OBJECTIVE TYPE QUESTIONS ON
CONSTITUTION OF INDIA

1. The Supreme Court of India upheld the decision to implement the quota for other backward glasses (OBCs) in higher educational institutions. The court, however, excluded the "creamy layer" from being a beneficiary. The reason is:

(a) Creamy layer is not an OBC; it is a forward caste
(b) Creamy layer is politically powerful
(c) It can compete with others on equal footing
(d) The inclusion of creamy layer would be unjust.

2. Which Article authorises the Parliament to form new States, and alter areas, boundaries or names of existing States?

(a) Article 2
(b) Article 3
(c) Article 6
(d) Article 8

3. The Speaker can ask a member of the House to stop speaking and let another member speak. This phenomenon is known as

(a) **yielding the floor**
(b) crossing the floor.
(c) anti-defection
(d) decoram

4. All-India Services come under Article:

(a) 310
(b) **312**
(c) 316
(d) 319

5. What is the duration of 'zero hour' in Lok Sabha?

(a) 15 minutes
(b) Half-an-hour
(c) One hour
(d) Not specified.

6. The State which bas the largest number of seats reserved for the Scheduled Tribes in Lok Sabha is

(a) Bihar.
(b) Gujarat.
(c) Uttar Pradesh.
(d) Madhya Pradesh.

7. Which of the following Constitutional posts is enjoyed for a fixed term?

(a) President
(b) Chief Justice
(c) Prime Minister
(d) Governor

8. Which of the following exercises, the most profound influence, in framing the Indian Constitution?

(a) British Constitution

(b) US Constitution
(c) Irish Constitution
(d) The Government of India Act, 1935.

9. From which Constitution was the Concept of a Five Year Plan borrowed into the Indian Constitution?
a) USA
b) USSR
c) UK
d) Ireland

10. The words 'secular' and 'socialist' were added to the Indian Constitution in 1975 by amending the
a) Preamble
b) Directive Principles
c) Fundamental Rights
d) All of the above

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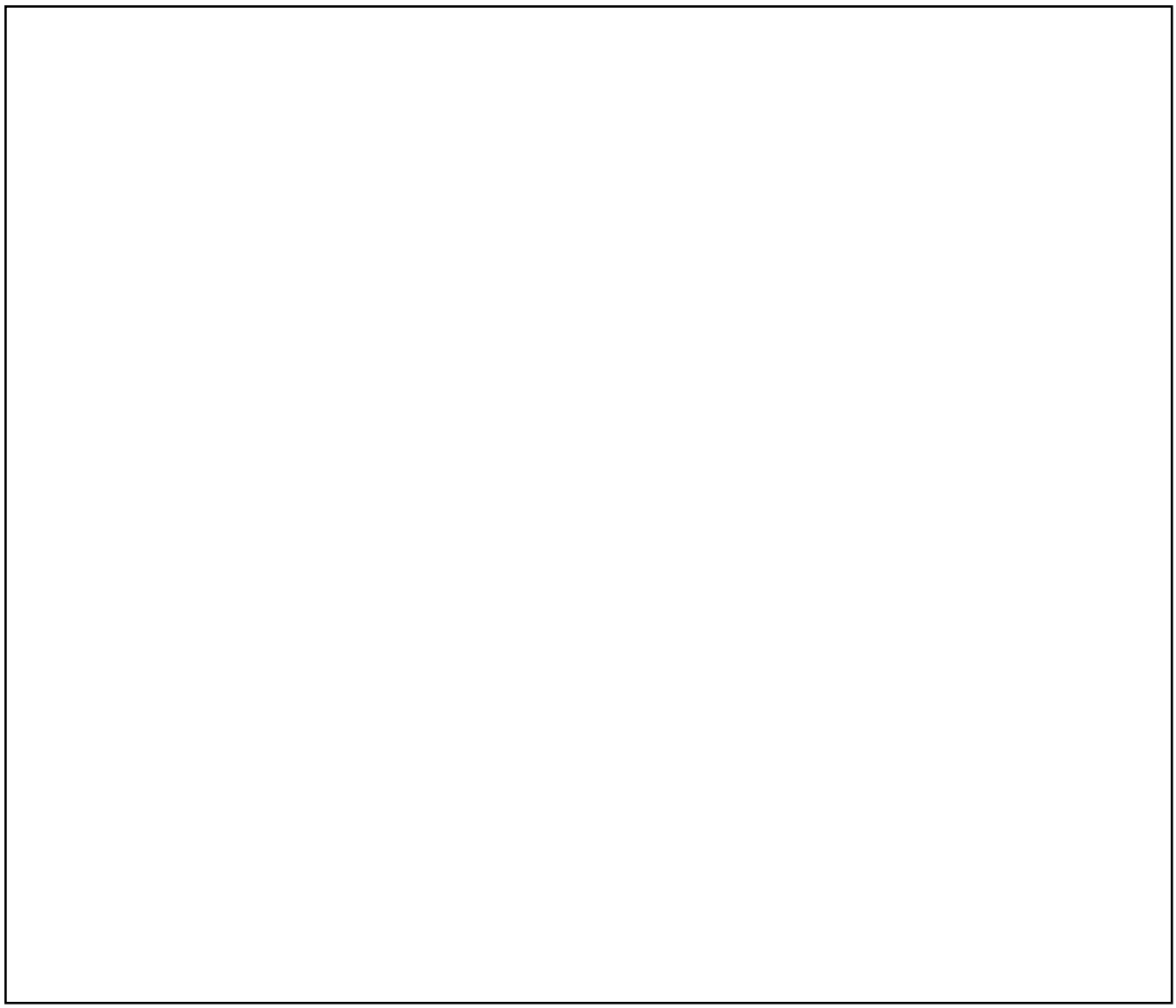

