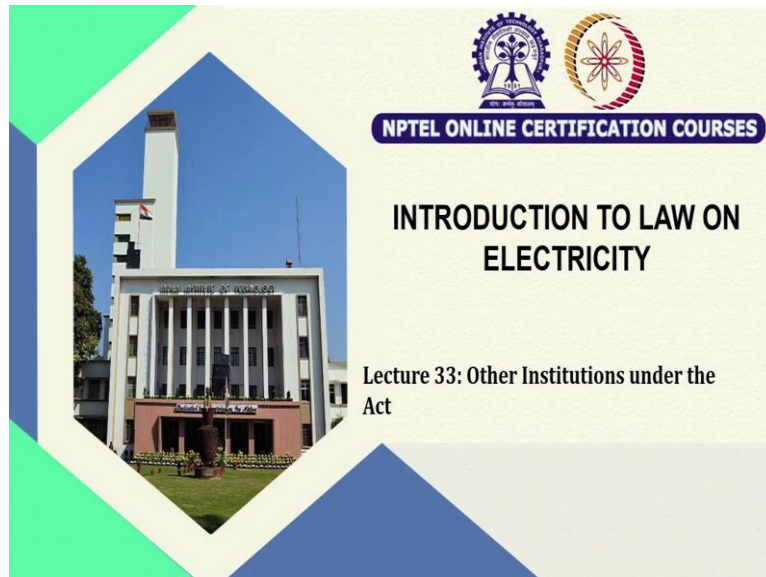


Introduction to Law on Electricity
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Lecture 33
Other Institutions under the Act

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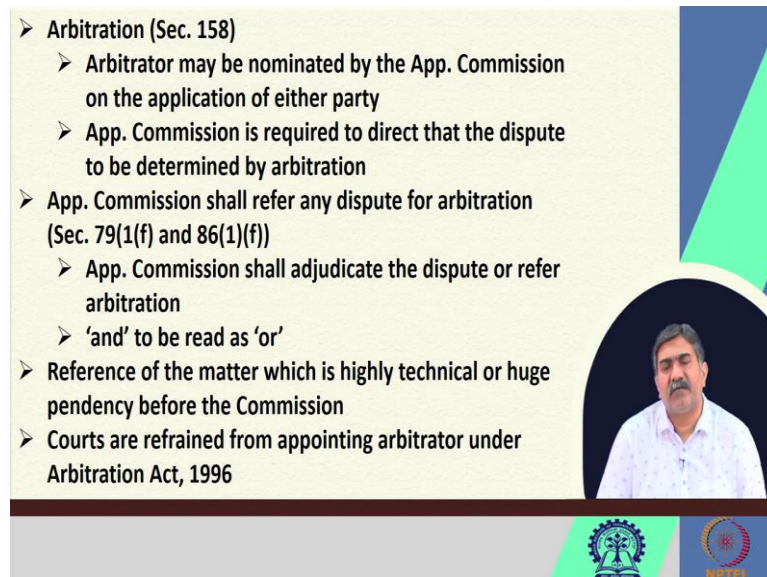
Welcome to all the learners. In today's session, we shall look into the other institutions which are being established under the Act, just to get a kind of comprehensive picture on the different bodies established under the Act for either regulating the sector or contributing in the promotion of the sector.

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So, in today's session, we will discuss the position of arbitrator, we will discuss the power and function of Central Electricity Authority. And also, we will look into the statutory provisions related to Forum of Regulators.

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➤ Arbitration (Sec. 158)

- Arbitrator may be nominated by the App. Commission on the application of either party
- App. Commission is required to direct that the dispute to be determined by arbitration
- App. Commission shall refer any dispute for arbitration (Sec. 79(1)(f) and 86(1)(f))
 - App. Commission shall adjudicate the dispute or refer arbitration
 - 'and' to be read as 'or'
- Reference of the matter which is highly technical or huge pendency before the Commission
- Courts are refrained from appointing arbitrator under Arbitration Act, 1996

The slide features a video inset of a man with a mustache, wearing a light blue shirt, speaking. The background of the slide is light green with a blue and green geometric design on the right side. At the bottom, there are logos for IIT Bombay and NPTEL.

