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Reference Material for Five Years

Bachelor of Law (Hons.)

Code : 038

Semester – II

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Bachelor of Law (Hons.)

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LAW OF CONTRACT

SUBJECT CODE: 102

Q1 Explain the concept of Indemnity, Guarantee and Agency in detail.

Answer - Indemnity can be treated as a sub-species of compensation and a Contract of Indemnity is a species of contracts. The obligation to indemnify is a voluntary obligation taken by the Indemnifier. The mere possibility of loss occurring will not make the indemnifier liable. The loss to the indemnity holder is essential, otherwise, the indemnifier cannot be held liable. Plus, the loss must arise due to the conduct of the indemnifier or any other person related. Strictly speaking this does not cover the acts of God; otherwise, various insurance transactions will be rendered untenable. Under Indian law, the definition of contract of indemnity is restricted to cases wherein the loss is caused by human agency. Losses from other causes are covered in other chapters of the Indian Contract Act, 1872.

Contract of Indemnity should have all the essentials of a valid contract like free consent, the legality of an object, etc. Consideration, in this case, can be anything done, or any promise made which serves as a motivation behind the contract. It is sufficient inducement that the person for whom the indemnifier has promised indemnity has received a benefit or that the indemnity holder has suffered an inconvenience of doing what the indemnifier asks. A contract of indemnity is one of the species of contracts.

So, we can say that if one person promises to save other from the loss caused to him by the conduct of the promisor himself or by the conduct of any other person subject to the condition if promisee (indemnity holder) work within the scope of the promisor. But in the case of Agency, Agency is a special type of contract. The concept of agency was developed as one man cannot possibly do every transaction himself. Hence, he should have the opportunity or facility to transact business through others like an agent. So, in agency one person employs another person to represent him or to act on his behalf, in dealing with the third person.

Concept of indemnity

Meaning:

The general meaning of indemnity is 'protection against losses' It means it is security or compensation against loss. So, we can say that if one person promises to save others from the loss caused to him by the promisor. It means "The obligation resting on one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit, or a right which inures to a person who has discharged a duty which is owed to him but which, as between himself and another, should have been discharged by the other."

Definition:

The term indemnity defined under 'section 124' of the Indian Contract Act, 1872- "a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person". So, we can see this provision incorporates a contract where one party promises to save the other from the loss which may be caused, either:

1. By the conduct of the promisor himself; and

2. By the conduct of any other person.

Essentials:

1. There must be a contract between the parties;

2. There must be two parties;

3. There must be a promise to save the other party from some loss: This is the most important element of a contract of indemnity. One party must promise to save the other party from any loss which he may suffer;

4. The loss may be due to the conduct of the promisor himself or any other person.

We have to refer to Section 124 of the Contract Act; the indemnity may be for the loss which a party may sustain due to the conduct of the promisor himself or of any other person. As stated earlier, this provision restricts the scope of contracts of indemnity as it covers the loss caused by a human agency only, i.e., by the conduct of the promisor or of any other person. However, the general definition of the contract of indemnity is much wider and it also covers the losses caused by the acts other than human beings. In other words, the losses, arising from

accidents or events which do not losses arising from accidental fire, perils of the seas, etc. Thus, the contracts of fire insurance and marine insurance also fall in the category of the contract of indemnity.

Rights of indemnity-holder:

The rights of the indemnity-holder are dependent on the terms of the contract of indemnity as a general rule. Section 125 of the Indian Contract Act, 1872 comes into play when the indemnity holder is sued i.e., under a specific situation.

The indemnity holder is entitled to recover the: if the act of indemnity holder is within the scope of indemnifier or according to him-

All the damages that he may have been compelled to pay in any suit in respect of any matter to which the promise of the indemnifier applies.

For example, if a contract to indemnify B against the consequences of any proceedings which C may take against B in respect of a particular transaction? If C does institute legal proceeding against B in that matter and B pays damages to C, A will be liable to make good all the damages B had to pay in the case.

All the costs of suits that he may have had to pay to the third party provided he acted as a man of ordinary prudence and he did not act in contravention of the directions of the indemnifier or if he had acted under the authority of the indemnifier to contest such a suit.

In the case of *Adamson vs. Jarvis*18274 BING 66, Adamson was entitled to recover the money he had to pay to the true owner of the cattle as well as any expenses incurred by him to get a legal counsel, etc. Actually, in this case, Adamson was an auctioneer who was given cattle by Jervis. Adamson followed the instruction of Jervis and sold the cattle. But, Jervis was not a real owner of that particular cattle. And thereafter the real owner filed a suit against Adamson.

Held– It was held that the defendant was liable for loss of plaintiff and compel to compensate him as per Section 125 of the 2nd rule.

All the sums that he may have paid under the terms of any compromise of any such suit provided such compromise is not contrary to the indemnifier's orders and was a prudent one or if he acted under the authority of the indemnifier to compromise the suit.

Rights of indemnifier

The rights of the indemnifier have not been mentioned expressly anywhere in the Act. In Jaswant Singh vs. Section of State, it was decided that the rights of the indemnifier are similar to the rights of a surety under Section 141 where he becomes entitled to the benefit of all securities that the creditor has against the principal debtor whether he was aware of them or not.

Where a person agrees to indemnify, he will, upon such indemnification, be entitled to succeed to all the ways and means by which the person originally indemnified might have protected himself against loss or set up his compensation for the loss.

The principle of subrogation i.e., substitution is founded in equitable principles. Once the indemnifier pays for the loss or damage caused, he will step into the shoes of the indemnified. Thus, he will have all the rights with which the original indemnifier protected himself against loss or damage. The principle of subrogation is applicable due to both the ICA, 1872 itself and principles of equity.

In India, there is no specific provision which states when a contract of indemnity is enforceable. There have been confliction judicial decisions throughout. In Osmal Jamal & Sons Ltd vs. Gopal Purushotam, was amongst the first Indian cases where the right to be indemnified before paying was recognised. But now, a consensus of sorts has been formed in favour of the opinion of Equity Courts. In *K Bhattacharjee vs. Nomo Kumar*, *Shiam Lal vs. Abdul Salal*, and *Gajanand Moreshwar*,case, it has been decided that the indemnified may compel the indemnifier to place him in a position to meet liability that may be cast upon him without waiting until the promisee (indemnified) has actually discharged it.

Indemnity requires that the party to be indemnified shall never be called upon to pay. Thus, the liability of the indemnifier commences the moment the loss in form of liability to the indemnified becomes absolute.

Concept of Agency

The nature of agency –

Agency- A relationship that exists when one party represents another in the formation of legal relations;

Agent– a person who is authorized to act on behalf of another;

Principal– a person who has permitted another to act on her or his behalf.

Agency by agreement:

Agency normally involves the principal authorizing an agent to act on her behalf and the agent agreeing to do so in return for some fee;

Actual authority – the power of an agent that derives from either express or implied agreement;

Apparent authority – the power that an agent appears to have because of conduct or statements of the principal.

Agency by estoppels:

An agency relationship created when the principal acts such that third parties reasonably conclude that an agency relationship exists.

Agency by Ratification:

An agency relationship created when one party adopts a contract entered into on his or her behalf by another who at the time acted without authority.

Agent and principal defined

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" [section 182].

WHO MAY EMPLOY AN AGENT

Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent. [section 183]. – – Thus, any person competent to contract can appoint an agent.

WHO MAY BE AN AGENT

As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained. [Section 184]. – – The significance is that a Principal can appoint a minor or person of unsound mind as an agent. In such a case, the Principal will be responsible to third parties. However, the agent, who is a minor or of unsound mind, cannot be responsible to the Principal. Thus, Principal will be liable to third parties for acts done by Agent, but the agent will not be responsible to the Principal for his (i.e. Agent's) acts.

CONSIDERATION NOT NECESSARY

No consideration is necessary to create an agency [Section 185]. Thus, payment of agency commission is not essential to hold the appointment of Agent as valid.

Duties of Agent

1. Must perform in accordance with the principal's instructions, or failing instructions, then performance must meet the standards of the industry;

2. Fiduciary duty – a duty imposed on a person who has a special relationship of trust with another

Duties of Principal

1. pay the agent a fee or percentage for services rendered;

2. assist the agent in the manner described in the contract;

3. reimburse the agent for reasonable expenses; and

4. indemnify against losses incurred in carrying out the agency business.

Indemnity in agency

Section 222 talks about indemnity in the agency-

Agent to be indemnified against consequences of lawful acts- The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in the exercise of the authority Conferred upon him.

Illustrations

i) B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.

ii) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

In the case of *Adamson vs. Jarvis*1827] 4 BING 66, Adamson was entitled to recover the money he had to pay to the true owner of the cattle as well as any expenses incurred by him to get a legal counsel, etc. Actually in this case Adamson was an auctioneer who was given cattle by Jervis. Adamson followed the instruction of Jervis and sold the cattle. But, Jervis was not a real owner of that particular cattle. And there after the real owner filed a suit against Adamson.

Held– It was held that the defendant was liable for loss of plaintiff and compel to compensate him.

Guarantee

According to Section 126 of the Indian Contract Act, 'A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety'; the person in respect of whose default

the guarantee is given is called the principal debtor'; and the person to whom the guarantee is given is called ‘the creditor'. A guarantee may be either ora1.m written. For example, if A, and his friend B enter a trader's shop, and A asks the trader, "supply the articles required by B, and if lie does not pay you. I wiJ1.l' It is a contract of guarantee. The primary liability to pay is that of R but if he fails to pay, A becomes liable to pay. On the other hand, if A says to the trader, "let him (B) have t!le goods, 1 will sec you are paid", the contract is one of indemnity and not a contract of guarantee.

From the above-mentioned definition of guarantee you will notice that in a contract of guarantee, there are three parties known as creditor, principal debtor and surety. A contract of guarantee is forn~cd when all the three agree. Let us take an example, A and B enter in a shop, and A orders to deliver certain goods to B on credit, The shopkeeper says "I can give goods on credit provided A gives the guarantee for the payment". A promises to guarantee the payment. In this example, B is the principal debtor, A is the surety and the shopkeeper is the creditor and the contract is a contract of guarantee.

A contract of guarantee is an agreement and as such all the essentials of n valid contract must be present. For instance, the contracting parties should be competent to contract. Suppose in the above-mentioned example B is a minor i.e., incompetent

Indemnity and Guarantee

In a situation of specific contracts A would be regarded as the principal debtor and he will become personally liable to pay. Thus, the incapacity of the principal debtor does not affect the Validity of a contract of guarantee. The requirement is that the creditor and the surety must be competent to contract.

Now you may ask that if a contract of guarantec should have all the essentials of a contract then what is the consideration between surety and the principal debtor. It is not necessary that there should be direct consideration between the surety and the creditor i.e., the surety need not be benefited. It is sufficient (for the purposes of consideration) that something is being done or some promise is made for the benefit of principal debtor. It is presumed that the consideration received by principal debtor is the sufficient consideration for the surety. You would appreciate it if you go through the provision of Section 127, which says: Any thing

done, or any promise made for. the benefit of the principal debtor, may be a sufficient considerntion to the surety for giving the guarantee.

On examining the definition of contract of guarantee, you would find that as there are three parties, the. . are three contracts as well. One contract is between the creditor and the principal debtor, out of which the guaranteed debt arises. Second contract is between the surety and the principal debtor which implies that the principal debtor shall indemnify the surety, if the principal debtor fails to pay and the surety is asked to pay. The third contract is between the surety and the creditor by which surety undertakes (guarantees) to pay the principal debtor's liabilities (debt) if the principal debtor fails tp pay.

For a valid contract of guarantee, it is essential that there must be an existing debt or a promise whose performance is guaranteed. In case there is no such debt or promise, there can be no. valid guarantee. In fact, a contract of guarantee pre-supposes the existence of a IiabiIity enforceable by law. For example, A gives the guarantec to B for the payment of a time-barred debt due from C. This is not a valid contract of guarantee because the primary liability between B and C is not enforceable bylaw. In case A pays the amount, he cannot recover it from C.

An interesting aspect of the contract of guarantee is that though it is not a contract of uberritnae fidei (a contract of absolute good faith) and therefore, it is not necessary foi the principal debtor or the creditor to disclose all the material facts to the surety before he enters into a contract. However. the facts which are likely to affect the surety's decision must be truly represented to him. Section 142 of the Act provides that arty guorantee which lzas been obtained by means of misrepresentation made by the creditor., or with his knowledge and assent, concerning a moterialpart of the transaction, is invalid.

You should also note that not only there should be no misrepresentation but it is also essential that the guarantee must not be obtained by concealing some facts. Section 143 provides that any guarantee which the creditor has obtained by means of keeping silence to material circumstances is invalid. For example, A employs B as clerk to collect money for him. B fails to account for some of his receipts, and A, in consequence, calls upon him (B) to furnish security for his duly accounting.-C gives the guarantee for B's duly accounting. A did not inform C about B's previous conduct. B, dterwards, makes default. Here the guaranted given by C is invalid because it was obtained by concealment of facts by A.

From this discuss~on, let us summarise the essential features of a contract of guarantee as follows :

i) Existence of a debt, for which some person other than the surety should be primarity liable. ii) Consideratio~l, but it is not necessary that the surety should be benefited. iii) All the essentials of a valid contract should be present.

iv) Creditor and surety must be competent i.e., principal debtor need not be Competent to contract. v) Surety's liability is dependent on principal debtor's default. -r.i) Guarantee must not be obtained by misrepresentation. vii) Guarantee must not be obtained by concealment of material facts

Conclusion

After all, we have seen in this present project Simply put, indemnity requires that one party indemnify the other if certain expenses spoken of in the contract of indemnity are incurred by him. For example, car rental companies stipulate that the person hiring will be responsible for damage to the rental car caused by his reckless driving and will have to indemnify the rental company.

Most attention of late has been given to the development of indemnity contracts in the IT industry. There are some circumstances in which the existence of an indemnity would make a significant difference while in others, a contract of indemnity will have little or no role to play. Another new concept called ‘Indemnity Lottery’ can be found in the law of contract that implies that in civil cases of indemnity results can never be predicted. Brazilian jurist Leonardo Castro is credited for coining the term.

A simple indemnity clause is not the answer to liability issues. The law leans disfavouably towards for those who try to avoid liability or seek exemption from liability of their actions. The underlying reasoning is that a negligent party should not be able to completely shift all claims and damages made against it to another, non-negligent party. For example, many a times a ticket to an amusement park may claim that a person entering the park will not hold the management liable. Rarely will such a defense work in a court of law because it is not based on a contract. Most people hurt on an amusement park ride are able to sue for damages quite successfully.

Q2 Explain the differences between Indemnity and Guarantee.

Answer - In its broadest meaning an indemnity is an undertaking to perform an obligation or pay a debt of another, and therefore encompasses all contracts of guarantee and many contracts of insurance. For the purposes of this article it is therefore necessary to define indemnity more narrowly. The term "contract of indemnity" will be used to denote an independent promise by a third party to indemnify a creditor against any loss that may be suffered in the course of a transaction with a principal debtor. Primary liability is assumed by the indemnifier by way of security given for the performance of an obligation or the payment of a debt. The liability is therefore wholly independent of any obligation of the principal debtor. "Contract of guarantee" will refer to the obligation of a third party either to ensure that the principal debtor performs his obligations or to repay the debt herself. The liability of the guarantor may therefore be described as secondary as it will arise only upon the default of the principal debtor on his primary obligation to the creditor.

In every case of guarantee there are at least two obligations, a primary and a secondary. The secondary - the guaranty - is based upon the primary, and is enforceable only if the primary default.

The obligation assumed by the guarantor is to answer for the default of another. "Surety" will be used as a general term to cover both guarantors and indemnifiers. Both a contract of guarantee and a contract of indemnity must be valid contracts: there must be offer and acceptance, intention to create legal relations, and good consideration. There is, however, a difference in the obligation undertaken

An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promise.

There are no hard and fast rules for determining whether a contract is an indemnity or a guarantee. In each case the courts will look at the specific terms of the agreement and in some cases the surrounding circumstances. Thus the central concern is construction, and the courts will base their decision on the substance of the agreement as opposed to its form or description. The fact that a document is described as either a "guarantee" or an "indemnity" is taken as a guide by the courts, but is by no means conclusive.

Ultimate Object

A document will be construed by the courts in accordance with what is seen to be the "ultimate object"6 of the agreement. The intention of the parties will be central to interpretation. Therefore, in commercial agreements, for example, the courts will have regard to such factors as how the parties intended to regulate their dealings by way of the agreement, and the commercial benefits arising out of the agreement. In Direct Acceptance Finance Ltd v Cumberland Furnishing Pty Ltd7 construction was held to be the key to interpretation. Although the ultimate object of the document must govern its interpretation, "[ilt is the method by which that object is attained which decides the class to which the document belongs".8

Terms of the Agreement

The court must start by looking at the terms of the agreement. A guarantor's liability is generally taken to be co-extensive with that of the principal debtor, and therefore if the principal debtor defaults on his primary obligation to the creditor, the creditor may recover from the guarantor whatever sum she could have recovered from the principal debtor.9 The liability of a guarantor must not be different in kind or extent from that of the principal debtor. If it is potentially greater then the contract will be one of indemnity. The courts must therefore ascertain whether the document was intended to be a mere contract of guarantee by asking what is the extent of the protection that the creditor has been promised by the surety. Therefore not be a guarantee if the obligation assumed by the surety is not just the money due at the time of the default of the principal debtor, but is the amount that would have become payable if the transaction had run its full course, or the sum required to completely protect the creditor from any loss.' In such cases the contract will be an indemnity as the liability of the surety is potentially greater than that of the principal debtor. When the surety undertakes to become Liable - Under a contract of guarantee the assumption of secondary liability is an undertaking to become liable upon the default of the principal debtor. The guarantor's obligation is thereby dependent on the default of the principal debtor. Under a contract of indemnity, however, a primary liability falls upon the indemnifier and liability will arise according to the terms of the agreement. A distinction can clearly be drawn between:13 a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified

against that liability, independently of the question of whether a third person makes default or not.

The agreement will be a contract of indemnity if, for example: 1. the creditor is able to recover a loss on a transaction from the surety even though the principal debtor is not guilty of default 2. the agreement provides that the surety's liability arises only in the event that the creditor makes a loss on the totality of the principal transaction or a profit less than she should have made. In this situation the surety does not undertake to become liable upon the default of the principal debtor and hence there is no obligation to make good particular defaults. In addition the creditor has no recourse to the surety upon any particular default of the principal debtor. The validity of the surety's promise is independent of the principal debtor's promise; or 3. the agreement provides that the liability of the surety will arise at the request or upon notice from the creditor.15 An agreement may provide that in the event that the principal transaction becomes unsatisfactory the creditor may demand payment from the surety. Such liability is not dependent upon any default of the principal debtor and must therefore be an indemnity.

Rights of Subrogation - Upon payment by the surety of the principal debt he is legally entitled to the full rights of subrogation, thereby stepping into the creditor's shoes.16 This equitable principle was stated in Craythorne v Swinbume:1 7

a surety will be entitled to every remedy, which the creditor has against the principal debtor, to enforce every security and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities, entered into without the knowledge of the surety; having a right to have those securities transferred to him; ... [t]his right of a surety ... stands, not upon contract, but upon a principle of natural justice.

This principle generally applies to both guarantees and indemnities. But if the agreement contains a clause entitling the surety only to such rights as the creditor under his discretion assigns to her upon her payment of the principal debt (as in Yeoman Credit v Latter) then the agreement must be an indemnity. A guarantor is by law entitled to full rights of subrogation. An agreement which purports to give completely different rights to the creditor and the surety (upon payment of the principal debt) can therefore only be an indemnity,avoid the consequences of variation of the principal transaction. Clauses cannot convert what is in essence a contract of guarantee into a contract of indemnity.2° The courts will look to the

overriding intention of the agreement,21 and if the circumstances and the intention dominating the agreement are indicative of a guarantee then this must control the interpretation. In General Produce Co v United Bank" a clause was construed as making the surety liable as a principal debtor only in certain circumstances. The surety was liable as a guarantor at the outset of the document, but became liable as a principal debtor on the release of the original principal debtor's liability., This interpretation by the Court reconciled the apparent inconsistency in the document before them. There is no conflict between this case and cases where the court has found that such a clause does not convert what is in essence a contract of guarantee into a contract of indemnity: the court will attempt in each case to give effect to the intention of the parties.

Surrounding Circumstances

The courts may look to the surrounding circumstances to determine the intentions of the parties. This has most commonly occurred in cases where all parties knew that the principal transaction might not be enforceable.4 If the contract is a guarantee the unenforceability of the principal transaction will generally relieve the guarantor from liability. However, in such situations the courts are more likely to find that the contract is an indemnity 2 in order to avoid a situation where the:2 0

three parties [the creditor, principal, and surety].., enter into an arrangement under which money was to be advanced on [a contract] on which no-one was liable at all, there being noone liable as principal and therefore no-one liable as surety.

