Bhubaneswar, Sambalpur and Jeypore.
- **Industrial Tribunal for** adjudication of disputes in any matters specified in second schedule or third schedule. In Odisha, the Central Industrial Tribunal is at Bhubaneswar, and there are two State Industrial Tribunal at Bhubaneswar and Rourkela each.
- **National Industrial Tribunal** for adjudication of industrial disputes of national importance.

### **How can be dispute settled?**

**Step-1:** Any workman who is suspended or dismissed from the service by the employer may make an application before the Conciliation Officer.

**Step-2:** If conciliation fails or is not possible within 45 days from the date of application, the party may approach appropriate Labour Court/Tribunal. Government can also refer the matter to labour tribunal in the event of failure of conciliation. Any workman who is suspended or dismissed from the employment can approach labour court/ tribunal within three years from the date such order.

**Step-3:** Any party who is aggrieved by the order of the labour court or tribunal may approach High Courts or Supreme Court of India

### **THE WORKMEN'S COMPENSATION ACT,1923 (As amended 2000)**

This Act assures some relief to workmen and/or their dependents in case of accidents arising in course of the employment of workman to cause either

death or disablement of workman<sup>11</sup>. Simply speak, workmen covers all workers irrespective of their status or salaries either directly or through contractor or a person recruited to work abroad. It must be remembered that a workman who is covered under ESI Act, 1948 to get compensation from Employees State Insurance Corporation is not entitled for compensation under Workmen's Compensation Act

**Who is liable to provide compensation and in which situation-** The employer is required to compensate an employee who has suffered accident in course of employment causing death/permanent total disablement/ permanent partial disablement/ temporary disablement; or who has contracted an occupational disease.

**Can an employer be immune from the liability of compensation-** Yes. Law has immune employer from paying compensation to the workmen in some situations, viz.

- in the respect of any injury which does result in the total or partial disablement of the workman for a period exceeding three days.
- In respect of any injury which is directly attributable that the workman at the time of injury has been under the influence of drink or drugs; or the workman has willfully disobeyed the safety rules; or the workman has willfully removed or disregarded safety guard or device which has been provided for the purpose of securing the safety of the workman.
- when the employee has contracted a disease which is not directly attributable to a specific injury caused by the accident or to the occupation.
- when the employee has filed a suit for damages against the employer or any other person in a Civil Court.

### **Who are the dependents of a deceased workman?**

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<sup>11</sup> Section 2 (1) (n) of the Workmen's Compensation Act defines who is a workman and the section read with schedule II of the Act, wherein list of persons who, subject to the provisions of Section 2 (1) (n), are included in the definition of workman.

The following relatives of a deceased workmen can be considered as dependant:

- i. a widow, a minor [legitimate or adopted] son, and unmarried [legitimate or adopted] daughter, or a widowed mother; and
- ii. if wholly dependent on the earnings of the workman at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm;
- iii. if wholly or in part dependent on the earnings of the workman at the time of his death-
  - a) a widower,
  - b) a parent other than a widowed mother,
  - c) a minor illegitimate son, an unmarried illegitimate daughter or a daughter [legitimate or illegitimate or adopted] if married and minor or if widowed and minor,
  - d) a minor brother or an unmarried sister or a widowed sister if a minor,
  - e) a widowed daughter-in-law,
  - f) a minor child of a pre-deceased son,
  - g) a minor child of a pre-deceased daughter where no parent of the child is alive, or
  - h) a paternal grandparent if no parent of the workman is alive.

### **Where claim application is filed and by whom?**

Application for compensation can be filed before the Commissioner for Workmen's Compensation Act of the area in which the accident took place which resulted injury; or where the applicant claiming compensation ordinarily resides; or where the employer has his registered office. Claim application in case of fatal accident can be filed by the dependent (s) of the deceased workman. In case of non-fatal accident the injured worker who suffered partial or permanent disablement can file an application under the Act.

### **Time limitation for claim application:**

A claim application shall be filed within two years from the date of accident. However, the Commissioner for Workmen's Compensation may entertain the application after such limitation period by condoning delay after hearing the parties.

### **Where appeal lies:**

The appeal lies with the High Court on the order of the Commissioner for Workmen's Compensation.

### **How is method of compensation decided:-**

The amount for compensation is calculated on the consideration of the fatality of injury or loss of life. Where permanent total disablement results from the injury, the amount of compensation will be an amount equal to 60% of the monthly wages of the injured workman multiplied by the relevant factor or an amount of ninety thousand rupees, whichever is more. Where the death of a workman results from the injury, the amount of compensation will be an amount equal to 50% of the monthly wages of the injured workman multiplied by the relevant factor or an amount of eighty thousand rupees, whichever is more.

### **Illustration of compensation calculation:**

Sahadev died on 20.07.2012 due to cause of injury in course of employment in a motor workshop. His date of birth is 25.3.1980. His wage was Rs.3000/ for the month preceding to the month of his death. He is entitled to get the compensation of Rs. 308925/- on the basis of the calculation as follows:

- Wages : Rs.3000/- per month
- Age: 31 years
- Factor as per schedule IV of the Workmen's Compensation Act:205.95
- Amount of compensation: Rs.308925/-

If Sahadev might have incurred permanent total disablement by such accident, then amount of compensation would be Rs.370710/- on the basis of the calculation as follows.

- Wages : Rs.3000/- per month
- Age: 31 years
- Factor as per schedule IV of the Workmen's Compensation Act:205.95
- Amount of compensation: Rs.370710/-

Where any employer is in default of paying the compensation due under this Act within one month, then Commissioner may direct the employer to pay the compensation with twelve percent interest and fifty percent of the compensation amount with interest by way of penalty if court does not find any justification for delay.

## **THE MINIMUM WAGES ACT, 1948**

The objective of the Act is to provide for fixing minimum wages in certain employments. The Act applies to persons engaged in schedule employments or in specified class of work in respect of which minimum wages have been fixed. For the purpose of wages, the Act covers all workers employed to work in agricultural, industrial and small-scale sectors that include farm labourers, transport workers, factory workers, construction workers, person working in cottage industry<sup>12</sup>.

### **What is wage?**

Wage is defined by this Act as all remuneration, capable of being expressed in terms of money, which would be payable to a person for the work done by him in respect of his employment. The wage does not include-

- a) value of house accommodation;
- b) value of any other amenity or service provided;

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<sup>12</sup> Refer the Schedule of the Minimum Wages Act for details of employment

- c) any contribution paid by the employer to the Pension/Provident Fund;
- d) any travelling allowance/concession;
- e) any sum paid to the employee to defray special expenses entailed on him by nature of his employment; or
- f) any gratuity payable on discharge.

### **How is minimum wage rate fixed?**

Under Section 5 of the Minimum Wages Act, 1948 there are basically two methods of fixation or revision of minimum wages. One is committee method and another is notification method. Revision of minimum wages should not exceed an interval of 5 years. Minimum rate of the wages fixed or revised consist of the following:

- a basic rate of wages and a special allowance, i.e. cost of living allowance;
- a basic rate of wages with or without cost of living allowance and cash value of concession for supplies of essential commodities;
- an all inclusive rate, i.e basic rate, cost of living allowance and cash value of concession.

Minimum wages for workers in Odisha

1. Non-Agricultural Sector

- Unskilled- Rs.150.00
- Semiskilled- Rs.170.00
- Skilled- Rs.190.00
- Highly Skilled- 205.00

2. Agricultural Sector

- Non-ploughing workers- 126.00
- Ploughing workers- 150.00

Source: Notification No. 8586 dated 6<sup>th</sup> October 2012, Labour and Employment Department, Government of Odisha

The responsibility to fix minimum rates of wages lies with the appropriate government, that means central government to fix wages for schedule employment under the authority of central government, and by the state government in relation to employment under state governments. Government may fix minimum wages for:-

- time work (minimum time rate)
- piece work (minimum piece rate)

- piece work for the purpose of securing to such employees on a time work basis (guaranteed time rate)
- overtime work (overtime rate)

Minimum rates for wages can be fixed by the government either by the hour, by the day, by the month or by such large wage period as may be prescribed. The rate for minimum wage can be varied depending upon:-

- i. different schedule employments;
- ii. different classes of work in the same schedule employment;
- iii. work by adults, adolescents, apprentices;
- iv. work in different localities.

**Is there any prescribed norm for wage rate:-**

Yes. The norms prescribed by the Act to determine work period and wages in different conditions of work are given hereunder.

| What to be decided                  | Norms   |
|-------------------------------------|---|
| Fixing hours for normal working day | <ul style="list-style-type: none"> <li>▪ 9 hours for adult in a normal working day</li> <li>▪ one or more specified intervals between working hours</li> <li>▪ inclusive of intervals and rest, working hour shall not spread over more than twelve hours on any day</li> <li>▪ one day rest in every period of seven days with remuneration</li> </ul> |
| Overtime                            | <ul style="list-style-type: none"> <li>▪ Overtime wage is entitled to such worker who works for more than nine hours on any day and for more than forty-eight hours in any week.</li> <li>▪ Payment for overtime work to be made at</li> </ul>  |

|   |   |
|---|---|
|   | <p>the rate of one and half times of the ordinary rate of wages in the case of employment in agriculture for every hour or part of the hour of overtime work.</p> <ul style="list-style-type: none"> <li>▪ In case of any other schedule employment, the overtime wage is at the double of the ordinary rate of wages.</li> </ul> |
| Wages for two class of work                                 | <ul style="list-style-type: none"> <li>▪ Where an employee does two or more classes of work to each of which is a different minimum rate of wages is applicable, wages at not less than the minimum rate in respect of each such class.</li> </ul>  |
| Wages of worker who works for less than normal working days | <ul style="list-style-type: none"> <li>▪ Worker is entitled to receive wages in respect of work done by him on that day as if he had worked for a full normal working days.</li> </ul>  |

**Where and how a claim application is filed:-**

All claims arising out of payment of minimum wages and inter alia can be filed by the employee himself, group of employees, any authorized representative of trade union or by any Inspector before such authority constituted by the notification of the appropriate government. Any application for claim shall be filed within six months from the date on which the minimum wages became payable. It is to be noted here that any claim application may be admitted after the said period of six months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period. Application shall be filed in duplicate with court-fee in one copy. However, no court fee shall be chargeable from the persons employed in agriculture; or in respect of application made by an Inspector.