Now, to begin with what the Electricity Act talks about resolving the dispute through arbitration. Section 158 of the Act empowers the regulatory commission to nominate an arbitrator to resolve the dispute which has come before the commission. And the arbitrator will have the necessary jurisdiction to take up the list only when it has been referred by the appropriate commission.

That is what the language of Section 79 or Section 86, which deals with the functions of the commission, Central and State, respectively, refers to. Section 79(1)(f) and 86(1)(f) entrust the responsibility on the commission to adjudicate the dispute arising between the generating companies and the licensees. Further, it says “and” refer the matter to resolve the dispute to any arbitrator.

Now, if you look at the language, if you read Section 79 or 86, you will find that the lawmaker have used the word ‘and’, so it has to be adjudicated and or to be referred. The plain reading of Section 79 subsection 1 clause f (section 79(1)(f)) highlights the error, highlights the anomaly. Highlights the anomaly in terms of how do we understand and use therein. Because if the commission adjudicates the dispute, there is no question of referring it to arbitrator.

Only when the commission decides not to adjudicate and appoint an arbitrator, the issue of arbitration will come. So, “and” has to be read as or. And as a law student, we know very well that these rules of interpretation are very much applicable, where “and” can be read as or “may” can be read as shall, “shall” can be read as may. So, for the purpose of understanding the power of the commission to refer any dispute for arbitration under Section 79 or Section 86, “and” has to be read as or.

Now, the question comes in that what made the lawmakers to provide for arbitration. The rationale is that if the matter involves highly technical issues, or the commission does not have that kind of bandwidth in terms of timeline. In such situations, commission can very well consider to refer the matter to be taken up by the arbitrator. And courts are to be refrained from referring the matter to arbitrator by applying Arbitration Act of 1996. Why is this important? Because under Arbitration Act, courts are empowered to appoint an arbitrator when the parties approach.

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- Gujarat Urja Vikas Nigam Ltd. v. Essar Power (2008 – SC)
- Clarified the law on party autonomy to refer the disputes to arbitration and the appointment of arbitrators
- Held:
- The Act is special law to deal with electricity sector – also came into effect after the Arbitration Act
- Any dispute can only be resolved by the concerned regulator or by arbitrators appointed by it
- No autonomy with the parties to appoint arbitrator

So, the issue is the power of the regulatory commission to appoint an arbitrator under the Electricity Act and power of the High Court to appoint an arbitrator under the Arbitration Act of 1996. There is a visible conflict between the Electricity Act and Arbitration Act. This conflict was taken up before the Supreme Court in the year 2008 in Gujarat Urja Vikas Nigam Limited versus Essar Power.

Wherein a question was raised that if the High Court appoints the arbitrator, what shall be the sanctity of such appointment. Because the Electricity Act clearly assigns the responsibility to the regulatory commission under Section 158. Now, the court, in this case, clarified the law

and court has said that Electricity Act being a special law, being later enacted law, shall prevail upon the Arbitration Act, because that is what is the general rule of interpretation, that special law prevails upon general law.

And also, the law which has been enacted at a later point of time, will have precedence over the law which has been enacted earlier. And it further clarifies that the commission has a responsibility to resolve the dispute under Section 79 or 86, or it can appoint an arbitrator. So, the court read the power of the commission and clarified that party does not have autonomy of appointing the arbitrator. Parties need to apply, but then the appointment has to be done by the commission. So, on the application of party that is there, but then who shall be? it is the prerogative of the commission. That is what it says.

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➤ **Tamil Nadu Generation and Distribution Corp. Ltd. v. PPN Power Generation Co. Pvt. Ltd. (2014 – SC)**

➤ **Observed:**

- **The power to refer the dispute for arbitration should not be exercised arbitrarily**
- **APTEL can re-examine the decision of the Commission to refer the dispute**
- **Arbitrariness, Unreasonableness, Perversity are grounds to evaluate the decision of the Commission**

On the issue of the decision of the commission to appoint an arbitrator, whether it can be challenged. In 2014, the Supreme Court, in the case of Tamil Nadu Generation and Distribution Corporation Limited versus PPN Power Generation said that because it is a statutory responsibility given upon the commission, it cannot be exercised in an arbitrary manner. The commission cannot be unreasonable in its approach.