Why the Distinction is Important

It is submitted that the real importance of the distinction is the special rights of the parties to a contract of guarantee, in contrast with the conditional but standard two party relationship in a contract of indemnity. The distinctiveness of the guarantee contract is apparent in three main areas:

.Contracts Enforcement Act 1956 Section 2(1) of the Contracts Enforcement Act 1956 applies (inter alia) to "[e]very contract by any person to answer to another person to the debt, default, or liability of a third person." Section 2(2) further provides that: No contract to which this section applies shall be enforceable by action unless the contract or some memorandum

or note thereof is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him. In other words, in order for a creditor to be able to bring an action on a guarantee, that contract must be in writing and signed by the guarantor. This section only applies to guarantees and not to indemnities. The importance of compliance is emphasised by recent New Zealand cases. The requirement that all the material terms of a contract of guarantee be contained in the note of memorandum was a successful defence for a guarantor who alleged defects in the signature attestations and in the identification of the parties in Golden Coast Poultry Industries Ltd v Brown.' In this case the name of the principal debtor had been omitted and the guarantor was released from liability. A guarantor was also successful in Westpac Banking Corp v Morris28 where the alleged insertion of details into a contract after it had been signed supported a defence of invalidity under the Contracts Enforcement Act.

Creditors' Rights The distinction between a guarantee and an indemnity is important in that the rights of the creditor are governed by the nature of the agreement. A contract of guarantee involves a promise by the guarantor collateral to that of the principal debtor. If the principal debtor then fails to perform his obligation to the creditor, the creditor is entitled to sue the guarantor. The liabilities of the principal debtor and the guarantor are therefore co-extensive, as are the rights available to them pursuant to an action by the creditor. It therefore follows that if the principal obligation cannot be enforced against the principal debtor the guarantor must also be released from liability. The principle of co-extensiveness historically relates back to the Roman law concept of fide jussio. This was based on the reasoning that the guarantor's obligation is dependent upon that of the principal debtor and therefore cannot exist without a valid and subsisting obligation on her part.29 The relevant rule of law is "[where] the principal is not obliged, neither is the surety, as there can be no accessory without a principal obligation".o This rule was affirmed in Lakeman v Mountstephen: 1

There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters ex post facto, and need not be at the time, but until there is a principal debtor there can be suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

With a contract of indemnity on the other hand, primary liability falls upon the indemnifier. The indemnifier's obligation is wholly independent of that of the principal debtor, though default by the principal debtor is the most likely cause of recourse to the indemnifier by the

creditor. An indemnifier will remain liable notwithstanding the unenforceability or invalidity of the principal contract. This is because the promise is to keep the creditor harmless against loss, not to answer for the debt of the principal.32 The indemnifier owes an independent debt, contingent on the creditor suffering some loss, and is thereby agreeing to answer for her own debt, not that of another.33 On this basis an indemnifier can be held liable for a shortfall on the anticipated profit notwithstanding that there was no further liability on the part of the principal, as in Goulston Discount Co Ltd v Clarke24 In that case, a man wished to purchase a £400 car with the assistance of the plaintiff finance company by way of a normal hire purchase agreement. The plaintiff bought the car from the defendant dealer from whom the finance company sought an indemnity. The material parts of the indemnity clause read:

In consideration of your entering into a hire purchase agreement with RH Webb I agree to indemnify you against any loss you may suffer by reason of the fact that the hirer under the said agreement for any cause whatsoever does not pay the amounts which he would if he completed his agreement by exercising the option to purchase. Loss shall mean the difference between the total amount the hirer would have had to pay to acquire title to the goods under the hire purchase agreement, plus your expenses, less payments received by you.

The hire purchase agreement was to run over two years and was calculated to cover the £300 (a £100 credit had been given for the trade-in), a finance cost of £57 and an option to purchase for £1. The total hire purchase price amounted to £458. Webb paid the first few instalments but then defaulted. The plaintiff then legally repossessed the car, sold it for £155 and sued the defendant dealer under the indemnity contract for the balance of the hire purchase price which it was unable to recover from Webb. At first instance it

It was held that the contract was a guarantee and that the plaintiff finance company was therefore only entitled to bring an action for the amount owing in arrears as opposed to the full amount of the hire purchase agreement. On appeal, Lord Denning MR had no difficulty in reversing this decision and finding that the contract was indeed an indemnity: a very sensible agreement which the defendant ought to honour. Had the contract been a guarantee, the defendant would have been liable only for the payments due at the time of termination.

Creditors' Obligations

What are the obligations of the creditor when taking action against the guarantor? To what extent, if any, must the creditor endeavour to recover from the principal debtor before an action can be brought against the guarantor? Is the creditor under any obligation to notify the guarantor of the principal debtor's default? A guarantor will be released from liability if there has been a breach of a condition precedent to the operation of the guarantee. Such conditions may be expressed or implied.

Every contract of guarantee or indemnity whereby any person (other than a minor) undertakes to accept liability in the event of the failure of a minor to carry out his obligations under a contract shall be enforceable against that person... to the extent that it would be if the minor has been at all material times a person of full age, and that liability shall not be affected by any other provision of this Act or any order made pursuant to any other provision of this Act [emphasis added].

Neither a guarantor nor an indemnifier has a defence that her contract is unenforceable owing to the fact that the principal obligation arises under an infant's contract and is therefore void. The second exception is that directors will remain liable on their contracts of guarantee notwithstanding that the contract of loan with the company is itself ultra vires and therefore unenforceable. This is consistent with equitable principles as the director of a company will be deemed to know that the principal obligation into which the company has entered is ultra vires. It would therefore be unfair to allow her to escape liability by claiming that the principal transaction was ultra vires and void and that she should therefore be relieved from liability under their guarantees. The exception was first asserted in an obiter statement by Lord Blackburn in Chambers v Manchester and Milford Ry Co46 and later relied on in Yorkshire Ry Wagon Co v Maclure. 7

Conclusions

Whether an undertaking regarding the debt or obligation of a third party is a guarantee or an indemnity will always depend on the facts of the individual

Q3 Explain rights and duties of Bailor, Bailee and Lien.

Answer - According to Contract Act, bailment means delivery of goods by one person to another for some purpose upon a contract that they these goods shall be returned or disposed

of according to the directions of the person delivering them when the purpose will be accomplished.

Explanation

Under Contract Act, bailment is considered a contract. Such contract is consisted of following essentials.

i. Delivery of Goods

For a valid bailment, it is essential that goods should be delivered from one person to another person. It means that possession of goods should be changed.

ii. Delivery for Some Purpose

It is necessary for a valid bailment that goods should be delivered for some purpose.

iii. Return or disposing of Goods

For a valid bailment, it is also essential that goods should be returned or disposed off according to directions of bailor when purpose is accomplished.

3. Definition of Bailor

In bailment, the person, who delivers goods, is call bailor.

4. Duties and Liabilities of Bailor

Following are duties and liabilities of bailor;

i. Disclosing of defects of goods bailed

It is duty of bailor to disclose any defects, which are present in goods, which are being bailed.

ii. Repayment of expenses

It is liability of bailor to repay all those expenses, which bailee spends for purpose of bailment.

iii. Bailor's Responsibility to Bailee

Bailor is liable to bailee for any loss, which the bailee bears in the following situations;

a. No right to make bailment

Bailor is responsible to bailee for any loss, which bailee bears because bailor was not entitled to make bailment.

b. No Right to get back bailed goods

Bailor is responsible to bailee for any loss, which bailee bears because bailor was not entitled to get back bailed goods.

c. No right to give Directions

Bailor is responsible to bailee for any loss, which bailee bears because bailor was not entitled to give directions.

5. Definition of Bailee

In bailment, the person to whom goods are delivered is called bailee.

6. Duties and Liabilities of Bailee

Following are duties and liabilities of bailee;

i. Care

In all cases of bailment, bailee is bound to take care of bailed goods in the same manner in which a man of ordinary prudence takes care of his own goods of the same quality and value.

ii. Unauthorized use of Bailed Goods

If bailee makes any use of goods bailed and such use in not according to conditions of bailment, he is liable to make compensation to bailor for any damage, which is caused to the goods during such use.

iii. Mixing of Bailed goods with Bailee's goods

If bailee mixes bailed goods with his own goods without consent of bailor, his liability arises in the following two cases;

a. When goods can be Separated?

Out of mixed goods, if bailed goods can be separated or divided, bailee will be under obligation to bear all expense of separation or division, and any damage, which is caused from such mixture.

b. When goods cannot be Separated?

Out of mixed goods, if bailed goods cannot be separated or divided, bailee will be under obligation to compensate the bailor for such loss of bailed goods.

iv. Return of Bailed goods

It is duty of bailee to return bailed goods to bailor without any demand an according to directions of bailor on expiration of time or accomplishment of purpose.

v. Non-return of Bailed Goods

If bailee fails to return bailed goods at proper time, it is his liability to compensate bailor for any destruction or loss from this time.

vi. Increase or Profit from bailed goods

In absence of any contrary contract or according to directions of bailor, bailee is also under obligation to deliver to bailor any increase or profit, which may have accrued from bailed goods.

3. Right of Lien

The word lien means to "retain the possession of". According to section 47(1) the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases namely:

1. Where the goods have been sold without any stipulation as to credit
2. Where the goods have been sold on credit but the term of credit has expired
3. Where the buyer becomes insolvent

The right of lien is one of the unpaid sellers right against the goods the property in which is transferred to the buyer. It is the unpaid sellers right to retain the goods until the whole of the price is paid or tendered. Lien can be exercised only for non-payment of the price and not for

any other charges due against the buyer. The right can only be exercised on the fulfillment of two conditions:

1. The unpaid seller must be in actual possession of goods
2. The unpaid seller can retain the goods only for the payment of the price of good

The right is not linked to the title of the goods but is concerned with the possession of the goods, hence the goods have to be in actual possession of the seller in order to exercise this right, which can even be done if he possesses the goods as a Bailee or an agent and should not necessarily be the owner. Thus the seller where he has transferred the documents to the buyer his lien is not defeated as long as he remains in the possession of the goods. But if the buyer has transferred the documents of title to a bona fide purchaser, the seller's lien is defeated, as the seller is not allowed to exercise this right when the goods were in the hands of the carrier. Where the goods are sold on credit this right is suspended during the term of credit. But on expiry of that term, if the goods are still in the possession of the seller his lien revives.

This exists only for the price of goods as expressly put in Section 46(1) (a) as held in the case of *Transport & General Credit Corp. v. Morgan*, the right wholly depends upon the statutory provisions and not upon any equitable considerations. The seller is thus not entitled to lien for any other charges i.e. charges for storage or the like. In the case of *Somes v. British Empire Shipping Co.*that where the price has been tendered the seller cannot claim to return the goods further for the expenses incurred by him on storage during the period that he was holding the goods in the exercise of his lien.

Now, since this right is based only on possession, as soon as the possession of goods is lost this right is also lost. The unpaid seller loses the lien thereon:

1. When he delivers the goods to a carrier or other Bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods:
2. When the buyer or his agent lawfully obtains possession of the goods ;
3. By waiver thereof.

The unpaid seller of goods having a lien thereon does not lose his lien by reason only that he has obtained a decree for the price of the goods. Section 47 also provides for the loss of lien by the unpaid seller in the following cases:

1. When he delivers the goods to the carrier or other Bailee for the purpose of transmission to the buyer without reserving right of disposal of the goods;
2. When the buyer or his agent lawfully obtains possession of the goods;
3. By wavier of the lien.

The basis of the right is the non-payment of the price and therefore if the buyer is willing to pay the price there is no question of exercise of this right, if the buyer pays the price this right which might have existed earlier is terminated. It is given under section 47(1) that the unpaid seller is entitled to exercise his right until payment or tender of the price in respect of certain goods, the payment of price thus terminates the sellers right to retain the goods.

The seller also loses when he delivers the goods to a carrier other than a Bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods. This continues so long as the unpaid seller delivers the goods is not made and the seller has the possession of the goods.

According to section 48 if the seller has delivered a part of the goods he can exercise on the remaining part of the goods unless and until the part delivery was made under such circumstances as to show it had been waived because sometimes delivery of part may operate as delivery of whole. Such a waiver may be presumed when the seller allows a period of credit to the buyer or delivers a part of the goods to the buyer or his agent.

4. Banker's Lien

A banker's lien, when it is not excluded by special contract, express or implied, extends to all bills, cheques, and money entrusted or paid to him, and all securities deposited with him, in his character as banker.Strictly, it is confined to securities and properties in the custody of the banker;and in respect of things which belongs to customer, and held by the bank as security;whether they are in the same or different branches. If thing is in possession of the bank, but owned by the customer, has no right over it. A deposit of valuables with a banker is subject to the banker's lien for the customer's general debts to him, unless can prove

agreement to give up his general lien. Thus, if a certain sum is due to a bank in one account, it may retain as security or other movable that came into it hand in another account; including repayment of subsequent advances. A banker's lien would also apply to negotiable instruments remitted by customer for collection. Unless, otherwise directed, the proceeds of such collection may be used by the bank for reducing the customer's debit balance.

5. Extent

The extent of bailee's lien is in respect of services involving the exercise of labour or skill rendered by him in respect of the goods bailed. The services rendered for the purpose of lien must be limited to the labour or skill expended by the bailor over the goods bailed; the lien has nothing to do with any other kind of service. Such labour and skill must have been spent, and thirdly, the lien applies only to such goods over which the bailee has bestowed his labour and expenses, and not to other goods. Nor does any lien attach to goods bailed to a person for the purpose of his working with it, and not upon it. Mere making arrangement for storage of goods in a godown for payment would not attract his provisions since no improvement in the goods takes place, nor is any labour or skill exercised in respect of such goods.

6. Loss

A bailee's right is lost with the loss possession. It is lost if he surrenders possessions of the goods, even though he subsequently regains possession. Thus, in *EC Eduljee v. Café John Bros,E* sold a second hand refrigerator to *P*, and agreed to put it in order for further sum. *P* took delivery. Later, *E* agreed to make further repairs as an act of grace, and was given possession. *E* claimed a lien, as the original fixed for repairs had not been fully paid. It was held that the lien was lost by the original delivery to *P*.

The lien is also lost if the bailee has sold the goods.The bailee's assertion of right to retain the chattel otherwise than by way of lie may operate as a waiver of the lien; or by an act or agreement of the bailee amounting to waiver.

*Right to recover expenses Survives lienz: E*ven though the right is lost on loosing possession of goods, the bailee, nevertheless, retains the right to recover the expenses incurred by him for the preservation of the goods form deterioration no provided for in the contract of bailment.

7. Lien an implied pledge

Banker's lien is a general lien recognized by law. The general lien on the banker is regarded as something more than an ordinary lien; it is an implied pledge. This right coupled with rights u/s 43 of the *Negotiable Instruments Act, 1881* permits bills, notes and cheques, of the banker, being regarded as a holder for value to the extent of the sum in respect of which the lien exists can realize them when due; but in the case of the other negotiable instruments e.g. bearer bonds, coupons, and share warrants to bearer, coming into the banker's hands and thus becoming liable to the lien, the character of a pledge enables the banker to sell them on default, if a time is fixed for the payment of the advance ,or, where no time is fixed ,after request for repayment and reasonable notice of intention to sell and apply the proceeds in liquidation of the amount due to him .The right of sale extends to all properties and securities belonging to a customer in the hands of a banker ,except title deeds of immovable property which obviously cannot be sold.

The law gives inter alia, a general lien to the bankers – *Lloyds Bank v. Administrator General of Burma,* To claim a lien, the banker must be functioning qua banker under Section 6 of the Banking Regulation Act- *State Bank of Travencore v. Bhargavan ,1969 Kerala.*It is now well settled that the Banker lien confers upon a banker the right to retain the security, in respect of general balance account. The term general balance refers to all sums presently due and payable by the customer, whether on loan or overdraft or other credit facilities.*(Re European Bank (1872) 8 Chapter App 41)* In other words, the lien extends to all forms of securities deposited, which are not specifically entrusted or to be appropriated.

8. Case Laws and Illustrations

- *State Bank of India v/s Javed Akhtar Hussain***:**

It was held by the Court that the action of the bank in keeping lien over the TDR and RD accounts was unilateral and high handed and even it is not befitting the authorities of the State Bank of India. The court relied on the ruling *Union Bank of India v/s K.V.Venugopalan* where it was held by the court that the fixed deposit money lodged with the bank is strictly a loan to the bank. The banker in connection with the FD is a debtor .The depositor would accordingly cease to be the owner of the money in fixed deposit .The said money becomes money of the bank, enabling the bank to do as it likes, that however, with the obligation to

repay the debt on maturity .In the same ruling it was further held that the bank being a debtor in respect of the money in FD, had no right to pass into service the doctrine of banker's lien and the money in Fixed Deposit.

- *Valpy v. Gibson:*

Goods were sold and sent by the sellers at the request of the buyer to the shipping agents of the buyer, and were put on board a ship by those agents. Subsequently, they were re-landed and sent back to the sellers for the purpose of re-packing. While they were still in the possession of the sellers for that purpose, the buyer became insolvent. Thereupon the sellers refused to deliver them to the buyer's trustee in bankruptcy except upon payment of the price. Held, that the sellers had lost their lien by delivering the goods to the shipping agents, and their refusal to deliver the goods to the trustee was wrongful.

- *Gurr Cuthbert***:**

Sale of stack of hay for 86 dollars, to be paid for as it is taken away, the whole to be removed by a certain date. Part, but only part, was paid for and removed by the buyer before that date, and two months after that date the seller cut up and used the remainder. In doing so, the seller waived his line, and the buyer successfully maintained an action against him.

- *Grice Richardson***:**

The appellants, who traded in Australia, imported three parcels of tea which they sold to the respondents, who gave their acceptance or promissory notes for the price. The appellants were also warehousemen, having a bonded warehouse in which they had stored the tea on its importation. On selling the tea to the respondents, the appellants handed them delivery orders, which stated that the tea to which it referred was warehoused by the appellants. The delivery orders were subsequently endorsed by the respondents to w & Co. And entries were made at the warehouse that the tea had been transferred to the company. Subsequently, W & Co became insolvent and their acceptance and notes were dishonoured, by which time part of the tea had been delivered to W & Co and part remained in the warehouse, for which the appellants had not been paid. Held that the appellants as vendors retained their lien in respect of the tea which remained in the warehouse.

Q4 Under what circumstances an agency is terminated?

Answer - Contract entered into through an Agent and obligations arising from the acts done by an agent be enforced in the same manner and will have the same legal consequences as if the contract has been entered into and the acts done the principal in person as described in section 226 of the Act. Where a Agent does not work in good faith and is not loyal to his principal and tries to commit fraud or misrepresent in the business of Agency then principal is bound to take steps towards termination of the agency.

The following may the reasons which can be responsible for the termination of the Agency:-

1. By the principal revoking his authority: Under section 203 of Contract Act-1872 lays down that, the principal may save or otherwise revoke the authority given to his agent at any time before the authority has been exercised so to bind the principal.

2. By the Agent renouncing the business of the Agency:- Section 206 of Indian Contract Act, 1872 provides that, principal can revoke the agent's authority so also the agent can renounce the agency by giving a reasonable notice of renunciation otherwise he will be liable to make the loss good for any damage. Sec. 207 further mentions that like revocation the renunciation may also be express or implied in the conduct of agent.

3. By the business of the agency being completed:- In term of contract where the period of completion of the business is made the agency automatically stands terminated.

4. By either the principal being adjudicated an insolvent: Section 201 of the Act clearly indicates that, the agency which may be validy created stands revoked in the event of different situations including the death or insanity of the principal or the agent or by insolvency of the principal.

5. Principal should give reasonable notice of revocation:- Provisions says that a reasonable notice of the revocation when he have the justification to revoke the authority under sec.206.

6. By either the principal or Agent dying or becoming unsound mind: Section 201 also describes that, when principal dying or becoming of unsound mind agent is bound o take on behalf of the representatives of his late principal all reasonable steps for the protection of interests of agency.

7. By the happening of any event rendering the agency unlawful: - Whenever there is declaration of war the principal and agent may become alien enemies also comes in the way of termination of the agency.

8. If a limited period is given:- If the agency is for a fixed term, although with the possibility of fresh appointment after the expiry of the term it automatically terminates on expiry of the said term such agency cannot be said to be irrevocable as in the case of P. sukhdev v/s Commissioner of Endowments-1997. Under sec.205.

9. Manner and Circumstances of Revocation:- The principal may have where the agent has himself an interest in the property which forms the subject matter of the agency, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal under section 203 of the Act.

The Principal cannot revoke the authority given to his agent after the agent has partly exercised his authority so far as regards such acts and obligations as arise from acts already done in the Agency as laid down in the section 204 of the Act.