### **Authorities to decide claim amount**

- Assistant Commissioner of Labour: Claims not exceeding Rs.20,000/-
- Deputy Commissioner of Labour: Claims above Rs.20,000/- and not exceeding Rs.50,000/-.
- Joint Commissioner of Labour: Claims above Rs.50,000/-.

### **What shall an applicant do after filing claim application:-**

It is the duty for the applicant to appear by person or through his representative before the Claim Authority on the specified date as fixed by such authority failing which the authority may dismiss the application or pass ex parte order. If the applicant is aggrieved with any order passed by the authority for his default, the applicant may move authority within one month from the date of the said order with sufficient cause to set aside order and for rehearing of the matter. It must be remembered that no appeals lie in any Court in the claim matter for minimum wages. However, aggrieved party may approach High Court under writ jurisdiction.

### **What are the offences under the Act and what is the punishment for them?**

If any employer who pays to any employee less than the minimum rate of wages fixed for that employees' class of work; or contravenes any provision pertaining to fixing hours for normal working days shall be punishable with imprisonment up-to six months or with fine up-to Rs.500/-. The offence under this Act shall be cognizable and non-bailable (section 22 and 22 B).

It must be noted here that cognizance of a complaint against any employer on the allegation of paying wages less than the minimum rates of wages shall not be entertained by the Court unless an application of such claim is filed before the appropriate authority and such authority has sanctioned the making of the complaint. No court shall take cognizance of a complaint against any person for contravening the provisions for fixing hours for normal

working days except on a complaint made by, or with the sanction of, an Inspector.

The Act prohibits Civil Courts from entertaining any suit for recovery of minimum wages payable under the Act. (Section 24). But it does not bar the jurisdiction of an Industrial Tribunal to adjudicate upon a dispute relating to the fixation of wages of employees covered under the Minimum Wages Act.

### **LAW ON SOCIAL SECURITY FOR WORKERS IN UNORGANIZED SECTOR**

Social security is a basic need of all people regardless of their employment. For workmen, social security includes both welfare and protection of workers. According to International Labour Organization (ILO) classification, welfare amenities are:-

- a) latrine and urinal facilities;
- b) washing and bathing facilities;
- c) creches;
- d) rest shelter and canteens;
- e) drinking water facilities;
- f) arrangement for protection of fatigue;
- g) health service including occupational safety;
- h) administrative arrangement within the establishment to look after the welfare;
- i) uniform and protective clothes; and
- j) shift allowance

In India, social security is a major concern for the workers of unorganized sector even though their number is very large and contribution of unorganized sectors to national income substantial as compared to that organized sectors. There are legislations in India that apply wholly or partly to unorganized sectors. The laws like the Factories Act- 1948, the Minimum Wages Act-1948, the Payment of Wages Act-1936, the workmen Compensation Act-1923 which are applicable to the workers in the

unorganized sectors where there is an identifiable relationship between employee and employer. On the other hand, the workers who have worked on contract or casual basis are covered under some laws such as the Contract Labour (Regulation and Abolition) Act-1970, the Beedi and Cigar Workers (Conditions of Employment) Act-1966, the Building and Other Construction (Regulation of Employment and Conditions of Service) Act-1966, the Mines Act-1952, the Plantation of Labour Act-1951.

### **What is understood by unorganized sector?**

The unorganized sector consists of all incorporated private enterprises owned by individuals or households engaged in the sale of production of goods and services operated on a proprietary or partnership basis and with less than ten total workers.

*(Source: Report on Conditions of Work and Promotion of Livelihoods in the Unorganized Sector by the National Commission for Enterprises in the Unorganized Sectors, Government of India)*

The unorganized sector comprises various categories of workers such as (a) those who are employed on a more or less regular basis in the establishments which are outside the scope of existing social security legislations, (b) those who are employed as casual labour with uncertain employment and income, (c) small and marginal farmers, (d) seasonal workers, and (e) migrant labourers.

*(Source: Labour Welfare and Social Security in Unorganized Sector by Meenakshi Gupta)*

The 1<sup>st</sup> National Commission Labour, under the chairmanship of Justice Gajendra Gadkar, defined the unorganized sector as that part of the workforce who have not been able to organize in pursuit of a common objective because of constraints such as:-

- a) casual nature of employment;
- b) ignorance and illiteracy;
- c) small size of the establishments with low capital investment per person employed;
- d) scattered nature of establishments ;and
- e) superior strength of the employer operating singly or in combination.

The Commission listed 'illustrative categories of unorganized labour. These are:

- i. contract labour including construction workers ;
- ii. casual labour;
- iii. labour employed in small scale industry;
- iv. handloom/power loom workers;
- v. beedi and cigar workers;
- vi. employees in shops and commercial establishments;

Issues relating to the workers of unorganized sector are complex as unorganized sector is characterized by casual work, unstable and irregular employment, labour intensive technology, unspecified work conditions, inadequate wages, improper work environment etc. In order address the issues connected with the workers of unorganized sectors, the Parliament of India enacted the Unorganized Workers' Social Security Act, 2008.

### **Purpose of the Unorganized Workers' Social Security Act**

- 1) It redefines workers to cover all types of workers including self-employed, casual, contract, home based workers etc.
- 2) It assures to provide unique social security number and social security card for each worker.
- 3) It offers a variety of social security benefits such as life insurance, health benefit, maternity benefit and old age pensions for the unorganized worker.
- 4) It obliges central government to provide a minimum amount of benefits and funds for the social welfare of the unorganized worker.
- 5) It requires state governments to formulate welfare schemes for unorganized workers such as provident fund; employment injury benefit; housing; educational scheme for children; skill up-gradation of workers, funeral assistance, and old age homes.
- 6) It provides scope for the unorganized workers to create social security structures in association with government and civil society organizations.

### **Who is unorganized sector worker-** It includes:

- a) home-based worker including domestic servant/worker
- b) self-employed worker
- c) wage worker
- d) agricultural worker
- e) any other worker who is not covered under the Workmen's Compensation Act, 1923; the Industrial Disputes Act, 1947, the Employees State Insurance Act, 1948; the Employees ' Provident Funds Act, 1952; the Maternity Benefits Act, 1961; the Payment of Gratuity Act.

**How is unorganized worker registered-** It is the duty of every of unorganized worker to get him registered to obtain identity card carrying Unique Identification Number. Any person who has completed fourteen years of age shall make application in prescribed form to the concerned District Collector with a self-declaration by confirming that he/she is an unorganized worker.

Application for registration of unorganized worker  
Form-1  
(rule-12)

Name of the unorganized worker.....  
 Father/Husband's Name.....  
 Occupation.....  
 Present Address.....  
 Permanent Address.....  
 Dependants:  
 a) Father\_\_\_\_\_   
 b) Mother\_\_\_\_\_   
 c) Dependent children\_\_\_\_\_   
 d) Others\_\_\_\_\_

**Obligations of government for implementation of Act-**

The Act specifies responsibility for both central government and state governments to ensure social security for unorganized workers.

| Central Government   | State Governments   |
|--|---|
| <ul style="list-style-type: none"> <li>➤ To constitute National Social Security Board headed by the Union Minister for Labour and Employment as ex-officio Chairperson.</li> <li>➤ To formulate welfare schemes relating to life and disability cover, health and maternity benefits, old age protection etc.</li> </ul> | <ul style="list-style-type: none"> <li>➤ To constitute State Social Security Board headed by the Minister for Labour and Employment of the concerned State as ex-officio Chairperson.</li> <li>➤ To formulate welfare schemes for unorganized workers such as provident fund; employment injury benefit; housing; educational scheme for children; skill up-gradation of workers, funeral assistance, and old age homes.</li> </ul> |

|  |   |
|--|---|
|  | <p>➤ To set up Workers Facilitation Centre to disseminate information, to assist workers for registration , and to facilitate enrolment of workers in social security scheme.</p> |
|--|---|

### **Beneficial schemes for unorganized workers:**

There are some schemes from which unorganized workers can be benefited are as follows:

- National Old Age Pension Scheme
- National Family Benefit Scheme
- Janani Surakshya Yojana
- Scheme for the welfare of the weavers
- Scheme for the welfare of the handicrafts workers
- Scheme for the welfare of the fishermen
- Rashtriya Health Insurance scheme

### **LAW ON MIGRANT WORKERS**

Freedom to move freely throughout the territory of India and freedom to practice any occupation is a fundamental right guaranteed by the Article-19 of the Constitution of India. That means every citizen of India has got constitutional fundamental right to move from his/her native state to other states in India in quest for employment for his livelihood. Migration by choice is acceptable, but migration by compulsion or under coercion is objectionable. The Parliament of India enacted the Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 to regulate the employment and conditions of service of inter-state migrant workmen who are generally illiterate, unorganized and normally to work under extremely averse conditions. This Act is applied to every establishment having five or more inter-state workmen and to every contractor who

employs or employed five or more migrant workmen on any day of the preceding twelve months.

Definition of key words used in the law

1. **Contractor** means any persons who recruit, supply or employs workmen.
2. **Establishment** means any office, government department, local authority or any occupational place.
3. **Workman** means any person who performs skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work for hire or reward in any establishment.

## **Key provisions of the Act:**

**1. Regarding employment:-** The Act lay down that any establishment having valid registration certificate can employ inter-state migrant workmen. It is necessary for every inter-state migrant workman to obtain pass-book from the contractor which must contain the following:

- a) passport size photograph of the workman;
- b) the name and place of the establishment wherein the workman is employed;
- c) the period of employment;
- d) the proposed rates and modes of payment of wages;
- e) displacement allowance payable;
- f) journey fare payable to the workman
- g) deduction made.

