UNIT 2 SUBSTANTIVE LAW AND PROCEDURAL LAW

Structure

2.0 INTRODUCTION

In Unit-1, we studied the concept of law, basic principles of law and certain important concepts such as persons, rights, duties, property, possession, ownership and liabilities, among other things. As you know by now, law is a discipline which keeps an organized social setup intact. It defines rights and provides remedies for wrongs done, i.e. it prescribes the manner of enforcement of rights. Thus, the main concern of law is to determine rights and wrongs. A right is an interest, respect of which is a duty and disregard of which is a wrong. There can be no right without a corresponding duty. Every duty must be a duty towards some person or persons in whom a correlative right is vested. And conversely, every right must be a right against some person or persons upon whom a correlative duty is imposed.

Examples: i) Suppose B has borrowed money from A. A has a right to recover debt from B, and B owes a duty towards A to pay the same.

ii) X and Y have entered into an agreement and Y has broken it; in X lies the right and Y has the duty to make good the loss caused by the breach of the contract.

Therefore, the terms 'rights' and 'wrongs' are relative; one term is opposite of the other. Where there is a right, there is its corollary, a duty. We have a duty to

respect the rights of others so that others may respect our rights as well. Otherwise, there can be no social adjustment and no security of any right. Liberty is not a personal affair only. It is social contract. The breach of a right is a wrong and the removal of a wrong is a right. In law, there is no wrong without a remedy. What distinguishes a legal right is that it stands the physical force or backing of the state, but behind the moral one there is no force except good faith. The State compels the wrong-doer to submit to the law, to act in the required way or to suffer the consequences for the wrong prescribed by the law for enforcing the sanctity of rights. These compulsions are known as 'liabilities'; an expression of popular usage for 'legal obligations'.

What is right or what is wrong and what are the liabilities of an individual, a group or even the State for different wrongs committed by them against other(s) form a matter of substantive law. How a right should be protected or liability for a wrong is to be fixed and imposed or how a person or a group of persons can be punished for any wrong or crime done is a matter of procedural law. The knowledge of substantive law and the procedural of the land will help the members of any civilized society to play an effective role in the society with regard to their rights and duties and also of others.

Therefore, in this Unit, we will focus on the substantive and procedural laws with reference to civil, criminal and administrative laws.

2.1 OBJECTIVES

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

- Explain the meaning of the substantive law and the procedural law including the interrelationship between the two;
- Distinguish between the substantive law and the procedural law; and
- Appreciate the importance of the substantive law as well as the procedural law in administering civil, criminal and administrative justice to the people.

2.2 SUBSTANTIVE AND PROCEDURAL LAWS: INTERRELATIONSHIP AND DIFFERENCES

Both substantive and procedural laws are inevitable components of law of any civilized society. One without the other has neither any useful and meaningful existence nor any significance as well. Both, substantive law and procedural law, are mutually reinforcing and one acquires greater meaning and validity in presence of the other. Both these laws have their own functions and significance. We will discuss each of these laws below.

2.2.1 Concept of Substantive Law

The law which defines rights and liabilities is known as substantive law. It is so called because it puts in a clear-cut and precise form the substance of the subject matter for enforcing which the courts of law and the officers of law exist. The function of substantive law is to define, create or confer substantive legal rights or legal status or to impose and define the nature and extent of legal duties or liabilities. Substantive law defines, in regard to a specific subject, the legal rights and relationship of people among themselves or their relationship with other

people or between them and the State. Any wrong done by an individual, group of persons or the state against the other(s) will make the wrong-doer accordingly liable to the others. Wrongs may be either civil or criminal. Substantive law refers to all categories of public and private law, including the law of contracts, property, torts and crimes of all kinds.

For *a civil wrong*, law calls upon and forces the wrong-doer to perform his part of contract; to do the act in question which it was his legal duty or obligation to have done the very act, or the failure or the denial to do which is the wrong in question against which remedy is sought. Where such performance, known in legal language as specific performance, is not possible then the wrong-doer is liable to pay damages or compensation to the one who suffers from such wrong. It could be a wrong against any private person or against society as such, or against the State itself. State has right and power to maintain the law and order within the community, to keep society intact, if it has been disturbed.

A criminal wrong, on the other hand, has an altogether different character. A criminal wrong is an act or omission which is made punishable by any law for the time being in force; and, in legal language, it is called an offence. Substantive law deals with the "substance" of your charges, in case of any crime done against the other. Every charge is comprised of elements. Elements are the specific acts needed to complete a crime. Substantive law requires that the prosecutor prove every element of a crime in order for someone to be convicted of that crime. What elements are required will depend on the crime with which you are charged vis-à-vis the State's substantive laws.

For example: Suppose you are charged with a felony driving while intoxicated. Here, at four States the prosecutors are required to prove that:

i) You were driving or operating a motor vehicle.

ii) Driving on a public roadway.

iii) Driving while you were intoxicated.

iv) And that you have prior convictions, if any, for driving while intoxicated.

Substantive law is the statutory or written law that governs rights and obligations of those who are subject to it. It defines the legal relationship of people with other people or between them and the State. In other words, substantive law defines, in regard to a specific subject, the legal rights and relationship of people with other people or as between them and the State. Substantive law defines civil rights and responsibilities/liabilities in civil law as well as crimes and punishments in the criminal law. It is codified in legislated statutes or can be enacted through the initiative process.

For example: Murder is an offence under the Indian Penal Code (IPC) and is defined therein. The IPC also provides for punishment for the crime. This is known as substantive law. Similarly, the provision of the Indian Contract Act, 1872 are substantive in nature.

Substantive law has increased in volume and changed rapidly in the twentieth century as the Central and State legislatures have enacted statutes that displace many common law principles. The Indian Contract Act, the Transfer of Property Act, the Industrial Disputes Act, the Indian Penal Code are instances of substantive law.

2.2.2 Concept of Procedural Law

The law which tells about how the courts and the officers dealing with the law act in giving effects to the substantive law of the land is known as *Adjectival or Procedural law.* 'Civil' and 'Criminal' laws are not two water-tight compartments. There are several wrongs for which there are both civil and criminal liabilities and there may be actions which are both civil and criminal in nature.

The law of procedure is that branch of law which governs the process of litigation. It embodies the rules governing the institution and prosecution of civil and criminal proceedings. Procedural law comprises the rules by which a court hears and determines what happens in civil or criminal proceedings. Historically, the law known to many is substantive law, and procedural law has been a matter of concern to those who used to preside as judicial officers or those who advocate law. But, over time, the courts have developed rules of evidence and procedure, which also fall under procedural law mostly related to fairness and transparency of the process.

According to Salmond (Fitzgerald, 2006) the law of procedure is the law of actions. The word 'actions' is used in the sense to include all legal proceedings. Procedural law deals with the means and instruments by which the ends of administration of justice are attained, i.e. effective administration or application of substantive law. Procedural law is the vehicle providing the means and instruments by which those ends are attained. It *regulates* the conduct of the Courts and the litigants in respect of the litigation itself, whereas substantive law *determines* their conduct and relations in respect of the matters litigated.

In brief, the procedural law:

- informs about the process that a case will go through (whether it goes to trial or not);
- determines how a proceeding concerning the enforcement of substantive law will occur; and
- prescribes the practice, procedure and machinery for enforcement of the rights and liabilities.

The Indian Evidence Act, the Limitation Act, the Code of Civil Procedure, the Code of Criminal Procedure are instances of procedural law.

2.2.3 Interrelationship and Differences between Substantive Law and Procedural Law

It is interesting for us to know the relationship and differences, if any, between the substantive law and procedural law. Both are related to each other as follows.

1) Substantive law and procedural law are the two main categories within the law. One without the other is useless. Both are essential for delivery of justice.
2) Procedural law is an adjunct or an accessory to substantive law and renders the enforcement of substantive rights very effective.
3) Both, substantive law and procedural law, are codified in the form of rules. While the substantive law refers to the body of rules that stipulate the rights and obligations of individuals and collective bodies, the procedural law is

also the body of rules, but governing the process of determining the stipulated rights and liabilities of the parties in the given facts and circumstances.

4) Substantive laws and procedural laws exist in both civil and criminal laws. But, in criminal law, if the procedural law is used to prevent commission of offences then it assumes the character of substantive law as well.

We also need to understand the difference or the distinction between the substantive law and procedural law. Substantive law precedes the procedural law. Procedural laws sub-serve the substantive laws in the sense that the former will act as a means to promote and achieve the interests, objectives, aims or goals of the latter.

Justice Schroeder (*Sutt v Sutt,* 1969) explained in a family law case, that "It is vitally important to keep in mind the essential distinction between substantive and procedural law". Substantive law creates rights and obligations, and is concerned with the ends which the administration of justice seeks to attain. It defines the actual law set down by the legislature, such as elements of a right, liability/obligation, crime, penalties to be imposed, rules of evidence, etc. Procedural law defines the manner in which the case proceeds and will be handled. In a criminal case, if the state violates a substantive rule of law, that is more likely to result in reversal of a conviction than a violation of criminal procedural law (unless the violation relates to a constitutional or legal protection).