The reasonable notice of revocation is essential. Revocation may be express or implied in the Contract of the business under section 206 of the act.

The revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively under section 207 of the act.

ILLUSTRATION: - A empowers B to let A's house. Subsequently A lets it himself. This implied revocation of B's authority.

CONCLUSION:- The effect of termination of Agency is on the maximum level to the Agent about his earnings and also put the principal in financial losses. Agent must remain faithful in the business of Agency. He should rendered the accounts, financial matters, appointment of sub-agents and other activities relating to Agency to the notice of his principal failing which it leads to termination of Agency.

Q5 Define the tern Sub-Agent. How far is principal bound by the acts of Sub – Agents. Distinguish between Sub-Agent and Substituted – Agent.

Answer - A rule which based on the principle that Agency is a contract based on trust and mutual confidence between the parties. A principal may have the mutual confidence in his

Agent but not in the subsequent sub Agent appointed by the Agent. There is a provision regarding 'delegates non-protest delegare' which means of this maximum is that an agent to whom another has delegated his own authority cannot delegate that authority to a third person.

PROVISIONS MADE IN THE ACT:- Under section 190 of the Contract Act which deals with delegation of an authority by the Agent describes as under:-

"An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally unless by the ordinary custom or trade a sub-agent may or from the nature of the agency a sub-agent must be employed."

However the general principle is that the agent cannot delegate his authority to a third person but there are two exceptions to this general rule. These are:-

i) When the ordinary custom of trade permits employment of a sub-agent.

ii) When the nature of agency demands that employment of a su-agent is necessary by the Agent.

Although there are two exceptional conditions no agent is authorized to delegate his authority it the nature of his act is purely managerial and he is supposed to use his personal skill in discharge of his duty or where he is personally required to perform his duties.

SUB-AGENT:- Sub agent is a person employed by and acting under the control of the original Agent in the business of Agency under section 191 of the Act.

LEGAL POSITION OF SUB-AGENT PROPERLY APPOINTED:- Sub Agent may be either properly appointed or improperly appointed. If he is appointed by the Agent with the authority of his principal he is called sub-agent properly appointed. If he is appointed without the authority of principal he is improperly appointed.

When the sub-agent is appointed properly with the consent of the principal, the principal is bound by his acts and is responsible for his action as if he was an agent appointed by the principal.

The sub-agent is not responsible for his acts to principal. He is responsible only for such acts to the original Agent.

But if the sub-agent is guilty of fraud or willful wrong against the principal he becomes directly responsible to the principal under section 192 of the Act.

Difference between sub-Agent & substitute Agent

SUB-AGENT	SUBSTITUTED AGENT
Sub Agent is a person employed by and acting under the control of the original agent in the business of agency.	Substituted agent can be nominated by the original Agent to act for the principal for a certain part of the business of agency.
A sub-agent is not generally responsible to the principal but he is responsible to the agent.	A substituted agent by his mere appointment becomes immediately responsible to his principal.
There is no privity of contract between sub-agent and principal.	A privity of contract is created between the principal and the substituted Agent.

CONCLUSION:- There is lot of difference in between sub-agent and substituted agent one is appointed by the original agent is immediate responsible to the original whereas the substituted agent is directly responsible to the principal. He is appointed for some part of the business of agency.

Q6 Sharing of Profits in Business is not a conclusive evidence of the existence of Partnership. Comment.

Answer - The object of every partnership must be to carry on a business for the sake of profits and share the same. Therefore clubs, societies which do not aim at making profits are not said to be a partnership. The definition of term 'Profits' in the Partnership Act is that 'net- gains' i.e. he excess of the returns over outlay. At one time it was thought that a person who shared the profits must incur the liability also as he was deemed to be a Partner as it was held in a case of Grace v/s Smith, 1775. This principle was again confirmed in a case of

Waugh v/s Carver, 1793, it was held that the person sharing the profits does not always incur the liability of partners unless the real relation between them is that of partners.

ESSENTIALS:- Although sharing of profits is one of the essential elements of every partnership but every person who shares the profits need not always be a partner.

Example No.1: - I may pay a share of profits to the manager of my business instead paying him fixed salary so that he may takes more interest in the progress of the business, such person sharing the profits is simply my servant or agent but not my partner. Example No. 2:- A share of profits may be paid by a business man to a money-lender by way of payment towards the return of his loan and interest thereon, such a money-lender does not thereby become a partner.

a. The principle laid down in Cox v/s Hickman-1860: this principle forms the basis of the provisions of section 6 of the Partnership Act which gives a caution that the presence of only some of essentials of partnership does not necessarily result in partnership. For determining the existence of partnership there must be had to the real relation between the parties after taking all the relevant facts into consideration.

b. In determining whether a group of persons is or not a firm or whether a person is or is not a partner in a firm. To answer this query an explanation is given below:

(i) Sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons as partners.

(ii) Receipt by a person of a share of the profits of a business or of a payment contingent upon the earning of profits or varying with the profits earned by a business does not of itself make him a partner with the persons carrying on the business and in particulars the receipt of such a share by a servant or agent as remuneration a case of McLaren v/s Verschoyle-190l, or by a widow or child of a deceased partner.

(iii) Mollow March & Co. v/s Courts of Wards-1872: In this case a Hindu Raja advanced a large amount to a firm. Raja was given extensive powers of control over the business and he was to get commission on profits until the repayment of loan with 12% interest. It was held by the Raja could not be made liable for the debts contracted in the agreement was not to create Partnership but simply to provide security.

(iv) In a case of Walker v/s Hi4sch-1884: A person was working as clerk. The served a notice by the defendants terminating his services. Clerk contented that he was a partner and claimed dissolution of firm. I was held that though he shared the profits he was having the capacity of a servant only. He was not a partner and could not see dissolution of the firm.

CONCLUSION:- On nut-shell it could be concluded that just sharing the profits in the business is not conclusive existence of the partnership till it create some relationship between the persons who have entered into Partnership.

Q7 How the firm is registered? What is the effect of Registration and Non – Registration of firms?

Answer - In the Contract Act it is not necessary that the firm should be registered at the time of its formation. However a firm may be got registered at any-time after the creation of Partnership. Act does not lay down any-time limit within which the firm should be registered provided in section 63 of Partnership Act. The act does not impose any penalties for non registration of firms.There are some disabilities are provided in sec.69 of the Act for unregistered firms and their partners.

HOW THE FIRM IS REGISTERED:- The partnership agreement or any transaction between the partners and third parties is void on the basis of non-registration of partnership firm and the partners themselves. In addition to the above no prudent partner or firm should hesitate to get his or its name registered at the earliest possible opportunity. The procedure of registration is very simple as provided in section 58 and 59 of the Act.

A registration of firm may be affected by submitting to the Registrar of Firms a statement in the prescribed form and accompanied by the prescribed fee. The application must bear the following information:-

The firm's name. Place of business and the name of other places where the firm can carry on business. Date of joining of each partner with their permanent addresses. The duration of the firm.

When the Registrar is satisfied that the above mentioned requirements have been complied with and then he shall record an entry of statement in the register. This amounts to the registration of the firm.

Section 69 of the Act imposes certain claims in the Civil Courts. This section provides pressure which is to be brought to bear on partners to have the firm and themselves registered. The pressure consists in denying certain right of litigation to the firm or partners not registered under this act. A cause of action arose when the firm was unregistered but was registered at the time of filing the suit. It was held in the case of State of U.P., v/s Hamid Khan & Bros. and othrs-1986: it was held that section 69 to be inapplicable in this case.

EFFECTS OF NON-REGISTRATION& REGISTRATION

ON REGISTRATION OF FIRM	ON NON-REGISTERED FIRM
Any partner, nominee and authorized agent can bring a suit to enforce a right arising from a contract against any past or present partner and for the third parties too.	No partner, nominee and agent can bring a suit to enforce a right arising from a contract against any firm or any past or present partner of the firm or third parties.
Registered firm can claim of set-off or other proceedings to enforce a right arising from a contract u/s 69 of the Act.	The disabilities as provided in sec.69 of the act i.e.to claim of set-off or other proceedings to enforce a right arising from a contract.
Filing of the return every year is necessary.	It is not required to file the return by the un-registered firm.

Loonkaran v/s Ivan E. John, 1977, it was held that sec.69 is mandatory and unregistered partnership firms cannot bring a suit to enforce a right arising out of a contract falling within the ambit of sec.69 void.

In M/s Balaji Constructions co., Mumbai v/s Mrs. Lira Siraj Sheikh, 2006 It was observed that the firm was not registered on the date of filing of suit and person suing as partners were not shown in register of firm and suit by such firm hit by section 69(2) of Partnership Act and was liable to be dismissed.

CONCLUSION :- It is very well established that the partnership agreement or transaction between the partners and third parties is void on the ground of Non-Registration of the firm as well as of Partners. To enforce any right arising out of a contract the registration of both firm and partners are necessary for the benefit of the both.

Q8 Discuss the essentials of Partnership Firm.

Answer - Indian partnership Act was enacted in 1932 and it came into force on Ist day of October, 1932. A partnership arises from a contract and therefore such a contract is governed not only by the provisions of the Partnership Act but also by general law of contract.

DEFINITION OF PARTNERSHIP:- Kent's view "Partnership as a contract of two or more competent persons to place their money, efforts, labour and skill or some of them in lawful commerce or business and to share the profit and bear the loss in certain proportions. "Dixon defines partnership as, "Group of Persons". According of Pollock, "Partnership is a relation which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of all of them."

Definition:- Section 4 of the Indian Partnership Act defines the 'Partnership' as under:- Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all."

NATURE OF PARTNERSHIP:- Partnership is a form of business organization, where two or more persons join together for jointly carrying on some business. It is an improvement over the 'Sole-trade' business, where one single individual with his own resources, skill and effort carries on his own business. Any two or more persons can join together for creating Partnership.

In certain respects a partnership is a more suitable form of business organization than a Company. For the creation of partnership just an agreement between various persons is required. Whereas in the case of company there are a lot of procedural formalities which have to be gone through to create a Company. In the case of company the control over regarding distribution of profits, holding of meetings, maintaining of accounts runs through a statutory control. Whereas in partnership firm the partners are the master of their affairs.

ESSENTIALS OF PARTNERSHIP: THE FOLLOWING ARE THE ESSENTIALS OF THE PARTNERSHIP:-

1. PERSONS WHO HAVE AGREED:- A question is arises at the preliminary stage is that, " who are the persons and who can agree for partnership:

(i) MINORS: - A minor is incompetent to contract case of Mohori Bibi v/s Damodardass Ghosh-1903: Minor may not become partner but he can be admitted to benefit of partnership and can share the profits. He cannot be liable for the losses.

(ii) CORPORATION: - A corporation is a legal person therefore corporation may enter into a partnership with the condition only if the constitution of the corporation must empowers it to form a partnership and not otherwise.

(iii) FIRM: - Firm is also recognized as a legal person in India and it cannot enter into a partnership. A firm which is proprietorship firm or a company registered under the Company's Act can very well enter into a partnership but here is mentioned that partnership firm is not a legal person therefore it is not competent to enter into a partnership. Duli chand v/s CIT, 1956.

(iv) ALIEN: - A national of other country may be a friendly alien or an enemy alien. A friendly Alien can enter into Partnership but latter Cannot except when he is under the protection of that country.

2. TO SHARE THE PROFITS OF A BUSINESS:- This line consists the two parts: 1. To share the profit and 2. Of a business. However the explanation of these two terms are as under :-

(i) Business:-This definition is not exhaustive. The existence of business is essential unless there is no intention to carry on business and to share the profits, there can be no partnership. Therefore the objects of the partnership and business must be lawful. Case of R.R.Sharma v/s Ruben, 1946.

(ii) Sharing of Profits:- A case of Cox v/s Hickman, 1860: though sharing of the profits of business is essential. The definition leave it opens as to how and when these profits are to be shared. In order to continue the partnership the actual existence of a business carried on by partners with an agreement to share profits of such business is essential.

(iii) Sharing of losses Grace V/s Smith-1775, Mutual Agency and Acting for all and to carry on the business are the essential terms of the partnership.

CONCLUSION:- In order to constitute partnership there must not only be sharing of profits but there must be also the relationship and the principle of agency. Section 4 of the act that there must be actual existence of a business carried on by the partners with an agreement to share the profits of such business is essential.

Q9 Explain the principle or doctrine of Holding Out.

Answer - Every partner is liable for all acts of the firm done while he is a partner. Therefore generally a person who is not a partner in the firm cannot be made liable for an act of the firm. In certain cases however a person who is not a partner in the firm may be deemed to be a partner or held out to be a partner for the purpose of his liability towards a third party.

The basis of liability of such a person is not that he was himself a partner or was sharing the profits o4 was taking part in the management of the business but the basis is the application of the law of estoppels because of which he is held out to be a partner or deemed to be a partner by "holding out"

DEFINITION OF HOLDING OUT Section 28 of the Partnership Act makes the following provision under this doctrine:-

(1)Anyone who by words spoken or written or by conduct represents himself or knowingly permits himself to be represented to be a partner in a firm is liable as a partner in that firm to anyone who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

(2) Where after a death of the partner the business is continued in the old firm name the continued use of that name or of the deceased partner's as a part thereof shall not itself make his legal representative or his estate liable for any act of the firm done after his death.

ESSENTIAL INGREDIENTS: 1. Representation: - The representation may be in any of the three ways:-

i) By words written or spoken: - In case of Bevanv/s The National Bank Ltd., a person permitted his name to be used in the title of the firm. Therefore he was held liable under this principle.

ii) By conduct:- In the case of Parter v/s Lincell: a person by his conduct represented as a partner and was held liable. Martyn v/s Gray-1863: It was held that by knowingly permitting himself or suffering himself to be represented as a partner.

iii) Alleged Representation relied:- In the case of Munton v/s Rutherford: it was held that Mrs.Ruherford was not liable as a partner by estoppels or holding out.

iv)Credit to Firm on Representation:- In the case of Oriental bank of Commerce v/s S.R.Kishore& Co.-1992: It was held he was liable for the acts of the firm on the basis of the principle of "holding out". Section 28 of the Act is based upon the principle of estoppels by conduct. Where a man holds himself out as a partner or allows others to do it, he is then

properly stopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man doing so may be rightly held liable as a partner by estoppels as held in a case of Mollwo March & Co. v/s Court of Wards-1872.

The representation on which a case of "Holding Out" is sought to be established may be express or implied it may consist of verbal or written statements or even may be by conduct. Form of representation is not material in such case.

EXCEPTIONS TO THE DOCRINE OF HOLDING OUT:-

1. Tort: The principle of holding a person liable for act of a firm on the ground of holding out cannot be extended to include liability arising out of tort.

2. Liability of Retired Partner: - The rule of holding-out provided in this section is also applicable to the retired partner who retires from the firm without giving proper public notice of his retirement. In such case person who even subsequent to the retirement give credit to the firm on the belief that he was a partner will be entitled to hold him liable as held in a case of Scrarf v/s Jardine-1882.

3. Insolvency of Partner: - Insolvency of the partner extinguished as the liability of a partner and he cannot be held liable even upon this doctrine.

4. Dormant Partner: His retirement does not require a public notice for bringing end to his liability. According to proviso to section 45(1) of the partnership Act a dormant partner is not liable for the acts done after the date on which he ceases to be a partner.

CONCLUSION: Anyone who by words spoken or written or by conduct represents himself or knowingly permits himself to be represented to be a partner in firm is liable as a partner in that firm to anyone who has on the faith of any such representation given credit to the firm, he must bear the consequences u/s28.

Q10 What are the provisions regarding dissolution of Partnership Firm?

Answer - Dissolution of partnership means coming to an end of the relation known as Partnership between various partners. It may also can be defined as the breaking up or extinction of the relationship which subsisted between all the partners of the firm as held in a case of Santdas v/s sheodyal-1971:

Here we are to note the significance of words in definition is, "between all partners "means every one of the members of the firm cease to carry on business of partnership. Thus where one or more members ceased to be partners in such firm while others remain the firm is not said to be dissolved.

DEFINITION: - The term dissolution of the Partnership firm has been defined in Section 39 of the Partnership Act which lies as, "the dissolution of partnership between all the partners of a firm is called the, 'dissolution of the firm'."

MODES OF DISSOLUTION: - There are five different modes of the dissolution of a firm:

Dissolution: = I without the interference of Court.

Ii. With the orders of the Court.

1. Without the interference of the Court: - there are four modes of dissolution of firm:-1.By Agreement under section 40 of the Act. 2, Compulsory dissolution u/s-41. 3. on the happening of certain contingencies u/s 42. 4. by Notice u/s 44 of Act.

1. Dissolution by Agreement: - As partners can create partnership by making a contract as between them, they are also similarly free to end this relationship and thereby dissolve the firm by their mutual consent.

Sometimes there may have been a contract between the partners indicating as to when and how a firm may be dissolved, such firm can be dissolved in accordance to such contract. A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners as provided in section 40 of the Act. A case in this regard is of, EFD.Mehta v/s MFD Mehta-1971.

2.Compulsory dissolution:- Under Section 41 of the Act, if by the happening of any event which makes it unlawful for the business of the firm or for the partners to carry it on in partnership.

(a)If by the adjudication of all the partners or of all the partners but one as insolvent declared by the court.

3.On he happening of certain contingencies:- On the grounds of the gist of contract made between the partners of a firm may dissolved :- i) If the partnership firm constituted for a fixed term. By the expiry of the term firm can be dissolved. Ii) By the death of a partner may results dissolution unless rest of partners agrees to contrary. iii) It firm is constituted to carry out one or more adventures or undertaking by the completion thereof. On completion of the same firm may be dissolved.

4.Dissolution by Notice of Partnership:- If the partnership is azt will the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention dissolve the firm as provided in section 44 of this act, with the following conditions:-

a). The notice for dissolution of partnership must contain the clear intention of dissolving the firm which must be a final one. The date on which firm is dissolved must be indicated in the notice. A case of Mir Abdul Khaliq v/s Addul Gaffar Serifff-1985.

b). Notice must be given in writing.

c). Written notice must be given to all other partners of the firm.

5. Dissolution By Court:- A firm may be dissolved at the suit of a partner on any of grounds which provided in Section 44 of Act:-

i. That the partner has become of an unsound mind.

ii. That the partner has become in any way permanent incapable of performing his duties as a partner but in the case of Whitewell v/s Arthur- 1885: it was held partial incapacity cannot be a ground for dissolution of partnership firm.

iii. That a partner is guilty of such misconduct as would prejudicially affect the business of the firm, a case of Harrison v/s Tenent-1856.

iv. That the business cannot be carried on except at loss.

Q11 Explain the main provisions of sales of Goods Act.

Answer - **Scope of the Act**

The sale of Goods Act deals with 'Sale of Goods Act,1930,'contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price." 'Contract of sale' is a generic term which includes both a sale as well as an agreement to sell.

Essential elements of Contract of sale

1. Seller and buyer

There must be a seller as well as a buyer.'Buyer' means a person who buys or agrees to buy goods[Section 2910].'Seller' means a person who sells or agrees to sell goods [Section 29(13)].

2. Goods

There must be some goods.'Goods' means every kind of movable property other than actionable claims and money includes stock and shares,growing crops,grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale[Section 2(7)].

3. Transfer of property

Property means the general property in goods,and not merely a special property[Section 2(11)].General property in goods means ownership of the goods. Special property in goods means possession of goods.Thus,there must be either a transfer of ownership of goods or an agreement to transfer the ownership of goods.The ownership may transfer either immediately on completion of sale or sometime in future in agreement to sell.

4. Price

There must be a price.Price here means the money consideration for a slae of goods[Section 2(10)].When the consideration is only goods,it amounts to a 'barter' and not sale.When there is no consideration ,it amounts to gift and not sale.

5. Essential elements of a valid contract

In addition to the aforesaid specific essential elements,all the essential elements of a valid contract as specified under Section 10 of Indian Contract Act,1872 must also be present since a contract of sale is a special type of a contract.

Meaning and types of goods

Meaning of goods[Section 2(7)]

Goods means every kind of movable property other than actionable claims and money,and includes the following:

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- Stock and share
- Growing crops,grass and thing attached to or forming part of the land which are agreed to be served before sale or under the Contract of sale.

Types of Goods[Section 6]

1.Existing Goods

Existing goods mean the goods which are either owned or possessed by the seller at the time of contract of sale.The existing goods may be specific or ascertained or unascertained as follows:

a) Specific Goods[Section 2(14)]:

These are the goods which are identified and agreed upon at the time when a contract of sale is made-For example,specified TV,VCR,Car,Ring.

b) Ascertained Goods:

Goods are said to be ascertained when out of a mass of unascertained goods,the quantity extracted for is identified and set aside for a given contract.Thus,when part of the goods lying in bulk are identified and earmarked for sale,such goods are termed as ascertained goods.

c) Unsanctioned Goods:

These are the goods which are not identified and agreed upon at the time when a contract of sale is made e.g. goods in stock or lying in lots.