**2. Regarding wages, welfare, etc.-** Any inter-state migrant workman is entitled to avail wages, holidays, working hours and other conditions of services at par with other workman employed in such establishment and performing same or similar kind of work. It must be remembered that an inter-state migrant workman shall in no case be paid less than the wages fixed under the Minimum Wages Act, 1948. Any inter-state migrant workman is entitled for displacement allowance and journey allowance for the onward journey from the place of residence of the inter-State migrant workman in his native to the place of work in other State and return journey also. The wages payable to the inter-state migrant workmen shall be paid in cash. The Contractor or Employer is liable to provide other facilities for the inter-state migrant workmen that include:-

- a) regular payment of wages;
- b) equal pay for equal work irrespective of sex;
- c) suitable work condition;
- d) suitable residential accommodation
- e) medical facilities;
- f) protective clothes;

**3. Regarding Dispute Adjudication:** Any dispute arising out of employment or non-employment or conditions of employment of an inter-state migrant workman can be settled by the Labour Commissioner. An application for this can be made to the **State Labour Commissioners** wherein establishment is situated; or in the state wherein the recruitment of such workman was made if he makes an application in that behalf to that Government on the ground that he has returned that State after completion of his employment. No application can be entertained by the government after the expiry of a period of six months from the date of his return to the state after completion of his employment, unless the government concerned is satisfied that the applicant was prevented by the sufficient cause from making the application within that period.

Appeal may be preferred before the Chief Labour Commissioner by the Aggrieved Person against any order passed by the Labour Commissioner within thirty days from the date on which order is communicated to him.

It is pertinent to mention here that a migrant workman or his legal heir in the event of the death of that workman is entitled for free legal aid in relation to any proceedings before the authority u/s 15 of the Payment of wages Act-1936, u/s 20 of the Minimum Wages Act-1948, or appropriate Labour Court u/s 33 C (2) of the Industrial Disputes Act, 1947 or before Commissioner for Workmen's Compensation under Workmen's Compensation Act. The concerned authority, on his satisfaction, may engage an Advocate to conduct the proceedings on behalf of the migrant workman or his legal heir and to meet all the legal expenses in this regard.

## **LAW FOR BUILDING AND OTHER CONSTRUCTION WORKERS**

It is fact that more than 90 percent workers in our country are working in the unorganized sector and a large section of them are employed in building and construction works. The Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 enacted by the central government to regulate employment and service conditions for

building and other construction workers and to provide for their safety, health and welfare measures. The Building and other Construction Workers Welfare Board has been constituted by the government of Odisha as per the provision of the law to extend following benefits to registered building and other construction workers.

| Types of benefits              | Minimum year of registrations required to avail such benefit | Amount  |
|--------------------------------|--|---|
| Assistance in case accident    | 1 year   | <ul style="list-style-type: none"> <li>▪ Rs.1000/- maximum towards treatment for accident.</li> <li>▪ Rs.100000/- maximum depending upon the severity of disability.</li> <li>▪ Minimum wage for maximum 30 days</li> </ul> |
| Death benefit                  | 1 year   | <ul style="list-style-type: none"> <li>▪ Rs.50,000/- for natural death</li> <li>▪ Rs.100000/- for death in accident</li> <li>▪ Rs.1800/- for funeral expenses</li> </ul>  |
| Pension                        | 3 years  | <ul style="list-style-type: none"> <li>▪ Pension on the completion of 60 years of age as per the National Old Age Pension Scheme</li> </ul>   |
| Medical expenses for treatment | 3 years  | <ul style="list-style-type: none"> <li>▪ All expenses made towards the treatment of diabetics, thalsermia, cancer, heart disease, kidney related disease, brain disease at government hospital</li> </ul>                   |

|  |         |   |
|--|---------|---|
| Maternity benefit                            | 1 year  | <ul style="list-style-type: none"> <li>Up-to Rs.2000/- for woman workers each for maximum two births</li> </ul>   |
| Loans and advances for construction of house | 3 years | <ul style="list-style-type: none"> <li>Loan assistance up-to Rs.40,000/- for worker whose registration is five years and above.</li> </ul>  |
| Financial assistance for skill up-gradation  | 3 years | <ul style="list-style-type: none"> <li>Rs.3000/- for three months training</li> </ul>   |
| Education assistance                         | 1 year  | <ul style="list-style-type: none"> <li>Rs.1500/- for boy and Rs.2000/- for girls for Class XI or XII education .</li> <li>Rs.2000 for boy and Rs. 2500 for girl for graduation, diploma or ITI education.</li> <li>Rs.3000/- for engineering, medical or post graduation education</li> </ul> |
| Assistance for purchasing working tools      | 1 year  | <ul style="list-style-type: none"> <li>Rs.2000/-</li> </ul>   |
| Assistance for marriage                      | 3 years | <ul style="list-style-type: none"> <li>Rs.5000/- for unmarried female worker and for maximum two girl children of the registered worker for their marriage</li> </ul>   |

**Registration procedure:** District Labour Officer is the registering authority to register construction workers. Building workers between the age of 18-60 and who has been engaged for not less than 90 days in preceding 12 months in any construction activities is eligible for registration. Any worker eligible for registration can make application in the prescribed format (Application in

Form XXVII, Rule 265 (1) of Rules 2002) to the District Labour Officer accompanying with following documents.

- a) Certificate of age proof (school leaving/ birth certificate / certificate issued by the government medical officer) or simply the declaration by the worker of his age.
- b) Certificate of employment proof from the employer or inspector.
- c) Nomination in Form XXXI Rules 265 (2) and 266 (4)
- d) Three numbers passport size attested photograph
- e) Rs.20/- registration fees in cash

### Disabilities and Mental Health

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Even though the Constitution of India guarantees Right to Equality and Right to Life and Personal Liberty, but a large section of people is being discriminated because of disability. There are millions of disabled persons in India. As per the enumeration of 2001 Census, around 22 million population are persons with disabilities. People are disabled by physical, mental, sensory and intellectual impairment or illness. Protection for disabled person is a constitutional imperative in India. The Directive Principles of State Policy mandates the State to provide public assistance in case of disablement and to ensure that the access to justice is not denied to any citizens by reason of economic or other disabilities. India is also a signatory to the Convention on the Rights of the Persons with Disabilities adopted by the General Assembly of the United Nations on 13 December 2006. Owing to fulfil constitutional mandate and international obligations, the Parliament of India formulated a number of supportive legal and policy framework as follows for realization and protection of the rights of the disabled persons.

- The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act , 1995.
- The Rehabilitation Council of India Act,1992
- The Mental Health Act, 1987.
- National Trust for the Welfare of Persons with Mental Retardation and Cerebral Palsy Act,1999.

#### What is disability?

According to Wikipedia, 'disability' is the consequence of an impairment that may be physical, cognitive, mental, sensory, emotional, and developmental or some combination of these.

#### Some other definition.....

- *Persons with Disabilities* includes those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society or in equal basis with others (**Convention on the Rights of Persons with Disabilities**).
- *Disability* means blindness, low vision, leprosy-cured, hearing impairment, locomotor disability, mental retardation, mental illness. Person with disability means a person suffering from not less than

### **International Declaration on Rights of the Person with Disability:**

The General Assembly of the United Nations adopted the Convention on the Rights of Persons with Disabilities on 13 December 2006. The convention recognizes universal human rights standards such as Inclusion, Participation, Accessibility, Non-Discrimination, Equal Opportunities, and Respect for Inherent Dignity for the Persons with Disability. It also identifies obligation on States to promote, protect and ensure full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their dignity. The Convention recognizes that the persons with disability have same human rights including:

- Equality before the law without discrimination
- Right to life, liberty and security of the person
- Equal recognition before the law and legal capacity
- Freedom from torture
- Freedom from exploitation, violence and abuse
- Right to respect physical and mental integrity
- Freedom of movement and nationality
- Right to live in the community
- Freedom of expression and opinion
- Respect for privacy
- Respect for home and the family
- Right to education
- Right to health
- Right to work
- Right to adequate standard of living
- Right to participate in political and public life
- Right to participation in cultural life

### **Legal Framework in India:**

The Constitution of India guarantees Right to Equality and Right to Life and Personal Liberty for all without any discrimination. However, the protection of persons with disability has been mandatory with the passing of certain legislations. The two most important legislations concerning with the protection of disabled persons are The Persons with Disabilities ( Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and The Mental Health Act, 1987.

*The Persons with Disabilities Act* basically enlists facilities that persons with different types of disabilities would be entitled to and the responsibilities and obligations which are placed on the Central Government, State Governments, and local bodies. It broadly includes measures for prevention and early detection of disabilities, education, employment, social security, research and manpower development, barrier-free access and preferences and facilities that are available to such persons and the action which needs to be taken to avoid any discrimination against persons with disabilities. The Mental Health Act recognizes treatment and care of mentally ill persons and sets legal procedures for possession, custody and management of property by mentally ill person.

**The Mental Health Act, 2005** provides regulatory framework for the treatment and care of mentally ill persons. The key provisions of the Act are as follows:

- Regulate admission to psychiatric hospitals or psychiatric nursing homes of mentally ill persons who do not have sufficient understanding to seek treatment on a voluntary basis, and to protect the rights of such persons while being detained.
- Protect citizens being detained in psychiatric hospitals or psychiatric nursing homes without sufficient cause.
- Regulates responsibility for maintenance charges of mentally ill persons who are admitted to psychiatric hospitals or psychiatric nursing homes.
- Provide facilities for establishing guardianship or custody of mental ill persons who are incapable of managing their own affairs.

- Provide for establishment of Central Authority and State Authorities for Mental Health Services.
- Provide for legal aid to mentally ill persons at state expenses in certain cases.