We can conclude that the substantive law defines the rights and duties, while procedural law provides the machinery or mechanism for enforcing the rights and duties. However, the clear differentiation between substantive law and procedural law is that the latter sub-serves the former. Even though both these laws are affected by Supreme Court opinions and are subject to constitutional interpretations, each serves a different function in the civil and criminal justice system. A legal action is started by taking out a writ in civil case, by a summon or an arrest in a Criminal case, and ends by the trail and judgment in the court itself, followed by the execution of the judgment.

Whether the law is civil or criminal, it may all be classified as substantive law and procedural law. From this point of view, we may divide law into 4 branches as follows: i) Civil Substantive law, ii) Civil Procedural law, iii) Criminal Substantive law, and iv) Criminal Procedural law. With the above clarity on the concepts of substantive law and criminal law as well as the relationship and the distinction between the two broad braches of law, let us now have a look at the substantive and procedural laws with special reference to civil and criminal laws.

Check Your Progress

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

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

1) Define substantive law and procedural law.

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2) Explain the relationship and differences between substantive law and procedural law.

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2.3 CIVIL LAW

Civil law can be both substantive and procedural. The civil substantive law refers to what the statute or regulation actually says. Civil procedural law refers to both statutory as well as other rules set out by the court or other competent agency for handling the application of the law.

For instance, the law says that "you can't make loud noises after 10 P.M. within the city limits". Then,

1) the substance of the law is: i) the loud noise, ii) the time, iii) the place, and iv) the prohibition.

2) the procedure of law may be to call the police, lodge a complaint, appear before the court at specified time and place, testify in a certain manner, etc.

The above instance has illustrated the substantive and procedural aspects of law.

2.3.1 Civil Substantive Law

As mentioned in Unit-1 of this Block, law is a set of codified rules. So, the Acts/ Statutes are nothing but the codified rules in respect of specified matter(s). These substantive laws (Acts/Statutes) are made by Parliament at the Central level, or the Legislature at the State level or other competent law-making body at that respective level. The substantive laws so made cover wide range of subjects and many different laws. Just to provide you clarity, some specific instances of civil substantive laws are given below.

- Law of Contract — The Indian Contract Act, 1872.
- Law of Marriage — The Hindu Marriage Act, 1955.
- Labour Law — includes many Acts covering different labour related matters.
- Law of Transfer of Property – The Transfer of Property Act, 1882.
- Law of Torts – No particular Act (legislation), but based on certain well-established/recognized principles and rules.

We will now explain the specific Acts (laws) in some details so as to provide you better understanding of the civil substantive law.

A) **Law of Contract:** Here, let us look at the Indian Contract Act, as an instance, to explain the gist of substantive law of contract.

The Indian Contract Act, 1872: Mercantile Law is that branch of law which is connected with and deals with the rights and obligations arising out of commercial transactions entered into by traders. For instance, an essential aspect of a business transaction is the creation of a contract — express or implied — governed by commercial laws which include law of contract that lays down the general principles of contract as well as the principles of special contracts like indemnity and guarantee, bailment, agency and pledge. In addition to these, Sale of Goods Act, 1930, Partnership Act, 1932, Negotiable Instruments Act, 1881, etc., govern the relations between the persons carrying on business as well as their relations with third parties, among others.

- Section 2(h) of the Indian Contract, 1872 defines the term 'contract' as "An agreement enforceable by the law is a contract." An 'agreement' is defined as "every promise and every set of promises forming the consideration for each other". According to Section 2(h), "A proposal, when accepted, becomes a promise." A contract is an agreement, an agreement is a promise and a promise is an accepted proposal. Hence, every agreement, in its ultimate analysis, is composed of a proposal from one side and its acceptance by the other.

- According to Section 10, an agreement is a contract when it is made for some consideration, between parties who are competent, with their free consent and for a lawful object. Thus, every contract is an agreement, but every agreement is not a contract. An agreement grows into a contract when the following conditions are satisfied.

  1) There is some consideration for it.
  2) The parties are competent to contract.
  3) Their consent is free.
  4) Their object (consideration) is lawful.

- After the formation of a valid contract, the next stage is reached, namely, the fulfillment of the object the parties had in mind. When the object is fulfilled the liability of either party under the contract comes to an end. The contract is then said to be discharged. But "performance" is not the only way in which a contract is discharged. A contract may be discharged in different ways such as: i) By performance (Sections 37-67); ii) By Impossibility of performance (Section 56); iii) By Agreement (Ss.62-67); etc.

- Bailment implies a sort of relationship in which the personal property of one person temporarily goes into the possession of another. The ownership of the articles or goods is in one person and the possession in another. For example, delivering a cycle, watch or any other article for repair, or leaving a cycle or car, etc., at a stand, are all familiar situations

which create the relationship of bailment. Thus, a bailment is a subject of considerable public importance. The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor in this case is called the pownor. The bailee is called the "pownee".

- The Contract Act also defines "Agent" and "Principal". An "agent" is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal". The essentials of a contract agency, creation of agency, agent's authority, sub-agent, substituted agent, termination of agency, rights and duties of agent and principal, etc are discussed in Sections 183 to 209.

Thus, you could notice that there are many sections which deal with different aspects/matters related to contract:

- Sections 124 and 125 deal with contract of Indemnity and Sections 126 to 147 deal with the contract of Guarantee.
- Sections 148 to 181 deal with bailment of which Sections 172 to 179A deal with pledge and Sections 180 and 181 deal with suits by bailees or bailers against wrong-doers.

To sum up, all the 'Sections' of this Act are nothing but the codified rules which together formed a particular substantive law, namely, *The Contract Act, 1872* or simply, to call it so, the ***law of contract.*** This is just one example of substantive law on one subject matter, i.e. contract.

Similarly, as mentioned elsewhere above, *there are wide-ranging Acts covering different subject matters such as family law, labour law, law of torts, law of transfer of property, etc.* As one more instance, let us look at ***family law*** as another substantive law.

B) Family Law: We know that the individuals in any society have their personal faiths and beliefs. Individuals, however, join and live together in specified manner to form families. These families are governed by certain social norms and also by certain legislations. Hence, the families may be of different faiths such as Hindu family, Muslim family, Christian family and so on, depending upon their specific religious faiths and practices, and the respective personal laws the members of these families are governed by.

India is a country which abounds in personal laws; each religion/community has its own personal law. The Hindus, the majority community, have their separate family law, so have the Muslims, the biggest minority community, and others as well. Thus, smaller minority communities such as the Christians, Parsis and Jews, whose number in the context of the total population of India is not very significant, too have their own separate family laws.

➢ After codification, the Hindu Law is divided into the following *four enactments* (Paras Diwan, 2009).

1) The Hindu Marriage Act, 1955, which has abolished polygamy and introduced strict monogamy for all Hindus. Divorce and

separation have been recognized by the Act. It also specifies, among others, when a marriage is valid, when it is void, when it is voidable, and so on.

2) *The Hindu Minority and Guardianship Act, 1956* deals essentially with: a) Guardianship of person of minors, b) Guardianship of the property of minors, c) De facto guardian, and d) Guardians by affinity.

3) *The Hindu Adoptions and Maintenance Act, 1956* defines 'maintenance' as "provision for food, clothing, residence, education, and medical attendance and treatment". It deals with: i) Personal obligation to maintain certain relations; ii) Obligation to maintain the dependants of the person whose property had devolved on one; and iii) Obligation of the joint family to maintain its members. It has steered off clearly from all the religious and sacramental aspects of adoption, and has made adoption a secular institution and secular act, so much so that even a religious ceremony is, now, not necessary for adoption. All adoptions after 1956 are secular, and to be valid, must conform to the requirements of the Act. The law of adoption enables a childless person to make somebody else's child as his own.

4) *The Hindu Succession Act, 1956* lays down uniform law of succession for all Hindus. It bases its rule of succession on the principle of propinquity, i.e. preference of heirs on the basis of proximity of relationship.

- The Muslim matrimonial law has been statutorily modified by the Muslim Dissolution of Marriage Act, 1939, so as to permit the wife to have judicial divorce. The wakf Act, 1954 has made some changes in the traditional Muslim law. The rest of Muslim law is still traditional.

- The Christian law in India is based on the 19th century English law. The Christian matrimonial law in India is contained in the Indian Christian Marriage Act, 1882 and the Indian Divorce Act, 1869.

- The Parsi matrimonial law, before its codification, was based on Hindu customs and English common law. Conceding to the demand of the Parsi community for the reform of their matrimonial law, the Parsi Marriage and Divorce Act was passed in 1865. It was modified in 1936 and in 1988 and now almost at par with Hindu matrimonial law.

- The Jew matrimonial law is still based on customs.