2. Future Goods[Section 2(6)]

Future goods mean goods to be manufactured or produced or acquired by the seller after the making of the contract of sale.There can be an agreement to sell only.There can be no sale in respect of future goods because one cannot sell what he does not possess.

3. Contingent Goods [Section 6(2)]

These are the goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

Price Of Goods

Meaning[Section 2(10)]

Price means the money consideration for a sale of goods.

Modes of determining Price [Section 9(1)]

There are three modes of determining the price as under:

- It may be fixed by the contract or
- It may be left to be fixed in an agreed manner
- It may be determined by the course of dealing between the parties.
- Thus,the price need not necessarily be fixed at the time of sale.

Consequences of not determining the Price in any of the Mode [Section 9(2)]

Where the price is not determined in accordance with Section 9(1),the buyer must pay seller a reasonable price.What is a reasonable price is a question of fact dependent on the circumstances of each particular case.It may be noted that a reasonable price need not be market price.

Consequence of not Fixing Price by third party[Section 10(1)]

The agreement to sell goods becomes void if the following two conditions are fulfilled.

- If such agreement provided that the price is to be fixed by the valuation of a third party,
- If such third party cannot or does not make such valuation.

Duty of buyer

A buyer who has received and appropriated the goods,must pay a reasonable price therefor.

Right of party not at fault to sue

Where such a third party is prevented from making the valuation by fault of the seller or buyer,the party not at fault may maintain a suit for damages against the party in fault.

Conditions and Warranties

It is usual for both seller and buyer to make representations to each other at the time of entering into a contract of sale. Some of these representations are mere opinions which do not

form a part of contract of sale.Whereas some of them may become a part of contract of sale.Representations which become a part of contract of sale are termed as stipulatuins which may rank as condition and warranty e.g. a mere commendation of his goods by the seller doesn't become a stipulatuin and gives no right of action to the buyer against the seller as such representations are mere opinion on the part of the seller.But where the seller assumes to assert a fact of which the buyer is ignorant,it will amount to a stipulation forming an essential part of the contract of sale.

Meaning of Conditions [Section 12(2)]

A condition is a stipulation
Which is essential to the main purpose of the contract
The breach of which gives the aggrieved party a right to terminate the contract.

Meaning of Warranty[Section 12(3)]

A warranty is a stipulation
Which is collateral to the main purpose of the contract
The breach of which gives the aggrieved party a right to claim damages but not a right to reject goods and to terminate the contract.

Conditions to be treated as Warranty[Section 13]

In the following three cases a breach of a condition is treated as a breach of a warranty:
Where the buyer waives a conditions; once the buyer waives a conditions,he cannot insist on its fulfillment e.g. accepting defective goods or beyond the stipulated time amount to waiving a conditions.
Where the buyer elects to treat breach of the condition as a breach of warranty;e.g. where he claims damages instead of repudiating the contract.
Where the contract is not severable and the buyer has accepted the goods or part thereof,the breach of any condition by the seller can only be treated as breach of warranty.It can not be treated as a gorund for rejecting the goods unless otherwise specified in the contract.Thus,where the buyer after purchasing the goods finds that some condition is not fulfilled,he cannot reject the goods.He has to retain the goods entitling him to claim damages.

Express and Implied Conditions and Warranties

In a contract of sale of goods,conditions and warranties may be express or implied.

1.Express Conditions and Warranties.

These are expressly provided in the contract.For example,a buyer desires to buy a Sony TV Model No. 2020.Here,model no. is an express condition.In an advertisement for Khaitan fans,guatantee for 5 years is an express warranty.

2. Implied Conditions and Warranties

These are implied by law in every contract of sale of goods unless a contrary intention appears from the terms of the contract.The various implied conditions and warranties have been shown below:

Implied Conditions

1. Conditions as to title [Section 14 (a)]

There is an implied condition on the part of the seller that

In the case of a sale,he has a right to sell the goods,and
In the case of an agreement to sell,he will have a right to sell the goods at the time when the property is to pass.

2. Condition in case of sale by description [Section 15]

Where there is a contract of sale of goods by description,there is an implied condition that the goods shall correspond with description.The main idea is that the goods supplied must be same as were described by the seller.Sale of goods by description include many situations as under:

i. Where the buyer has never seen the goods and buys them only onm the basis of description given by the seller.
ii. Where the buyer has seen the goods but he buys them only on the basis of description given by the seller.
iii. Where the method pf packing has been described.

3. Condition in case of sale by sample [Section 17]

A contract of sale is a contract for sale by sample when there is a term in the contract, express or implied,to that effect.Such sale by sample is subject to the following three conditions:

The goods must correspond with the sample in quality.
The buyer must have a reasonable opportunity of comparing the bulk with the sample.
The goods must be free from any defect which renders them unmerchantable and which would not be apparent on reasonable examination of the sample.Such defects are called latent defects and are discovered when the goods are put to use.

4. Condition in case of sale by description and sample [Section 15]

If the sale is by sample as well as by description, the goods must correspond with the sample as well as the description.

5. Condition as to quality or fitness [Section 16(1)]

There is no implied condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale.In other words,the buyer must satisfy himself about the quality as well as the suitability of the goods.

Exception to this rule:

There is an implied condition that the goods shall be reasonably fit for a particular purpose described if the following three conditions are satisfied:

1.
    1. The particular for which goods are required must have been disclosed(expressly or impliedly) by the buyer to the seller.
    2. The buyer must have relied upon the seller's skill or judgement.
    3. The seller's business must be to sell such goods.

6. Condition as to merchantable quality[Section 16(2)]

Where the goods are bought by description from a seller who deals in goods of that description,there is an implied condition that the goods shall be of merchantable quality.The

expression ‘ merchantable quality’ means that the quality and condition of the goods must be such that a man of ordinary prudence would accept them as the goods of that description.Goods must be free from any latent or hidden defects.

7. Condition as to wholesomeness

In case of eatables or provisions or foodstuffs,there is an implied condition as to wholesomeness.Condition as to wholesomeness means that the goods shall be fit for human consumption.

8. Coditions implied by custom [Section 16(3)]

Condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Implied warranties

a)Warranty as to quiet possession [Section14(b)]

There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods.The reach of this warranty gives buyer a right to claim damages from the seller.

b)Warranty of freedom from encumbrances [Section 14(c)]

There is an implied warranty that the goods are free from any charge or encumbrance in favour of any third person if the buyer is not aware of such charge or encumbrance.The breach of this warranty gives buyer a right to claim damages from the seller.

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- Warranty as to quality or fitness for a particular purpose annexed by usage of trade[Section 16(3)]
- Warranty to disclose dangerous nature of goods

In case of goods of dangerous nature the seller fails to do so, the buyer may make him liable for breach of implied warranty.

Transfer of property in goods

Meaning of Passing of Property/Transfer of Property

Passing of property implies transfer of ownership and not the physical possession of goods.For example,where a principal sends goods to his agent,he merely transfers the physical possession and not the ownership of goods.Here,the principal is the owner of the goods but is not having possession of goods and the agent is having possession of goods but us not the owner.

Q12 Difference between Sale and Agreement to Sell.

Answer - Key Differences Between Sale and Agreement to Sell

The following are the major differences between sale and agreement to sell:

1. When the vendor sells goods to the customer for a price, and the transfer of goods from the vendor to the customer takes place at the same time, then it is known as Sale. When the seller agrees to sell the goods to the buyer at a future specified date or after the necessary conditions are fulfilled then it is known as Agreement to sell.
2. The nature of sale is absolute while an agreement to sell is conditional.
3. A contract of sale is an example of Executed Contract whereas the Agreement to Sell is an example of Executory Contract.
4. Risk and rewards are transferred with the transfer of goods to the buyer in Sale. On the other hand, risk and rewards are not transferred as the goods are still in possession of the seller.
5. If the goods are lost or damaged subsequently, then in the case of sale it is the liability of the buyer, but if we talk about an agreement to sell, it is the liability of the seller.
6. Tax is imposed at the time of sale, not at the time of agreement to sell.
7. In the case of a sale, the right to sell the goods is in the hands of the buyer. Conversely, in agreement to sell, the seller has the right to sell the goods.

Conclusion

Under Indian Sale of Goods Act 1930, section 4 (3) deals with the contract of sale and agreement to sell, where it has been clarified that the agreement to sell also come under sale. However, there is a distinction between these two terms which we discussed above.

Q13 Explain the concept of passing of property.

Answer - Passing of Property

As already noted in Unit 1, the passing of property i.e. the ownership in the goods from the seller to the buyer, is one of the essentials of a contract of sale. We have also seen that it is the essence of a contract of sale. In order to determine the liability of parties, it is important to see in whom does the property lie at a given instance. For example, if after the contract the goods are destroyed or damaged, the party who is the owner of the goods at the time will have to bear the loss.If the property in the goods has already passed, the buyer will have to bear the loss but if the seller still continues to be the owner, the loss will have to be borne by him. It is relevant to note here section 26. According to this section, risk prima facie passes with property. It reads that unless otherwise agreed, the goods remain at the seller‟s risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer‟s risk whether delivery has been made or not. Clearly, then, it is with the property that the risk prima facie passes. Therefore, passing of property becomes an important topic. The provisions of section 4 may also be noted here. As per that section, the seller may transfer the property in the goods either at the time of the contract or at some future time.

The first part of Chapter III of the Sale of Goods Act,1 containing sections 18 to 26 deals with “transfer of property as between seller and buyer”.

Specific and Unascertained Goods

For the purpose of transfer of property, goods have been divided into specific and unascertained. We have already noted the distinction between these two types of goods in Unit 1. Specific goods mean goods identified and agreed upon at the time a contract of sale is

made.2 On the other hand, if the goods are not identified and agreed upon at the time of making the contract, such goods are known as unascertained goods. Sections 19, 20, 21, 22 and 24 provide the rules regarding the transfer of property in specific goods while sections 18, 23 and 25 provide the rules regarding the transfer of property in unascertained goods.

Transfer of Property in specific goods

(i) Property passes when intended to pass- S. 19: It is provided that in a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Further, this section provides that for the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

1 1930. 2 S. 2 (14).

The question as to whether the title from the vendor to the vendee passed on execution of registration of documents for non-payment of consideration money entirely depends upon the intention of the parties. It is for the court concerned to take into consideration the various factors and circumstances existing at the time for the purpose of determining the intention of the parties.3In Saks v Tilley,4 there was a contract for the sale of diamonds. The condition for the supply of diamonds was acceptance of the bill of exchange by the buyer. Along with the parcel of diamonds, the Bill was sent and the invoice was marked "settled by acceptance". It was held that the intention of the parties was that the ownership in the goods should not pass until the Bill is accepted. In united India Ins. Co. v O. Jameela Beevi,5 there was a sale of a motor vehicle (jeep). The price stipulated in the agreement was Rs. 10,000 out of which Rs. 2,000 had been paid by the buyer immediately, and the document containing the agreementof sale stipulated registration in the name of the buyer, after the balance of Rs. 8,000 was paid. It was also agreed that: (1) until the entire price is paid, the ownership in the vehicle shall not pass to the buyer, and (2) the seller was to execute the requisite papers after the payment of the balance of the price. Before the abovesaid conditions were fulfilled, there was an accident and the question arose as to who was the owner of the vehicle for the purpose

of liability of the Insurance Company. It was held that since the requisite conditions necessary for the transfer of property had not yet been fulfilled, the seller was the owner of the vehicle at the time of the accident. In Underwood v BCB & Cement Syndicate,6 there was a contract to supply a condensing engine, F.O.R. London. At the time of the contract, it was installed at the seller‟s premises. It was dismantled. While it was being loaded in trucks for being taken to the rails, it was damaged. It was held that in this casethe intention of the parties was that the property should not pass until the engine was safely put on rail in London and therefore, loss for the damage to the engine had to be borne by the seller.In United Breweries Ltd. V State of Andhra Pradesh,7 a beer manufacturer sold beer in bottles and crates. According to the scheme, the customer had to pay the sale priceof beer plus refundable deposit for the crates and bottles. Then the customer, in his own turn, apart from charging the price of the beer was to take 40 paisa refundable deposit from the consumer. The consumer could return the bottles to the said manufacturer‟s customer and the customer would return the empty bottle to the manufacturer and get back the refund. It was held that there was sale of beer only and not of bottles and crates. There was no intention to sell bottles and crates and, therefore, they could not constitute the turnover assessable to sales tax.

Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

3 Ramchandra Singh v SDO, Hazipur AIR 1989 Pat50. 4 1915 32 TLR 148 CA. 5 AIR 1991 Ker. 380. 6 1922 1 KB 343. 7 AIR 1997 SC 1316.

(ii) Specific goods in a deliverable state- S. 20: This section deals with the case where the contract of sale is unconditional for specific goods in a deliverable state. In such a case, the property in the goods passes to the buyer when the contract is made. It is immaterial whether the time of payment of price or the time of delivery of the goods, or both, is postponed. Thus, if the contract between the parties satisfies the following conditions, the property passes at the time of making of the contract: The contract is an unconditional one; The goods are specific; The goods are in a deliverable state.

On the fulfilment of these conditions, the property would pass even though the delivery of the goods or the payment of the price, or both, is postponed.

A contract which is not subject to any condition precedent or subsequent is unconditional. Goods are said to be in a deliverable state when they are in such state that the buyer would under the contract be bound to take delivery of them. For example A purchases a table which, according to the contract, has to be polished by the seller before delivery, the table is not in a deliverable state. It will become in a deliverable state when the same has been polished. The property in such a case would not pass at the time of the making of the contract. If the contract is a conditional one, the property would not pass at the time of making of the contract. Sections 21 and 22 deal with conditional contracts whether the seller is to fulfil the condition of either putting the goods in a deliverable state under section 21 or to weigh, measure, test, etc. the goods in order to ascertain the price, according to section 22. The property in such a case would pass only when that condition is fulfilled and the buyer has notice thereof. In the case of Sandhusaran Singh v W.B. State Electricity Board,8 the plaintiff submitted a tender for the purchase of specified quantities of M.S. Rods of a particular description, lying in the specified railway yards. The tender was accepted. Under the terms, the buyer had to deposit the price and complete the removal of the entire goods in instalments within specified time. The plaintiff removed part of the goods after depositing proportionate price. Due to unavoidable circumstances like heavy breaches on the road owing to rain and landslide and consequent difficulty in transporting the remaining goods, the buyer sought extension of time. The seller did not grant the reasonable extension sought by the buyer. The seller wrote to the buyer cancelling the contract in respect of the remaining goods, and began to make a re-sale of those goods. The buyer brought an action for an injunction to restrain the seller from selling the remaining goods by treating the contract as cancelled. He pleaded that it was a sale of specific goods, in a deliverable state and the contract was unconditional, and, therefore, the property viz. ownership in the goods had passed to the buyer when the contract was made on the acceptance of his tender, and hence the seller had no right to cancel the contract and resell the goods. The buyer‟s plea was accepted and it was held that since the buyer had become the owner of the goods at the time of acceptance of his tender, under section 20, the purported re-sale of those goods by

8 AIR 1986 Cal. 240.

the seller was bad and the injunction sought for was issued. In Tarling v Baxtor,9 a contract for the sale of a certain stack of hay was entered into on January 6. The price was to be paid on February 4, but the stack was not to be removed until May 1. The stack was accidentally destroyed by fire on January 20. It was held that in this case the property in the goods had passed to the buyer even though the payment of the price and the delivery of the goods were postponed and, therefore, the buyer should bear the loss. In Kursell v Timber operators,10there was a sale of uncut timber defined to be "all trunks and branches of trees, but not seedlings and young trees of less than six inches in diameter at height of four feet from the ground," the timber to be cut not more than twelve inches from the ground. The buyers were given a time of 15 years within which they were to cut and remove the timber. The buyers had only worked for a few days when there was acquisition of the forest by Latvian Government whereby the contract was annulled and there was confiscation of all the property rights. The sellers sued buyers for the price but the buyers refused to pay the same on the ground that the property in the uncut timber had not passed to them. Held that the goods were not sufficiently identified and they were not specific because trees of only certain specifications were to be taken and moreover the goods were not in a deliverable state until they had been severed by the purchasers, therefore, the property in them did not pass at the time of making of the contract. The buyers as such were not liable to pay the price. In Acraman v Morrice,11 there was a contract for the purchase of trunks of certain oak trees. The buyer had to mark the portions he wanted and the seller was to cut off the rejected portions and then deliver the trunks to the buyer. The buyer selected the portions he wanted and before the rejected portions were separated by the seller, the seller became insolvent. The buyer himself got the rejected portions severed and carried away the trunks for which he had already paid. The assignees of the insolvent sued the buyer for conversion. It was held that since the rejected portions had yet to be severed by the seller according to the contract, the property in the goods had not passed to the buyer, the assignees of the seller were entitled to recover for the value of the goods taken away by the buyer .

Q14 What are the rights of Unpaid Seller?

Answer - According to Section 45(1) of Sale of Goods Act, 1930, the seller is considered as an unpaid seller when:

a- When the whole price has not been paid and the seller has an immediate right of action for the price.

b- When Bills of Exchange or other negotiable instrument has been received as conditional payment, and the pre-requisite condition has not been fulfilled by reason of the dishonour of the instrument or otherwise. For instance, X sold some goods to Y for $50 and received a cheque. On presentment, the cheque was dishonoured by the bank. X is an unpaid seller.

Seller also includes a person who is in a position of a seller i.e agent, consignor who had himself paid or is responsible for the price.

Rights against buyer

1- Suit for the price

When any goods are passed on to the buyer and the buyer has wrongfully neglected or refused to pay as per the terms and conditions of the contract, the seller may sue him as per the Section 55(1) because once the property has been passed the buyer is bound to pay the price.

But in the case due date of payment has been passed and goods had not been delivered yet, the seller can sue the buyer for the wrongful neglect or refusal on his part according to clause 2 of Section 55.

In case the price is due in foreign currency the damages must be calculated at the rate of exchange prevailing at the time when the price was due not on the judgement date.

2- Suit for damages

In case there is a wrongful refusal on the part of buyer for acceptance of goods and payment of money, the seller can sue him for damages of non-acceptance as per Section 56. For calculating the quantum of damages Section 73 and 74 of the Indian Contract Act applies.

In case the goods have a ready market, the seller has to resell the goods and buyer have to pay the losses if incurred. If the seller does not resell the goods the difference between contract and market price at the day of breach is taken as a measure for damages. If the difference between them is nil seller gets nominal value.

There is a duty of mitigation on the part of the seller, which means that injured has to make reasonable efforts to minimise the loss from that breach. For instance, if the seller can resale the goods, the difference in price in contract and resale price is given to the seller but if the seller deliberately refuses to resale the goods and its market value reduces then the buyer will not be liable for the exaggerated loss.

The nature of the duty of mitigation has been explained by the supreme court in case of *M. Lachia Shetty V Coffee Board*, where, a dealer who bid at an auction of coffee had been accepted, refused to carry out the contract, consequently, coffee was reauctioned at next best bidding price and dealer who refused the bid have to give the difference in the amount of loss to the board.

3- Suit for interest

As stated under Section 61, where there is a specific agreement between buyer and seller with regards to interest on the price of goods from the date on which payment becomes due, the seller may recover interest from a buyer. But if there were no such agreement the seller may charge interest from the day he notifies the buyer.

If there is no contract to the contrary, the court of law may award interest to the seller at such rate as it thinks fit on the amount of the price from the date on which amount is payable.

4- Repudiation of the contract before the due date

According to Section 60, the rule of anticipatory breach contract applies, wherein, if buyer repudiates the contract before the date of delivery the seller can consider the contract as rescinded and can sue for damages of the breach.

According to this Section, if one party repudiates before due date other has two courses of action. Either he may immediately accept the breach and bring the action of damages the contract is rescinded and damages will be assessed according to the prices then prevailing or he can wait for the date of delivery. In the second case, the contract is open at risk and will be a benefit to both parties. Ma be the party changes is mind and agree to perform and damages will be assessed according to prices on the day of delivery.

Rights against goods

a- Lien

Lien is a right which seller of goods can exercise when a buyer has not paid the price of goods, under this right seller can retain the possession of goods as an agent or bailee for the buyer. The seller can retain his possession as per Section 47 under the following circumstances:

1- In case the buyer is insolvent.

2- When the term of goods sold on credit is expired.

3- Goods sold without any stipulation as to credit.

When the goods are sold on credit the right to lien is suspended during the term of credit and lien exist only for the price of goods, not any additional charges.

According to Section 48 if the seller has delivered a part of unpaid goods he can exercise his right of lien on rest. In Grice V Richardson, the sellers had delivered a part of the three parcels of tea comprised in the sales, and they had not been paid for the part which remained with them. They were allowed to keep it till the payment of the price. Where, however, a part of goods delivered which show an agreement to waive the lien, the seller cannot the remainder.