## Facts and Figures

According to the Census 2001, there are 2.19 crore people with disabilities in India who constitute 2.13 per cent of the total population. This includes persons with visual, hearing, speech, locomotor and mental disabilities.

| Disability Specific Data |             |            |            |            |
|--------------------------|-------------|------------|------------|------------|
| Types of Disability      | Census 2001 |            | NSSO-2002  |            |
|                          | Number      | Percentage | Number     | Percentage |
| Locomotor                | 0.61        | 28%        | 0.97       | 52%        |
| Visual                   | 1.06        | 49%        | 0.25       | 14%        |
| Speech                   | 0.16        | 7%         | 0.09       | 5%         |
| Hearing                  | 0.13        | 6%         | 0.18       | 10%        |
| Mental                   | 0.22        | 10%        | 0.16       | 9%         |
| Multiple                 | -           | -          | 0.19       | 10%        |
|                          | 2.19 Crore  | 100.0%     | 1.85 Crore | 100.0%     |

### Issues of Persons with Disability/ Mental ill persons and Legal Remedies:

The Community Workers like Para-Legal Volunteers would certainly come across with many issues and might find disability in litigation.

**Proof of disability:** It must be remembered that first proof for a person with disability is Disability Certificate. The PLV may find themselves in a role of assisting persons with disability to obtain certificate. A person with disability shall submit an application ( Form -1) to the **Medical Officer** of concerned district by person himself /herself or by legal guardian where a person with disability is a minor (i.e. a person who has not completed 18 years of age) or any person who is unfit or unable to make such application due to mental retardation or other disability. The application must be accompanied by (i) proof of residence, and (ii) two recent passport size photographs.

### Steps to obtain disability certificate as per the Government of Odisha guidelines

1. Submission of Application at Medical Authority
2. Examination of application
3. Issuance of certificate maximum by one month from the date of receipt of application
4. Informing applicant by the medical authority conveying the reason of rejection where an applicant is found ineligible for disability certificate.
5. Applicant who is aggrieved by the nature of certificate issued to him or by refusal to issue certificate may make representation before the District Medical Officer (CDMO) . The representation for review must be accompanied by a copy of the certificate or the letter of rejection.
6. Applicant will be called upon to make submission of his review representation
7. Disposal of review application by maximum one month from the date of its receipt
8. Where an applicant is aggrieved by the order of the CDMO may represent against such decision to Appellant Medical Board at the address of the Office of the Director for Welfare of Persons with Disabilities, Bhubaneswar, Odisha
9. The Appellant Medical Board shall, after due examination of disability, pass orders within a period of 2 months from the date of the receipt
10. Decision of the Appellant Medical is final

**To Know Competent Authority in Odisha for Disability Certificate**

- Authority to issue certificate for single disability: Medical Officer in charge of CHC/PHC/ Hospital
- Authority to issue certificate for Multiple Disability: Chief District Medical Officer (CDMO)

### **Education**

The key issues relating to education of persons with disability are revolved around inclusive education, reservation of seats in educational institutions, disabled friendly learning environment, provision of scribe for visually impaired children, and education for children of special need. Education for children with disability has attended special focus in PwD Act. The Section 26 of PwD Act

directs the central and state governments to ensure that all children with disabilities get free education till they are 18 years of age. The government is required to make special provisions such as transport facilities, removal of architectural barriers in schools, supply of books, uniform and other materials, grant of scholarship, suitable modification in the examination system for the benefits of disabled children, and restructuring curriculum for the benefits of the hearing impaired children ( Article-30). It is mandatory for all government educational institutions and other educational institutions receiving aid from the government to reserve minimum three percent of seats for persons with disabilities.

Keeping in view legal mandates of section 26 of PwD Act, the Right of Children to Free and Compulsory Education Act, 2009 has been amended by the RTE (Amendment) Act 2012 for providing free and compulsory education for children with disabilities up to the minimum age of 18 years. Children with disabilities has been included in the definition of 'child belonging to disadvantage group' of the RTE Act. Hence the children with disabilities shall have right to pursue free and compulsory education in accordance with the provisions of PwD Act. The children with 'multiple disabilities' and severe disabilities' may also have right to opt for home-based education.

## Central Scheme for Higher Education for Children with Disability

1. **Scheme for Inclusive Education of the Disabled Children at Secondary Stage (IEDSS):** It provides scholarship of Rs.600 per month for inclusive education of the disabled children in Class IX-XII. The schemes aims at enabling all students with disabilities, after completing eight years of elementary schooling, to pursue further four years of secondary schooling in an inclusive and enabling environment.
2. **National Scholarship for Persons with Disabilities** provides financial assistance to disabled students for pursuing post-matric /post-secondary technical or professional education. Any student desiring for scholarship shall have to submit in prescribed Application Form within the stipulated time to the National Handicapped Finance and Development Corporation (Ministry of Social Justice and Empowerment) Government of India, Redcross Bhawan, Sector-12, Faridabad, Harayana. Online application may be submitted. An application for scholarship must

## **Employment**

The Right to employment of persons with disabilities is protected under the Persons with Disabilities Act. The Act mandates the Central and State Governments to identify posts to be reserved for persons with disability (Section-32). Government is required reserve minimum three percent of the posts in every establishment for persons with disability of which one percent each shall be reserved for persons suffering from blindness or low vision, hearing impairment, and locomotor disability or cerebral palsy.

Issues involved in this area include creating and reserving posts under the disability category, protecting rights on acquiring disability, reinstatement, promotion, compassionate employment, concessions, compensation, and alternate employment.

## **Marriage, Divorce and Maintenance:**

There are several instances where marriage is disputed on the grounds of mental disorder. People have approached court either for annulling their marriage or for dissolution of marriage or divorce on grounds of mental disorder. . The basic questions that arise in a case of annulment of marriage are - whether the mental disorder was concealed before the wedding? In a case of divorce, degree of mental illness, duration and intensity of the illness are the main issues addressed.

## **Criminal Liability:**

The Indian Penal Code rules out certain acts from the purview of criminal liability. A crime committed by a person of unsound mind is one such exception. Section 84 of the IPC states that if a person who has committed a crime is incapable of understanding the consequences of their acts and was unaware of the fact that the act was wrong under law, then such a person would not be punished. While determining the exemption of criminal liability on the ground of mental disorder, the court examines various issues surrounding the crimes such as motive, planning, behavior prior to and during the crime, nature of crime, circumstances that lead to the crime, history of mental illness etc. The most important point that court has dwelled upon is the degree of mental illness. While deciding exemption on mental illness, the court makes a distinction

between legal insanity and medical insanity. The parameters of legal insanity are only applied to immune any person from criminal liability on the ground of mental disorder.

### **Adoption and Inheritance by person with disability**

Rights of adoption and inheritance are very limited for certain groups of disabled persons. Mental disability and leprosy are two such instances. Personal laws in India do not consider adoption by persons with certain disabilities as valid. Despite the legal position for adoption by person with mental disability or leprosy, if a child is adopted then he or she is automatically entitled to all rights of inheritance. But if such adoption is disputed and contested, the validity of such an adoption is entirely dependent on the severity and type of the disability of the adopted parents.

### **Care and Protection of Mental Ill Persons:**

Disability, as defined u/s 2 (i) of the PwD Act of 1995, includes mental disabilities i.e person with mental retardation and mental illness. However, the care and protection of mental ill persons has been taken care by a special law namely the Mental Health Act, 1987. The mentally ill person has been defined as '*a person who is in need of treatment by reason of any mental disorder other than mental retardation*'. The law has put forth that *no mentally ill person shall be subjected during treatment to any indignity (whether physical or mental) or cruelty.*

- 1) **Mentally ill persons are entitled for free medical treatment:** It is responsibility of the psychiatric hospital or psychiatric nursing home to render medical treatment to the mentally ill persons in following ways:
  - a) On the request of any person (not being a minor) who consider himself to be mentally ill person.
  - b) On the request of the guardian where the person is minor.
  - c) On application made by a relative or friend of the mentally ill person where such person concerned is unable to express for admission as a voluntary patient. Application in prescribed form accompanied by two medical certificates from 2-medical

practitioners certifying condition of mental illness to be submitted to the medical officer of the psychiatric hospital or nursing home.

2) **A mentally ill person is entitled for reception for extended treatment:**

Mentally ill person is entitled for reception order if his/her mental disorder requires treatment for more than six months or his/her detention is necessary for the personal safety of the mentally ill person or for the protection of others. For the purpose of reception, an application for a reception order must be made before the competent magistrate by the medical officer-in charge a psychiatric hospital / nursing home or by the husband, wife or any other relative of the mentally ill person other than the minor or a person who has not seen the alleged mentally ill person within 14 days before the date of the application. Application for reception order may be made in the prescribed form and must be accompanied by two medical certificates from 2- medical practitioners of whom one shall be a medical practitioner in the service of the government. On receipt of an application, the Magistrate may act in the following manner:

- a) Examine the statements of the application and evidence of mental illness; or
- b) Personally examine the alleged mentally ill person, if necessary; or
- c) Make camera proceeding in the presence of the applicant, the alleged mentally ill persons, the representative of the mentally ill person, and any other person as the Magistrate thinks fit; or
- d) Dismiss the application; or
- e) Pass a reception order.

3) **Care and Treatment of mentally ill person who is found wandering:** If a mentally ill person who wanders here and there and incapacitates to care of himself is found by the officer –in- charge of any local police station, it is duty of the police officer to take such mentally ill person into custody and produce him before the nearest magistrate within a period of 24 hours excluding the time necessary for the journey from the place

where he was taken into such protection to the court. The Magistrate may pass a reception order for detention of the such person as an inpatient in a psychiatric hospital / nursing home based on the certification of medical officer certifying such person to be a mentally ill person and on the satisfaction of the magistrate that detention is necessary in the interest of the health and personal safety of the mentally ill person.

4) **Order in case of mentally ill person cruelly treated:** Any officer in charge of a police station or any private person who has reason to believe that a mentally ill person is being ill treated or neglected by his relative or other person having charge of him may report the matter to the magistrate within whose jurisdiction the mentally ill person resides. On receipt of the application the Magistrate may make the following course of action.

- a) Cause the mentally ill person to be produced before him;
- b) Summon such relative or other person who is or who ought to be in charge of such mentally ill person;
- c) Pass an order requiring relative or any other person to take proper care of such mentally ill person;
- d) Pass penalty of imposing fine upon such relative or any other person who willfully neglects to comply the order of the magistrate;
- e) Pass reception order for keeping such mentally ill person in a psychiatric hospital / nursing homes if there is no person legally bound to maintain the mentally ill persons of if such person refuses or neglects to maintain that mentally ill person.