CONTRACT

1. The term contract is defined as "an agreement enforceable by law" in section _____of Indian Contract Act.
    a. 2(e)
    b. 2(h)
    c. 2(d)
    d. 2(g)

    Ans.b.
2. According to section 2(e) every promise and every set of promises forming the consideration for each other is _____
    a. Contract
    b. Agreement
    c. Offer
    d. Acceptance Ans.b.
3. A proposal when accepted becomes
    a. Offer
    b. Contract
    c. Promise
    d. Agreement

    Ans.c.
4. A promise not supported by consideration is called
    a. Nudum pactum
    b. Acceptance
    c. Agreement
    d. Proposal

    Ans.a.
5. A minor's agreement is void. This proposition is made in
    a. Nihal Chand Vs. Jan Khan
    b. Sreekrishnan Vs. Kurukshethra University
    c. Mohari Beevi Vs. Dharmodas Khosh
    d. Nanjappa Vs. Muthuswamy

    Ans.c.

6. An agreement which is enforceable by law at the option of one or more of the parties, but not at the option of the other or others is
    a. Void agreement
    b. Voidable contract
    c. Valid contract
    d. Nudum pactum

    Ans.b.
7. When the consent of a party to a contract has been obtained by undue influence, fraud or misrepresentation the contract is
    a. Legal
    b. Voidable
    c. Void
    d. Enforceable

    Ans.b.
8. The term 'proposal or offer' has been defined in section
    a. Section 2(a)
    b. Section 2(b)
    c. Section 2(c)
    d. Section 2(d)

    Ans.a.
9. A bid at an auction sale is
    a. An implied offer to buy
    b. An express offer to buy
    c. An invitation to offer to buy
    d. An invitation to come to bid Ans.a.
10. Who said "every agreement and promise enforceable at law is a contract"?
    a. Austin
    b. Bentham
    c. Pollock
    d. Salmond

    Ans.c.

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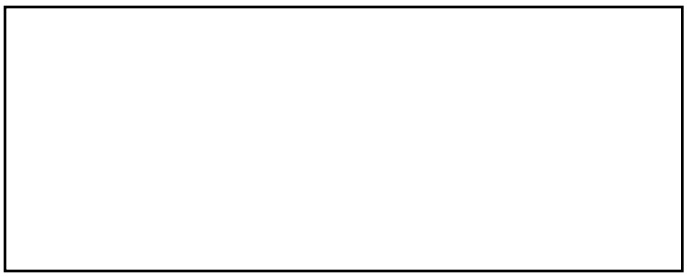
CRIMINAL LAW
(OBJECTIVE)



CRIMINAL LAW

1. When two or more persons agree to do an illegal act or do an act by illegal means such an act amounts to
   a. Criminal conspiracy
   b. Criminal indictment
   c. Abetment
   d. Constructive liability

   Ans.a
2. In kidnapping, the consent of minor is

a. Partly material
b. Wholly material
c. Party immaterial
d. Wholly immaterial

Ans.d

3. P committing a murder removed some ornaments from the dead body. Though the accused P was guilty of an offence of murder. The removal of ornaments amounts to
   a. Theft
   b. Mischief
   c. Misappropriation
   d. Robbery

   Ans.c

4. Kidnapping from lawful guardianship under section 361 of IPC can be
   a. Of a person of unsound mind
   b. Of a person under 18 years of age if female
   c. Of a person under 16 years of age if male
   d. All the above

   Ans.d

5. Right of private defence of property against robbery continues
   a. As long as the offender continues in the commission of criminal trespass or mischief
   b. As long as the fear of instant death or of instant hurt or of instant personal restraint continues
   c. As long as the offender causes or attempts to cause to any person death or hurt or wrongful restraint
   d. Both b. and c.

   Ans.d

6. Assault or criminal force used in attempting to commit theft of property is punishable under section ____ of IPC
   a. 356
   b. 378
   c. 379
   d. 384

   Ans.a

7. Whoever, either prior to or at the time of the commission of an act does anything in order to facilitate the commission of that act, and there by facilitates the commission there of, is said to _____
   a. Conspire the doing of that act
   b. Aid the doing of that act
   c. Abet the doing of that act
   d. Instigate the doing of that act

   Ans.b

8. X knows Y to be behind a bush. Z does not know it. X intending to cause or knowing it to be likely to cause Y's death, induces Z to fire at the bush. Z fires and kills Y. Here Z may be guilty of no offence, but ____

a. X has not committed any offence
b. X has committed the offence of culpable homicide
c. Z has committed offence of murder
d. Has committed the offence of abetment

Ans.b

9. In which among the following cases, the Supreme Court held that "brutality is inbuilt in every murder but in case of every murder death sentence is not imposed"?
   a. Regu Mahesh Vs. Rajendra Pratap **(2004) 1 SCC 46**
   b. Union of India Vs. Madhusudan Prasad **(2004) 1 SCC 43**
   c. State of Uttar Pradesh Vs. Lalit Tandon **(2004) 1 SCC 1**
   d. Prem Sagar Vs. Dharambir **(2004) 1 SCC 113**

   Ans.d

10. Whoever induces or attempts to induce a candidate or voter to believe that he or any person who he is interested will become or will be rendered an object of Divine displeasure or spiritual censure commits the offence of
    a. Affray
    b. Illegal gratification
    c. Bribery
    d. Undue influence