Termination of lien takes place when the seller losses the possession of goods. As per Section 49, under following circumstances right of lien is terminated-

1- Waiver of lien-

The right of lien is an implied right attached by law in every contract of sale, the seller has the autonomy to waive this right, it may be expressed or implied from the conduct of the seller.

2- When buyer or agent lawfully obtains possession of goods.

Once the buyer got the possession of goods from the seller, all the rights of the seller in respect to goods are ceased even if the price is not paid. The seller can recover the price as a normal debt because the acceptance of possession gives absolute, unqualified and indefeasible right of goods to the buyer. When the goods are given again to the seller for repair he can not access the right of lien.

3- When the seller delivers goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.

When the seller has delivered goods to the carrier for transmission, his right of lien is ceased but the right to stoppage in transit is still accessible by him. In case seller regains possession of goods in transit by stoppage his right to lien is revived.

Like in Valpy V Gibson, the goods were delivered to the buyer's shipping agent, who had put them on board a ship. But the goods were returned to the seller for repacking, while they were still with the sellers the buyer became insolvent and seller being unpaid seller claimed to retain the goods in the exercise of their lien. It was held that they have lost their lien by delivery to the shipping agent. On the contrary, when the seller has reserved the rights of disposal his right of lien continues till the end of the transit. And the seller cannot lose his right to lien just because he has obtained a decree for the price of goods.

b- Stoppage

When the goods have been transferred to carrier or bailee for the purpose of transmission to the buyer, who has become insolvent, the seller has the right to stop the goods in transit in order to protect himself against the loss that may arise due to insolvency. As per Section 50, there are four essential requirements for stopping the goods in transit:

1. Unpaid seller.
2. Buyer insolvent.
3. Property should have passed to the buyer.
4. Property should be in course of transit.

The course of transit depends upon the capacity of middleman to hold the goods. Middleman should be an intervening person between the seller who has parted with the goods and the

buyer who has not yet received the goods as held in the case of *Schotsmans v Lancashire & Yorkshire Rly co.*

Section 5 lays down the rules and regulations related to commencement and end of the transit, this Section is divided into seven sub-Sections which solve all the issues related to commencement and end of transit:

1- Delivery to the buyer- Goods are considered to be in transit from the time when they are delivered to the carrier or other bailee for the purpose of transmission to the buyer, till the goods are received by the buyer himself or his agent takes delivery of them.

For example, in the case of *Great Indian Peninsula v Hanmandas,* the seller consigned the goods with the GIP Ry Co for transportation to the buyer. On the arrival at the destination, the company had delivered the goods to the buyer who had loaded them on his cart, but the cart had not yet left the railway compound when a telegram was received by the company to stop the goods. The company did not do so and were sued by the seller in damages. It was held that the transit had ended as soon as the goods were handed over to the buyer.

But when the buyer denies accepting the delivery even when it has been landed at the place of destination, the transit does not end. This happened in the case of *James v Griffin* where on arrival of goods at the port of destination in the river Thames, the buyer sent his son to have goods landed, but told him that on account of his insolvency he did not intend to receive the goods and would like the seller to have them. When goods were so lying the seller's instruction to stop them was received. The buyer's trustee in bankruptcy claimed the goods. It was held that the goods were still in transit.

2- Interception by the buyer- When the buyer or the agent takes the delivery of the goods from the carrier, the transit ends even before their arrival at the appointed destination.

In case the carrier delivers the goods before the arrival of the buyer, although it is wrongful and the carrier may be held liable for the damages but the transit ends here.

In the case of *Lyons v. Honffnung,* the buyer takes his seat as a passenger in a ship which was carrying the goods. The court said that this does not amount to delivery to the buyer before their arrival at the appointed destination.

3- Acknowledgement to the buyer- The transit is considered to come to an end when the goods arrive at the appointed destination and the carrier acknowledges to the buyer or his agent that he is now holding the goods on his behalf. It is immaterial if the gods are still in the carrier or the buyer has indicated another destination. In order to put an end to the original contract of carriage, a very clear acknowledgement is required.

In the case of *Whitehead v. Anderson,* a quantity of timber was consigned on board. When the ship arrived at the destination, the buyer went bankrupt. The buyer's agent came to the board and told that he has come to take possession. The captain said that he will deliver only when the freight is paid. Before this could be done, the seller sent a notice to stop and asked to send the goods to be delivered to the agent of the seller. The court said that since the transit has not ended, the carrier was within his rights in returning the goods to the seller. The captain agreed to deliver the goods on a condition and if the condition is not fulfilled, the buyer does not acquire the constructive possession of goods.

4- Rejection by the buyer– When the buyer rejects the goods and the carrier or other bailee continues to possess them, the goods are held to be still in transit. This will also include the case when the seller himself refuses to take back goods.

5- Delivery to ship charted by the buyer- It is a question of fact whether the carrier is acting independently or as an agent of the buyer at the time when the goods are delivered to a ship charted by buyer. As soon as the goods are loaded on the ship, the transit ends if the carrier is acting as an agent of the buyer.

Thus, for instance, *Rosewear china clay co ltd, re*, the contract was for the sale of china clay at FOB Fowey. The buyer chartered a ship and instructed the seller to load to the goods at Fowey, which was accordingly done. The destination of the ship was not told to the seller nor any bill of lading signed. The seller gave notice stopping the goods.

6- Wrongful refusal to delivery- When the carrier wrongfully denies delivering the goods to the buyer or his agent the transit is at the end. It is obvious that goods should have arrived at their destination because otherwise, the carrier has the right to refuse to deliver them.

In the case of *Bird v. Brown,* the court discussed as to when it is wrongful to refuse the delivery of goods. In this case, the goods arrived at the destination but the buyer has become

insolvent. A merchant was acting for the seller who gave stop notice to the seller without authority.

Subsequently, the trustee of the buyer demanded the goods as the buyer was insolvent. The carrier refused to deliver the goods and handed them to the merchant. The court said that after the formal demand for goods by the trustee, there could be no valid stoppage in transit.

7- Part delivery- in the case when the goods have been delivered partly, the seller has a right to stop the delivery of the rest of the goods unless the part delivery shows an agreement to the possession of the whole. For instance, A sells to B 20kg of wheat, 10kg has been transferred to B but rest 10kg is still in transit, in case B fails to pay A has a right to stop the goods in transit.

c- Resale

Exercising the right of lien or stoppage does not rescind the agreement but reselling of goods does and without this right, the other two rights of lien and stoppage would not be of much usage because he can only retain goods under these right till the buyer pays back the money.

The unpaid seller can exercise his right under following conditions and circumstances-

1- Seller before reselling the goods needs to send a notice to the buyer except in the case of perishable goods, giving him last chance to pay the price and take back the goods within a reasonable time. If the buyer does not pay the money back seller has the right to resell the goods. If the seller fails to give notice of his intention to resell, he cannot claim damages from the buyer and he has to give any profit.

2- If there is any loss in the resale of goods he can claim the loss from the buyer, on the contrary, if there is profit buyer cannot claim it.

3- Seller gives rightful ownership to buyer after the resale it does not matter notice of resale is given or not to defaulted buyer.

4- Sometimes the seller reserves exclusive right to resale the goods if the buyer makes a default in payment, in such cases the buyer cannot ask for profit on resale if no notice is served and seller has the exclusive right to resale.

For instance, R V Ward V Bignall, there was a contract of sale of two cars, vanguard and zodiac for 850$. The buyer deposited 25$ but afterwards did not pay the price despite a reasonable notice. The seller then tried to resell but could be sold only a vanguard for 359$. he then claimed damages for 475$ representing the balance of price and 22$ as advertising expenses. Court held that once the seller resells the goods the contract is rescinded and he cannot claim the money but he can ask for advertising expenses and a shortfall in the price of the vanguard.

Rights against seller

1- Damages for non-delivery

Section 57 states that, whenever any seller or refuses to deliver the goods to the buyer, the buyer may sue for non-delivery of goods. If the buyer has paid any amount he is entitled to recover it. Quantum of damages is decided through market forces, contract and market price on the day of the breach is considered as damages. If the buyer wants to claim that damages he must prove it in the court of law, otherwise, he cannot get a penny more than refund i.e the amount he has already paid. Buyer must try to keep the loss at a minimum by purchasing the goods from other sources instead of waiting for the market to fluctuate.

2- Suit for specific performance

Acc to Section 58 when goods are specific or ascertained and there is a breach of contract committed on the part of the seller then the buyer can appeal to the court of law for specific performance. The seller has to perform the contract and he does not have any option of retaining the goods by paying damages. The power of the court to order specific performance is subject to the provisions of chapter II of Specific Relief Act, 1963.

Thus on the sale of ship buyer was allowed to recover the ship specifically in the case of Behnke V Bede Shopping, there was a ship named the city which holds a unique value to the plaintiff but she was a cheap vessel being old but her engines were new and as to satisfy the German regulations and hence plaintiff could as a German shipowner have her at once put on the German register. A very experienced ship-valuer has said that he knew only one other

comparable ship, but that may not be sold. Thus, on sale of a ship buyer was allowed to specifically recover the ship.

3- Suit for breach of warranty

As stated under Section 59, the buyer cannot reject the goods solely on the basis of breach of warranty on the part of the seller or when a buyer is forced to treat a breach of condition as a breach of warranty. But he may sue the seller for damages or set up against the seller the breach of the warranty in the extinction of the price.

The measure of damages is directly and naturally occurring loss in ordinary events from breach of warranty. Mason V Burningham, the buyer of a second-hand typewriter spends some money on getting it overhauled. Afterwards, the typewriter was seized from her as stolen property. this was a breach on the part of the seller of warranty of quiet possession. She was held entitled to recover damages including the cost of repair. She did a natural thing in having the typewriter repaired and the amount she had spent was a loss directly and naturally resulting from the breach.

4- Suit for anticipatory breach

According to Section 60, the rule of anticipatory breach contract applies, wherein, if any party repudiates the contract before the date of delivery the other party can consider the contract as rescinded and can sue for damages of the breach.

According to this Section, if one party repudiates before due date other has two courses of action. Either he may immediately accept the breach and bring the action of damages the contract is rescinded and damages will be assessed according to the prices then prevailing or he can wait for the date of delivery. In the second case, the contract is open at risk and will be a benefit to both parties. Maybe the party changes is mind and agree to perform and damages will be assessed according to prices on the day of delivery.

Conclusion

The seller becomes an unpaid seller when either he had not been paid in full or the buyer has failed to meet the maturity of bills of exchange or any other negotiable instrument accepted

by seller as a condition precedent. Under this situation, the seller can resell the goods if he had exercised the right of lien or stoppage in transit, after giving notice to the buyer and the new buyer will have good title over the goods. In this case, the seller has the right to sue the buyer for failure to pay the required amount as well as a lien. On the contrary, if the seller fails to deliver goods to the buyer, he may sue the seller for non-performance and can claim damages or specific performance.

Q15 what are the remedies to the Breach of the Contract?

Answer - Many commercial agreements contain express provisions forremedies. For example, in a contract for the sale of goods, thebuyer may be entitled to require the seller to make good orreplace defective items. There may be a presumption (which may beexpressed in the contract) that all the terms which are to governtheir contractual relationship have been included by the partiesin express written form in the contract itself. In doing so theyintended to displace any rights and remedies provided by law(such as the buyer's right to terminate the contract forfundamental breach) which are not specified in the contract.

The purpose of a cumulative remedies clause is to ensure thatthe parties' rights specifically provided for in the agreementare in addition to their rights provided by the general law(*see inset box "Cumulative remedies clause"*). Anyparticular remedy that a party envisages it may need should bespecifically preserved in the contract.

Damages

Unlike the equitable remedies of specific performance andinjunction (*see "Specific performance" and "Injunctions"below)* damages for loss in a breach of contract claim areavailable as of right.

An innocent party may claim damages from the party in breachin respect of all breaches of contract. The damages may benominal or substantial. Nominal damages are awarded where theinnocent party has suffered no loss as a result of the other'sbreach and substantial damages are awarded as monetarycompensation for loss suffered as a result of the other party'sbreach.

For an innocent party to obtain substantial damages he mustshow that he has suffered loss as a result of the breach(remoteness) and the amount of his loss (measure). It is up tothe party in breach to argue that the innocent party has failedto mitigate his loss.

Remoteness of loss

The innocent party may only recover damages for loss sufferedas a result of the breach provided it is not too remote. The aimof damages is to put him in the position he would have been hadthe contract been properly performed.

The principles of remoteness are given in *Hadley vBaxendale ([1854] 9 Exch. 341*) and provide that thefollowing losses are recoverable:

- All loss which flows naturally from the breach.
- All loss which was in the contemplation of the parties at thetime the contract was made as a probable results of thebreach.

If the loss does not fall within the above categories, then itwill be too remote and will not be recoverable.

The rule in *Hadley v Baxendale* has been interpretedto mean that only loss which is within the reasonablecontemplation of the parties may be recovered (*The Heron II[1969] 1 AC 350*).

(Note that when dealing with specific types of contract theremay be legislation that covers remedies under that particulartype of contract. For example, in a sale of goods contract, aparty may be able to recover special damages (for example, fromunusual loss arising from special circumstances known thecontract breaker (*section 54, Sale of Goods Act 1979*)(SGA).)

Measure of damages

This is the method for calculating the damages to which theinnocent party is entitled. It covers loss of bargain orexpectation loss. The usual aim of the court is to put theinnocent party in the position he would have been in had thecontract been properly performed (*Robinson v Harman [1848] 18LJ Ex 202*). The two usual methods of assessing this aredifference in value or cost of cure. The court will generally usethe more appropriate.

Sometimes reliance loss may be sought where loss ofexpectation is difficult to prove. The aim of reliance loss is toput the innocent party into the position he would have been inhad the contract never been made, that is, an indemnity for hisout of pocket expenses incurred in reliance on the contract(*Anglia TV v Reed [1972] 1 QB 60*).

There are many other types of loss that have been claimed byinnocent parties. Damages for disappointment or mental distressare not generally awarded (*Addis v Gramophone Co. Ltd*

[1909]AC 488) unless the contract is, for example, a holidaycontract (*Jarvis v Swans Tours Ltd [1973] 1 QB 233*).

Mitigation

An innocent party cannot recover for loss that he could haveavoided by taking reasonable steps. This is sometimes expressedas the duty to mitigate. This does not apply to actions for theprice of goods delivered. Such an action is an action for anagreed sum and not an action for damages.

Although there is no duty to mitigate before actual breachoccurs the innocent party should not aggravate his loss. It isfor the defendant to prove that the plaintiff has failed tomitigate his loss (*Pilkington v Wood [1953] Ch 770*).

Advance payments

If a party in breach has made advanced payments under thecontract his ability to recover that money depends upon whetherthat payment constitutes a deposit (that is, a guarantee by himof due performance) or merely a payment of the whole or part ofthe price in advance.

If it is a deposit (this depends on the intentions of theparties) the general rule is that it cannot be recovered and itwill be set off against any damages awarded to the innocentparty. Care should always be taken with deposits so that they donot amount to penalties (*see "Penalty clauses"below*). However it may be possible to recover a deposit ifthe party has a lien over it (for example, *Chattey andAnother v Farndale Holding Inc., The Times, 17th October,1996*).

If the advance payment is not a deposit, the party in breachmay recover it, subject to any claim for damages by the innocentparty in respect of the breach.

An innocent party may only recover an advance payment if therehas been a total failure of consideration. This is aquasi-contractual remedy. If there is only a partial failure ofconsideration, this remedy is not available (*Rowland v Divall[1923] 2 KB 500).*

Penalty clauses and liquidated damages

It is common for the parties to expressly state in thecontract that if the contract is breached, a specified sum willbe payable or that goods will be forfeited. Clauses coveringthese areas are known as liquidated or agreed damages clauses.They frequently appear in commercial contracts, whetherindividually negotiated or on a party's standard business termsand, most commonly, in relation to late rather than defectiveperformance, particularly in the fields of

construction andengineering and supply or sale of goods. Occasionally, theyappear in lease agreements imposed by a key or anchor tenant who,for example, needs to be trading from the demised premises by acertain deadline. Such clauses do not usually appear in contractsof employment.

The purposes of such clauses are to make recovery of damageseasier, avoiding the problems of proving actual loss; to avoidarguments as to the remoteness of certain types of consequentialor indirect losses; and to assure the other party of theirintention to be bound by the contract.

The normal rules applicable to the determination of whether aclause operates as liquidated damages or a penalty applyirrespective of the type of contract in question. A distinctionmust be drawn between clauses which purport to impose a penaltyon the defaulting party and clauses which levy liquidated damagesfrom that party. Penalty clauses are generally not enforceable,whereas liquidated damages clauses are.

Penalty or liquidated damages?

For a liquidated damages clause to be valid the specified summust be a genuine pre-estimate of the anticipated loss which theclaimant would be likely to suffer in the event of a breach ofthe obligation in question. If the loss is difficult to quantifya "best guess" procedure should be operated, keeping a record ofthe calculations underlying any elements of the determinedfigure. Provided the selected figure is not vastly in excess ofthe greatest loss which could be suffered, the clause is likelyto be enforceable. The essence of a penalty is that the moneyspecified is *in terrorem* of the defaulting party, inother words, it is intended to apply undue force to the otherparty to perform his side of the contract.

The use of the words "penalty" or "liquidated damages" are notconclusive. It is necessary to examine whether the amountspecified is in fact a penalty or liquidated damages. It is forthe party in breach to show that the sum is a penalty(*Robophone Facilities Ltd v Blank [1966] 3 All ER128*).

The leading case of *Dunlop Pneumatic Tyres*establishes the tests to distinguish penalties from liquidateddamages:

- A clause will be construed as a penalty clause if the sumspecified is "extravagant and unconscionable" in comparison withthe greatest loss that could possibly have been proved as aresult of the breach.

- It is likely to be a penalty if the breach of contractconsists of not paying a sum of money and the sum stipulated asdamages is greater than the sum which ought to have beenpaid.
- There is a presumption that if the same sum is stated toapply to different types of breach of contract, some of which areserious and others not, it is likely to be a penalty clause.
- It is not a bar to the operation of a liquidated damagesclause that a precise pre-estimation is impossible.

(*Dunlop Pneumatic Tyre Co Limited v New Garage & MotorCo Limited [1915] A.C 79*)

There is no public policy issue in relation to the upper limitof damages to which parties can contract to be liable. The UnfairContract Terms Act 1977 will in certain circumstances impose atest of reasonableness in relation to exclusion clauses (whichpurport to limit or exclude liability) but this is unlikely toapply to a genuine liquidated damages clause. If the clausespecifies a sum which is more than a genuine pre-estimate (andtherefore a penalty) the clause will be unenforceable. The courtswill not benefit the party claiming damages by imposing a lowersubstitute figure.

To claim on a genuine liquidated damages clause, the claimantmerely has to show breach of contract, whether or not there hasbeen any actual loss and regardless of the extent of anyloss.

It is not entirely clear whether a liquidated damages clauseis intended to be a mutually binding limitation on the amount ofdamages payable. It is likely that it is intended to be mutuallybinding in the field of building and engineering contracts. ACourt of Appeal case held that where "£nil" was inserted asthe amount of liquidated damages, then general damages for breachof contract were not recoverable in the alternative (*Temloc vErrill Properties, 1987 39 BLR.30*). A contract can, however,expressly provide for the party seeking to impose the clause tohave a choice whether to operate it or not. Certain charterpartycases suggest that the claimant may have a choice either to sueunder the liquidated damages clause or to ignore it and claimgeneral damages without limitation although these cases areprobably limited to that area of law.

If, however, the clause is invalidated because it is a penaltyclause or due to acts of the claimant (such as requiring theother party to perform additional work without a contractualmechanism to grant that party further time to perform thecontract) or breach of contract by the claimant, then the limitspecified in the unworkable clause will operate as a limitationon the amount of damages which can be claimed (although in thecase of a penalty

the limit is unlikely to be reached because byits nature, it will be higher than the loss could ever be).

As regards enforcement, many contracts will specify that thedamages can be deducted from subsequent sums due. This isparticularly the case for building contracts where interimpayments to the contractor are usual. Many contracts will alsoprovide for the claimant to be able to recover liquidated damagesas if they were a debt due by the other party. If possible, whendrafting a penalty clause, you should try to ensure that you candeduct or recover damages in these ways as they are a moreeffective way of ensuring that you will be able to recover themoney due.

Otherwise the usual rules of enforcement would apply and aclaim form would be issued in the normal manner (without, ofcourse, having to prove actual loss).

Note that it will be a defence to a claim for liquidateddamages that the claimant has prevented the other party fromcompleting his obligations either by the claimant's own breach ofcontract or by other acts of prevention in circumstances wherethere is no provision in the contract to make an allowance orgive a time extension to the party from whom damages are claimedfor these circumstances.