5) **Custody and Management of Property of mentally ill person:** Where a mentally ill person is possessed of property but is incapable of taking care of himself or managing of property, the court has discretion to appoint a guardian for the purpose of management of property of such mentally ill person. The competent court to decide management of property of mentally ill person is District of whose jurisdiction such mentally ill person resides. An application for such purpose may be made either by (i) any of the relatives of mentally ill person, (ii) Advocate General, and (iii) District Collector. On the satisfaction of the court that person is mentally ill and

incapable of taking care of himself or managing his property, the court may pass an order for the appointment of guardian, and /or appointment of manager for the management of property. A person who is appointed as guardian shall be responsible for the care and maintenance of the mentally ill person and of such members of his family as are dependent on him. Any person who is appointed as manager shall manage the property in such manner as it would have been exercised by the owner , but shall not mortgage, sale, gift, exchange any immoveable property of the mentally ill person.

| <b>Purpose</b>   | <b>Application made to whom</b>  | <b>Application made by whom</b>   |
|--|--|---|
| For Admission in Psychiatric Hospital/ Nursing Home                | Medical Officer in – charge  | Mentally ill person himself/herself   |
|  | Medical Officer in – charge  | Guardian in case mentally ill person is minor   |
|  | Medical Officer in – charge  | Relative or friend of the mentally ill person   |
| For Reception order on application                                 | Any Magistrate (CJM, SDJM, JMFC) as the State Government by notification declare | -medical officer in charge<br>-husband, wife or any other relative of the mentally ill person |
| For Reception order for mentally ill person who is found wandering | Any Magistrate (CJM, SDJM, JMFC) as the State Government by notification declare | -Officer in –charge of police station   |
| For reception order in case of mentally ill person cruelly treated | Any Magistrate (CJM, SDJM, JMFC) as the State Government by notification declare | -Officer in –charge of police station.<br>- Any private person                                |

|   |                |   |
|---|----------------|---|
| For custody and management of property of mentally ill person | District Court | <ul style="list-style-type: none"><li>- Any of the relatives of mentally ill person</li><li>- District Collector</li><li>- Advocate General</li></ul> |
|---|----------------|---|

### Alternative Dispute Resolution System

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Broadly, there are three types of dispute resolution in our country. The first is by Adjudication where disputes are resolved by formal justice institutions such as courts or tribunals wherein judge is bound to follow principles and procedures established by law, and strict rules of relevancy, admissibility, presumption, and burden of proof provided by the evidence of law. The second is by Arbitration that is the settlement of dispute outside the court with the assistance of an arbitrator. The third is by negotiation whereby disputes are resolved through amicable settlement between the disputed parties by mediation of third party. While the former is called Adversial Justice System, the latter two is Alternative Dispute Resolution System.

#### **UNDERSTANDING ALTERNATIVE DISPUTE RESOLUTION**

Alternative Dispute Resolution (ADR) refers to a set of mechanism that a society utilizes to resolve dispute without resort to adversial justice system. ADR has been evolving as viable set for justice dispensation system to provide a solution to legal disputes and to render complete justice to parties in conflict. ADR is not a substitute for adversial justice system, but it has been recognized as the simple, informal and inexpensive methods for dispute redressal. The underlying objective of ADR is to facilitate access to justice, to provide more effective dispute resolution, to relive court burden, and to reduce cost and delay. ADR can be practiced in three common modes. They are Arbitration, Conciliation and Mediation.

- **Arbitration** involves individual lawyer or panel outside of the court system that determines legal and/or technical merits of a dispute and determines an 'arbitral award'.
- **Conciliation** is usually a court initiated practice to motivate and guide litigants to arrive at an equitable, negotiated settlement instead of proceeding to trial.
- **Mediation** is voluntary and confidential process in which neutral person to act as mediator in assisting disputing parties to clarify issues, develop options and work toward a mutually beneficial resolution.

ADR may be practiced by individuals or institution within / without the court system. The institutions that can practice ADR include: Court, Bar Association/Council, Lawyers Collective, Civil Society Groups etc. Individuals that can practice ADR include: judges, designated arbitrator/mediator, lawyer, psychologist, social worker etc.

### **ADR UNDER INDIAN LAW**

ADR has been an integral part of our history. Arbitration, an alternative dispute resolution mechanism, was very popular and prevalent in ancient India and awards of panchayats were binding in nature. The law enacted by the British Government in India such as Civil Procedure Code, the Indian Arbitration Act, 1899 had contained provision for reference of disputes to arbitration without the reference of the court.

#### **ADR in Labour Law:**

The first avenue where the conciliation has been effectively introduced and recognized by law was in labour law, namely the Industrial Disputes Act, 1947. Conciliation has been statutorily recognized as an effective method of dispute resolution in relation to disputes between workers and the management. The provision in the Industrial Disputes Act allows disputing parties to settle disputes by negotiation with Conciliation Officer of the government before resorting to litigation.

**ADR in Family Law:**

ADR has got recognition in the matter of settlement of family disputes. Section 5 of the Family Court Act provides provision for the government to require the association of Social Welfare Organization to hold family court to arrive at a settlement. Section-6 of the Act provides for appointment of permanent counsellor to effect settlement in the family matters. Further Section 9 of the Act imposes an obligation on the court to make effort for settlement before taking evidence in the case.

**ADR in Legal Services Authorities Act**

The legislation which has given more emphasis on the alternative dispute resolution is the Legal Services Authority Act, 1987. One of the mandates for Legal Services Authority is to organize Lok Adalat to settle disputes through conciliation and compromise. Lok Adlat is empowered to decide the disputes referred to them, to effect settlement by mediation and to award a decree on the basis of compromise between the parties. Any settlement by Lok Adalat is binding like an order, decree, judgment or award of a court. No appeal lies against the order of the Lok Adalat. Now the Legal Services Authority has established another forum for ADR named Permanent Lok Adalat (PLA) to resolve the matters relating to public utility services such as transport services; postal/telegraph or telephone service; insurance services; services in a hospital or dispensary; services relating to supply of power, water or water to public.

Key provisions of Legal Services Authority Act, 1987 relating to Lok Adalat

**Section-19**

1. The Legal Services Authority at each level- Central, State, District and Taluk level- is responsible for organizing Lok Adalats.
2. Conciliators for Lok Adalat comprise the following.
  - o A sitting or retired judicial officer
  - o Other persons of repute as may be prescribed by the State Government in consultation with the Chief Justice of High Court.

**Section -20**

Cases can be referred for consideration of Lok Adalat as under:

1. By the consent of both parties to disputes.
2. One of the parties makes an application for reference.
3. Where the court is satisfied that matter is an appropriate one to be taken cognizance by the Lok Adalat.
4. Compromise settlement shall be guided by the principles of justice, equity, fair play and other legal principles.
5. Where no compromise has been arrived at through conciliation, the matter shall be returned to the concerned court for disposal in accordance with law.

**Section-21**

1. After the agreement is arrived by the consent of the parties, award is passed by the conciliators. The matter need not be referred to the concerned court for consent decree.
2. Every award of Lok Adalat shall be deemed as decree of civil court.
3. Every award made by the Lok Adalat shall be final and binding on all the parties to dispute
4. No appeal shall lie from the award of the Lok Adalat

**Section-22**

1. Every proceedings of the Lok Adalat shall be deemed to be judicial proceedings for the purpose of:
  - Summoning of witness
  - Discovery of documents
  - Reception of evidence

**ADR in Code of Civil Procedure**

By virtue of amendment in the Code of Civil Procedure in the year 2002, Section 89<sup>13</sup> has been incorporated which provides settlement of disputes

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<sup>13</sup> Section-89. Settlement of disputes outside the court

(1) Where it appears to the Court that there exists elements of a settlement which may be acceptable by parties, the Court shall formulate the terms of settlement and give them to the parties for their

outside the court with a view to attempt or to arrive at an amicable settlements of disputes between the parties. The underneath objective of the newly inserted section-89 is to promote settlement of disputes outside the court. When court finds elements of mutual settlement in a case, the court may persuade parties for mutual settlement and refer the case for-

- o Arbitration,
- o Conciliation,
- o Lok Adalat,
- o Judicial settlement
- o Mediation

Where a dispute is referred for arbitration or conciliation, the provision of the Arbitration and Conciliation Act, 1996 shall apply. Where dispute is refereed to Lok Adalat or for judicial settlement, the provision of section -20 of the Legal Services Authority shall apply.. For mediation it is mentioned u/s 89 that court shall effect a compromise between parties by following the prescribed procedure. Among the methods of ADR, 'mediation' is not statutorily regulated and this is evidenced from section 89 of the code.

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observations and after receiving the observation 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 had been referred-
- a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act,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 Lokadalat in accordance with the provisions of Sub-section-(1) of the Section-20 of the Legal Services Authority Act, 1987 shall apply as if the disputes were 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 shall apply as if the disputes were referred to a Lok Adalat under the provisions of that Act; and
  - d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed.

## **METHODS OF ADR**

The main methods of ADR are arbitration, mediation and conciliation. Lok Adalat is a fine blend of all. Let us give brief illustration of these key words with reference to laws in India.

**Arbitration:** The law governing arbitration in India is the Arbitration and Conciliation Act, 1996. Arbitration may be adhoc or institutional. In adhoc arbitration, the arbitration is agreed to and arranged by the parties themselves without recourse to any institutions. In case of any disagreement on the appointment of arbitrator for adhoc arbitration, the Chief Justice of India or the Chief Justice of High Court may, depending upon the matter, appoint arbitrator. Institutional arbitration is the arbitration conducted by an established arbitration organization like the Indian Council of Arbitration, New Delhi.

**Conciliation:** The proceedings relating to conciliation are enumerated under section 61-81 of Arbitration and Conciliation Act, 1996. Any dispute arising out of legal relationship, but not excluded by any law, can be conciliated (u/s 61 of ACA). Any party of the dispute can take initiative and send invitation for conciliation. Proceedings shall commence when other party accepts the invitation. If other party does not give reply to invitation within 30 days, then invitation stands rejected.