    Ans.d

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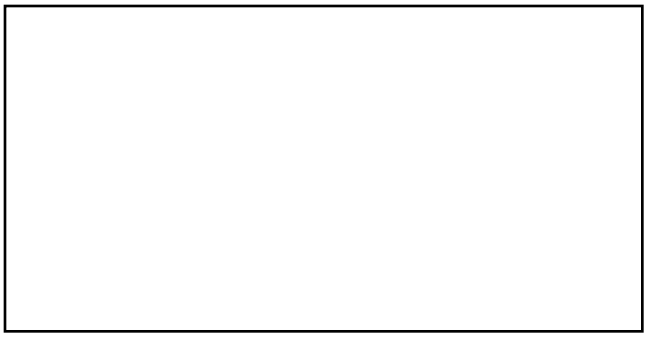
CLAT LLM 2009
SELF STUDY KIT

LEGAL THEORY
(OBJECTIVE)



LEGAL THEORY

1. Statues are "sources of law------- not parts of the law itself". This statement is made by
   (a) Savigny
   (b) Austin
   (c) Gray
   (d) Pound.

2. According to Salmond, legal sources of law

1. are recognized as such by the law itself

II. lack formal recognition by the law

III. operate mediately

IV. are the only gates through which new principles can find entrance into the law of the above statements.

(a) I and III are correct

(b) I and IV are correct

© I, III and IV are correct

(d) only I is correct

3 "Custom as a source of law comprises legal rules which have neither been promulgated by legislation nor formulated by professionally trained judges, but arises from popular opinion and is sanctioned by long usage".

Who amongst the following defined custom as above?

(a) Prof. Carter

(b) Austin

© Henry Maine

(d) Vinogradoff.

4. Blackstone says that the legislation of the ----- Parliament is Supreme according to English law for "what the Parliament doth, no authority upon earth can undo".

Choose the suitable word from the following to fil up the gap, in the above sentence:

(a) State

(b) Central

© Colonial

(d) Imperial

5 Delegation of legislative power to the representative body/authority "for the purposes of the Act" is

(a) known as constitutional legislation

(b) known as Henary VIII clause.

© **valid delegated legislation**

(d) invalid delegated legislation.

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PART-2

300 SHORT NOTES

"The life of the law has not been logic, it has been experience";(NALSAR 2007)

The great Justice Oliver Wendell Holmes, Jr. penned a host of memorable aphorisms that summarize his legal philosophy: "The life of the law has not been logic, it has been experience"; "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"; "The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it-and nothing else"; "I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law." Most memorably of all, "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."

The Common Law. Written over the course of several years (actually, a reworking of various essays and articles, some for the American Law Review) and finally published in 1881, The Common Law remains a benchmark of legal thinking. Indeed, the noted legal historian F.W. Maitland said of the work that "For a long time to come [it] will leave its mark wide and deep on all the best thoughts of Americans and Englishmen about the history of their common law."

Holmes was, at the time of its writing, in practice at Shattuck, Holmes and Munroe, following his professorship at Harvard Law School and prior to his appointment to the Supreme Judicial Court of Massachusetts. His inducement to write came in the form of an invitation to deliver a series of lectures at the Lowell Institute in Boston, twelve lectures given over the course of six weeks. The invitation came in the winter of 1879, for the lecture series to take place the following winter. At first reluctant, Holmes nevertheless saw this as an opportunity to finally collect his various writings on the common law into one work. He accepted the invitation and began his writing that summer. On November 23, 1880 Holmes delivered his first of the twelve Lowell Lectures and a few months later, the book based on his lectures was published.

The Common Law is by no means a perfect piece of legal scholarship. Indeed, for many it is more a work of philosophy than a work of law, which is not surprising given Holmes's deep interest in philosophical thinking. The fact of its imperfections, however, has not dulled its influence. Initially received with only lukewarm praise, critics noted how large areas of law were left out (which Holmes acknowledges in his preface) including Equity, Bills & Notes, and Partnership. There was also some differentiation in tone throughout, due no doubt to the nature of the work, that is, a compilation of articles written over many years. There were also complaints about uneven handling of certain topics, a certain sense of hyperbole in others, and an aggressive disregard for viewpoints in opposition to his own.

And yet, as Sheldon Novick writes in Honorable Justice: The Life of Oliver Wendell Holmes (Little Brown, 1998), "The force of the presentation overwhelmed all these defects. Beneath its immense burden of learning and its detailed expositions of history, The Common Law was a work of art more than it was a work of scholarship. It was a coldly passionate expression of intuitions. Holmes saw the landscape of the common law illuminated by his thought as by a beacon. The force of his certainty infused every word." Novick also notes that even Holmes's harshest critic, Yosal Rogat, called the work "The most important book on law ever written by an American."

A mere twenty years later, however, Holmes himself pronounced that The Common Law was "dead", noting that the "theories and points of view that were new in it, now have become familiar to the masters and even to the middle-men and distributors of ideas -- writers of textbooks and practical works..." Was he expressing dismay, or an ironic acknowledgement that even after harsh initial criticism, ideas fostered in his work had, in fact, made their way into mainstream legal thought? Possible, considering this remark from Felix Frankfurter in Of Law and Men (Harcourt Brace, 1956), "The book is a classic in the sense that its stock of ideas has been absorbed and become part of common juristic thought ... they placed law in a perspective which legal scholarship ever since has merely confirmed." For if anything, it is this common if gradual acceptance of his precepts that has made Holmes's work a classic, even now, almost 125 years later.