India has another aspect of family law – a family law which is applicable to the parties, only if they choose to be governed by it. "Any two persons" belonging to any Community, religion, nationality or domicile in India or abroad may opt to marry under the provisions of the Special Marriage Act, 1854, and if they do so, whichever community, religion or nationality any one of them (or both of them) may belong to, or wherever they may be domiciled, they will be governed by the provisions of the Act and not by any other personal law.

C) **Labour Law:** The other substantive law is labour law. Labour legislation in India grew with the growth of industry. A number of labour legislations have been enacted to improve the conditions of the labour keeping in view the development of industry and national economy. The plantation industry in Assam was the first to attract legislative control in India. A number of Acts were passed from 1863 onwards. The important social security Acts include: Workmen's Compensation Act, 1923 (now Workers' Compensation Act, 1923), The Employee's State Insurance Act, 1948, the Employee's Provident Funds Act, 1952, the Industrial Disputes Act, 1947, the Trade Unions Act, 1926 and the Maternity Benefit Act, 1961. Laws were also made to regulate the labour-management relations. Some of them are: The Industrial Employment (Standing Orders) Act, 1946. Labour legislations ensuring labour welfare and minimum standards were also enacted. Some of them are: The Factories Act, 1948, The Minimum wages Act, 1948, The Payment of Wages Act, 1936 and The Payment of Bonus Act, 1965.

D) **Law of Transfer of Property:** The Transfer of Property Act, 1882 has been enacted with an object to "define and amend certain parts of the law relating to the transfer of property by act of parties". Transfer 'by act of parties' is a transfer which takes place between two living persons. Such transfers are also called 'transfer inter-vivos'. On the other hand, transfer of property under will or inheritance of property by an order of the court is a transfer by 'operation of law'. It is not a transfer by act of parties because in such transfers the transferor is not a living person and the transfer takes place automatically under the given law.

Transfer of properties by operation of law are governed by personal laws, e.g. Hindu and Muslim law of wills and inheritance by order of the court as per the law. Transfer of movable properties by act of parties was earlier regulated by Chapter VII (Sections 76 to 123) of the Indian Contract Act, 1872, which was repealed and enacted as separate Act as Sale of Goods Act, 1930. Thus, before 1882, although there were specific provisions for the transfers by operation of law under the personal laws and there was also law for the transfer (sale) of movable properties by act of parties, but there was no definite law for the transfer of immovable properties by act of parties. In the absence of any specific enacted law for the transfers of immovable properties by act of parties, the Anglo-Indian courts used to decide the cases by applying the principles of equity, justice and good conscience as it prevailed in England. A clear, certain and uniform law for the transfer of immovable properties by act of parties was, therefore, urgently required in India then. Thus, the law of Transfer of Property Act came into existence in 1882 with an object to provide a definite, clear and uniform law for transfer of immovable property by act of parties, i.e. transfer between living persons, suitable to the socio-economic conditions of India. The enactment contains 137 sections, divided in three parts: Sections 5 to 37 deal with transfer of property, whether movable or immovable; Sections 38 to 53-A deal with transfer of immovable property; and the other part deals with the sale of immovable property, mortgages of immovable property, and charges and leases of immovable property, exchanges, gifts and transfer of actionable claims.

E) **Law of Torts:** Another substantive law is Law of Torts. Analytically, the law of tort (or torts) is a branch of the law of obligations, where the legal obligations to refrain from causing harm to another and, if harm is done to repair it or compensate for it, etc., are imposed not by agreement but independently of agreement by force of the general law. Socially the function of tort is to shift loss sustained by one to the person who is deemed to have caused it or been responsible for its happening, and in some measure to spread the loss over an enterprise or even the whole community. Historically, there was no general principle of tortious liability, but the king's courts gave remedies for various forms of trespass and direct injuries, and later allowed an action on the case for harm indirectly caused. Other forms of harm later became redressible, e.g. libel and slander, and distinct forms of action developed to redress particular kinds of harm so that the law of tort was concerned with a number of recognized kinds of wrongs, each with distinct requirements and procedure. Statute added new entitlements to claim, e.g. in cases of fatal accidents, new grounds of liability. Case-law has extended liability, e.g. from physical injuries to mental injuries, and from intentional harms to harms done negligently, i.e. by failure to show the standard of precautions deemed necessary in the circumstances. It remains the case, however, that the law of tort is a collection of circumstances in which the courts will give a remedy, normally by way of damages, for legally unjustified harm or injury done by one person to another rather than a general principle of liability applicable to manifold cases. It is potentially confusing to think of tort as connected with wrongs, as the wrongful element consists only in there having been a breach of legal duty, which may be purely technical and not involve any moral delinquency or criminality.

Tort and crime sprang from a common tool but have diverged in many respects. Therefore, it is still true that many common law crimes are also actionable torts but not the converse e.g. assault. Liability, in general, depends on the defendant having, by act or omission, acted in breach of a legal duty incumbent of view and infringed a recognized legal right vested in the plaintiff, and thereby caused the plaintiff a harm of a foreseeable kind. Not every harm is actionable, there is no liability for an inevitable accident, or an act of God: there are justifications such as statutory or common law authority. The peculiarity consequence of liability may be shifted by liability insurance.

In tort law, the principle of vicarious liability applies, and joint tortfeasors are all liable for the whole harm caused, with right of relief inter se. If the plaintiff was himself wholly or partly to blame for the damage, damages awarded may be reduced in proportion to the degree in which he was at fault. The standard of care and precautions which imports liability for harm, is generally a failure to take the care and precautions which were reasonable in the circumstances, but in certain cases strict liability applies, where the defendant is liable if he failed to avoid the evil consequences, unless he can establish one of certain limited defences, and in cases of breach of statutory duty the liability may be absolute, i.e. there is liability if the prohibited harm happens at all, irrespective of precautions.

Torts may be classified into those involving intention, those involving negligence, and the wrongs of strict liability. They may also be classified

into torts affecting the person (e.g. trespass, negligence), the family (wrongful death of a relative), reputation (libel and slander), property (e.g. trespass to land or goods, nuisance, conversion), economic rights (deceit, inducement of breach of contract, injurious falsehood), and certain miscellaneous torts such as conspiracy. There are certain kinds of conduct such as infringement of privacy, which are not yet, but may come to be recognized as actionable torts.

The normal remedy for a tort is an award of pecuniary damages in compensation for the harm done; in personal injury and death cases the computation of damages involves many complicated issues. In some circumstances such as nuisance, an injunction is a competent remedy.

The above types of substantive laws are not exhaustive, but illustrative only. We have, thus, focused our discussion on what substantive law is and how it is useful to society. We, now, discuss Civil Procedural Law which actually facilitates giving effect to civil substantive laws.

2.3.2 Civil Procedural Law

Though the substantive laws are very important, the value and importance of procedural law, or otherwise called adjudicative law, cannot be under-estimated. It is a set of rules codified as a procedure and its main function is to facilitate the process of adjudication to meet effectively the ends of substantive law. The rules of procedure are intended to be a handmaid to the administration of justice, and they must, therefore, be constructed liberally and in such manner as to render the enforcement of substantive rights very effective. Thus, the procedural law is an adjunct or an accessory to substantive law.

The Code of Civil Procedure, 1908 is an instance of procedural law in India. The code of civil procedure is an adjective law. It neither creates nor takes away any right. It is intended to regulate the procedure to be followed by civil courts in adjudicating substantive rights under different substantive laws.

Before 1859, there was no uniform code of civil procedure. There were different systems of civil procedure in different parts of the Country. The first uniform Code of Civil Procedure was enacted in the year 1859. But, that Code was not made applicable to the Supreme Courts in the Presidency Towns and to the Presidency Small Cause Courts. Though some amendments were made therein and the code was applied to the whole of British India, there were many defects in it, and, therefore, a new code was enacted in 1877. Again, another code was enacted in 1882, which was also amended from time to time. In the year 1908, the present Code of Civil Procedure was enacted. It was amended by two important Amendment Acts in 1951 and 1956. Due to some defects, again in 1976, the code was further enacted which was also not found sufficient. In pursuance of Justice Malimath committee the code was amended by the Amendment Acts of 1996 and 2002.

In *Saiyad Mohd. v Abdulhabib* (1988, p.1624) the Supreme Court stated that "A procedural law is always in aid of justice, not in contradiction or to defeat the very object which is sought to be achieved by substantive law. Procedural law is always subservient to the substantive law. Procedural law cannot give what is not sought to be given by a substantive law, nor it can take away what is given by the substantive law.

For your better understanding of the civil procedural law, let us have a look at the Code of Civil Procedure, 1908. It consist of: i) the body of the code containing 158 sections divided into eleven parts; and ii) the First Schedule containing 51 Orders with Rules. In the body, Sections 1 to 8 are preliminary in nature.

Part-I (Sections 9 to 35B) and orders 1 to 20 of the First Schedule deal with suits.