It is important to observe all relevant proceduralrequirements in the contract such as notice periods andprovisions requiring the liquidated damages to be assessed anddeducted within certain time periods, otherwise the defendantwill not be required to pay the damages.

Specific performance

This is an equitable remedy granted at the court'sdiscretion.

Specific performance is a decree by the court to compel aparty to perform his contractual obligations. It is usually onlyordered where damages are not an adequate remedy (for examplewhere the subject matter of the contract is unique for example,Chinese vases in *Falcke v Gray* (*[1859] 4 Drew651*) but not if a replacement of the subject matter could beobtained even after a long delay (*Societe des IndustriesMetallurgiques SA v Bronx Engineering Co Ltd [1975] 1 Lloyds Rep465*).

It is a general rule that specific performance will not beordered if the contract requires performance or constantsupervision over a period of time and the obligations in thecontract are not clearly defined. For example, specificperformance of a covenant to keep a shop open

during normalbusiness hours was refused by the House of Lords in *Co-opInsurance v Argyll Stores* (*[1997] 3 All ER 297*) onthe grounds that enforcement of a covenant to carry on a businesswould require constant supervision of the courts with the courtresorting to criminal punishment for contempt of court if theorder was not complied with. However, a recent case has reversedthis rule in relation to a tenant's repair covenants (*RainbowEstates Limited v Tokenhold Limited and another [1998] NewProperty Cases 33*). The judge in this case concluded thatthe old law of refusing specific performance if it would involveconstant supervision was no longer good or (at least) that therewere exceptions. It may be that only in the most exceptionalcircumstances (such as in this case) specific performance will beavailable to the landlords; however the arguments advancedindicate that it should be available in other situations.Specific performance was ordered requiring tenants to spend£300,000 on repairs to the flats. Factors militating infavour of this remedy were that the landlord had no right ofentry to repair in default of the tenant; that the lease had noforfeiture clause and that the building was listed so that repairas distinct from redevelopment was the most appropriateoutcome.

Specific performance is often ordered in relation to buildingcontracts because the contract deals with results rather than thecarrying on of an activity over a period of time and it usuallydefines the work to be completed with certainty (*Jeune vQueens Cross Properties Ltd [1973] 3 All ER 97*).

Specific performance is not available for contracts requiringpersonal services such as employment contracts because such anorder would restrict an individual's freedom (*Chappell vTimes Newspapers Ltd [1975] 1 WLR 482*).

The court has broad discretion to award specific performanceand in exercising this discretion it takes into account factorssuch as:

- Delay in asking for the order (*Lazard Brothers & CoLtd v Fairfield Properties co (Mayfair) Ltd [1977] 121 SJ793*).
- Whether the person seeking performance is prepared to performhis side of the contract (*Chappell v Times Newspapers Ltd[1975] 1 WLR 482*).
- Whether the person against whom the order is sought wouldsuffer hardship in performing (*Patel v Ali [1984] 1 All ER978*).
- The difference between the benefit the order would give toone party and the cost of performance to the other (*Tito vWaddell (No 2) [1977] Ch 106*).

- Whether any third party rights would be affected.
- Whether the contract lacks adequate consideration (the rule"equity will not assist a volunteer" applies so that specificperformance will not be ordered if the contract is for nominalconsideration even if it is under seal (*Jeffrys v Jeffrys[1841] 1 Cr & Ph 138*)).

Injunction

Like specific performance, an injunction is an equitableremedy and therefore only granted at the discretion of the court.It is awarded in circumstances where damages would not be anadequate remedy to compensate the claimant because the claimantneeds to restrain the defendant from starting or continuing abreach of a negative contractual undertaking (prohibitoryinjunction) or needs to compel performance of a positivecontractual obligation (mandatory injunction).

In exercising its discretion the court will consider the samefactors as above for specific performance and will use thebalance of convenience test (weighing the benefit to the injuredparty and the detriment to the other party). An injunction willnot be granted if its effect would be to compel a party to dosomething which he could not have been ordered to do by a decreeof specific performance (*Lumley v Wagner [1852] 1 DM & G604).*

In urgent cases a plaintiff may be able to obtain an interiminjunction to restrain an act. Special types of injunction may begranted to preserve property and assets pending trial (Marevainjunctions and Anton Piller orders).

Quasi contract: other remedies

Quasi-contract creates obligations at common law, distinctfrom obligations under a contract. It is an area of law in itsown right.

Quasi-contractual remedies are sometimes available either asan alternative to a remedy for breach of contract or where thereis no remedy for breach of contract. For example, a claim forquantum meruit (a reasonable remuneration for work done of goodssupplied under a contract which is later discovered to bevoid).

Limitation of actions

An innocent party will lose his right to bring a claim forbreach of contract if he delays for a certain length of time.

The Limitation Act 1980 provides statutory limitation periods.Theses do not apply to equitable remedies, however, in practice,equity usually applies the statutory rules.

The Limitation Act 1980 distinguishes between simple contractsand deeds. It provides the following limitation periods:

- For simple contracts, six years from when the cause of actionaccrued.
- For deeds, twelve years from when the cause of actionaccrued.

If there has been fraud or mistake, the limitation period doesnot begin to run until the innocent party has discovered this orshould have discovered this. There is a three year time limit inrespect of damages for personal injuries arising from breach ofcontract.

In acquisition agreements (which may be deeds) the seller maywant a shorter limitation period (commonly six years from thedate of the contract) This shorter period relates to the InlandRevenue's time limit for making tax assessments. Alternatively,the seller may want an even shorter period in relation to non-taxmatters (perhaps to link in with the audit of the targetcompany).

Q16 Explain different kinds of Negotiable Instruments.

Answer - Negotiable instruments are is a commercial document that satisfies certain conditions and transferable either by the application of law as by the custom of bleed concerned.

This instrument can be transferred freely from hand to hand and has a legal life that can be transferred by more delivery or endorsement.

Most Common Types of Negotiable Instruments are;

- Promissory notes.
- Bill of exchange.
- Check.

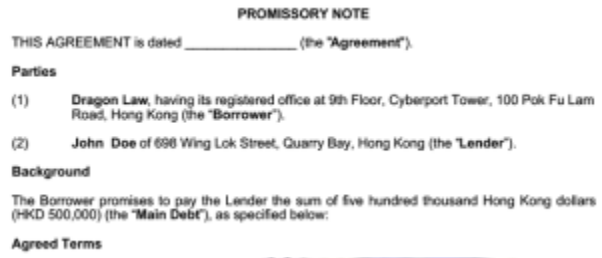
Most negotiable instruments fall under the following two categories; the Negotiable instrument by statute and Negotiable instruments by custom or usages.

Negotiable instrument acts state three instruments. check, bill of exchange and promissory notes are negotiable instruments.

They are therefore called negotiable instruments by statute.

Negotiable instruments by Statute are;

Promissory Notes as Negotiable Instrument



PROMISSORY NOTE

THIS AGREEMENT is dated _____ (the "**Agreement**").

Parties

(1) **Dragon Law**, having its registered office at 9th Floor, Cyberport Tower, 100 Pok Fu Lam Road, Hong Kong (the "**Borrower**").

(2) **John Doe** of 696 Wing Lok Street, Quarry Bay, Hong Kong (the "**Lender**").

Background

The Borrower promises to pay the Lender the sum of five hundred thousand Hong Kong dollars (HKD 500,000) (the "**Main Debt**"), as specified below:

Agreed Terms

The promissory note is a signed document of written promise to pay a stated sum to a specified person or the bearer at a specified date or on demand.

The promissory note is an instrument in writing containing an unconditional rule signed by one party to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument.

Thus a promissory note contains a promise by the debtor to the creditor to pay a certain sum of money after a certain date. The debtor is the maker of the instrument.

Bill of Exchange as Negotiable Instrument

Bill of Exchange

NO. HE-17991 BANGKOK 3-7-1991

Exchange for US$ 20,000.00

At - after sight of this FIRST Bill of Exchange

(Second of the same tenor and date being unpaid)

Pay to the order of Bangkok Bank Limited the sum of

US$ TWENTY THOUSAND EIGHT HUNDRED EIGHTY ONLY

Value received. BANK UNION LIMITED BANK LTD. CREDIT NO.05601

IFL/738/91

To UNIVERSAL CORP.

271-B LATIF CLOTH MARKET

M.A. JINNAH RD., KARACHI INDIA

The Bill of Exchange contains an order from the creditor to the debtor to pay a certain person after a certain period.

The person who draws it is called drawer (creditor) and the person on whom it is drawn is called drawee (debtor) or acceptor.

The person to whom the amount is payable is called payee.

Check as Negotiable Instrument

A Check (cheque in royal Britain) is a bill of exchange drawer a specified banker not expressed to be payable otherwise than on demand.

It is an instrument in writing, containing unconditional order, signed by the maker (depositor), directing a certain banker to pay a certain sum of money to the bearer of that instrument.

Some other instruments have acquired the character of negotiability by customs or usage of trade.

Negotiable instruments by custom or usages are mainly, the government promissory notes, delivery orders, and railway receipts have been held to be negotiable by usage or custom of the trade.

Q17 Distinguish between Holder and Holder in Due Course.

Answer - <u>DISTINGUISH BETWEEN HOLDER AND HOLDER IN DUE COURSE</u>

HOlDER	**HOLDER IN DUE COURSE**
(1) Meaning:	
In simple words the person who is the payee or in whose name it has been endorsed and who possesses it or a person who is its	In simple words, he is the person who has the right to sue in his. own name and has received the instrument for value and his

bearer, in order to be a holder, the person must be entitled in his own name to the possession of the instrument and should have the right to sue under the instrument. He must have a legal and valid title to the Instrument.	possession must be before the instrument becomes mature.
(2) Definition:	
According to the Sec. 8 of the act "the holder of a promissory note, bill or exchange means the payee are endorsee who is in possession of it or the bearer thereof but does not include a beneficial owner claiming through a benamider".	According to Sec.9 of the act, "any person who for considerators become the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or endorse thereof payable to order. Before the amount mentioned in become payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title".
(3) Valuable Consideration:	
Necessary	Not necessary
(4) Right to sue:	
A holder cannot sue all prior parties.	Due to legal title of the instrument the bolder in due course has a write to file a suit in case of refusal of payment.

(5) Holder in Good Faith:	
The instrument may or may not be obtained in good faith.	He must have become a holder of the instrument in good faith before the date of maturity. It is necessary that possession of instrument must be good. If there is any defect in tile title of transferor at due time of raking Instrument. he cannot be considered a holder in due course.
(6) Holder before Maturity:	
A person can become holder, before or after the maturity of the negotiable instrument.	He must have become u holder before the date of maturity of the instrument. But an accommodation will can be negotiated after maturity to the holder in due course.

PRIVILEGES OF A HOLDER IN DUE COURSE

A holder in due course enjoys as the following privileges under the act.

(1) Rights In Case of Incomplete Instrument:

Where one person signs and delivers to another a paper stamped as per law in blank or partially written authorizes the latter to file it. He undertakes lo be answerable when instrument is completed. The former cannot deny the authority which he has given for any amount not exceeding covered by the stamp. (Sec. 20)

(2) Prior Parties Liable:

Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied. (Sec. 36). Prior parties to the instrument Include the maker or

drawer, acceptor and all prior endorser. The holder in due course can sue any of the prior parties liable to pay in his own name.

Illustration:

- X draws a bill on Y. Afterward, X endorse the bill to Z which further endorse to M who is holder in due course. M can recover the amount from X, Y or Z.

(3) Right to Enforce Payment of Fictitious Name:

An acceptor of a hill cannot claim as against the holder in due course. that the other parties to the bill were fictitious. When the drawer is a fictitious person and is endorsed in the same hand as drawer's signature, the acceptor Is not relieved from liability to any bolder in due-course due to the reason that the drawn is fictitious:". (Sec. 42)

(4) No Effect of Conditional Delivery:

When an instrument is negotiated to a holder in due course, the other parties instruments cannot escape liability on the ground that the delivery of the instrument was conditional or for a special purpose only. (Sec. 46 & 47) .

(5) lnstrument Cleansed of all Defects:

Even though as between the immediate parties to an instrument it was caused by fraud. etc. Once the instrument passes through the hands 0f a holder in due course, it is clean of all defects, and any person acquiring, it takes it free of all defects, unless he was himself a party to the fraud. (Sec. 53).

(6) Instrument Caused by Unlawful Consideration:

The defence on the part of a person liable on u negotiable instrument that it has been. lost or obtained from him by means of an offense or fraud or unlawful consideration, cannot be setup against a holder in due course. (sec. 58)

(7) Every Holder Is Holder in Due Course:

The law presumes that every holder of a negotiable instrument is a holder in due course provided that where the instrument has been obtained by unlawful means the burden of proving that the holder is the holder in due course lies. upon him. (Sec.118)

(8) Estoppel Against Denying Original Validity or Instrument:

No maker of the promissory note and no drawer of a bill of exchange or cheque and no acceptor of a bill of exchange for the honor of the drawer shall be a suit thereon by a holder in due course, be permuted to deny the validity of the instrument as originally made or drawn. (Sec.120)

(9) Estoppel Against Denying Capacity of Payee to Endorse:

No maker of the promissory note and no acceptor of a bill of exchange payable to order shall in a suit thereon by a holder in due course, be perceived to deny the payee's capacity, at the date of the note or bill to endorse the same.

Q18 What are the effects of Material Alterations?

Answer - Section 87 of the Negotiable Instrument act clearly states that

any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties.

Effects of Material Alteration

The main effect of a material alteration is that it makes the instrument void, i.e., it discharges the instrument itself as against any person who was a party to such instrument at the time of material alteration and did not give his approval to it.

All the prior parties to a negotiable instrument, which was altered subsequently without their consent thereto, shall not be liable even to holder-in-due-course, having no notice or knowledge of the material alteration.

It makes no discrimination whether the alteration was for the benefit or detrimental to any party to the instrument. Moreover, it is also immaterial whether the holder himself altered the instrument or any stranger altered it while the instrument was in the custody of the holder

because a party, who is in custody of an instrument, is bound to preserve it in its original state.

It is, however, worth noting that a **materially altered instrument is not absolutely void**, i.e., not unenforceable against all the parties thereto.

It is void only against those who did not give their approval to the alteration, and can be enforced against those who consented to the alteration or effected the alteration. Such an instrument is also operative against those who become parties to the instrument subsequent to the alteration. There is, however, an exception to this rule.

An acceptor or endorser of a negotiable instrument is bound by his acceptance or endorsement notwithstanding any previous alterations of the instrument.

On the other hand, Section 89 of the Negotiable Instrument Act provides protection to a party who pays a materially altered bill of exchange or promissory note or cheque provided that the alteration does not appear on the face of the instrument in-question and pays so in good faith and without negligence on its part.

Such a party shall stand discharged if it makes payment to a person in the possession of the instrument under the circumstances, which do not afford a reasonable ground for believing that it is dis entitled to such payment. Besides, the payer under the above circumstances is also entitled to debit the party on whose account the payment was made with the amount paid.

Example of Material Alteration

For instance, A drew a cheque of Rs 500 in favour of B, who altered the figure 500 into 5,000 without taking the consent of the maker. The instrument appeared to be drawn for Rs 5,000 on the face of it. The drawee banker paid Rs 5,000 to B on the presentment of cheque for payment. The banker did so according to the apparent tenor of the instrument and in good faith. In this case, since the banker acted bona fide and without negligence, it is entitled to debit A with Rs 5,000.

Q19 What are different types of Crossing of Cheque?

Answer - Crossing of Cheques

Crossing a cheque refers to drawing **two parallel transverse lines** on the cheque with or without **additional words** like "& CO." or "Account Payee" or "Not Negotiable" **between the lines.**

By using a crossed cheque, one can make sure that the **amount** specified **cannot be en-cashed** but can only be **credited** to the **payee's bank account**.

Crossing of Cheque is recognized under **The Negotiable Instruments Act, 1881.**

The crossing of cheque had developed gradually as a means of **protection** against misusing of cheques.

Crossing of cheque **provides instruction** to the paying banker to **pay the amount through banker** only, and not directly to the payee or holder presenting it at the counter. This ensures that payment is made to the actual payee.

Types of Crossing of Cheques

Crossing of Cheques can be done in two ways:

1. General Crossing
2. Special Crossing

General Crossing

Section 123 of **The Negotiable Instruments Act, 1881** defines General Crossing as:

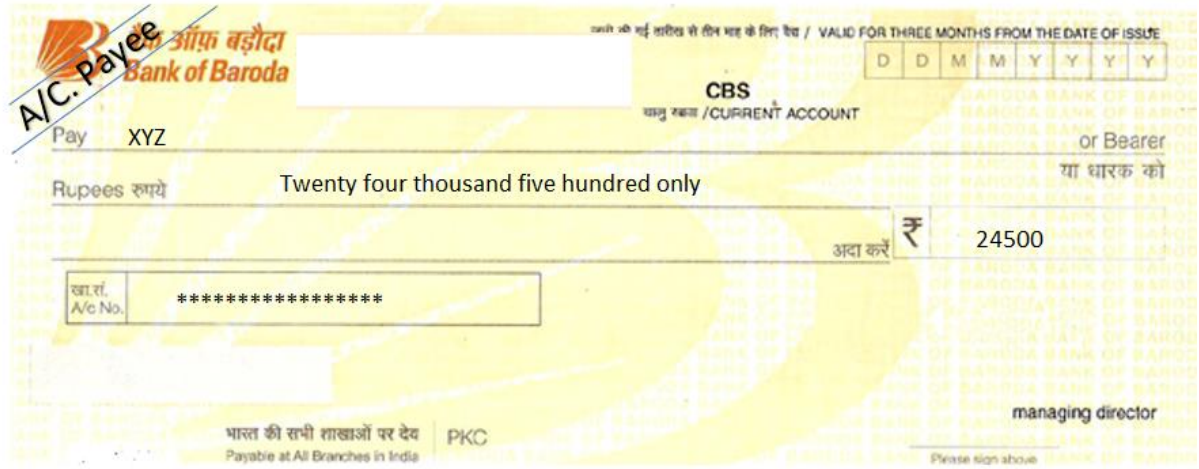
"Where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally".

- Two parallel transverse lines are drawn on the face of the cheque, generally, on the top left corner of the cheque
- Holder or payee cannot get the payment at the counter but through the bank only
- Including the name of the banker is not essential, hence, the amount can be **encashed by any banker**

- The words, "& Company", "Not Negotiable", "A/C. Payee" may or may not be written
- It can be converted into Special Crossing

Specimen of General Crossing of Cheques

Types: General Crossing



Example: A Cheque Leaf

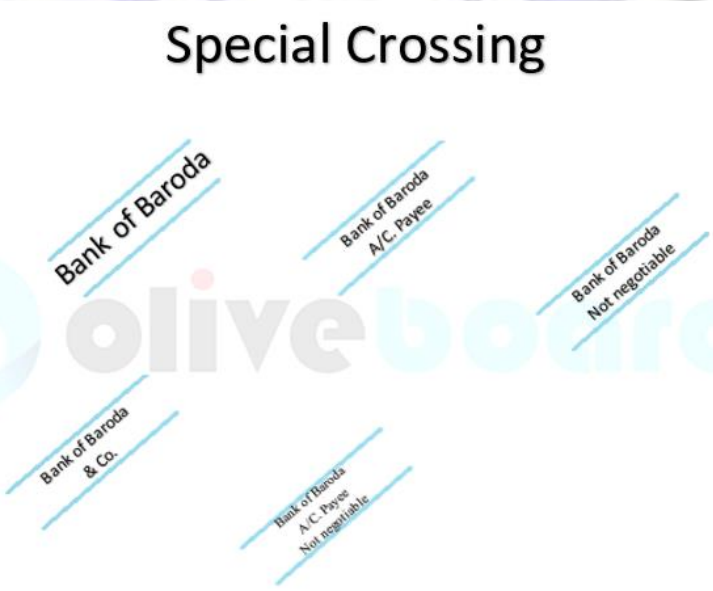
Special Crossing

Section 124 of **The Negotiable Instruments Act, 1881** defines Special Crossing as:

"Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that in addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially and to be crossed to that banker."

- Also known as Restricted Crossing
- Two transverse lines are not necessary to be drawn
- Name of the banker is added across the face of the cheque
- The Name of the Banker may or may not carry the abbreviated word, '& Co.', 'Account payee' or 'Not Negotiable'
- Payment can be made **only through the bank mentioned** in the Crossing. The Banker, mentioned in the Crossing, may appoint another banker as his agent to collect such cheques. thus, making it safer than 'generally' crossed cheques
- Specially Crossed Cheques can never be converted to General Crossing.

A specimen of Special Crossing of Cheques



Type: Special crossing

Double Crossing

Here the cheque bears two separate "**special**" crossing. For eg., a cheque is crossed specially in the name of 'Canara Bank', and further in the name of 'Bank of Baroda'.