ESSAYS

(Part-1)

1. Judicial Activism
2. Hart's Concept of Law and the Indian Constitution (NALSAR 2004)(NALSAR 2006)
3. Transitional jurisprudence: the role of law in political transformation.
4. Women’s Reservation Bill
5. Freedom of press in India : Constitutional Perspectives
6. Should Euthanasia be Legalised in India?
7. Doctrine of pleasure and its proviso article 311 of Indian Constitution
8. The Doctrine of Promissory Estoppel – Application to the Government.
9. Legal Aid under the Constitution of India
10. Dual Citizenship (CLAT 2008)
11. Writ of Habeas corpus
12. Austin’s Concept Of Sovereignty in Indian constitution(CLAT 2008)
13. Uniform Civil Code

14. Principles of Jermy Bentham and Supreme Court of India -Case Comment on Olga Tellis and Ors. v. Bombay Municipal Corporation and Ors.
15. Sustainable Development and Indian Judiciary: (NLSU 2007)
16. I. R. Cohelo Vs. State Of Tamilnadu: Analyse the Case Relating To 9th Schedule Under Indian Constitution
17. Write a comment on State of Madras Vs Smt.Champakam Dorairajan(AIR1951 Supreme Court 226)
18. Justice delayed is justice denied…Explain
19. Do the Judges make or declare law with reference to Hart & Dworkin's Principle in Indian legal System?
20. Right to privacy Vs Right to know…which will prevail?(NLSU 2007)
21. Explain the Doctrine of Prospective over ruling
22. Write a note on Waman Rao Vs Union of India
23. Right to strike
24. Euthanasia
25. IS the foetus a human being with a fundamental right to life?
26. Legalizing live-in-relationships
27. Write a note on Moore's concept law and morality (NALSAR 2003)
28. Should Right To Information Have Been Granted as a Fundamental Right?(NALSAR 2003)
29. The Hart-Fuller Debate.(CLAT 2008)
30. The Relationship between Constitutional Law and Administrative Law.
31. Ordinance-making power: whether reviewable?
32. Executive Discretion And Article 356 Of The Constitution Of India:
33. Right to information and Judiciary
34. Law relating to Contempt of Court in India
35. Truth As Defence To Contepmt Of Court: In Re: Arundhati Roy & Court On Its Town Motion Vs M.K.Tayal
36. Judicial review as a basic structure
37. Law of torts in India

38. Education as a fundamental right(NALSAR 2006)
39. The right to speedy trial
40. State liability in tort
41. Write a comment on Fundamental right Case
42. Social Rights and the Constitution of India.
43. Is The Supreme Court Disproportionately Applying The Proportionality Principle?(Wednesbury test)
44. Changing perceptions of secularism
45. Judicial Review of Presidential Proclamation under Article 356.
46. Are Articles 15(4) and 16(4) Fundamental Right?
47. Appointment Of Non-Member Of Parliament Or State Legislature As Minister—Scope
48. Reservations (CLAT 2008)
49. Torture as a challenge to civil society and the administration of justice
50. Oriental and occidental approaches to law
51. Sentencing Discretion and IPC
52. Supreme Court of India and Social Jurisprudence
53. Need for socialistic jurisprudence
54. Rule of law and Democracy (NALSAR 2006)
55. Death Penalty
56. Fundamental duties
57. Write a note on the Amendments introduced in CR.P.C by 2005 Amendment Act
58. **Reforms in Christian law of succession in India.**
59. Developments in Muslim Law:
60. Ceremonial Validity of Hindu Marriages: Need for Reform.
61. Christian Law of Succession and Mary Roy's Case.
62. Treaty making power of a government.
63. Passing of Property in International Sale Contracts.
64. DNA Technology and Its Application in the Administration of Justice: Problems and Prospects.

65. Lawyers and the Boycott of Courts.
66. Engagement of Supreme Court judges after retirement.
67. Independence of Judiciary –
68. Judicial Reform in Justice-Delivery System.
69. Ban on smoking at public places.
70. Alternate Dispute Resolution in India.(NLASU 2007)
71. Police and Personal Liberty
72. GATT AND INDIAN CONSTITUIONAL ISSUES (NALSAR 2007).
73. Discuss the historical school of jurisprudence (NALSAR 2007).
74. WOMEN'S EMPOWERMENT—ROLE OF JUDICIARY AND LEGISLATURE (NALSAR 2007).
75. Criminalization of politics (NALSAR 2004 & 2007)
76. Legal positivism.(NALSAR 2004)
77. "Minorities right to establish and administer educational institutions. (NLSU 2006)
78. Judicial legislation (NALSAR 2007)
79. Political Parties in Indian context (NLSU 2006).
80. Changing Face Of The Legal Profession In India In The Era Of Globalization (NLSU 2006)(Opening up of legal profession to foreign competition-CLAT 2008)
81. Law as an instrument of social change (NLSU 2004 & 2007).
82. Human Rights Jurisprudence and Criminal Law (NLSU 2007).
83. NARCO ANALYSIS AND SELF INCRIMINATION (CLAT 2008).
84. PLEA BARGAINING (CLAT 2008)
85. Office of Profit under Indian Constitution (CLAT 2008)
86. Power to pardon…(CLAT 2008)
87. Comment on P.A.Inamdar Case(NALSAR 2003)
88. Theory of Justice and Rawl (NALSAR 2006)