**Mediation:** Mediation is the most viable method of conflict resolution. As per provision of order X, rule I-A of the Code of Civil Procedure, the court may direct the parties in conflict to opt for mediation. A wide nature of disputes including matrimonial, labour, motor accident claims, complaints u/s 138 of the Negotiable Instrument Act, 1881,

petition u/s 125 of the Code of Criminal Procedure, 1973 or any other compoundable offence can be referred for mediation.

### COMPARISON BETWEEN JUDICIAL PROCESS AND VARIOUS ADR PROCESS IN INDIA

| Judicial Process  | ADR Process  |   |   |
|---|--|---|---|
|   | Arbitration  | Mediation   | Conciliation  |
| Judicial process is an adjudicatory process where matter is adjudicated by court.               | Arbitration is quasi judicial adjudicatory process where the arbitrator is appointed by the court or by the parties in the dispute | Mediation is a negotiation process. Parties keep their right to resolve the dispute and decide the terms of settlement. Mediator facilitates the process. | Conciliation is non-adjudicatory and voluntary process. The function of the conciliator is more active than the facilitative function of the mediator |
| Procedure and decision are governed by the provisions laid down by the law or relevant statute. | Procedure and decision are governed by the provisions of the Arbitration and Conciliation Act,1996                                 | Procedure and settlement are not regulated by statutory provisions.   | Procedure and decision are governed by the provisions of the Arbitration and Conciliation Act,1996  |
| The decision is binding on the parties.   | Decision is binding  | A binding settlement is reached only if parties arrive at   | Decision is binding   |

|  |   |  |   |   |
|--|---|--|---|---|
|  |   |  | a mutually acceptable agreement.  |   |
|  | Adversial in nature as focus is on past events and determination of rights and liabilities of the parties | Adversial in nature as focus is on determination of rights and liabilities of parties. | Collaborative in nature as focus is on the present and future and resolution of dispute is by mutual agreement of parties irrespective of rights and liabilities. | The focus is on the present and future          |
|  | Personal appearance of the parties is not always required   | Personal appearance of the parties is required but not essential                       | Personal appearance of the parties is essential   | Personal appearance of the parties is essential |
|  | Proceeding is formal and held in open forum   | Proceeding is formal and held in private.  | Proceeding is informal and held in private.   | Proceeding is formal and held in private        |
|  | Decision is appealable in higher courts   | Decision is subject to challenge on specified grounds                                  | Settlement reached on mutual agreement is not appealable.   | Decree/order not appealable                     |

### **MATTERS WHICH CAN BE SETTLED THROUGH ADR?**

It must be remembered all litigations are not amenable for settlement by negotiation. There are certain litigations which have to necessarily decide

through adjudicatory process by courts, but not by negotiations. They are criminal cases, cases involving public interest, matters relating to taxation and cases involving fraud, forgery, coercion etc. On the other hand, the cases which can be amenable to be settled by alternative dispute resolution are of the following types of cases:

- disputes relating to matrimonial matters, maintenance, custody of children.
- disputes relating to partition /division of family property.
- disputes relating to partnership.
- disputes arising out of contracts
- dispute between suppliers and customers
- dispute between bankers and customers
- dispute between employers and employees
- compensation claims in accident cases
- dispute arising between consumer and business establishment

## **ROLE OF PARALEGAL VOLUNTEERS IN ADR**

The roles of PLVs are envisaged under the National Legal Services Authority (Legal Aid Clinics) Regulations, 2011. One of the key roles of PLVs is to act as the intermediary between or among disputed parties to amicably resolve the pre-litigation disputes through mediation /counseling. If paralegals find any the dispute involves with litigation, they may refer such dispute to concerned Legal Service Authority or the District ADR Centre. That means a paralegal by his/her own effort can resolve any petty dispute at the pre-litigation stage. On the other hand, a paralegal can take efforts to the bring the parties in disputes to settlement by using the machinery of mediation or conciliation at the ADR centers or at the legal services institutions. The paralegals are expected to generate awareness among people about alternative dispute resolution system and to assist parties to resolve pre-litigation disputes through mediation. Thus a paralegal, by and large, can play the role of a mediator (third party) to assist disputing parties to resolve their disputes without going to litigation.

## KEY POINTS OF MEDIATION

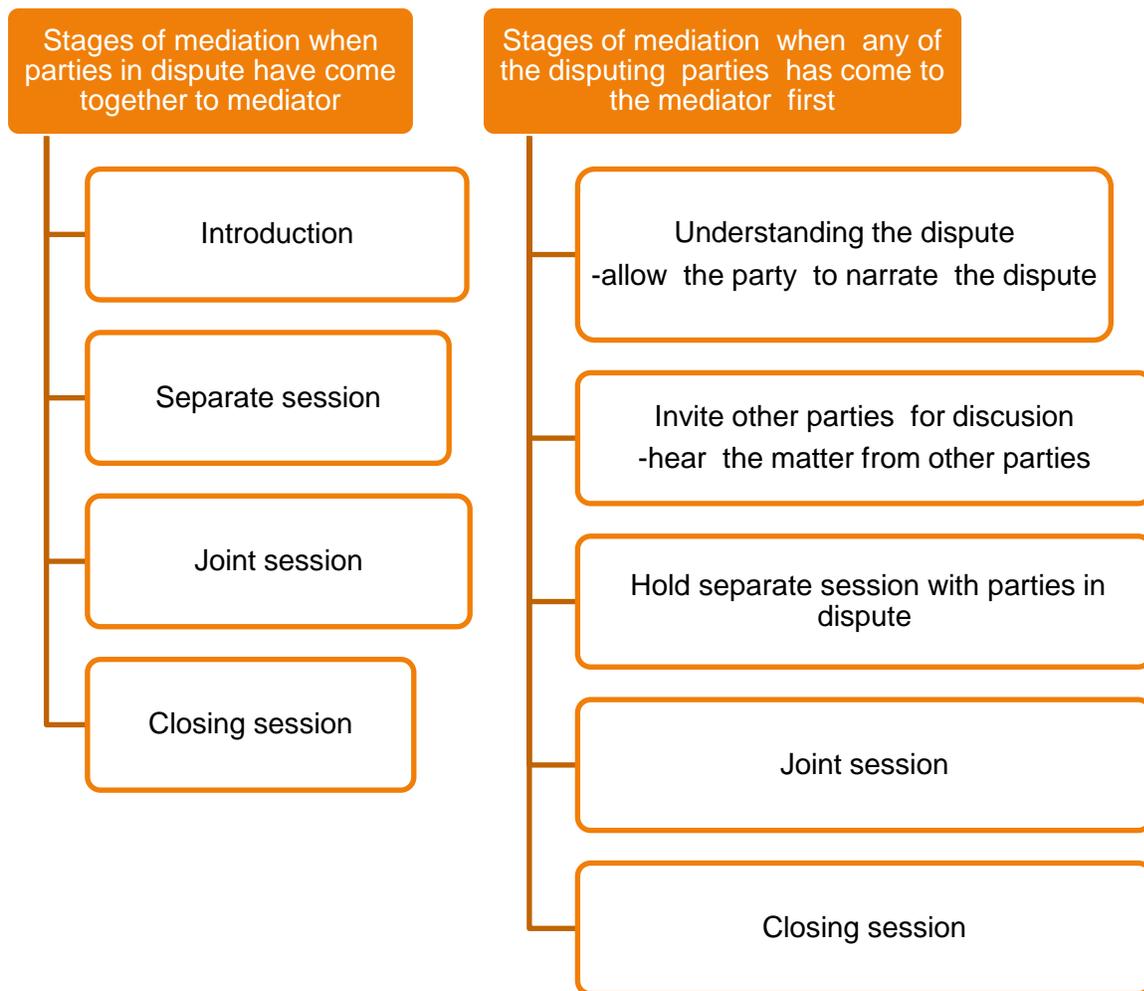
- a) Mediation is voluntary process where a neutral third party facilitates the disputed parties to resolve their disputes amicably. In mediation, the parties have right to decide whether to settle dispute and the terms of settlement.
- b) Mediation is a party-centered negotiation process. The parties are the focal point of mediation process. The role of the mediator to render assistance, facilitate and persuade parties to arrive at a settlement.
- c) The mediator should keep the mediation process informal that means mediation is not necessarily to be governed by the rules of evidence.
- d) The mediator must remain impartial and independent and should keep his personal preference away from the mediation process.
- e) The mediator must adopt effective communication and counselling techniques to ensure that a productive interaction is held with the parties.
- f) Mediation is an informal process wherein the parties may share personal or private things. Mediation is confidential in nature which means any statement or information shared by the parties with the mediator shall not be disclosed.
- g) Any settlement is made between parties through mediation is required to be reduced in writing, signed by the parties and witness thereof.

The PLVs are expected to perform the role of conciliator. It must be remembered that conciliator does not give a decision but his role is to induce the parties for settlement. While conciliating a dispute, the PLV must take into consideration of circumstances of the case and wishes of the disputed parties. Therefore, Paralegals must have good counselling skills as they will more often

come into contact with people who have petty cases which could be solved through mediation and counselling.

## MEDIATION PROCESS

Mediation is a dynamic process in which mediator assist parties to negotiate a settlement for resolving their disputes. In doing so, a mediator is required to undertake several round of session with parties in step by step. Number of sessions may vary depending upon nature of the dispute and whether both the parties have come to the mediator or not. The common steps for mediation are as follows which can be followed by paralegal in course of mediating a dispute for mutual settlement.



The common stages of the mediation process are:

1. Introduction / Opening Session and opening statement
2. Separate session(s)
3. Joint session
4. Closing

### **Stage-1: Introduction/Opening session**

- Establish neutrality
- Understand problem
- Develop rapport with parties
- Gain confidence and trust of the parties
- Appraise parties of the benefits/advantage of mutual settlement
- Motivate parties for mutual settlement
- Decide process of mediation

### **Stage -2: Separate Session**

- Understand the dispute at a deeper level
- Provide opportunity for the parties to express their emotions/ concern
- Create such conducive atmosphere so that parties can disclose confidential information which they normally do not wish to share in public.
- Understand underlying interest of the parties
- Help parties to realistically understand the case
- Make parties to shift from litigation to solution finding mood.
- Encourage parties to generate options and find terms that are mutually acceptable.