As per Section 127 of **The Negotiable Instruments Act, 1881**:

"Where a cheque is crossed specially to more than one banker except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof."

Thus, a cheque doubly crossed shall be payed by the banker when the second banker is acting only as the agent of the first collecting banker and this has been made clear on the Cheque, i.e., crossing must specify that the banker to whom it has been specially crossed again shall act as the agent of the first banker for the purpose of collection of the cheque.

It is done in case, the banker, to whom a cheque is specially crossed, does not have a branch at the place of the paying banker, or if he, otherwise, feels the necessity, he may cross the cheque specially to another banker

Q20 Explain dishonour of Negotiable Instruments.

Answer - **Dishonour of negotiable instrument** means loss of honour or respect for the instrument in question on the part of the maker, drawee, or acceptor, as the case may be, which eventually results in non-realization of payment due on the instrument.

Dishonour by non-acceptance:

Any type of negotiable instruments, i.e., **bill of exchange**, promissory note, or cheque may be dishonoured by non-payment by the drawee/acceptor thereof. But a bill may also be dishonoured by non-acceptance because bill of exchange is the only negotiable instrument which requires its presentment for acceptance and non-acceptance thereof, can amount to dishonour.

When is a bill said to be dishonoured by Non-Acceptance?

A bill is said to be dishonoured by non-acceptance in the following circumstances.

1. When the drawee or one of the several drawees, not being partners, commit default in acceptance upon being duly required to accept the bill. In this regard Section 63 expressly provides that the holder must, if so required by the drawee of a **bill of**

exchange presented to for acceptance, allow the drawee forty-eight hours (exclusive of public holidays) to consider whether he will accept it.

2. Where presentment is required and the bill remains unrepresented.
3. Where the drawee is incompetent to enter into a valid contract.
4. Where the bill is given a qualified acceptance.
5. If the drawee is a fictitious person.
6. If the drawee cannot be found even after reasonable search.
7. Where the drawee has either become insolvent or is dead and the holder does not present the bill to the assignee or legal representative of the insolvent or deceased drawee.

It is relevant to note that where a drawee-in-case-of-need is named in a bill of exchange or in any endorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.

Dishonour of negotiable instrument by Non-payment:

A promissory note, **bill of exchange**, or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill, or **drawee of the cheque** commit default in payment upon being duly required to pay the same. Also the holder of a bill or pro-note may treat it as dishonoured, without placing for payment when presentment for payment is excused expressly by the maker of the pro-note, or acceptor of the bill and the note or bill when overdue remains unpaid.

Dishonour by non-acceptance vs Dishonour by non-payment:

If a bill is dishonoured either by non-acceptance or by non-payment, the drawer and all the endorsers of the bill are liable to the holder, provided notice of such dishonour is given to them. The drawee, on the other hand, shall be liable to the holder only in the event of dishonour by non-payment.

Dishonour of Cheque for insufficient of funds in the account:

A cheque drawn by a person on an account maintained by him with a bank for payment of any amount of money to another person can be returned unpaid for lack of enough funds in the said account. This is called **dishonour of cheques** for insufficiency of funds (in the drawer's account). In such cases, the drawer is also criminally liable for this offense and may be punished with imprisonment for a term, which may extend to one year, or with fine that may extend to twice the amount of the cheque, or with both.

Dishonour of cheque vs promissory note:

A cheque being drawn on specified bank and not expressed to be payable otherwise than on demand is never presented to the drawee bank for acceptance and same is the case of a promissory note. However, a pro-note made payable at a certain period after sight is required to be presented for sight, but it is never subject to presentment for acceptance.

How is a party to a negotiable instrument discharged?

A party to a negotiable instrument is discharged in the following ways

- By cancellation of the name of a party to the instruments
- by release of any party to the instruments
- by payments
- by allowing drawee more than 48 hours to accept
- by delay in presenting a cheque for payment
- by payment in due course of a cheque (payable to order)
- by taking qualified acceptance
- by non-presentment for acceptance of a bill of exchange
- by operation of law
- by material alteration

Code: 104

LAW OF TORTS

Ques 1. What do you understand by Tort? Mention various definition of jurists related to tort?

Ans. The word Tort is derived from a Latin word 'Tortus' which means 'twisted' or 'cooked act'. In English it means, 'wrong'. The Expression 'Tort' is of French Origin. The word Tort was derived from the Latin term Tortum. The term 'Tort' means a wrongful act committed by a person, causing injury or damage to another, thereby the injured institutes (files) an action in Civil Court for a remedy viz., unliquidated damages or injunction or restitution of property or other available relief. Unliquidated damages means the amount of damages to be fixed or determined by the Court.

Sir John Salmond: "Tort as a civil wrong for which the remedy is common law action for unliquidated damages and which is not exclusively the breach of contract or the breach of trust or other merely equitable obligation."

Prof. P H Winfield: Tortious Liability arises from breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is redressable by an action for unliquidated damages.

Clark and Lindsell: "Tort is a wrong independent of contract for which the appropriate remedy is a common law action."

Fraser: A tort is an infringement of a legal right in rem of a private individual, giving a right of compensation of the suit of the injured party.

Section 2(m) of Limitation Act, 1963: "Tort means a civil wrong which is not exclusively a breach of contract or breach of trust."

Ques 2. Difference between Tort and Crime?

Ans.

S. no.	Tort	Crime
1	The person who commits a tort is known as 'tortfeasor'	The person who commits a crime is known as 'offender'
2	Proceedings take place in Civil Court	Proceedings take place in Criminal Court.
3	The remedy in tort is unliquidated damages	The remedy is to punish the offender
4	It is not codified as it depends on judgemade laws	Criminal law is codified as the punishments are defined

5	Private rights of the individuals are violated	Public rights and duties are violated which affects the whole community.

Ques 3. Difference between Trot, Contract and Quasi Contract?

Ans. A distinct difference between contract and tort laws lies in the issue of consent. In contract law, both parties must enter an agreement knowingly and without coercion.

Each party must consent to the contract and its outcomes. In tort law, the interaction between the parties is not based on consent.

Usually, torts occur by the intrusion of one party to another that results in some type of harm. Courts will award damages in a contract case to restore the injured party to where they were before the breach occurred.

In a tort case, a court will award damages to compensate the victim for their loss.

Another difference between the two branches of law, is that punitive damages are sometimes awarded in tort cases, whereas they are rarely awarded in breach of contract cases.

Can a Person File a Contract Claim and a Tort Claim in the Same Lawsuit?

In some cases, a tort claim and contract claim will be included within the same lawsuit. However, due to the differences between torts and contracts, these cases are not as common as those where both claims are filed separately.

If you have a case where there was a breach of duty in a contract, and a tort claim is tightly related to the subject matter of the contract, it may be possible to file the claims concurrently.

Difference between Tort and Quasi-Contract:

Quasi contract cover those situations where a person is held liable to another without any agreement, for money or benefit received by him to which the other person is better entitled. According to the Orthodox view the judicial basis for the obligation under a quasi contract is the existence of a hypothetical contract which is implied by law. But the Radical view is that the obligation in a quasi contract is sui generis and its basis is prevention of unjust enrichment. Quasi contract differs from tort in that:

• There is no duty owed to persons for the duty to repay money or benefit received unlike tort, where there is a duty imposed.

• In quasi contract the damages recoverable are liquidated damages, and not unliquidated damages as in tort.

Quasi contracts resembles tort and differs from contracts in one aspect. The obligation in quasi contract and in tort is imposed by law and not under any agreement. In yet another dimension quasi contract differs from both tort and contract. If, for example, A pays a sum of money by mistake to B. in Quasi contract, B is under no duty not to accept the money and there is only a secondary duty to return it. While in both tort and contract, there is a primary duty the breach of which gives rise to remedial duty to pay compensation

Ques 4. Define *Injuria Sine Damnum and Damnum Sine Injuria?*

Ans.

Injuria sine damno: 1) Injuria - injury to legal right

2) sine -without

3) damno - damages, monetary loss.

The meaning of this maxim is injury to legal right without any monetary loss. This is actionable, because there is violation of legal right, even though plaintiff suffer no loss in term of money and defendant is liable.

In simple words, Injuria sine damno means Injury without damage or it means infringement of an absolute private right without any actual loss or damage. whenever there is an invasion of legal right, the person in whom the right is vested is entitled to bring an action and may recover damages, although he has suffered no actual harm. In such case, the person need not prove the actual damage caused to him. Example Trespass to land or property.

Suppose 'A' enter a private compound without permission of the owner just for asking water, here the moment 'A' step in, A commit trespass and action can lie against 'A' even no actual damage is caused.

Here are some famous cases –

Ashby v/s White, 1703.

Fact- Plaintiff was legal voter ,his name was there in voter list.defendant was a returning officer, i.e. incharge of election. Deft. Refused the plaintiff to offer or to tender his lawful vote to his candidate. Plaintiff sued Deft.for compensation even though no loss is caused in term of money.

Issue - Whether defendant is liable.

Defence of Deft- The plaintiff suffered no loss in money. Moreover, the candidate to whom he was about to offer /tender his vote got elected. So deft.not liable

Held - Court held that Deft.is liable to pay compensation because he has violated legal right of plaintiff to vote. Even though plaintiff suffered no actual loss in term of money, or the

candidate to whom plaintiff was interested got elected, defendant has committed a tort and therefore liable to pay compensation.

Dmanum Sine Injuria

Damnum means = Damage in the sense of money, Loss of comfort , service , health etc.

Sine means = Without

Injuria means = Infringement of a legal right / injury to legal right.

Damnun sine injuria means damages , monetary loss, to the plaintiff without violation of legal right, not actionable because no injury to legal right.

In Simple words, Damnum sine injuria means damage without infringement of any legal right. damage without injury is not actionable. Mere loss of money's worth does not of itself constitute legal damage. There are many acts which though harmful are not wrongful in the eyes of law, therefore do not give rise to a right of action in favour of the person who sustains the harm. No one is to be considered a wrong doer who merely avails himself of his legal rights, though his action may result in damage to another.

Gloucester Grammar school case, 1410 (setting up rival school)

Fact - Defendant was school teacher in plaintiff's school. Because of some dispute Deft left plaintiff's school and started his own school. As defendant was very famous amongst students or his teaching,boys from plaintiffs school left and joined to Deft.School . Plaintiff sued Deft.for monetary loss caused.

Held - Deft not liable. Compensation is no ground of action even though monetary loss in caused if no legal right is violated of anybody.

Ques 5. Define any two Justification In Tort?

Ans. Volenti non fit iniuria (or injuria) (Latin: "to a willing person, injury is not done") is a common law doctrine which states that if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring a claim against the other party in tort or delict. Volenti applies only to the risk which a reasonable person would consider them as having assumed by their actions; thus a boxer consents to being hit, and to the injuries that might be expected from being hit, but does not consent to (for example) his opponent striking him with an iron bar, or punching him outside the usual terms of boxing. Volenti is also known as a "voluntary assumption of risk.

" Volenti is sometimes described as the plaintiff "consenting to run a risk." In this context, volenti can be distinguished from legal consentin that the latter can prevent some torts arising in the first place. For example, consent to a medical procedure prevents the procedure from

being a trespass to the person, or consenting to a person visiting one's land prevents them from being a trespasser.

The defence has two main elements:

• The claimant was fully aware of all the risks involved, including both the nature and the extent of the risk; and

• The claimant expressly (by statement) or implicitly (by actions) consented to waive all claims for damages. Knowledge of the risk is not sufficient: sciens non est volens ("knowing is not volunteering"). Consent must be free and voluntary, i.e. not brought about by duress. If the relationship between the claimant and defendant is such that there is doubt as to whether the consent was truly voluntary, such as the relationship between workers and employers, the courts are unlikely to find volenti.

It is not easy for a defendant to show both elements and therefore comparative negligence usually constitutes a better defence in many cases. Note however that comparative negligence is a partial defence, i.e. it usually leads to a reduction of payable damages rather than a full exclusion of liability. Also, the person consenting to an act may not always be negligent: a bungee jumper may take the greatest possible care not to be injured, and if he is, the defence available to the organiser of the event will be volenti, not comparative negligence

NECESSITY

Necessity as a defense is defined under section 81 in Indian Penal Code as: “Act likely to cause harm, but done without criminal intent, and to prevent other harm.—Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.”

Factors affecting necessity

Affirmative defense

A defendant typically invokes the defense

Against intentional torts of trespass to chattels, , trespass to land or conversion.

With the necessity defense there will always be a prima facie violation of the law.

A tort is a civil wrong for which unliquidated damages have to be compensated by the defendant even if he did in case of necessity. The defense of necessity is only applicable when the defendant is able to justify his unlawful acts. It seems to be generally assumed that, if the defense of necessity succeeds, that is the end of the matter.

To present the defense at trial, defendants must need to meet the burden of provision of the four elements:

They were forced with a choice of evils and choose the lesser evil.

They acted to prevent imminent harm

They reasonably anticipated a direct casual relationship between their conduct and the harm to be averted.

And, they had no legal alternatives to violating the law.

Ques.6 What do you understand by Act done under Statutory Authority under tort?

Ans. When the commission of what would otherwise be a tort, is authorized by a statute the injured person is remediless. This is unless legislature has thought it proper to provide compensation to him. The statutory authority extends not merely to the act authorized by the statute but to all inevitable consequences of that act. But the powers conferred by the legislature should be exercised with judgment and caution so that no unnecessary damage is done, the person must do so in good faith and must not exceed the powers granted by the statute otherwise he will be liable.

For example, if there is a railway line near your house and the noises of the train passing disturbs then you have no remedy because the construction and the use of the railway is authorized under a statute. However, this does not give the authorities the license to do what they want unnecessarily; they must act in a reasonable manner. It is for this reason that we see that there are certain guidelines that need to be followed during construction of public transport facilities.

The philosophy behind this principle is that the lesser private rights must yield to the greater public good. Hence the state and people working for the state are given certain immunity and are allowed to do acts in pursuance of the public order even if they may lead to tortious liability. The extent to which this immunity is available to a public authority depends on whether the authority is absolute or conditional. Such a condition may be express or implied. In case of absolute statutory authority the immunity is available against both the act and its natural consequences. If absolute, then the authority is not liable provided it has acted reasonably and there is no alternative course of action.

In **Metropolitan Asylum District Board v. Hill**

a local authority being empowered by a statute to erect a small-pox hospital was restrained from erecting it at a place where it was likely to prove injurious to the residents of the locality. The authority to construct a hospital was construed as impliedly conditional only, i.e. to erect the hospital provided that the hospital authorities selected a site where no injurious results were likely to be caused to others.

Ques 7. Define Negligence under tort?

Ans. Negligence In order for a plaintiff to win a lawsuit for negligence, he or she must prove all of the "elements." For instance, one of the elements is "damages," meaning the plaintiff must have suffered damages (injuries, loss, etc.) in order for the defendant to be held liable. So, even if you can prove that the defendant was negligent, you may not be successful in your negligence lawsuit if that negligence caused you no harm.

When deciding on a verdict in a negligence case, juries are instructed to compare the facts, testimony, and evidence in determining whether the following elements were satisfied:

1. Duty

2. Breach of Duty

3. Cause in Fact

4. Proximate Cause

5. Damages

These five elements of a negligence case are explained in greater detail below.

1.Duty

The outcome of some negligence cases depends on whether the defendant owed a duty to the plaintiff. A duty arises when the law recognizes a relationship between the defendant and the plaintiff requiring the defendant to act in a certain manner toward the plaintiff. A judge, rather than a jury, ordinarily determines whether a defendant owed a duty of care to a plaintiff, and will usually find that a duty exists if a reasonable person would find that a duty exists under a particular set of circumstances.

For example, if a defendant was loading bags of grain onto a truck and struck a child with one of the bags, the first question that must be resolved is whether the defendant owed a duty to the child. If the loading dock was near a public place, such a public sidewalk, and the child was merely passing by, then the court may be more likely to find that the defendant owed a duty to the child. On the other hand, if the child were trespassing on private property and the defendant didn't know that the child was present at the time of the accident, then the court would be less likely to find that the defendant owed a duty.

2. Breach of Duty

It's not enough for a plaintiff to prove that the defendant owed him or her or a duty; the plaintiff must also prove that the defendant breached his or duty to the plaintiff. A defendant breaches such a duty by failing to exercise reasonable care in fulfilling the duty. Unlike the

question of whether a duty exists, the issue of whether a defendant breached a duty of care is decided by a jury as a question of fact. Thus, in the example above, a jury would decide whether the defendant exercised reasonable care in handling the bags of grain near the child.

3. Cause in Fact

Under the traditional rules in negligence cases, a plaintiff must prove that the defendant's actions were the actual cause of the plaintiff's injury. This is often referred to as "but-for" causation, meaning that, but for the defendant's actions, the plaintiff's injury would not have occurred. The child in the example above could prove this element by showing that but for the defendant's negligent act of tossing the grain, the child would not have suffered harm.

4. Proximate Cause

Proximate cause relates to the scope of a defendant's responsibility in a negligence case. A defendant in a negligence case is only responsible for those harms that the defendant could have foreseen through his or her actions. If a defendant has caused damages that are outside of the scope of the risks that the defendant could have foreseen, then the plaintiff cannot prove that the defendant's actions were the proximate cause of the plaintiff's damages.

In the example described above, the child would prove proximate cause by showing that the defendant could have foreseen the harm that would have resulted from the bag striking the child. On the contrary, if the harm is something more remote to the defendant's act, then the plaintiff will be less likely to prove this element. Assume that when the child is struck with the bag of grain, the child's bicycle on which he was riding is damaged.

Three days later, the child and his father drive to a shop to have the bicycle fixed. On their way to the shop, the father and son are struck by another car. Although the harm to the child and the damage to the bicycle may be within the scope of the harm that the defendant risked by his actions, the defendant probably could not have foreseen that the father and son would be injured on their way to having the bicycle repaired three days later. Hence, the father and son wouldn't be able to satisfy the element of proximate causation

5. Damages

A plaintiff in a negligence case must prove a legally recognized harm, usually in the form of physical injury to a person or to property. It's not enough that the defendant failed to exercise reasonable care. The failure to exercise reasonable care must result in actual damages to a person to whom the defendant owed a duty of care.

Ques 8. Define Nervous Shock?

Ans. Nervous Shock

• Nervous shock refers to a psychiatric illness caused by shock. Nervous shock is different from normal grief, sorrow, or anxiety. Usually, primary victims involved in an accident recover damages for shock.

• Generally, there can be no recovery for a nervous shock unaccompanied by physical injury. However, when the nervous shock follows as a result of physical injury, the nervous shock is a part of the physical injury, and a plaintiff is entitled to recovery for nervous injury.

Definition To amount in law to "nervous shock", the psychiatric damage suffered by the claimant must extend beyond grief or emotional distress to a recognised mental illness, such as anxiety neurosis or reactive depression. Damages for bereavement suffered as a result of the wrongful death of a close one are available under the Fatal Accidents Act 1976, while courts can also award damages for "pain and suffering" as a result of physical injury.

Intentionally inflicted nervous shock

It is well established in English law that a person who has intentionally and without good reason caused another emotional distress will be liable for any psychiatric injury that follows.[2] An example of this is a bad practical joke played on someone which triggered serious depression in that person. The joker intended to cause the other person emotional distress and will be liable for the medical consequences.

Negligently inflicted nervous shock

Before a claimant can recover damages for the nervous shock which he suffered as a result of the defendant's negligence, he must prove all of the elements of the tort of negligence:

1. The existence of a duty of care, i.e. the duty on the part of the defendant not to inflict nervous shock upon the claimant;

2. A breach of that duty, i.e. the defendant's actions or omissions in those circumstances fell below what would be expected from a reasonable person in the circumstances.

3. A causal link between the breach and the psychiatric illness, i.e. the nervous shock was the direct consequence of the defendant's breach of duty;

4. The nervous shock was not too remote a consequence of the breach.

For fear of spurious actions and unlimited liability of the defendant to all those who may suffer nervous shock in one form or other, the English courts have developed a number of "control mechanisms" or limitations of liability for nervous shock. These control mechanisms usually aim at limiting the scope of the defendant's duty of care not to cause nervous shock, as well as at causation and remoteness.

Primary victims

A "primary victim" is a person who was physically injured or could foreseeably have been physically injured as a result of the defendants negligence. An example of this is a claimant who is involved in a car accident caused by the defendant's careless driving and gets mildly injured (or even remains unharmed) as a consequence, but the fright from the crash triggers a serious mental condition. Such a claimant can recover damages for his car, his minor injuries and the nervous shock he had suffered. Rescuers (such as firemen, policemen or volunteers) who put themselves in the way of danger and suffer psychiatric shock as a result used to be "primary victims", until the decision in White v Chief Constable of the South Yorkshire Police explained that rescuers had no special position in the law and had to prove reasonable fear as a consequence of exposure to danger.