JUDICIAL ACTIVISM

The concept of judicial activism which is another name for innovative interpretation was not of the recent past; it was born in 1804 when Chief Justice Marshall, the greatest Judge of the English-speaking world, decided *Marbury* v. *Madison*1. Marbury was appointed Judge under the Judiciary Act of 1789 by the U.S. Federal Government. Though the warrant of appointment was signed it could not be delivered. Marbury brought an action for issue of a writ of mandamus. By then, Marshall became the Chief Justice of the Supreme Court having been appointed by the outgoing President, who lost the election. Justice Marshall faced the imminent prospect of the Government not obeying the judicial fiat if the claim of Marbury was to be upheld. In a rare display of judicial statesmanship asserting the power of the Court to review the actions of the Congress and the Executive, Chief Justice Marshall declined the relief on the ground that Section 13 of the Judiciary Act of 1789, which was the foundation for the claim made by Marbury, was unconstitutional since it conferred in violation of the American Constitution, original jurisdiction on the Supreme Court to issue writs of mandamus. He observed that the Constitution was the fundamental and paramount law of the nation and "it is for the court to say what the law is". He concluded that the particular phraseology of the Constitution of the United States confirms and strengthens the principle supposed to be essential to all written Constitutions. That a law repugnant to the Constitution is void and that the courts as well as other departments are bound by that instrument. If there was conflict between a law made by the Congress and the provisions in the Constitution, it was the duty of the court to enforce the Constitution and ignore the law. The twin concepts of judicial review and judicial activism were thus born.

Judicial creativity may yield good results if it is the result of principled activism but if it is propelled by partisanship, it may result in catastrophic consequences generating conflicts which may result in social change. In 1857 when the American Supreme Court headed by Chief Justice Taney ruled in *Dred Scott* v. *Sandford* that negros were not equal to whites and the rights

guaranteed under the Constitution were not available to them, the decision had accelerated the civil war between the Northern and Southern States ultimately resulting in the abolition of slavery and strengthening of the Union.

The function of the American Judiciary was intended to be proscriptive to block the enforcement of an unjust law or action instead of being prescriptive giving directions as to how remedial actions should be taken by the Executive. The Fifth Amendment to the American Constitution mandating inter alia that no one shall be deprived of life, liberty or property without due process of law was in the beginning understood as applicable only to the Union. It however was extended by the Fourteenth Amendment to the States also. As a result of this decision, the responsibility of the American Supreme Court to interpret the legislative and executive actions in the light of the due process clause became very great.

In the initial stages, only in respect of substantive laws, the doctrine of due process was applied but later the procedural laws also were brought within its purview. Between 1898 and 1937, the American Supreme Court declared 50 Congressional enactments and 400 State laws as unconstitutional. Freedom of contract and individual rights to property came to be viewed by Judges as paramount and sacred. As a result, several welfare laws including the one pertaining to restriction of hours of labour for bakery workers were struck down. The commerce clause came in very handy for the Supreme Court to strike down several progressive legislative measures commonly called "New Deal Legislation". Restraints on manufacturing processes also came to be struck down under the commerce clause.

This active posture of the Supreme Court made the President to devise a method to increase the number of Judges by what is popularly called "court packing plan". The proposal was to retire every Judge who completed the age of 70 years and in his place to appoint two Judges with the consequence that

the majority of the Judges of the Supreme Court Bench would be the nominees of the President. The President expected support from his nominees. Although this plan did not materialise, it yielded the desired result in that the court reversed its trend. In fact, this was perceived as a success for the Executive vis-...-vis the Judiciary.

The next important development in judicial activism in the United States was noticed in the first and second *Brown cases*, when the Court, under the leadership of Chief Justice Earl Warren, disallowed racial segregation in public schools and extended that prohibition to all public facilities. The earlier position taken in *Plessy* v. *Ferguson* that blacks could be treated as a separate class but must be provided with equal facilities - separate but equal - founded on racial discrimination was rejected by the Supreme Court at the risk of disturbing the institutional comity and delicate balance between the three organs of the State - the Legislature, the Executive and the Judiciary.

These decisions highlight the judicial statesmanship of Chief Justice Earl Warren, who declared that his appointment to the Supreme Court was "a mission to do justice".

After the American Government adopted the policy of affirmative action in order to improve the economic conditions of the blacks and also remove the sense of injustice blacks as a group had nurtured, the Supreme Court sustained the legislative measures enacted in this regard. In *H. Earl Fullilove* v. *Philip M. Klutzniok* a provision in the Public Works Employment Act, 1977 requiring States to procure services or supplies from businesses owned by minority group members was upheld declaring that it is a necessary step to effectuate the constitutional mandate for equality of economic opportunity.

This progressive trend appeared to have received a setback in the very next year, i.e., 1978 in the *Regents of the University of California* v. *Allen Bakke*. Allen Bakke, a white, who failed to secure admission to the University of

California Medical School challenged a provision by which 16% of the seats were reserved in favour of disadvantaged members of certain minority races as violative of the equality clause. The Court although accepted the principle that race-conscious admission programmes for the purpose of remedying the effects of past discrimination were legally permissible, sustained the challenge and granted a declaratory relief. This decision indicates the anxiety of the Supreme Court to retain its progressive image by not departing from the earlier precedents but at the same time trying to effectively set at naught the beneficial measures intended for the advancement of the disabled sections. This was achieved by the court by putting the blame on the University that it could not produce evidence to demonstrate that the preferential qualification in favour of the disadvantaged sections was either needed or geared to promote the stated goal of delivering health care services to the communities currently underserved. Both these cases are examples of judicial activism: one to render substantive justice and the other formal justice. Fortunately, this trend came to a halt in 1989 when the Supreme Court sustained an ordinance adopted by the Virginia City Council under which non-minority contractors were required to give sub-contracts at least to the extent of 30% to one or more of the minority business enterprises.