- Sections 15 to 21-A regulate the place of suing. They lay down rules as to jurisdiction of courts and objections as to jurisdiction.
- Sections 22 to 25 make provisions for transfer and withdrawal of suits, appeals and other proceedings from one court to another.
- Orders 1 to 4 deal with institution and frame of suits, parties to suit and recognized agents and pleaders. Order 5 contains provisions as to issue and service of summons. Order 6 deals with pleadings. Orders 7 & 8 relate to plaints, written statements, set-offs and counter-claims. Order 9 requires parties to the suit to appear before the court and enumerates consequences of non-appearance. It also provides the remedy for setting aside an order of dismissal of the suit of a plaintiff and of setting aside an ex-parte decree against a defendant. Order 10 enjoins the court to examine parties with a view to ascertaining matters in controversy in the suit. Orders 11 to 13 deal with discovery, inspection and production of documents and also admissions by parties. Order 14 requires the court to frame issues and order 15 enables the court to pronounce judgment at the 'first hearing' in certain cases. Orders 16 to 18 contain provisions for summoning, attendance and examination of witness and adjournments. Order 19 empowers the court to make an order or to prove facts on the basis of an affidavit of party. Section 33 and order 20 deal with judgments and decrees.

Part II (Sections 36 to 74) and Order 21 cover execution proceedings.

Part III (Sections 75 to 78) and Order 26 make provisions as to issue of Commissions.

Parts IV and *V* (Sections 79-93) and Orders 27 to 37 lay down procedure for suits in special cases such as suits by or against Government or Public Officers. Section 89 provides for settlement of disputes outside the court through arbitration, conciliation, meditation and Lok Adalats.

Part VI (Sections 94 and 95) and Order 38 provide for arrest of a defendant and attachment before judgment. Order 39 lays down procedure for issuing temporary injunction and passing interlocutory orders. Order 40 deals with appointment of receivers. Order 25 provides for security for costs. Order 23 deals with withdrawal and compromise of suits. Order 22 declares effect of death, marriage or insolvency of a party to the suit.

Parts VII and *VIII* (Sections 96 to 115) and Orders 41 to 47 contain detailed provisions for Appeals, Reference, Review and Revision.

Part IX (Sections 116-120) deals with special provisions relating to the High Courts not being the Court of a Judicial Commissioner.

Part X (Sections 121 to 131) enables High courts to frame Rules for regulating their own procedure and the procedure of civil courts subject to their superintendence.

Part XI (Sections 132 to 158) relates to miscellaneous proceedings.

- Section 148-A permits a person to lodge a caveat in a suit or proceeding instituted or about to be instituted against him.
- Sections 148 to 153-A confer inherent powers on every civil court. Section 153-A expressly declares that the place of trial shall be open to the public. The provision, however, empowers the presiding Judge, if he thinks fit, to order that the general public or any particular person shall not have access to the court.

Check Your Progress

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

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

3) What is transfer of property?

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4) Explain the essential conditions for a valid contract?

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2.4 CRIMINAL LAW

Like civil law, criminal law can also be divided into two branches or sets of law — criminal substantive law and criminal procedural law.

Criminal substantive law deals with the *nature and substance of charges* made against a person or a group of persons. Every charge is comprised of a few elements. Number of elements are not common to all charges and vary depending upon the nature and substance of the crime/charge. These elements are the specific acts the State must prove to show that a person has committed a crime. Which specific elements are required will depend on the crime a person is charged with

committing of it, and the State's substantive laws. Criminal Procedural Law, as the name implies, sets out the procedure for how a criminal case will proceed. The procedures are usually written down in a set of codified rules called a "Code of Criminal Procedure". How much of details is required for each phase of criminal procedure will vary depending on the nature of the charges leveled against a person and also the agency prosecuting a charged person.

Criminal substantive law defines how the facts in the case will be handled, as well as how the crime is to be charged. In essence, it deals with the substance of the matter, i.e. the crime and its nature. Criminal procedural law provides the process that a case will go through (whether it goes to trial or not). In other words, the criminal procedural law determines how a proceeding concerning the enforcement of substantive law will occur. Even though both are affected by the Supreme Court decisions/opinions subject to constitutional interpretations, each serves a different but coordinating functions in the criminal justice system.

Indian Penal Code and Code of Criminal Procedure are respectively the working examples of criminal substantive law and criminal procedural law in India. To provide you more clarity about the criminal substantive law and criminal procedural law, we will discuss these two codes, in brief, below.

2.4.1 Criminal Substantive Law

While we often use the term 'crime', it is not easy to define it. Even though many jurists and authors have attempted to define it as best as they could, it is agreed by them that it is a very difficult task to define 'crime' in general. Black Stone (1978) defined a crime as "an act committed or omitted in violation of a public law forbidding or commanding it". He writes at another place that crime is "a violation of the public rights and duties due to the whole community in its social aggregate capacity". It is the substantive law that will really take of many such matters as defining crime, its nature, kind and penalties, etc.

Historically, personal safety, liberty and property are of utmost importance to every individual; but these are not protected in an uncivilized society which is not governed by any (criminal) law. Every man was liable to be attacked in his person or property at any time by any one. The person who attacked either succumbed to or over-powered his opponent. In some societies, "a tooth for a tooth, an eye for an eye, a life for a life" was the forerunner of criminal justice. Such a system gave birth to archaic criminal law. As the time advanced, reformed laws came into existence. The injured person started accepting compensation, instead of killing his adversary. Subsequently, a sliding scale came into existence providing for satisfactory compensation even for ordinary offences. For a long time, the application of these principles remained with the parties themselves, but gradually this function came to be performed by the State.

Maintenance of peace and order is essential in any advanced society and, in particular, for all human beings to live peacefully and without fear of injury to their lives, limbs and property. This is possible only in States where the penal law is effective and strong enough to deal with the violators of law. Any State, whatever might be its ideology or form of government, to be designated as a State as such, should certainly have an efficient system of penal laws in order to discharge its primary function of maintaining peace and law and order in the land. The instrument, by which this paramount duty of the government is

maintained, is undoubtedly the penal law of the land. Penal law is an instrument of social control. Its approach is condemnatory and it authorizes the infliction of punishment by the State.

Mental elements in crime: Mental elements in crime matter much in criminal law. Intention, motive, *mens rea,* knowledge, innocence, mistake of fact, mistake of law, are some of the mental elements that play a significant part in criminal law. The maxim '*Et actus non-facit reum nisi mens sitrea'* explains the significance of mental element in crime. It means 'a guilty act together with a guilty mind constitute crime'. Thus, actus, i.e. that *deed* and mens i.e the *mental processes*, both have been recognised as necessary for liability under criminal law. The *actus rens,* i.e. the result prohibited in law, the *mens sitrea*, i.e. the guilty mind, both must be present at the same time to entail conviction under criminal law. Physical act and the state of mind both are important factors to be always kept in mind while judging liability under criminal law.

As mentioned elsewhere above, the substantive law under criminal law in India is the Indian Penal Code. It codifies the nature, gravity and definition of different kinds of crimes and, accordingly, codifies the proportionate punishment/penalty for each codified crime. We will touch upon some aspects of the Indian Penal Code here so as to provide you better understanding of the criminal substantive law.

Indian Penal Code, 1860: The Indian Penal Code is the criminal law in India which superseded all then existing Rules, Regulations and Orders, and provided a uniform criminal law, a substantive criminal law, for all the people irrespective of caste, creed or religion. It deals specifically with offences, and states what matters are offences, what will afford an excuse or a defence to a charge of an offence, and what will be the punishments and penalties for the given offences.

The IPC is divided into XXIII Chapters and 511 Sections. Chapter I (Sections 1 to 5) deals with the extent of operation of the code, punishment of offences committed within India and punishment for offences committed beyond India, but which by law may be tried within India. The code will not be applicable to the extra-territorial offences.

- Sections 76 to 95 of the code deals with general exceptions. Right of Private Defence is covered under Sections 96 to 106.
- Abetment and Criminal Conspiracy are explained under Sections 107 to 120B.
- Offences against the State, offences relating to the Army, Navy, Air Force, offences against the public tranquility, and offences by or relating to public servants are discussed under Sections 121 to 171.
- Sections 171-A to 267 deal with the offences relating to elections, contempt of the lawful authority of public servants, false evidence and offences against public justice, offences relating to coin and government stamps and offences relating to weights and measures.
- Offences affecting the public health, safety, convenience, decency and morals, and offences relating to religion are mentioned under sections 268 to 298.

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- Offences affecting the public health, safety, convenience, decency and morals, and offences relating to religion are mentioned under sections 268 to 298.

- Offences affecting life like culpable homicide, murder, hurt, criminal force and assault, kidnapping, abduction, slavery and forced labour, sexual offences, and unnatural offences are discussed under sections 299 to 377.

- Sections 378 to 489 deal with the offences against property like theft, extortion, robbery and decoity, criminal misappropriation of property, criminal breach of trust, receiving of stolen property, cheating, mischief, criminal trespass, and offences relating to documents and to property marks.