And therefore, on this premise, the Supreme Court categorically said that the APTEL (Appellate Tribunal for Electricity) does have necessary jurisdiction to entertain the appeal; if the aggrieved party finds that the decision of the commission is not in accordance with the spirit of the law, if the decision of the commission is unreasonable, and if it does not serve the larger public interest.

So, commission, as per the observation made by the Supreme Court in this case, does not have the supreme and unassailable authority. It is subject to scrutiny, and tribunal can very well look into the matter; tribunal can very well assess the background against which the reference has been made or the reference has been denied. In both the cases, the tribunal can very well examine.

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➤ Chief General Manager, IPC MP Power Trading Co. Ltd. v. Narmada Equipments Co. Ltd. (2021 – SC)

➤ Observed:

- Applied the ratio of Gujarat Urja Vikas Nigam Ltd. Case
- the plea of maintainability and jurisdiction can be taken at any stage of the proceedings
- objections going to the heart of the case can and should be addressed by the Court, irrespective of the stage at which they are brought to light

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In 2021 very recently, a very important question has been raised in Chief General Manager, MP Power Trading Company versus Narmada Equipments Company Limited. The question was that if the arbitrator has been appointed and appointed by the parties or by the High Courts, and no objections were being raised at the time of the appointment. Can the same be challenged at later stage of point?

Now, the Supreme Court examined the issue from a very legalistic viewpoint. The court said that let us look at the very power which is given under Section 79. The very function which has been entrusted on the commission under Section 79, read with Section 158, or Section 86 read with Section 158, it says that, to appoint is the responsibility of the commission. So, the question here is of the maintainability. It is about the competence.

And we know very well that any legal remedy given without any competence shall have no validity in the eyes of law, regardless of the justness of the remedy provided. So, in 2021, the Supreme Court says that the point to be taken up is whether the High Court has a necessary jurisdiction to appoint an arbitrator for resolving the issue under Electricity Act or not. And the answer is no.

Now, on this issue that can the objection be raised at a later point of time? The court said yes. And the reason being very simple that the arbitrator who is going to arbitrate the matter that arbitrator does not have any competence that arbitrator does not have the legal sanction under the Electricity Act. So, what shall be the legal basis of resolving the dispute. And therefore, the objection can be raised.

Even at the latter stage, there is a no informity in the same. The court clarified this position that if the objection is not being raised at the first stage, at the very initial stage, that would not disqualify, that would not disentitle the party concerned to not to raise it at the ability stage. So, court has clarified on it. So, this is on the arbitrator. Let us look at the other important institution, other important body established under the Act, that is Central Electricity Authority.

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The slide features a list of bullet points on the left side, detailing the constitution of the Central Electricity Authority. On the right side, there is a circular inset video of a man with a mustache, wearing a light blue shirt, speaking. At the bottom of the slide, there are two logos: the Indian National Emblem on the left and the NPTEL logo on the right. The background of the slide is light green with a blue and green geometric design on the right side.

- Central Electricity Authority – Constitution (Sec. 70)
 - Legacy of the Electricity (Supply) Act, 1948
 - Consist of not more than 14 members, including Chairperson
 - Not more than 8 full-time members, including the Chairperson, to be appointed by the CG
 - Full time members to get salary as determined by the CG
 - Other members will get sitting fee
 - Members should have requisite expertise of the sector
 - Appointment is based on pleasure doctrine

It has its legacy from the 1948 Act, Electricity Supply Act. Section 70 of the 2003 Act talks about the establishment and to be established by the central government. It says that it shall have 14 members with including a chairperson, 8 members shall be full-time member, and they shall be getting salary as prescribed by the central government, and others would be getting the allowances in terms of sitting fees and all.

Who shall become the members? The law says who has necessary expertise in the electricity sector. And it also says that the appointment of the chairperson and the member is based on pleasure doctrine. Now as a law student, we know the significance of such appointment, and that termination can happen without assigning any reason. If the government decides to

remove the member or the chairperson, government need not advance any reason for such removal. That is what is the significance of the appointment based on doctrine of pleasure.