Judicial activism was made possible in India, thanks to PIL (Public Interest Litigation). Generally speaking before the court takes up a matter for adjudication, it must be satisfied that the person who approaches it has sufficient interest in the matter. Stated differently, the test is whether the petitioner has locus standi to maintain the action? This is intended to avoid unnecessary litigation. The legal doctrine 'Jus tertii' implying that no one except the affected person can approach a court for a legal remedy was holding the field both in respect of private and public law adjudications until it was overthrown by the PIL wave.

PIL, a manifestation of judicial activism, has introduced a new dimension regarding judiciary's involvement in public administration. The sanctity of locus standi and the procedural complexities are totally side-tracked in the causes brought before the courts through PIL. In the beginning, the application of PIL was confined only to improving the lot of the disadvantaged sections of the society who by reason of their poverty and ignorance were not in a position to seek justice from the courts and, therefore, any member of the public was permitted to maintain an application for appropriate directions.

After the Constitution (Twenty fifth Amendment) Act, 1971, by which primacy was accorded to a limited extent to the Directive Principles vis-...-vis the Fundamental Rights making the former enforceable rights, the expectations of the public soared high and the demands on the courts to improve the administration by giving appropriate directions for ensuring compliance with statutory and constitutional prescriptions have increased. Beginning with the *Ratlam Municipality case* the sweep of PIL had encompassed a variety of causes.

Ensuring green belts and open spaces for maintaining ecological balance; forbidding stone-crushing activities near residential complexes; earmarking a part of the reserved forest for Adivasis to ensure their habitat and means of livelihood; compelling the municipal authorities of the Delhi Municipal Corporation to perform their statutory obligations for protecting the health of the community; compelling the industrial units to set up effluent treatment plants; directing installation of air-pollution-controlling devices for preventing air pollution; directing closure of recalcitrant factories in order to save the community from the hazards of environmental pollution and quashing of a warrant of appointment for the office of Judge, High Court of Assam and Guwahati are some of the later significant cases displaying judicial activism.

A five-member Bench of the Andhra Pradesh High Court in *D. Satyanarayana* v. *N.T. Rama Rao* has gone to the extent of laying down the proposition that the executive is accountable to the public through the instrumentality of the judiciary.

Consistency in adhering to earlier views despite the amendment of the law is an aspect - though not a brighter one - of judicial activism. Illustrative of this in the Indian context is the decision of the Supreme Court in *Bela Banerjee case* in which even after the Constitution (Fourth Amendment) Act, 1955 specifically injuncting that no law concerning acquisition of property for a public purpose shall be called in question on the ground that the compensation provided by that law is not adequate, the Supreme Court reiterated its earlier view expressed in *Subodh Gopal* and *Dwarkadas cases* to the effect that compensation is a justiciable issue and that what is provided by way of compensation must be "a just equivalent of what the owner has been deprived of". *Golak Nath case* is also an example of judicial activism in that the Supreme Court for the first time by a majority of 6 against 5, despite the earlier holding that Parliament in exercise of its constituent power can amend any provision of the Constitution, declared that the fundamental rights as enshrined in Part III of the Constitution are immutable and so beyond the reach of the amendatory process. The doctrine of "prospective overruling", a feature of the American Constitutional Law, was invoked by the Supreme Court to avoid unsettling matters which attained finality because of the earlier amendments to the Constitution. The declaration of law by the Supreme Court that in future, Indian Parliament has no power to amend any of the provisions of Part III of the Constitution became the subject-matter of very animated discussion.

Kesavananda Bharati had given a quietus to the controversy as to the immutability of any of the provisions of the Constitution. By a majority of seven against six, the Court held that under Article 368 of the Constitution, Parliament has undoubted power to amend any provision in the Constitution

but the amendatory power does not extend to alter the basic structure or framework of the Constitution. Illustratively, it was pointed out by the Supreme Court that the following, among others, are the basic features: (*i*) Supremacy of the Constitution; (*ii*) Republican and Democratic form of Government; (*iii*) Secularism; (*iv*) Separation of powers between the legislature, the executive and the judiciary; and (*v*) Federal character of the Constitution. Supremacy and permanency of the Constitution have thus been ensured by the pronouncement of the summit court of the country with the result that the basic features of the Constitution are now beyond the reach of Parliament.

The judicial power under our Constitution is vested in the Supreme Court and the High Courts which are empowered to exercise the power of judicial review both in regard to legislative and executive actions. Judges cannot shirk their responsibilities as adjudicators of legal and constitutional matters. How onerous the exercise of judicial power was was very aptly stated by Chief Justice Marshall:

"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other is treason to the Constitution."

A common criticism we hear about judicial activism is that in the name of interpreting the provisions of the Constitution and legislative enactments, the judiciary often rewrites them without explicitly stating so and in this process, some of the personal opinions of the judges metamorphose into legal principles and constitutional values. One other facet of this line of criticism is that in the name of judicial activism, the theory of separation of powers is overthrown and the judiciary is undermining the authority of the legislature

and the executive by encroaching upon the spheres reserved for them. Critics openly assert that the Constitution provides for checks and balances in order to pre-empt concentration of power by any branch not confided in it by the Constitution.

Every Judge must play an active role in the discharge of his duties as "adjudicator of disputes". His role as an interpreter of law and dispenser of justice according to law should not be allowed to be diminished either because of the perceived notions of the other two wings of the State - the legislature and the executive or any section of the public. But this cannot be termed judicial activism.