- Section 489-A to 489-D were added to the IPC by the Currency Notes Forgery Act, 1889 in order to protect currency-notes and bank-notes from forgery. Prior to this, there were no special provisions dealing with currency-notes as the IPC was passed when paper-currency was not in vogue in India. Paper currency was introduced when the IPC was just being introduced. Forgery of currency-notes and making or possessing counterfeit currency-notes earlier were governed by the provisions of the IPC dealing with forgery of valuable securities (Sec.467) and making or possessing counterfeit seals, plates (Sec.472). However, these sections proved less effective for securing convictions for counterfeiting or possessing counterfeit currency-notes as well as for making or possessing instruments for counterfeiting currency-notes. Sections 489-E was inserted in the IPC by the Indian Penal Code (Amendment) Act, 1943 for prohibiting and penalising the acts of bringing in circulation photo-prints or otherwise printed or reproduced or imitated currency-notes or bank-notes.

- Offences relating to marriage such as cohabitation caused by a man deceitfully inducing belief or lawful marriage, marrying again during lifetime of husband or wife with concealment of former marriage from person with whom subsequent marriage is contracted, marriage ceremony fraudulently gone through without lawful marriage, adultery, enticing or taking away or detaining with criminal intent a married women are discussed under Sections 493 to 498. Section 498-A has been introduced in the Code by the Criminal Law (Amendment) Act, 1983 to combat the menace of dowry deaths. Defamation, criminal intimidation, insult and annoyance and attempts to commit offences are discussed under rest of the sections of IPC.

You can understand that all these sections, amongst other things, of the IPC provide you sufficient clarity of different types of offences and the punishments and/or penalties for the same. It also deals with effective defenses available to the individual(s) charged with offences.

2.4.2 Criminal Procedural Law

As mentioned above, the criminal law of India has been broadly codified into the Indian Penal Code (IPC) and the Criminal Procedure Code (CrPC). The former (IPC) is the criminal substantive law, and the latter (CrPC) is the criminal procedural law. Since sub-section 2.4.1 has dealt with criminal substantive law (IPC), we now deal with criminal procedural law (CrPC) below.

The CrPC provides for effective enforcement of IPC, which is the substantive law. The Criminal Procedure Code, 1908 sets out a body of rules which must be followed in the investigation, inquiry or trail of offence under the Indian Penal

Code as well as offences under other Acts. Section 5 of CrPC says: "All offences under the Indian Penal code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions contained in the code". It tells not only about how to punish for but also about how to prevent offences. Though it is mainly procedural, many of its proceedings also have a substantive character such as maintenance proceedings (habeas corpus proceedings, security proceedings or proceedings for the maintenance of law and order which impinge upon our rights and liberties). The criminal procedure code shall not affect any special or local law which may be, for the time being, in force. Therefore, though the Criminal Procedure Code is mainly an adjective law of procedure, yet it is wrong to say that the Code is purely an adjectival law; the reason being that there are certain provisions of the code which are of *semi-substantive character*, e. g. prevention of offences, maintenance proceedings, etc.

- ***Object of criminal procedure:*** The law of criminal procedure is intended to provide a mechanism for the enforcement of criminal substantive law. Without proper procedural law, the substantive criminal law which defines offences and provides punishments for the same would be almost of no use; because, in the absence of enforcement machinery, the threat of punishment held out to the law-breakers by the substantive criminal law would remain empty in practice. Empty threats do not deter, and without deterrent effect, the law of crimes will have hardly any meaning or justification. The law of criminal procedure is meant to be complementary to criminal substantive law and has been designed to look after the process of its administration.

- ***Importance or significance of criminal procedure:*** The law of criminal procedure has great significance for three main reasons.

  i) It is more constantly used and affects a greater number of persons than any other law.

  ii) The nature of its subject-matter is such that the human values are involved in it to a greater degree than in other laws.

  iii) As the law of criminal procedure is complementary to the substantive criminal law, its failure would seriously affect the substantive criminal law, which in turn would considerably affect the protection that it gives to society. Therefore, it has been rightly said that too much expenses, delay and uncertainty in applying the law of criminal procedure would render even the best of penal laws useless, ineffective and oppressive.

Prior to the Criminal Procedure Code, 1973, there was no uniform and effective law of criminal procedure for the whole of India. There existed separate Acts, mostly rudimentary in character which prescribed the Procedure of Courts in Provinces and Presidency towns. It was Criminal Procedure Code of 1861 which was initially enacted to be a uniform law of procedure for whole of India including the presidency towns. It was replaced by the Criminal Procedure Code of 1882, which also underwent several amendments from time to time, and followed by the Code of 1898. The most extensive and significant amendment was made by the Code of Criminal Procedure (Amendment) Act (Act XXVI of 1955). Yet, a constant demand was made for the revision of the Code. In pursuance of Law Commission Report, a draft bill was prepared and was passed by both the Houses

of Parliament, and the present Code of Criminal Procedure, 1973 came into force.

The present Code of Criminal Procedure contains 37 Chapters with 484 Sections.

- The *first* chapter deals with preliminaries, such as the title, scope, extent of the code and the definition of terms used therein.
- The *second* chapter tells us how many kinds of courts are constituted under the code. It tells us the powers and designation of some officers including the appointment of Judges, Magistrates, Public Prosecutors and Assistant Public Prosecutors,
- The *third* chapter deals with the powers of courts.
- The *fourth* deals with the powers of superior police officers and aid to the Magistrate, Public Prosecutors, Assistant Public Prosecutors and the police.
- The *fifth* chapter deals with arrest, escape and re-taking, the *sixth* with process to compel appearance the *seventh* with production of document or a thing and movable property.
- Chapters VIII, X and XI deal with powers and measures to prevent a breach of peace, to disperse unlawful assemblies, remove public nuisance and settle disputes relating to property likely to provoke a breach of the peace and preventive action of police, while Chapter IX deals with the maintenance of deserted wives, children and parents who require immediate care and attention and whose neglect is an unhappy social feature, which are substantive provisions.
- Chapter XII deals with information to the police and their powers to investigate.
- Chapter XIII deals with the jurisdiction of Criminal Courts.
- Chapter XIV deals with conditions requisite for initiation of proceedings.
- Chapters XV to XXIV deal with the procedure in trials and inquiries before courts.
- Chapter XXV tells us how to proceed when the accused is a lunatic or an insane person unable to understand the nature of the proceeding against him.
- Chapters XXVI, XXVII and XXIII deal with judgments, sentence, their confirmation, etc., including execution of sentences and orders, suspension, remission and commutation of sentences.
- Chapters XXIX and XXX deal with appeals, reference and revision. The remaining chapters deal with extensive variety of miscellaneous subjects such as bail bonds, disposal of property, transfer of cases, examination of witnesses, irregularity of proceedings, etc.

Based on the above discussion on criminal law, you must have got clarity that the criminal procedural law facilitates effective enforcement of criminal substantive law in due respect and, thus, the administration of criminal justice.

Check Your Progress

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

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

5) Explain the maxim *Et actus non-facit reum nisi mens sitrea.*

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6) Explain the importance of Criminal Procedure Code.

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2.5 ADMINISTRATIVE LAW

While the delivery of justice involving the issues related to constitutional, civil or criminal law is performed by the courts (the judiciary), effective implementation of all laws including the constitutional provisions primarily falls in the domain of governance – entire administrative machinery – at Central, State and other levels. Administrative law actually enables the authorities to perform not only pure administrative functions but also many legislative and quasi-judicial functions as part of the administration. Like the civil and criminal law, the administrative law can also be divided into two branches – administrative substantive law and administrative procedural law. We will discuss these laws below.

2.5.1 Administrative Substantive Law

As we know, administration is not a new concept. Its origin in any society can be traced to the beginning of organization of social system. It (administration) is as ancient as the human civilisation and a concomitant of organized administration. But, the administration gradually became popular with institutionalization of administration backed by clear governing rules and regulations. For example, in India, administrative law can be traced to the well-organised and centralized administration under the Mauryas and the Guptas, several centuries before the Christ. However, the administration under the East India Company is the precursor of the modern administrative system. Thus, administration is not of recent origin

and has been very much in existence since the times immemorial, but in different forms: the administrative law was not necessarily written law, yet the rules were very effectively implemented. In the twentieth century, administrative law has been characterized as the most outstanding legal development with well documented law; it does not mean that there was no administrative law earlier, as it existed in the form of unwritten law. Administrative law has grown and developed tremendously, in both quantitative and qualitative terms, in the twentieth century; it has become more articulated, definite and well-established system in all countries – democratic, communist or monarchies. It has assumed a more recognizable form in the present century so much so that it has come to be identified as a branch of public law by itself. It is essential because the State is not merely a police State exercising sovereign functions, but a progressive State as well which seeks to ensure social security and social welfare for the common man, regulate the industrial relations, exercise control over the production, manufacture and distribution of essential commodities, start many enterprises, try to achieve equality for all, ensure equal pay for equal work, and so on. It improves slums, looks after the health and morals of the people, provides education to children and takes all the steps which social justice demands. All these developments have widened the scope and ambit of administrative law.