### **Stage-3: Joint Session**

- Understand perspectives, relationship and feelings of both parties
- Provide opportunity to the parties to hear each other
- Make to them internalize facts and issues.
- Understand obstacles and possibilities
- Draw the conditions for settlement

### **Stage-4: Closing Session**

A. Where there is a settlement, the mediator must do the following

- Confirms the terms of settlement
- Such terms of settlement are reduced in writing
- The agreement is signed by all the parties and it must countersigned by the witness.
- Mediator must put his/her signature on the signed agreement certifying that agreement was signed in his/her presence.
- A copy of the signed agreement is provided to the parties.
- The mediator should congratulate all parties for reaching a settlement.

B. Where settlement is not reached, the mediator may prepare report stating therein that 'matter is not settled'. The report will not mention any reason of non-settlement of fix responsibility on any one for the non-settlement.

**Qualities of a mediator:**

1. **Neutrality:** A mediator should be neutral.
2. **Persuasive Skills:** Mediator should have communication skills. He should also be able to freely communicate with parties. He should be able to persuade parties to open up and disclose their mind and heart, their grievances and the solution they expect.
3. **Legal and Technical Knowledge:** A mediator should have ability to assess the strength and weakness of the case.
4. **Patience:** To arrive at a solution may take different number of sittings. A mediator should be able to give the time needed for the parties from one stage to another.
5. **Confidentiality:** The parties tend to open discuss their problem with the mediator. The mediator has to be discreet and maintain confidentiality.

1. Active listening skills.
2. Empathetic attention.
3. Effective oral communication, using plain language accessible to the parties.
4. Skills in building rapport with the parties.
5. An objective and unbiased stance towards both parties.
6. The ability to establish a trusting relationship with both parties
7. Skill in putting parties at ease and in helping them clarify their needs.
8. Ability to challenge the parties as appropriate and to set realistic goals for them and for the process of conciliation
9. Respect for the parties, their values and their experience.
10. Ability to work with people from a variety of backgrounds.
11. Commitment to confidentiality in line with the rules for conciliation
12. Self-awareness and the ability to examine your own thoughts and values.
13. Punctuality in dealing with the Applicants
14. Deliberation – the conciliator should avoid overreacting or snap decisions
15. Knowledge of the root causes of disputes arising in society, particularly in the family.

**Qualities of Good Conciliator:**

- Conciliator should not give a decision but his main function is to induce parties to arrive at a settlement.
- Conciliator is not necessarily to follow the Code of Civil Procedure or Indian Evidence Act, but has to be guided by the principles of objectivity, fairness and justice
- Person who is acceptable to parties in conflict. Must be neutral, capable of understanding issues involved in the dispute, sense of time and attitude to resolve problems.

## Annexure-1

### Methodologies

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We must know that training is learning process that acquisition of knowledge, building concepts, sharpening of skills, and changing of attitudes or behaviours to enhance capacity for effective work performance. Effectiveness of training is largely dependent upon methodologies which denote the process or techniques applied in delivering a subject. Before proceeding to decide what would be appropriate methods for the Training of PLVs, we must take note of the basic differences between 'Teaching' and 'Training'. The difference is quite necessary to understand because very often it has been experienced that conventional teaching methods are inappropriate and ineffective for training.

| Teaching   | Training  |
|--|---|
| Teaching is more theory-oriented.                                    | Training is practical oriented.   |
| Teaching creates an awareness of the concept and provides knowledge. | Training helps in understanding the practical application of knowledge. |
| Teaching is to cause to know something, and to impart knowledge.     | Training is to exploring ways for application of knowledge.             |
| Teaching is focused for knowledge                                    | Training is for Knowledge   |

|   |  |
|---|--|
| development.  | enhancement, Skill development and Attitude change.  |
| Teaching makes learner to know.                               | Training makes learner to work.  |
| Teaching may be one way process and may not be participatory. | Training must be participatory. During the training not only do the participants learn from the trainer, but trainer also learn from the participants from their experience sharing. |

Methodology is most vital factor for training because methods defines how the subject matter will be delivered through training. To decide a methodology to be used in training mostly depends on the subject-line, training design, the profile of the participants, time available, training space and skill of the trainer. This Guide has attempted to delineate a set of methodologies which can be pursued in PLVs training. Methodologies suggested by the Guide are premised upon learning objectives, kind of participants for the training, etc as follows:

- The trainees are Para-legal Volunteers who are heterogeneous in character by their gender, age, education, occupation, residence.
- The trainees are adult learners.
- The focus of the training would be on Knowledge Enhancement, Skill Building and Attitude Development for PLVs towards assisting marginalized communities in accessing to justice system.
- Training is needed to be participatory and interactive.

An inventory of commonly used Participatory Learning Methods is given below. The trainers are suggested to adopt any method or combination of methods which trainer would reckon best fit and appropriate in delivering the subject.

1. Lecture-cum-Interactive Discussion
2. Case study
3. Group Discussion
4. Role Play
5. Question-Answers
6. Exposure visit
7. Short Films and Discussion

### **1. Lecture-cum- Interactive Discussion:**

The most common and simple method of teaching is lecture method whereby an Instructor teaches orally to a group of persons. Lecture is used to convey critical information, history, background, and theories<sup>14</sup>. As a training method, purpose of lecturing is limited in imparting knowledge and developing concepts. Formal lecturing is very conventional, can be better suited for classroom teaching but it may not be so effective for adult learning. Lecture method of teaching can be useful for training provided it is informal and aligned with slide presentation and interactive discussion. Lecture method of teaching has advantages and is bound to be practiced under certain circumstances that are as follows:

- It is most preferable method of teaching for a larger group.
- It is cost-effective.
- It enables facilitator to go directly to the subjects without any diversion.
- Vast subjects or lot of facts, information and concepts is relatively covered in short span of time through lecture method of teaching.

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<sup>14</sup> en.wikipedia.org

Like the reverse side of the coin, lecture method is being criticized for its boredom, ineffectiveness for adult learning, theory oriented teaching and it does not promote participatory interaction. But in the context of PLV training, lecture method of teaching may be desirable looking at the size of the training batch, subject line also. As PLVs are supposed to sensitize about fundamentals of law, it is presumed that lecture method may come handy in providing information about law, and legal system. In order to make the lecturing more effective, it is necessary that the trainer/facilitator shall have a structured lecture plan in hand, must be well-acquainted with the subject matter, and have prepared supportive materials in the form of PPT, handouts or notebooks to illustrate points.

**Tips for enhancing effectiveness of lecture method:**

- a) It is very important that the Facilitator/Trainer must make proper pre-plan how to deliver the subject in a participatory learning process. Plan must be chalked out in taking into consideration four factors. First, who are the participants and what is their base level. Secondly, what is subject matter? Thirdly, what is objective of the training. Last but not least, what is the time slot to cover that subject?
- b) Lecturing needs to be combined with PPT/slide show. The Facilitator must guard that slides in PPT is chronologically arranged in sequence with the lecture. PPT should be visible and must be short sentence only to highlight main points. Facilitator must avoid overdependence on PPT.
- c) In lecturing method of teaching it is important that the Trainer/Facilitator shall have good communication or oratory skills.
- d) In delivering lecture, the presenter should have appealing body movements and facial expression.
- e) Language used in teaching must be simple and easy to understand. Speak clearly and loudly.

- f) Trainer/Facilitator must give equal attention to the participants and have eye contact with the learners to assess whether they are following the lecture or not, and whether they are interested or bored.
- g) Leave question to participants or encourage them to raise questions to ensure that teaching is participatory, not a one way communication.
- h) Provide relevant and appropriate examples to relate the subject.
- i) Do not make the teaching directive.

## 2. Case Study:

As subject for the training is invariably related with law, case study method will be highly productive as it provides opportunity to trainees for problem analysis, peer discussion and self-learning. The Module has provided few case studies for illustration and analysis. The case studies presented in the module are drawn from various sources including case reported in Law Journal, cases dealt by CLAP, news report, cases constructed from imagination. The **Facilitator shall** have flexibility to bring other case studies for discussion if they are appropriate and relevant for topic.

There can 2-ways method for case study discussion depending upon the number of trainees and time availability. One method is where the Facilitator can narrate a case matter and then take response from few trainees randomly to the lead questions related to that case matter. Then based on their responds, the facilitator must appraise them legal analysis or solution to the case matter for common understanding among the participants. Another method is where the facilitator may divide them into 4-5 groups of equal size. Facilitator may decide either to give common case matter or separate problem to each and every group. Then groups will be allowed for brainstorming discussion for few minutes and make their group presentation. After presentation is completed, the facilitator must supplement and compliment the group views in order to enable trainees to understand appropriate legal solution to the case matters. Notwithstanding any method of presentation, it must be admitted that case

study method is an effective way to instill learners to think, discuss and analyze the case matters in different perspectives before arriving at any conclusion.

The facilitator is required to take guard of following tips with a view to make case study method of teaching effective and more participatory.

- a) Case study to be presented for discussion must have relevance to the learning objective of respective session.
- b) Case study to be presented has to be simple and it is to be believed that such matter has occurred or may happen in real situation. Complicated or exaggerated case matters must be avoided.
- c) Facilitator must have greater acquaintance in using the case study method.
- d) Learners must have capacity to perceive and understand the case matter.
- e) Case study must be followed by some lead questions for better comprehension for learners.

### **3. Group Discussion:**

One of the methods of participatory learning is group discussion. Brainstorming discussion in a group can help participants to broaden their understanding and perception, and to strengthen inter-personal communication skills by virtue sharing knowledge and experience among themselves. Quality of group discussion is by and large dependent upon subject for discussion, active participation among group members, time slot and effective guidance of facilitator. Tips underneath here may be helpful for facilitators in guiding to conduct for effective group work.