Laws enacted by the legislature must be implemented by the executive and their interpretation is within the province of the judiciary. That is the reason why judiciary has always been treated as the least dangerous branch and sometimes it is also described as the weakest of the three branches with no control either on the purse or on the sword. By reason of judicial activism, much good or harm could be brought about by the Judges by resorting to innovative interpretation. Decisions rendered by courts generally receive public acceptance in every democracy adhering to the concept of rule of law. The criticism occasionally voiced that the judiciary does not have a popular mandate and, therefore, it cannot play a prescriptive role which is the domain of the elected law-making body sounds at first blush sensible. Even so, the prescriptive role of the judiciary sometimes receives public approbation because the role played by it sustains what the Constitution mandates and averts the evils the basic document seeks to prohibit.

Interpretation of the Constitution is radically different from the interpretation of an ordinary legislative provision. The Constitution being the basic document incorporating the enduring values the nation cherished inevitably contains open-ended provisions which afford wider scope for the judiciary in the matter of interpretation. "We must never forget", observed Chief Justice

Marshall, "that it is a Constitution we are expounding ... intended to endure for ages to come and consequently to be adapted to the various crises of human affairs." In line with this thought was the view of Justice Cardozo, another great Judge:

"A Constitution states or ought to state not rules for the passing hour but principles for an expanding future."

The role of the Judge in interpreting law has been graphically described thus:

"Judges must be sometimes cautious and sometimes bold. Judges must respect both the traditions of the past and the convenience of the present. Judges must reconcile liberty and authority; the whole and its parts."

Where the public opinion asserts itself against the decisions of the judiciary, the question immediately surfaces as to the legitimacy of the judiciary since it lacks popular mandate. That is the reason why judiciary was cautioned by eminent legal philosophers to exercise great restraint while declaring the actions of the legislature unconstitutional. Judicial veto must not be exercised except in cases that "leave no room for reasonable doubt". Very eminent Judges like Holmes, Brandeis and Frankfurter always adhered to the theory of reasonable doubt believing firmly that what will appear to be unconstitutional to one person may reasonably be not so to another and that the Constitution unfolds a wide range of choices and the legislature therefore should not be presumed to be bound by any particular choice and whatever choice is rational, the court must uphold as constitutional. No legislature can with reasonable certainty foresee the future contingencies and necessarily every enacted law, on a closer scrutiny, will reveal several gaps which the judiciary is expected to fill. This is popularly called judicial legislation. Justice Oliver Wendell Holmes, while admitting this self-evident truth observed:

"... I recognise without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."

A delicate problem arises as to what constitutes a rational view according to the Constitution or an irrational view at variance with the constitutional prescriptions? To sustain a legislation or to strike it down, often times, the concept of "public interest" is relied upon by the judiciary. How slippery this doctrine of public interest is was graphically described by Justice Holmes thus:

"... (it is) a fiction intended to beautify what is disagreeable to the sufferers."

and this was resorted to as part of the unwillingness of the Judges "to grant power" and "to recognise it when it exists". According to Justice Holmes, law, including constitutional law, "is crystallised public opinion".

Subjectivity, it is now unanimously accepted, must be eschewed in the judicial process. But this is easier said than done. Often times, private notions of judges take the shape of legal principles.

Judicial activism can be compared with legislative activism. The latter is of two types: (*i*) activist law-making; and (*ii*) dynamic law-making. Activist law-making implies the legislature taking the existing ideas from the consensus prevailing in the society. Dynamic law-making surfaces when the legislature creates an idea outside the consensus and before it is formulated, propagates it. Dynamic law-making always ordinarily carries with it legitimacy because it is the creation of the legislators who have the popular mandate. Judges cannot play such a dynamic role; no idea alien to the constitutional objectives can be metamorphosed by judicial interpretation into a binding constitutional principle.

Without resorting to a preference in favour of any particular value choice and thereby inviting criticism of entering into the constitutionally forbidden area of judicial activism, the court can always draw lines at new angles by dexterously resorting to innovative interpretative processes.

The resultant situation may sometimes bring credit to the judicial institution and sometimes it may prove counter-productive. Examples of both categories are found even in the British constitutional law where the judiciary cannot go into the legality of a legislative measure enacted by Parliament. In the Indian context although it is not difficult to categorise cases under the above heads, the author refrains from doing so but nonetheless he is tempted to mention one decision as a great example of judicial boldness. Independence of the judiciary is recognised as the basic feature of the Constitution and when a person who was not qualified to become a High Court Judge was about to be sworn into the office, the Supreme Court intervened and permanently injuncted him from assuming the office and the Union of India and other constitutional functionaries not to administer oath despite the warrant of appointment issued by the President. The Court also struck a note of caution that, ordinarily, appointments to the High Court Benches should not be interfered with by the judiciary but in exceptional circumstances, interference becomes necessary. The Supreme Court had extracted the note of the Chief Justice of India who recommended an unqualified person for the office of Judge, High Court, stating that he is a judicial officer and, therefore, he was qualified for appointment. This decision is illustrative of how even high constitutional functionaries sometimes commit egregious mistakes.

In glaring contrast to this is the case of *A.D.M.* v. *Shivakant Shukla* in which the majority of the judges expressed "diamond bright" hope in the fairness of the executive in matters concerning personal liberty but later lamented for the wrong decision rendered by them. This is neither judicial restraint nor judicial boldness. Perhaps this is a rare example of judicial diffidence. The controversy is still simmering.