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The slide contains the following text:

- Commercial interest – Disqualification (Sec. 71)
 - Chairperson and Members must not have any commercial interest in the sector
- Function of the Authority (Sec. 73)
 - Advisory Function
 - National Electricity Policy; Technical matters; to improve the operation of the sector
 - Regulatory Function
 - Technical standards for construction of plants, electricity lines and connectivity to the grid; safety requirements; Specify grid standards; Metering

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Further, Section 71 says that chairperson or a member should not have any commercial interest in the activities which are related with electricity sector. If there is any commercial interest, they should not be allowed to be appointed. Function of the authority given under Section 73, and I have divided them into 4 sub headings.

One is the advisory one which is the most significant one where the Central Electricity Authority advises the government in the formulation of National Electricity Policy. It also advises the government on the technical matters. If you can recall, while discussing the generation sector, we learned that it has been delicensed; by the same time, the technical specifications for the establishment of generating plan must be in compliance with the specification prescribed by the Electricity Authority.

So, techno-economic clearance is not needed for establishing generating plants, but the compliance with the standards is must. So, on that, the Electricity Authority suggests the specification. The authority also has the responsibility of suggesting that how the power sector shall be improved, how the overall generation, efficacy in the transmission sector, and the quality and reliability in the distribution sector can be achieved.

On regulatory function, I have demarcated, I have as identified those functions which are related to laying down of certain standards. So, Central Electricity Authority decides on technical standards for the construction of electric plants. They also lay down the standards

on electricity lines, and connectivity to the grid. They bring the regulation with regard to safety requirements. They also specify the grid standards. And they also bring in the standards related to metering. So, they do have a responsibility to come up with a regulation on these important aspects connecting with electricity sector.

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- **Outreach Function**
 - Timely completion of schemes and projects; Publishing all India Electricity Statistics; Publishing Tariff & Duty of electricity supply in India; Promote research
- **Enforcement**
 - Enforcement of the Regulations with respect to measures relating to safety and electricity supply for electrical installations belonging to or under the control of the CG

In addition, they do have a function to ensure that there is a timely completion of the project, and there is proper implementation of the schemes what the government makes. They do have a responsibility to publish the statistics annually. They publish tariffs and duty of electricity supply in India that is again annually they do it. They collect the data, which helps in policymaking. They also have a responsibility to promote research so that necessary advancement can be achieved in the power sector.

They also have a responsibility to enforce the regulation with respect to measures relating to safety and electricity supply for electrical installation belonging to or under the central government. So, please do not mistake it with the enforcement measures which the commission can take.

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- **Coordination Forum (Sec. 166 (1))**
 - To be constituted by the CG
 - Comprises of Chairperson of the Central Commission and members, Chairperson of CEA and representatives of generating and transmission licensees (inter-state)
 - Smooth and coordinated development of the power system
 - State Government to constitute a Coordination Forum – with additional representative from distribution licensees
- **Forum of Regulators (Sec. 166 (2))**
 - To be constituted by the CG
 - Comprises of Chairperson of CERC and Chairpersons of SERC
 - Chairperson of CERC – Chairperson of the Forum
 - Established in the year 2005

Now, coming to the last body which I have decided to discuss with you under the Act, this is Forum of Regulators given under Section 166. Before I discuss Forum of Regulators, section 166 also talks about coordination forum. And in this, it says that it is to be constituted by the central government and who shall all be the member; it says that chairperson of the Central Electricity Regulatory Commission and the members of the Central Electricity Regulatory Commission shall be the member.

Then, the chairperson or the Central Electricity Authority shall be the member of this forum. And then the representatives of the generating and transmission licensee are entrusted; why? Because it is being done by the central government, they can also be the member of the forum. What is the responsibility of the forum? The responsibility forum is to ensure a smooth and coordinated development of the sector.

Similar coordination forum is also being provided for the provincial level. The state government can also constitute coordination forum at the state level. The composition is same, and you find an addition there. What is the addition there? Representatives of distribution licensees are also part of the forum. In addition, the law also provides for a committee at the district level, which shall have a responsibility to look at consumer satisfaction, which has a responsibility to see that how reliable and quality supply of electricity has been happening.