In a democratic country, administrative law is an integral and inseparable part of the general law of the land and of the specific Acts/Statutes legislated by the respective legislative bodies. Thus, the administrative law sub-serves the interests and objects of the general law of the land as well as the specific legislations.

Therefore, in this section, we will focus on important aspects of administrative law, not as separate branches like administrative substantive law and procedural substantive law. This is because of the fact that it is very difficult to clearly demarcate administrative law into two branches like administrative substantive law and administrative procedural law. However, the discussion on administrative law below will enable you to understand the subtle difference between the substantive and procedural aspects of it.

2.5.1.1 Concept of Administrative Law

We know that the main object of administrative law is to protect individual rights and institutional interests in a given organizational set-up. Some people place greater emphasis upon administration of rules which are designed to ensure that the organization performs its tasks effectively. Yet, others see the principal objective of administrative law as ensuring governmental accountability and fostering participation by interested parties in the decision-making process. It is indeed difficult task to evolve a scientific, precise and satisfactory definition of administrative law and demarcate its nature, scope and content. However, a look at some definitions will provide us clarity as to what the administrative law is.

Ivor Jennings (1959) defines administrative law as the law relating to the administration. It determines the organization, powers and duties of the administrative authorities. Griffith and Street (1967) state as follows.

i) Administrative law does not distinguish itself from Constitutional law; and

ii) In a broad sense, administrative law is the law that determines the powers and functions of administrative authorities, and also deals with the substantive aspects of such powers. For example, legislations relating to

public health services, houses, town and country planning, etc., that deal with administration of public services/amenities are not included within the scope and ambit of administrative law. Further, administrative law does not include the remedies available to an aggrieved person when his rights are adversely affected by the administration.

According to Davis (1972), administrative law is the law concerning the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action. Wade and Forsyth (2005) define administrative law as the law relating to the control of governmental power. According to him, the primary object of administrative law is to keep powers of the government within their legal bounds so as to protect the citizens against their abuse.

According to Jain and Jain (2007), administrative law deals with the structure, powers and functions of the organs of administration, the limits of their powers, the methods and procedures followed by them in exercising their powers and functions, and the methods by which their powers are controlled including the legal remedies available to a person against them when his rights are infringed by their operation.

With the above understanding of the concept of administrative law, we will now attempt to study its nature, scope and functions that will enable us to understand administrative substantive law and administrative procedural law in the context of administrative law.

2.5.1.2 Nature and Scope of Administrative Law

Administrative law deals with the powers of administrative authorities, the manner in which the powers are exercised properly and the remedies which are available to the aggrieved persons when these powers are abused by the authorities. The main object of the study of administrative law is to unravel the way in which these administrative authorities could be kept within their limits so that the discretionary powers may not be turned into arbitrary powers.

The nature of administrative law is that it facilitates exercise of administrative powers meant to perform certain functions. While a legislative act creates and promulgates general rules of conduct without specific reference to particular case(s), an administrative act applies a general rule to a particular case in accordance with the requirements of a particular policy decisions. Administration is, in fact, the process of performing acts or functions of issuing specific orders or of making decisions by applying general rules to particular cases.

The scope of administrative law can be discussed under the following:

- Delegated legislation; and
- Principles of natural justice.

A) **Delegated legislation:** According to the traditional theory, the function of the executive is to administer the law enacted by the legislature, and in the ideal State, the legislative power must be exercised exclusively by the legislators who are directly responsible to the electorate. But, the fact is that, apart from 'pure' administrative functions, the executive performs many legislative and judicial functions also.

When the function of legislation is entrusted to organs other than the legislature by the legislature itself, the legislation made by such organs is called *delegated legislation.* According to Mukharjee, J. (1970 mentioned in Takwani, 2008): "Delegated legislation is an expression which covers a multitude of confusion. It is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional Jurists".

According the Jain and Jain (2007), the term 'delegated legislation' is used in two senses; it may mean (a) exercise by a subordinate agency of the legislative power delegated to it by the legislature, or (b) the subsidiary rules themselves which are made by the subordinate authority in pursuance of the power conferred on it by the legislature. In its *first connotation*, it means that the authority making the legislation is subordinate to the legislature. The legislative powers are exercised by an authority other than the legislature in exercise of the powers delegated or conferred on them by the legislature itself. This is also known as *'subordinate legislation'*, because the powers of the authority which makes it are limited by the statute which conferred the power and consequently it is valid only insofar as it keeps within those limits. In its *second connotation,* 'delegated legislation' means and includes all rules, regulations, bye-laws, orders, etc., made by the subordinate authority. Thus, the object of the Minimum Wages Act, 1948 is "to provide for fixing minimum wages in certain employments". The Act applies to employments mentioned in the schedule. But, the Central Government (executive) is empowered to add any other employment to the schedule if, 'in the opinion of the government, the Act should apply'.

The Act/statute enacted by the legislature conferring the legislative power upon the executive is known as the *'Parent Act'* or *'Primary law'* that forms substantive administrative law, and the rules, regulations, bye-laws, orders, etc., made by the executive in pursuance of the legislative powers conferred by the legislature are known as *'subordinate laws'* or *'subsidiary laws'* or the *'child legislation'* or the *'administrative procedural law'*.

Delegated legislation does not fall beyond the scope of judicial review and in almost all the democratic countries it is accepted that courts can decide the validity or otherwise of delegated legislation mainly applying two tests:

1) Substantive Ultra vires, and
2) Procedural Ultra vires.

Ultra vires means beyond powers. These vires are discussed, in brief, below.

- *Substantive ultra vires:* It means that the delegated legislation goes beyond the scope of the authority conferred on it by the parent statute or the Constitution. It is a fundamental principle of law that a public authority cannot act outside the powers and it has been rightly described as the 'Central Principle' and foundation of large part of administrative law. An act which, for any reason, is in excess of power, is ultra vires; it means, it is beyond or outside its powers.

  A delegated legislation may be held to be invalid on the ground of substantive ultra vires in the following cases.

1) Where parent Act is unconstitutional.
2) Where delegated legislation is inconsistent with the parent Act.
3) Where delegated legislation is unconstitutional.
4) Unreasonableness of legislation.
5) Malafide, bad faith in legislation.
6) Sub-delegation in legislation.
7) Exclusion of judicial review
8) Retrospective effect.

- *Procedural ultra vires:* When a subordinate legislation fails to comply with certain procedural requirements prescribed by the parent Act or by the general law, it is known as 'procedural ultra vires'. While framing rules, bye-laws, regulations, etc., the parent Act or enabling statute may require the delegate to observe a prescribed procedure, such as holding of consultations with particular bodies or interests, publication of draft rules or bye-laws, laying them before parliament, etc. It is incumbent on the delegate to comply with these procedural requirements and to exercise the power in the manner indicated by the legislature. Failure to comply with the same may invalidate the rules so framed. But, at the same time, it is also to be noted that failure to observe the procedural requirements does not necessarily and always invalidate the rules. Thus, arises a distinction between mandatory requirements and directory requirements; non-observance of the former necessarily invalidates the rules, and not always in the case of non-observance of the latter.

Over and above, judicial and parliamentary controls, sometimes other controls and safeguards against the abuse of delegated power, are to properly and precisely limit the power of the delegate. If the extent of power is not properly defined in the Parent Act, the executive authority may usurp some powers of the legislature and may be tempted into unjustified interference with the rights of the individuals, who in turn may attempt to undermine or question the authority of the delegate. Then, the courts generally intervene and interpret the provisions of rules and regulations in such a manner as not to give blanket powers to the executive authority.

It is also argued that the delegation of power should be conferred only on trustworthy authorities such as Central Government, State Governments, etc., as these authorities will exercise the power conferred on them in a reasonable manner.

B) **Principles of Natural Justice:** Natural justice is an important concept in administrative law. Justice Megarry explained that natural justice is simple and elementary, as distinct from justice which is complex, sophisticated and technical. The *principles of natural justice* or *fundamental rules of procedure for administrative action* are neither fixed nor prescribed in any legislated code. They are better known by well established practice than they are described, and easier proclaimed than defined. 'Natural justice' means many things to many writers, lawyers, judges and administrators, among others. It has many colours and shades, and many forms and shapes (*John v Rees,* 1969).

According to de Smith, 'natural justice' expresses the close relationship between the Common Law and moral principles and it has an impressive ancestry. It is also known as 'substantial justice', 'fundamental justice', 'universal justice' or 'fair play in action'. It is a great humanising principle intended to invest law with fairness, to secure justice and to prevent miscarriage of justice (Takwani, 2008).