There is a radical difference between the traditional litigation which was essentially bipolar in which two parties are locked up in a confrontation of a controversy and the role of the judge was perceived to be passive. The modern litigation especially in the constitutional sphere involves judiciary in an active manner. The party who approaches the court not only asserts his right but also expects the court to lay down the norms for future guidance. The manner in which the prescriptive role is played by the court assumes great relevance. There is no justification on the part of anyone to assert that in the guise of judicial activism, the constitutional courts in the country are undermining the theory of separation of powers by encroaching upon the fields reserved for the legislature and the executive. In the wake of this criticism, one must notice the observations made by the Supreme Court in *Asif Hameed* v. *State of J&K*:

"Although the doctrine of separation of powers has not been recognised under the Constitution in its absolute rigidity but the Constitution-makers have meticulously defined the functions of various organs of the State. Legislature, Executive and Judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. ... Judiciary has no power over sword or the purse *nonetheless it has power to ensure that the aforesaid two main organs of the State function within the constitutional limits*. It is the sentinel of democracy. *Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive*. The expanding horizon of judicial review has taken in its fold the concept of social economic justice." (emphasis added)

The line of demarcation between the three organs of the State as laid down in the aforesaid ruling of the Apex Court finds clearer expression in its subsequent rulings in *Supreme Court Employees' Welfare Assn.* v. *Union of India* and *Mallikarjuna Rao* v. *State of A.P.*

It is true that in adjudicating public law matters, the court takes into account the social and economic realities while considering the width and amplitude of the constitutional rights. Touching upon this aspect, the Supreme Court in a recent decision, speaking through K. Ramaswamy, J., in *C. Ravichandran Iyer* v. *Justice A.M. Bhattacharjee* made very pertinent observations:

"In this ongoing complex of adjudicatory process, *the role of the Judge is not merely to interpret the law but also to lay new norms of law and to mould the law to suit the changing social and economic scenario to make the ideals enshrined in the Constitution meaningful and reality*. Therefore, the judge is required to take judicial notice of the social and economic ramification, consistent with the theory of law." (emphasis added)

The permanent values embodied in the Constitution need interpretation in the context of the changing social and economic conditions which are transitory in nature. The constitutional court undertakes the delicate task of reconciling the permanent with the transitory. It is the duty of the executive to implement faithfully the laws made by the legislature. When the executive fails to discharge its obligations, it becomes the primordial duty of the judiciary to compel the executive to perform its lawful functions. In the recent times, much of the criticism aired against the judiciary concerns this area. When crimes are committed by men in power and attempts are made to conceal them by rendering the official machinery ineffective, recourse to judiciary becomes inevitable. It becomes the duty of the judiciary to take cognizance of the executive's lapses and issue appropriate directions as to the method and manner in which the executive should act as ordained by the Constitution and the laws. If the judiciary fails to respond, it would be guilty of violating the Constitution, a treason indeed.

Neither the political executive which is responsible for laying down the policy nor the permanent executive comprising civil servants who are enjoined to

carry out the policies of the executive can act in any manner contrary to what the Constitution prescribes. When all the three organs of the State - the legislature, executive and the judiciary - owe their existence to the Constitution, no single organ can claim immunity from accountability.

To whom the judiciary is accountable is the next question. The answer to this is found in the Constitution itself. A judge of the Supreme Court or a High Court can be impeached on the ground of proved misbehaviour or incapacity and the power in this regard is vested in Parliament vide Articles 124(4) and 217(1)(*b*). When a judge is impeached, Parliament acts as a judicial body and its members must decide the guilt or otherwise of the judge facing the indictment objectively uninfluenced by extraneous considerations. When such a judicial function is discharged by Parliament, it is highly debatable whether political parties can issue whips directing their members to vote in a particular manner. An interesting case study in this regard is the impeachment proceedings against Shri Justice V. Ramaswamy which ended unsuccessfully.

Judicial creativity even when it takes the form of judicial activism should not result in rewriting of the Constitution or any legislative enactments. Reconciliation of the permanent values embodied in the Constitution with the transitional and changing requirements of the society must not result in undermining the integrity of the Constitution. Any attempt leading to such a consequence would destroy the very structure of the constitutional institutions. Conscious of the primordial fact that the Constitution is the supreme document, the mechanism under which laws must be made and governance of the country carried on, the judiciary must play its activist role. No constitutional value propounded by the judiciary should run counter to any explicitly stated constitutional obligations or rights. In the name of doing justice and taking shelter under institutional self-righteousness, the judiciary cannot act in a manner disturbing the delicate balance between the three wings of the State.

The new jurisprudence that has emerged in the recent times has undoubtedly contributed in a great measure to the well-being of the society. People, in general, now firmly believe that if any institution or authority acts in a manner not permitted by the Constitution, the judiciary will step in to set right the wrong.

Judicial activist fervour should not flood the fields constitutionally earmarked for the legislature and the executive. That would spell disaster. Judges cannot be legislators - they have neither the mandate of the ppeople nor the practical wisdom to gauge the needs of different sections of society. They are forbidden from assuming the role of administrators. Governmental machinery cannot be run by the judges. Any populist views aired by judges would undermine their authority and disturb the institutional balance.

Fidelity to a political or social philosophy not discernible from the constitutional objectives in the discharge of judicial functions is not judicial activism; it is subversion of the Constitution. Any judicial act which is politically suspect, morally indefensible and constitutionally illegitimate must be curbed.

Judicial activism characterised by moderation and self-restraint is bound to restore the faith of the people in the efficacy of the democratic institutions which alone, in turn, will activate the executive and the legislature to function effectively under the vigilant eye of the judiciary as ordained by the Constitution.

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Pattern of the Test Paper

Total Marks : 200

Subject areas :

Law of Contracts, Law of Torts,

Family Law , Criminal Law ,

Constitutional Law and Legal Theory

Number of Questions:

i) Objective Type : 50 questions of one mark each

ii) Short answers : 10 questions of five marks each

iii) Essay : Two questions of 50 marks each

(Two sections containing three questions each out of

which one from each section to be answered.)