So, you can very well find that this Act makes an attempt to connect with all the stakeholders and creates a forum so that the necessary inputs can reach for strengthening the performance

of the sector. As we know that electricity is a subject in the concurrent list with the shared responsibility between the central and the state governments.

It is not very difficult to imagine that differences may arise between the approach, between the central and the state governments on the approaches adopted in relation to the sector. And because both the governments are constitutionally empowered to legislate, constitutionally empowered to regulate the matter. What is needed is to create a well-designed coordinated forum to iron out the differences, to bring in informity in the sector.

And for this purpose, section 166 subsection 2 provides for the establishment of Forum of Regulators. Central Government has been entrusted with the responsibility to constitute the same and who shall be the member, it says, let it be a broader forum, let all the chairperson of CERC and SERC, be the member of this forum. And chairperson of Central Electricity Regulatory Commission shall be the chairperson of the forum.

This forum was established in the year 2005. And if you look at the regulations, the report which they have been making, it really makes a meaningful impact on the growth of the sector. If you look at the document, they are prepared for the streamlining the open access because open access is one of the revolutionary changes which has been introduced under the 2003 Act. Very comprehensive document, they have made.

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➤ **Functions of the Forum –**

- Analysis of tariff orders and other orders of the Commissions to highlight the efficiency improvements of utilities
- Harmonisation of regulation in power sector
- Laying standards of performances of licensees
- Information sharing amongst the members on issues of common interest
- Facilitate initiatives to promote investment in the power sector by way of implementation policies
- Assist in evolving measures for protection of interest of consumers

➤ Annual report to be prepared and forwarded to the CG

➤ Forum formulates its own rules of business

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So, what is the function of the forum? Function of the forum is to analyze the tariff orders. Because we have read interstate and intrastate, there is a demarcation of the jurisdiction

between the Center and the State's Regulatory Commission. So, analyze the tariff orders and other orders which the commissions are making.

And just to highlight that, how we can improve the functioning of the commission, how we can bring in certainty in the approach. And that is why the forum has been entrusted with the task of harmonizing the regulation in power sector that they can very well identify. If they do not find, they come to the conclusion that regulation passed by one state commission is not in alignment with either the central or with other state commission.

Because now, with the liberalisation in the power sector, developers are looking for an opportunity to invest, they are investing. So, if there are uniform rules, there will be better confidence. Also, with regard to standards on the performance of licensees, that let there be a kind of uniform standard, variance will adversely affect the trust of the stakeholders.

Further, it says that the forum would be a platform for sharing the information, which is of common interest, and relates to common approach, then information can be saved. So, you can very well make out that the Forum of Regulator is primarily supposed to carry out its responsibility by engaging into a dialogue. It is not a conflict resolution body, where some determination has to be there, where some decision has to be there; it is all about entering a dialogue looking at the differences and trying to look for a midway. It also has a responsibility to take the initiative to promote investment in the power sector. That is what it says.



And it also has been entrusted with the responsibility to suggest necessary measures to protect interest of consumers. And you would find it when you visit the website of the Forum of Regulators; you would find that there are reports which are being prepared by this forum on these issues. Annual Report is to be prepared by the forum and to be forwarded to the central government. And how the forum operates? It says that forum can formulate its own rule; the rules are already being made.

So obviously, it says that if there are any issues, they can be deliberated, discussed, and then majority call can be taken on the basis of the voices of majority. So, this is how the forum has been entrusted with a task to bring in informity to ensure certainty, and also to create a sort of ecosystem which shall give the confidence and trust to all the players operating in the power market.

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➤ References:

- Forum of Regulators,
<http://www.forumofregulators.gov.in>
- Central Electricity Authority, <https://cea.nic.in>
- Pallav Shukla, Appointment of Arbitrators for Electricity Disputes in India,
<http://arbitrationblog.kluwerarbitration.com/2016/05/10/appointment-arbitrators-electricity-disputes-india/>



These are the references for this session. Thank you very much.