In the words of Hedge. J., "The aim of the rules of natural justice is to secure justice, or to put it negatively, to prevent miscarriage of justice. Indeed, from the legendary days of Adam and of Kautilya's Arthashastra, the rule of law has had this stamp of natural justice which makes it social justice" (*A. K. Kripak v Union of India,* 1970, p.150). It is settled law and there is no dispute that the principles of natural justice are binding on all the courts, judicial bodies and quasi-judicial authorities. But, the important questions are: whether these principles are applicable to administrative authorities? Or, whether those bodies are also bound to observe them? Whether an administrative order passed in violation of these principles is ultra vires on that ground? Formerly, courts had taken the view that the principles of natural justice were inapplicable to administrative orders. In *Kishan Chand v Commissioner of Police* (1961, p.705), Wanchoo, J. observed that "The compulsion of hearing before passing the order implied in the maximum *'audi alteram parterm'* applies only to judicial or quasi judicial proceedings". But, in *Ridge v Baldwin* (1963, p.66), Justice Wade states that the principles of natural justice are applicable to 'almost the whole range of administration powers'. In *State of Orissa v Binapani* (1967, p.1269), Shah J. observed that "It is true that the order is administrative in character, but even an administrative order which involves civil consequences must be made consistent with rules of natural justice".

The principles of natural justice basically include the following.

i) *Nemo judex in causa sua* (No man shall be the Judge in his own cause).

ii) *Aaudi alteram partem* (Other party to the case must be heard).

iii) *Impartiality* (Reasoned decision shall be taken and delivered in good faith).

Though the two rules of natural justice, namely, *nemo judex in causa sua* and *audi alteram partem,* have now a definite meaning and connotation in law and their content and implications are well-understood and firmly established, they are nonetheless not statutory rules. Each of these rules yields to and changes with the exigencies of different situations. They do not apply in the same manner to situations which are not alike. These rules are not cast in a rigid mould nor can they be put in a legal strait-jacket. They are not immutable, but flexible. These rules can be adopted and modified by statutes as statutory rules and also by the tribunal which has to decide a particular matter and the rules by which such tribunal is governed. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, and the special circumstances including the apprehended danger and so on.

The first principle of natural justice, that is, no man shall be a Judge in his own cause, is very essential to be adhered to by any one who is to adjudge a

matter. He cannot act as Judge of a cause in which he himself has some interest either pecuniary or otherwise as it affords the strongest proof against neutrality. Therefore, the administrator who involves himself/herself in deciding any matter should not have personal interest of any kind in it. This is to ensure fairness in decision-making process and give impartial decisions which are free from any kind of bias. Like the judge, he is supposed to be indifferent to the parties to any controversy. He must be in a position to decide the matter objectively. He should not allow his personal prejudice to go into the decision-making.

The *second* fundamental principle of natural justice is *audi alteram partem*, i.e., no man should be condemned unheard or both the sides must be heard before passing any order. A party is not to suffer in person or in purse without an opportunity of being heard. This is another principle of civilized jurisprudence and is accepted by laws of Men and God. In short, before an order is passed against any person, reasonable opportunity of being heard must be given to him. Generally, this maxim includes two elements: i) notice; and ii) fair hearing.

Both these principles of natural justice aim at impartial, objective and fair decision-making process. One thing, however, must be noted as far as administrative law is concerned. Even if the order passed by an authority or officer is *ultra vires,* or against the principles of natural justice, and therefore null and void, *it remains operative unless and until it is declared to be so by a competent court.* Consequent upon such declaration, it automatically collapses and it need not be quashed and set aside. But, in absence of such a declaration, even an *ex-facie invalid* or *void order remains in operation de facto, and it can effectively be resisted in law only by obtaining the decision of the competent court.*

All the above can be considered as essential or substantial part of administrative law.

2.5.2 Administrative Adjudication: Procedural Law

Today, the State exercises not only sovereign functions but also acts as a progressive and democratic institution. It (State) also seeks to ensure social security and social welfare for the common masses. Sometimes, the issues arising out of its functioning are not purely legal, but are often administrative. It is not possible for the ordinary courts of law to deal with all these socio-economic problems. For example: Industrial disputes between the workers and the management must be settled as early as possible as it is in the interest of not only the parties to the disputes but also the society at large. It is, however, not possible for an ordinary court of law to decide these disputes expeditiously, as it has to function as restrained by certain innate limitations. Moreover, it is necessary that such disputes should not be determined in an arbitrary or autocratic manner. Administrative tribunals are, therefore, established to decide various quasi-judicial issues in place of ordinary courts of law.

- **Constitutional recognition:** The status of tribunals has been recognized by the Constitution. Article 136 of the Constitution empowers the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order passed/made by any tribunal in India.

Likewise, Article 227 enables every High Court to exercise power of superintendence over all tribunals throughout the territories over which it exercises jurisdiction. The Constitution (42nd Amendment) Act, 1976 — Articles 323-A and 323-B — empowers the parliament to constitute administrative tribunals for settlement of disputes and adjudication of matters specified therein. The tribunal is composed of one chairman, four vice-chairmen and a number of judicial members and technical members. Lawyers can appear before the tribunal.

- **Judicial review of administrative discretion:** Judicial review is a great weapon in the hands of judges. It comprises the power of a court to hold unconstitutional and unenforceable any law or order based upon such law or any other action by a public authority which is inconsistent or in conflict with the basic law of the land.

  Judicial review in India deals with three aspects:

  i) judicial review of legislative action;

  ii) judicial review of judicial decision; and

  iii) judicial review of administrative action.

  Judicial review of administrative action is, perhaps, the most important development in the field of public law. Judicial review is the most potent weapon in the hands of the judiciary for the maintenance of the rule of law. The High Courts and the Supreme Court are the ultimate interpreters of the constitution. This is indeed a delicate task assigned to the judiciary by constitution. Judicial review is, thus, the touchstone of the constitution and the essence of the rule of law.

  As a general rule, it is accepted that courts have no power to interfere with the actions taken by administrative authorities in exercise of discretionary powers. But, with the rapid growth of administrative law and the need and necessity to control possible abuse of discretionary powers by various administrative authorities, certain principles have been evolved by the courts regarding exercise of discretionary powers. If an action taken by any authority is either contrary to law, or improper or unreasonable or irrational or in violation of the principles of natural justice, a court of law can interfere with such action by exercising its power of judicial review.

  One of such modes of exercising power is the doctrine of proportionality. It is fundamental principle of law that every power must be exercised within the legal limits. Exercise of administrative power is not an exception to this basic principle. This is the doctrine by which these limits are ascertained; the very marrow of administrative law and enforced accordingly. Unfettered discretion cannot exist where the rule of law reigns. Again, all power is capable of abuse, and that power to prevent the abuse is the acid test of effective judicial review.

- **Judicial and other remedies:** Administrative law provides for control over the administration by an outside agency strong-enough to prevent injustice to the individual, while leaving the administration adequate freedom to enable it to carry on an effective Government. Due to increase in governmental functions, administrative authorities exercise vast powers in almost all fields.

If any individual is aggrieved by any action of any administrative authority there are remedies available to him and these may be classified as follows (Lord Denning, 1949):

- Prerogative remedies,
- Constitutional remedies,
- Statutory remedies,
- Equitable remedies,
- Common law remedies,
- Parliamentary remedies,
- Conseil d'Etat,
- Ombudsman, and
- Self-help.

We will discuss these remedies, in brief, below.

i) ***Prerogative remedies:*** The founding fathers of the Constitution of India have made specific provisions in the Constitution itself empowering the Supreme Court and High Courts (Article 32 and 226) to issue writs in the nature of *habeas corpus, mandamus, prohibition, quo warranto* and *certiorari* for enforcement of Fundamental Rights. Ordinarily, a writ would lie against the State which includes the statutory bodies and persons charged with public duties. We will discuss these writs in greater detail in Unit-14 under Block-4 of this course.

- *Locus standi:* In the prerogative remedies, locus standi is an important concept that attracts serious consideration. According to the traditional theory, only a person whose right has been infringed can apply to the court. But, the modern view has liberalized the concept of aggrieved person and the right-duty pattern commonly found in private litigation has been given up. The only limitation is that such a person should not be a total stranger. A recent feature of Indian legal system is the rapid growth and development of *public interest litigation*. Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of Constitutional or legal rights of a large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. Public interest litigation is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of community and to assure them social and economic justice which is the signature tune of our Constitution.

ii) ***Constitutional remedies:*** As mentioned above, an aggrieved party has a right to approach the Supreme Court under Article 32 or a High Court under Article 226 of the Constitution of India for an appropriate writ, direction or order. These are extraordinary or prerogative remedies.