- a) Depending upon the number of trainees, divide them into groups of equal size of 10-12 persons.

- b) Ensure that group composition is made perfectly. Each and every group must have proportionate gender representation and regional representation as well if trainees are drawn from different regions. Groups should have members who can play different roles as the discussion progress.
- c) Each group may be given separate tasks, but they are to be interrelated to the subject of the session.
- d) Tasks given to each group must be supplemented with some lead questions in order to make discussion in a right direction and productive.
- e) Each group shall select its own leader to make group presentation.
- f) Each group will make presentation of their own. After presentation of one group, other groups may be asked to give their opinions, if they want to supplement anything or disagrees with any points of that group views. Group exercise also helps in getting different perspective on the same subject.

#### **4.Role Play:**

There may be role play by participants on a script of the legal matters. A presentation of case study or issues through role play must be followed with analysis of the logic and learning from that play by the Facilitator. It must be necessary that script must be based on predicament of the people and have reflection of situation of real life. The script must be simple so that it can be easily understood by the role players. Script can be construed to give reflection of events in society such as domestic violence, marital disputes, unlawful arrest, human rights violation, child abuse etc. Following are some tips which may be followed by the Facilitator to make role play effective.

- a) The script in hand shall have relevance to the objective of the session. Script should depict both the problems as well as solution.
- b) Invite some participants for role play. Get the role player to go through the script and internalize their role in 10-15 minutes time. In order to save time, this preparatory work can be done in leisure time also.
- c) After the role play the participants must be asked to respond- (i) what was learned?, (ii) whether the legal solution was well reflected?

## **5.Question-Answers**

There must be a specific time slot in each session for question-answer. This would be an effective method first to identify and responds to the gaps in knowledge and secondly to clarify doubts. This method will be used both by the trainees and facilitator. Participants may ask question to clear their doubts and for more learning.

## **6. Exposure Visit:**

Wherever possible, PLV will have trip exposure visits to different commission/institutions or community to get more insight and firsthand knowledge. The purpose of the visit shall be explained in advance and participants shall be instructed to pay critical attention and to record their observations for a subsequent discussion

**7. Short films and discussion** Thematic short films may also be used, and it can easily bring participants attention on subject or for starting focused discussion.

F-1: Registration Format

|   |
|---|
| <p>Training of Paralegal Volunteers</p> <p>Date:.....To.....</p> <p>Venue:.....</p> <p>Organized by:.....</p> |
|---|

| Sl.No | Name | Registration No. | Signature for Attendance                 |  |  | Affix passport size photograph |
|-------|------|------------------|--|--|--|--------------------------------|
|       |      |                  | 1 <sup>st</sup> day<br>(Dated.....<br>.) | 2 <sup>nd</sup> day<br>(Dated.....<br>...) | 3 <sup>rd</sup> day<br>(dated.....<br>.) |                                |
|       |      |                  |  |  |  |                                |
|       |      |                  |  |  |  |                                |
|       |      |                  |  |  |  |                                |
|       |      |                  |  |  |  |                                |

Verified and Signed

Dated:

Registration-in Charge

F-1.1: Registration Format

|  |  |
|--|--|
| Refresher Training of Paralegal Volunteers |  |
| Date:.....To.....                          |  |
| Venue:.....                                |  |
| Organized by:.....                         |  |

| Sl.No | Name | Registration No. | Signature for Attendance            |                                     |
|-------|------|------------------|-------------------------------------|-------------------------------------|
|       |      |                  | 1 <sup>st</sup> day<br>(dated.....) | 2 <sup>nd</sup> day<br>(dated.....) |
|       |      |                  |                                     |                                     |
|       |      |                  |                                     |                                     |

Verified and Signed

Dated:

Registration-in Charge

**F-2: Pre-Training Assessment (To be filled up by Trainees)**

Name

Address

1. Why did you interested to become paralegal?

2. Have you ever received any paralegal training? Yes/No

3. If your response is Yes to Question 2, then give answer to questions in serial number-3

a) Name of the organization that provided you training.

b) When did you receive training? State the month and year.

c) What was training duration?

d) What was the subject matters of training?

4. What are presently doing as paralegal?

5. Do you have contact with State/District Legal Services Authority?

6. As paralegal volunteers what kind of challenges you face in the field?

7. What do you expect from this PLV Training?

Signature

Dated.....

### F- 3: Day-wise Feedback by Participants

Date

- 1) Describe briefly the lesson learned by you from today's training.
  
- 2) Which are the subjects you found useful?
  - a)
  - b)
  - c)
  
- 3) Which of the trainer(s) you reckon very good in terms delivering subject and adopting suitable teaching methods?
  - a)
  - b)
  - c)
  
- 4) Which of the trainer(s) you did not find effective and why?
  - a)
  - b)
  - c)
  
- 5) In your opinion which of the subject could have got more importance.
  - a)

- b)
- c)

6) Methodologies you found most effective

**F- 4: Evaluation of Training Programme by Participants**

|   |
|---|
| <p><b>Training of Paralegal Volunteers</b></p> <p>Date: ----To-----<br/>         Venue:-----<br/>         Organized by:-----<br/>         .</p> |
|---|

**Instruction:** This format will be filled up by each and every trainee only after the completion of all sessions of the training programme. Please read the questions given below carefully before putting your response. Questions from serial I-III are scaling questions. Answer is scaled as 1: **Strongly Disagree**; 2: **Disagree**; 3: **Unsure**; 4: **Agree**; 5: **Strongly Agree**. Make circle on only one number which you consider more appropriate. Please provide descriptive opinions for questions sercaling from IV-VIII. Put Tick Mark in the appropriate box for question number IX.

|  |   |   |   |   |   |
|--|---|---|---|---|---|
| <b>Q.I: On learning</b>                                      |   |   |   |   |   |
| a) I enjoyed the training very much                          | 1 | 2 | 3 | 4 | 5 |
| b) The subjects taught in the training were highly required. | 1 | 2 | 3 | 4 | 5 |
| c) I learned new things and gained                           | 1 | 2 | 3 | 4 | 5 |

|  |   |   |   |   |   |
|--|---|---|---|---|---|
| knowledge on practical application of law  |   |   |   |   |   |
| d) I got satisfactory answers to all questions that I had raised in the training | 1 | 2 | 3 | 4 | 5 |
| e) The training has fulfilled my expectations                                    | 1 | 2 | 3 | 4 | 5 |

|  |   |   |   |   |   |
|--|---|---|---|---|---|
| <b>Q.II: On teaching methods</b>                   |   |   |   |   |   |
| a) Trainers were well prepared                     | 1 | 2 | 3 | 4 | 5 |
| b) Trainers delivered subject in systematic manner | 1 | 2 | 3 | 4 | 5 |
| c) Sessions were well managed by the trainers      | 1 | 2 | 3 | 4 | 5 |
| d) Topics were properly understood                 | 1 | 2 | 3 | 4 | 5 |

|  |   |   |   |   |   |
|--|---|---|---|---|---|
| <b>Q.III: On relevance</b>                       |   |   |   |   |   |
| a) Subjects of the training were relevant for me | 1 | 2 | 3 | 4 | 5 |
| b) I got the opportunity to share my experience  | 1 | 2 | 3 | 4 | 5 |
| c) The knowledge gained from the                 | 1 | 2 | 3 | 4 | 5 |

|  |  |  |  |  |  |
|--|--|--|--|--|--|
| training would help me to provide legal aid to poor people of my area. |  |  |  |  |  |
|--|--|--|--|--|--|

Q.IV: Which are topics you found useful?

Q.V: Name the trainer(s) whom teaching you have admired most.

Q.VI: In your opinion which was the unnecessary part of the training?

Q.VII: Give your opinion about the organization that conducted the training.

Q-VIII: Would you reckon any subject(s) that needs to be covered in next training programme?

Q.IX: Give your rating on the following.

|                            | Excellent | Very Good | Good | Average | Poor |
|----------------------------|-----------|-----------|------|---------|------|
| Subjects covered           |           |           |      |         |      |
| Trainers                   |           |           |      |         |      |
| Training Venue             |           |           |      |         |      |
| Accommodation              |           |           |      |         |      |
| Food                       |           |           |      |         |      |
| Resource Kits              |           |           |      |         |      |
| Overall Training Programme |           |           |      |         |      |

## **F-5 : Template for Training Report**

It is really necessary to document any event in order to record the proceedings for reference in future. Documentation may be made in Audio-Visual or written report form. But the common form of documentation is Reporting as this may be cost-effective and easily accessible for readers. The purpose of report documentation is to:

- Keep on record the details of the programme.
- Use as reference in future.
- Assess the extent of achievement in correspondence to the stated objectives of the training programme.
- Analyze what changes are needed to bring improvement in next training programme.

It is to remember that there is no prescribed format for reporting of a training programme. The structure of the training report will largely depend on the type of programme. However, the training report must essentially capture the processes and innovation in the teachings and provide an analysis of outcomes to the objectives of the training as well. Ideally a training report may be premised upon a basic structure as follows:

### 1. Cover page

- Title of the training programme
- Date
- Name of Training Organization

### 2. Foreword

### 3. Acknowledgement

### 4. Contents

### 5. Context:

- It may be named as Introduction/Background. This section must highlight concept and rationale of the training programme.

## 6.Design of the Training

- Objectives
- Methodologies
- Learning Outcomes
- Programme Schedule

## 7. Profile of Trainees

## 8.Trainers Profile

## 9. Proceedings of Opening Session

## 10. Day-wise Thematic session

- It must provide proceedings of training session chronologically as per the programme schedule. It must capture key points, process followed, case study discussed or illustration made.

## 11. Learning and Best Practices

## 12. Key Questions

It must present the questions raised and answered provided.

## 12. Challenges faced:

- It must highlight challenges faced instantly which was not perceived earlier including deficiencies with trainers, inadequate preparation,

questions raised by participants could not be answered, time mismanagement etc.

13. Summary of the evaluation by participants.

14. Observations and Suggestions of Rapporteur

15. Photographs

16. Media clippings

17. Annexures

- Power-point presentations
- Hand outs
- Agenda
- Participants List