Articles 132 to 135 of the Constitution deal with appellate powers of the Supreme Court in constitutional matters and in civil and criminal cases. Article 136 of the Constitution of India confers extraordinary powers on the Supreme Court to grant special leave to appeal from any judgment, decree, determination, sentence or order passed by any court or tribunal. Article 139-A enables the Supreme Court to withdraw or transfer cases from one court to another court.

iii) ***Statutory remedies:*** In addition to the remedies mentioned above as available under the Constitution of India, different statutes also provide remedies to the aggrieved persons. They may classified into: a) Civil suits, b) Appeals to Courts, and c) Appeals to Tribunals.

iv) ***Equitable remedies:*** Against any arbitrary action of administrative authorities generally prerogative remedies are available to the aggrieved persons. The issue of writs is an extraordinary remedy and subject to the discretionary power of the court. In these ordinary circumstances, equitable remedies can be obtained against the administration. Declaration and Injunction are called as equitable remedies to the aggrieved person.

v) ***Common law remedies:*** Common law remedies include liability of the Covernment for the breach of contract and for tortious act of its servants and employees.

vi) ***Parliamentary remedies:*** England and India are democratic countries having parliamentary form of Government. There is effective control of parliament over the executive. The Executive/Ministers are responsible to Parliament/ Assemblies.

vii) ***Conseil d'Etat:*** Technically speaking, conseil d'Etat is a part of the administration, and in practice and reality it is an institution very much like a court. The actions of the administration are not immune from judicial control of this institution. It is staffed by Judges and professional experts. In fact, conseil d'Etat provides expeditious and inexpensive relief and better protection to the subjects against administrative acts or omissions than the common law courts. It has liberally interpreted the maxim *ubi jus ibi remedium* and afforded relief not only in cases of *injuria sine dommo* (injury without damages) but also in cases of *damnum sine injuria* (damages without injury).

viii) ***Ombudsman***: 'Ombudsman' means a delegate, agent, officer or Commissioner. According to Garner 'ombudsman' means "an officer of Parliament, having, as his primary function, the duty of acting as an agent for parliament, for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive. The 'ombudsman' inquires and investigates into complaints made by citizens against abuse of discretionary power, maladministration or administrative inefficiency and takes appropriate actions. For that purpose, very wide powers are conferred on him. He has access to departmental files. The complaint is not required to lead any evidence before the Ombudsman to prove his case. It is the function and duty of the Ombudsman to satisfy himself as to whether or not the complaint was justified. He can even act *suo motu.* He can grant relief to the aggrieved person as, unlike the powers of a civil court, his powers are not limited.

ix) ***Self-help:*** An aggrieved person is also entitled to resist an illegal or ultra vires order of the authority. If any person is prosecuted or any action is sought to be taken against him, he can contend that the bye-law, rule or regulation is *ultra virus* the power of the authority concerned. In case of 'purported' exercise of power, he may disobey the order passed against him.

All the above discussed aspects of administrative law, including the procedural implications, make amply clear to us both the substantive and procedural administrative laws.

Check Your Progress

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

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

7) Mention judicial and other remedies available under administrative law.

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8) Write a brief note on *Locus Standi.*

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2.6 LET US SUM UP

In this unit, we have discussed the concept of the substantive law and the procedural law and have understood the relationship and differences between the two. We have also discussed the substantive law and procedural law with special reference to civil, criminal and administrative law. We hope that whenever you read any particular law, or whenever any law is applied on you by any one in your real life situation, you will be able to identify what is substantive law that is applied and through what procedural law, and accordingly choose the ways and means of dealing with the issues involved therein.

2.7 ANSWERS TO 'CHECK YOUR PROGRESS' QUESTIONS

1) *Substantive law:* The law which defines rights and liabilities is known as substantive law. It is so called because it puts in a clear cut and precise form the substance of the subject matter for enforcing which the courts of law and the officers of law exist. The function of substantive law is to define, create and/or confer substantive legal rights or legal status, or to impose and define the nature and extent of legal duties. Substantive law defines, in respect of a specific subject, the legal rights and relationship of people among themselves or their relationship with any or many other people or between them and the State. Any wrong done by an individual, group of persons or the state against the other will make the wrong-doer liable to the others. Wrongs may be either civil or criminal. Substantive law refers to all categories of public and private law, including the law of contracts, property, torts and crimes of all kinds.

   Procedural law: The law which tells how the courts and the officers dealing with the law act in giving effects to the substantive law of the land is known as Adjectival or Procedural law. There are two broad procedural laws — 'Civil' and 'Criminal'. Of course these procedural laws are not two water-tight compartments. There are several wrongs for which there are both civil and criminal liabilities and, hence, there may be actions which are both civil and criminal in nature.

2) The *relationship* between substantive law and procedural law can be explained as follows. Substantive law and procedural law are the two main categories within law and are like two sides of the same coin. One without the other is of no use. Both are essential for delivery of justice. Both, substantive law and procedural law, are codified in the form of rules. While the substantive law refers to the body of rules that stipulate the rights and obligations of individuals and collective bodies, the procedural law is the body of rules that govern the process of determining the stipulated rights and liabilities of the parties in the given acts and circumstances.

   The *differences* between substantive law and procedural law are given below.

   i) Procedural law is an adjunct or an accessory to substantive law and renders the enforcement of substantive rights very effective.

   ii) Substantive law and procedural law exist in both civil and criminal laws. But, in criminal law, if the procedural law is used to prevent commission of offences then it assumes the character of substantive law as well.

   iii) Substantive law precedes the procedural law. Procedural laws sub-serve the substantive laws in the sense that the former will act as a means to promote and achieve the interests, objectives or goals of the latter.

   iv) The substantive law defines the rights and duties, while procedural law provides the machinery for enforcing the rights and duties. However, the clear differentiation between substantive law and procedural law is that the latter sub-serves the former. Even though both these laws are

affected by the Supreme Court opinions and both are subject to constitutional interpretations, each serves a different function in the civil and criminal justice system.

v) The provision of substantive law defines rights and duties while procedural law provides the machinery for enforcing those rights and duties. A legal action is started by taking out a writ in civil case and by a summons or an arrest in a criminal case, and ends by the trail and judgment in the court itself, finally followed by the execution of the judgment.

3) *Transfer of property:* Transfer of a thing or things by act of parties is transfer which takes place between two living persons. Such transfers are also called transfer between *inter-vivos*. Transfer of property under will and inheritance of property by an order of the court is transfer by operation of law.

According to Section 5 of Transfer of property Act, transfer of property means an act by which a living person conveys property in present or future, to one or more other living persons , or to himself, to himself and one or more other living persons.

4) Essential conditions for a valid contract include the following.

- Offer and acceptance
- Consideration
- Competent to contract or capacity to contract.
- Free consent
- Legal object.

5) The maxim *'Et actus non-facit reum nisi mens sitrea'* means 'a guilty act together with a guilty mind constitute crime. Thus, actus, i.e. that *deed* and mens i.e the *mental processes*, both have been recognised as necessary for liability under criminal law. The *actus rens,* i.e. the result prohibited in law, the *mens sitrea*, i.e the guilty of mind, both must be present at the same time to entail conviction under criminal law. Physical act and the state of mind both are important factors to be always kept in mind while judging liability under criminal law.

6) The law of criminal procedure has great significance for *three main reasons.*

- It is more constantly used and affects a greater number of persons than any other law.
- The nature of its subject-matter is such that human values are involved in it to a greater degree than in other laws.
- As the law of criminal procedure is complementary to the substantive criminal law, its failure would seriously affect the substantive criminal law which in turn would considerably affect the protection that it gives to society. Therefore, it has been rightly said that too much expenses, delay and uncertainty in applying the law of criminal procedure would render even the best of penal laws useless, ineffective and oppressive.

7) There exists judicial and other remedies under the administrative law. Administrative law provides for control over the administration by an outside agency strong-enough to prevent injustice to the individual, while leaving the administration adequate freedom to enable it to carry on an effective Government. Due to increase in governmental functions, administrative authorities exercise vast powers in almost all fields. If any individual is aggrieved by any action of any administrative authority, there are, however, remedies available to him. These remedies may be classified as follows (Lord Denning, 1949):

   i) Prerogative remedies,

   ii) Constitutional remedies,

   iii) Statutory remedies,

   iv) Equitable remedies,

   v) Common law remedies,

   vi) Parliamentary remedies,

   vii) Conseil d'Etat,

   viii) Ombudsman, and

   ix) Self-help.

8) *Locus standi:* In the prerogative remedies, locus standi is an important concept that attracts serious consideration. According to the traditional theory, only a person whose right has been infringed can apply to the court. But, the modern view has liberalized the concept of aggrieved person and the right-duty pattern commonly found in private litigation has been given up. The only limitation is that such a person should not be a total stranger. A recent feature of Indian legal system is the rapid growth and development of *public interest litigation.* Public interest litigation is brought before the court not for the purpose of enforcing the right of one individual against another as happens in the case of ordinary litigation, but it is intended to promote and vindicate public interest which demands that violations of Constitutional or legal rights of a large number of people who are poor, ignorant or in a socially or economically disadvantaged position should not go unnoticed and unredressed. Public interest litigation is a challenge as well as an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and the vulnerable sections of community, and to assure them the social and economic justice which is the signature tune of our Constitution.

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