Secondary victims

A "secondary victim" is a person who suffers nervous shock without himself being exposed to danger. An example of this is a spectator at a car race, who witnesses a terrible crash caused by negligence on the part of the car manufacturers and develops a nervous illness as a result of his experience. It is in these cases where the courts have been particularly reluctant to award damages for nervous shock. In several decisions, the courts have identified several strict requirements for the recognition of a duty of care not to cause nervous shock, as well as causation and remoteness:

• The claimant must perceive a "shocking event" with his own unaided senses, as an eye-witness to the event, or hearing the event in person, or viewing its "immediate aftermath". This requires close physical proximity to the event, and would usually exclude events witnessed by television or informed of by a third party.

• The shock must be a "sudden" and not a "gradual" assault on the claimant's nervous system. So a claimant who develops a depression from living with a relative debilitated by the accident will not be able to recover damages.

• If the nervous shock is caused by witnessing the death or injury of another person the claimant must show a "sufficiently proximate" relationship to that person, usually described as a "close tie of love and affection". Such ties are presumed to exist only between parents and children, as well as spouses and fiancés. In other relations, including siblings, ties of love and affection must be proved.

• It must be reasonably foreseeable that a person of "normal fortitude" in the claimant's position would suffer psychiatric damage. The closer the tie between the claimant and the victim, the more likely it is that he would succeed in this element. However, once it is shown that some psychiatric damage was foreseeable, it does not matter that the claimant was particularly susceptible to psychiatric illness - the defendant must "take his victim as he finds him" and pay for all the consequences of nervous shock (see "Eggshell skull" rule). A mere bystander can therefore hardly count on compensation for psychiatric shock, unless he had witnessed something so terrible that anybody could be expected to suffer psychiatric injury as a result. However, it seems that such a case is purely theoretic (see McFarlane v. EE

Caledonia Ltd, where the plaintiff witnessed an explosion of a rig where he and his colleagues worked, but received no compensation).

Ques 10. Explain Nuisance along with case laws?

Ans. NUISANCE

The word "nuisance" is derived from the French word "nuire", which means "to do hurt, or to else's improper use in his property results into an unlawful interference with his use or enjoyment of that property or of some right over, or in connection with it, we may say that tort of nuisance occurred annoy". One in possession of a property is entitled as per law to undisturbed enjoyment of it. If someone. In other words, Nuisance is an unlawful interference with a person's use or enjoyment of land, or of some right over, or in connection with it. Nuisance is an injury to the right of a person in possession of a property to undisturbed enjoyment of it and result from an improper use by another person in his property.

Stephen defined nuisance to be "anything done to the hurt or annoyance of the lands, tenements of another, and not amounting to a trespass."

According to Salmond, "the wrong of nuisance consists in causing or allowing without lawful justification the escape of any deleterious thing from his land or from elsewhere into land in possession of the plaintiff, e.g. water, smoke, fumes, gas, noise, heat, vibration, electricity, disease, germs, animals".

In order that nuisance is actionable tort, it is essential that there should exist:

· wrongful acts;

· damage or loss or inconvenience or annoyance caused to another. Inconvenience or discomfort to be considered must be more than mere delicacy or fastidious and more than producing sensitive personal discomfort or annoyance. Such annoyance or discomfort or inconvenience must be such which the law considers as substantial or material.

In **Ushaben v. Bhagyalaxmi Chitra Mandir, AIR 1978 Guj 13,** the plaintiffs'-appellants sued the defendants-respondents for a permanent injunction to restrain them from exhibiting the film "Jai Santoshi Maa". It was contended that exhibition of the film was a nuisance because the plaintiff's religious feelings were hurt as Goddesses Saraswati, Laxmi and Parvati were defined as jealous and were ridiculed. It was held that hurt to religious feelings was not an actionable wrong. Moreover the plaintiff's were free not to see the movie again.

In **Halsey v. Esso Petroleum Co. Ltd. (1961) 2 All ER 145:**,the defendant's depot dealt with fuel oil in its light from the chimneys projected from the boiler house, acid smuts containing sulphate were emitted and were visible falling outside the plaintiff's house. There was proof that the smuts had damaged clothes hung out to dry in the garden of the plaintiff's house and also paint work of the plaintiff's car which he kept on the highway outside the door of his house. The depot emanated a pungent and nauseating smell of oil which went

beyond a background smell and was more than would affect a sensitive person but the plaintiff had not suffered any injury in health from the smell. During the night there was noise from the boilers which at its peak caused window and doors in the plaintiff's house to vibrate and prevented the plaintiff's sleeping. An action was brought by the plaintiff for nuisance by acid smuts, smell and noise. The defendants were held liable to the plaintiff in respect of emission of acid smuts, noise or smell.

Ques 11. What do you understand by false imprisonment and malicious prosecution?

Ans. An unjustified criminal charge can be devastating to an innocent person. Even when criminal proceedings absolve a guiltless person, the stigma attached with detention and accusations of criminal activity can lead to significant economic and non economic losses. Job opportunities are foreclosed. Anxiety, depression and humiliation often follow. This blog explores two of the tort remedies available to the falsely accused in the civil justice system.

The elements of malicious prosecution are:

(1) a criminal case was brought against the plaintiff

(2) the criminal case was brought as a result of oral or written statements made by the defendant;

(3) the criminal case ended in the favor of the plaintiff;

(4) the defendant's statements against the plaintiff were made without probable cause; and

(5) the defendant's statements were motivated by malice toward the plaintiff. The elements of malicious prosecution pose a significant burden to the Plaintiff. As the elements note, the criminal case must be resolved in the favor of the Plaintiff. This means that the case must be dismissed or the plaintiff must be acquitted. Even if the plaintiff is actually innocent, the claim will not succeed if the plaintiff is found guilty at trial. Additionally, the claim must be made without probable cause. Probable cause means that the reporter of the crime must have a good faith and reasonable belief that the Plaintiff was guilty of the offense. It is not enough that the plaintiff is. It must be apparent to a reasonable person that the plaintiff is not guilty of the offense. Finally innocent, it should be noted that prosecuting attorneys generally cannot be held liable for malicious prosecution. False imprisonment is a tort separate from malicious prosecution.

The elements of false imprisonment are:

(1) the defendant intended to restrict the plaintiff's freedom of movement;

2) the defendant, directly or indirectly, restricted the plaintiff's freedom of movement; and

(3) the plaintiff was aware that his or her movement was restricted. False imprisonment is viable tort in a number of circumstances. One such circumstance is when an individual levels

a false allegation against another leading to an arrest and detention. The defendant must directly or indirectly restrict of movement.

There are several notable affirmative defenses to false imprisonment. Most of the affirmative defenses revolve around the rights of police officers and business owners to arrest or detain individuals suspected of committing a crime. Generally, police officers and shopkeepers have the right to detain individuals that they reasonably believe have committed a crime. Note that a plaintiff can sue the police for false imprisonment. However, the police have a privilege to arrest individuals without a warrant. If the police officer believed and had probable cause to believe that the accused had committed a criminal offense, that officer cannot be held liable for false arrest.

Ques 12. Define Judicial and Quasi Judicial act?

Ans. Judicial

The rule is that "no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice". And the exemption is not confined to judges of superior courts. It is founded on the necessity of judges being independent in the exercise of their office, a reason which applies equally to all judicial proceedings. But in order to establish the exemption as regards proceedings in an inferior court, the judge must show that at the time of the alleged wrong-doing some matter was before him in which he had jurisdiction (whereas in the case of a superior court it is for the plaintiff to prove want of jurisdiction); and the act complained of must be of a kind which he had power to do as judge in that matter.

Thus a revising barrister has power by statute "to order any person to be removed from his court who shall interrupt the business of the court, or refuse to obey his [105] lawful orders in respect of the same": but it is an actionable trespass if under color of this power he causes a person to be removed from the court, not because that person is then and there making a disturbance, but because in the revising barrister's opinion he improperly suppressed facts within his knowledge at the holding of a former court. The like law holds if a county court judge commits a party without jurisdiction, and being informed of the facts which show that he has no jurisdiction; though an inferior judge is not liable for an act which on the facts apparent to him at the time was within his jurisdiction, but by reason of facts not then shown was in truth outside it.

A judge is not liable in trespass for want of jurisdiction, unless he knew or ought to have known of the defect; and it lies on the plaintiff, in every such case, to prove that fact. And the conclusion formed by a judge, acting judicially and in good faith, on a matter of fact which it is within his jurisdiction to determine, cannot be disputed in an action against him for anything judicially done by him in the same cause upon the footing of that conclusion.

Allegations that the act complained of was done "maliciously and corruptly," that words were spoken "falsely and maliciously," or the like, will not serve to make an action of this kind maintainable against a judge either of a superior or of an inferior court.

There are two cases in which by statute an action does or did lie against a judge for misconduct in his office, namely, if he refuses to grant a writ of habeas corpus in vacation time, and if he refused to seal a bill of exceptions.

The rule of immunity for judicial acts is applied not only to judges of the ordinary civil tribunals, but to members of naval and military courts-martial or courts of inquiry constituted in accordance with military law and usage. It is also applied to a limited extent to arbitrators, and to any person who is in a position like an arbitrator's, as having been chosen by the agreement of parties to decide a matter that is or may be in difference between them. Such a person, if he acts honestly, is not liable for errors in judgment. He would be liable for a corrupt or partisan exercise of his office; but if he really does use a judicial discretion, the rightness or competence of his judgment cannot be brought into question for the purpose of making him personally liable.

QUASI-JUDICIAL ACTS

These quasi-judicial functions are in many cases created or confirmed by Parliament. Such are the powers of the universities over their officers and graduates, and of colleges in the universities over their fellows and scholars, and of the General Council of Medical Education over registered medical practitioners. Often the authority of the quasi-judicial body depends on an instrument of foundation, the provisions of which are binding on all persons who accept benefits under it. Such are the cases of endowed schools and religious congregations. And the same principle appears in the constitution of modern incorporated companies, and even of private partnerships. Further, a quasi-judicial authority may exist by the mere convention of a number of persons who have associated themselves for any lawful purpose, and have entrusted powers of management and discipline to select members. The committees of most clubs have by the rules of the club some such authority, or at any rate an initiative in presenting matters of discipline before the whole body. The Inns of Court exhibit a curious and unique example of great power and authority exercised by voluntary unincorporated societies in a legally anomalous manner. Their powers are for some purposes quasi-judicial, and yet they are not subject to any ordinary jurisdiction.

The general rule as to quasi-judicial powers of this class is that persons exercising them are protected from civil liability if they observe the rules of natural justice, and also the particular statutory or conventional rules, if any, which may prescribe their course of action. The rules of natural justice appear to mean, for this purpose, that a man is not to be removed from office or membership, or otherwise dealt with to his disadvantage, without having fair and sufficient notice of what is alleged against him, and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions be satisfied, a court of justice will not interfere, not even if it thinks the decision was in fact wrong. If not,

the act complained of will be declared void, and the person affected by it maintained in his rights until the matter has been properly and regularly dealt with. These principles apply to the expulsion of a partner from a private firm where a power of expulsion is conferred by the partnership contract.

It may be, however, that by the authority of Parliament (or, it would seem, by the previous agreement of the party to be affected) a governing or administrative body, or the majority of an association, has power to remove a man from office or the like without anything in the nature of judicial proceedings, and without showing any cause at all. Whether a particular authority is judicial or absolute must be determined by the terms of the particular instrument creating it.

On the other hand, there may be question whether the duties of a particular office be quasi-judicial, or merely ministerial, or judicial for some purposes and ministerial for others. It seems that at common law the returning or presiding officer at a parliamentary or other election has a judicial discretion, and does not commit a wrong if by an honest error of judgment, he refuses to receive a vote: but now in most cases it will be found that such officers are under absolute statutory duties, which they must perform at their peril.

Ques 13. Define Vicarious Liability?

Ans. Vicarious liability means the liability of one person for the torts committed by another person. The general rule is that every person is liable for his own wrongful act. However, in certain cases a person may be made liable for wrongful acts committed by another person. For example: An employer may be held liable for the tort of his employees. Similarly, a master is liable for any tort, which the servant commits in the course of his employment. The reason for this rule of common law is that: -

As the master has the benefit of his servant's service he should also accept liabilities.

– The master should be held liable as he creates circumstances that give rise to liability.

- The servant was at mere control and discretion of the master.

- Since the master engages the servant, he ought to be held liable when gagging a wrong person.

- The master is financially better placed than the servant.

It must be proved that a person was acting as a servant and that the said tort was committed in the course of his employment before a master can be sued for a tort committed by his servant.

MASTER AND SERVANT

A servant means a person employed under a contract of service and acts on the orders of his master. The master therefore controls the manner in which his work is done. The concept of

vicarious liability is based on the principle of equity that employee is normally people of meager resources and it is therefore only fair that the injured person is allowed to recover damages from the employers. Therefore a master is liable for the torts committed by his servant. To prove liability under master-servant relationship the servant must have acted in the course of his employment A master is liable whether the act in a question was approved by him or not. It is immaterial that the alleged act was not done for the benefit of the master. But the master is not liable for torts committed beyond the scope of employment. A servant is a person who works under the control of and is subject to the directions of another e.g. house-help, home servant, chauffeurs etc. Such persons are employed under a contract of service. The servant would also hold his master liable for torts committed in the course of duty for action done on ostensible authority. For vicarious liability to arise, it must be proved that:

1. There was a lawful relationship between the parties.

2. There must have been a contract of service between the parties.

3. The servant is under the control and discretion of the master. This control and discretion is determined by the master‟s freedom:

- To hire or fire the servant.

- To determine the tasks to be discharged.

- To provide implements.

- To determine how the tasks would be discharged.

- To determine the servants remuneration. - That the tort was committed by the servant in the course of his employment. This is irrespective of whether the servant was acting negligently, criminally, deliberately or wantonly for his own benefit.

An employer is however responsible for the torts committed by an independent contractor where the contract, if properly carried out, would involve commission of a tort and also in cases where the law entrusts a high duty of care upon the employer.

INDEPENDENT CONTRACTOR

An independent contract means a person who undertakes to produce a given result without being controlled on how he achieves that result. These are called contract for service. Because the employer has no direct control of him, he (the employer) is not liable for his wrongful acts. However, there are certain cases (exception) under which the employer may still be liable. These are: -

a). Where the employer retains his control over the contractor and personally interferes and makes himself a party to the act, which causes the damage.

b). Where the thing contracted is in itself a tort.

c). Where the thing contracted to be done is likely to do damage to other people's property or cause nuisance.

d). Where there is strict liability without proof of negligence e.g. the rule in Ryland vs. Fletcher.

Ques 14. Define Strict Liability?

Ans. Strict liability means liability without proof of any fault on the part of the wrongdoer. Once the plaintiff is proved to have suffered damage from the defendant's wrongful conduct, the defendant is liable whether there was fault on his part or not. Strict liability must be distinguished from absolute liability. Where there is absolute liability, the wrong is actionable without proof of fault on the part of the wrong-doer and in addition, there is no defense whatsoever to the action. Where there is strict liability, the wrong is actionable without proof of fault but some defenses may also be available .

Strict liability may be considered in the following case namely:

i. The rule in Ryland Vs. Fletcher (1866)
ii. Liability for fire and;
iii. Liability for animals.

1.The rule in RYLAND VS FLETCHER (1866) The rule is base on the judgment contained in the above case. It states that; "The person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril and, is prima facie answerable for all the damage which is the natural consequence of its escape". The above rule is commonly called the rule in Ryland vs. Fletcher. It was formulated on the basis of the case of Ryland vs. Fletcher (1866). In this case Ryland had employed independent contractors to construct a reservoir on his land adjoining that of Fletcher. Due to the contractor's negligence, old mine shafts, leading from Ryland‟s land to Fletcher's were not blocked. When the reservoir was filled, the water escaped through the shafts and flooded the plaintiffs mine and caused great damage. The court held that Ryland was liable and it was immaterial that there was no fault on their part.

Limits of the rule.

For this rule to apply the following conditions must be applied:

i. Non-natural user: The defendant must have used his land in a way, which is not ordinarily natural.

ii. Bringing into, or keeping or accumulating things on land for personal use.

iii. That the things brought were capable of causing mischief if they escaped. These things need not be dangerous always.

iv. Need for escape: There must be actual escape of the thing from the defendants land and not a place outside it.

v. That the plaintiff suffered loss or damage for such escape.

Defenses in rule in Ryland vs. Fletcher.

i. Acts of God: Act of God is a good defense to an action brought under the rule.

ii. Plaintiffs' Fault: If the escape of the thing is due to the fault of the plaintiff, the defendant is not liable. This is because the plaintiff has himself brought about his own suffering.

iii. Plaintiff‟s consent or benefit: That the accumulation or bringing of the thing was by consent of the plaintiff.

iv. Statutory authority: That the thing was brought into the land by requirement of an Act of parliament.

v. Contributory negligence: if the plaintiff was also to blame for the escape.

vi. Wrongful act of third party: the defendant may take the defence of the wrongful acts of a third party though he may still be held liable in negligence if he failed to foresee and guard against the consequences to his works of that third party‟s act.

2. Liability for Fire: The liability for fire due to negligence is actionable in tort. It is also a case of strict liability. Therefore, if a fire starts without negligence but it spreads due -to negligence of a person, then that person will be liable for damages caused by the spread of the fire.

3. Liability for Animals: This may arise in cases of negligence. An occupier of land is liable for damage done by his cattle if they trespass onto the land of his neighbors thus causing damage. In the same way, person who keeps dangerous animals like leopards, dogs, lions, etc is liable strictly for any injury by such animals. He cannot claim that he was careful in keeping them. He remains liable even in the absence of negligence.

Ques 15. Define the term Defamation?

Ans. Defamation means the publication of a false statement regarding another person without lawful justification, which tends to lower his reputation in the estimation of right thinking members of society or which causes him to be shunned or avoided or has a tendency to injure him in his office, professions or trade. It has also been defined as the publication of a statement that tends to injure the reputation of another by exposing him to hatred, contempt or ridicule. In the case of Dixon Vs Holden (1869) the right of reputation is recognized as an inherent right of every person, which can be exercised against the entire world. A man‟s reputation is therefore considered his property.

Following are the essential elements of defamation: -

i. False statement: The defendant must have made a false statement. If the statement is true, it's not defamation.

ii. Defamatory statement: The statement must be defamatory. A statement is said to be defamatory when it expose the plaintiff to hatred, contempt, ridicule or shunning or injures him in his profession or trade among the people known to him.

iii. Statement refers the plaintiff: The defamatory statement must refer to the plaintiff. But the plaintiff need not have been specifically named. It is sufficient if right thinking members of the society understand the statement to refer to the plaintiff.

iv. Statement must be Published: Publication of the statement consists in making known of the defamatory matter to someone else (third parties) other than the plaintiff.

TYPES OF DEFAMATION

1. Slander:

Slander takes place where the defamatory statement are made in non-permanent form e.g. by word of mouth, gestures, etc. Slander is actionable only on proof of damage. However, in exceptional cases, a slanderous statement is actionable without proof of damage. This is so in cases: a) Where the statement inputs a criminal offence punished by imprisonment. b) Where the statement inputs a contagious disease on the plaintiff. c) Where the statement inputs unchastely on a woman. d) Where the statement imputes incompetence on the plaintiff in his trade, occupation or profession.

2. Libel:

Libel takes place where the defamatory permanent form e.g. in writing, printing, television broadcasting, effigy, etc. Where a defamatory matter is dictated to a secretary and she subsequently transcribes it, the act of dictation constitutes a slander while the transcript is a libel.

An action for libel has the following essential requirements:

i) it must be proved that the statement is false,
ii) in writing,
iii) is defamatory, and
iv) has been published.

Distinctions between slander and libel Libel can be a criminal offence as well as a civil wrong while slander amounts to a mere civil wrong only.

1. Libel is in a permanent form while slander is in a non-permanent form.

2. Under libel, the wrong is actionable per se whereas in slander the plaintiff must prove actual damage except when it conveys certain imputations.

3. Libel can be a criminal offence and may as well give rise to civil liability while slander is essentially a civil wrong. Defenses against defamation

i. Truth or justification:

Truth is a complete defense to an action on libel or slander. The defendant must be sure of proving the truth of the statement otherwise more serious and aggravated damage may be awarded against him.

ii. Fair comment:

Fair comment on a matter of Public interest is a defense against defamation. The word "fair" means honesty relevant and free from malice and improper motive.

iii. Absolute Privilege:

Certain matters are not actionable at all in defamation. They are absolutely privileged. A matter is said to be privileged when the person who makes the communication has a moral duty to make it to the person to whom he does make it, and the person who received it has an interest in hearing it. They include statements made by the judges or magistrates in the course of judicial proceedings, statements made in Parliament by Legislators and communication between spouses, etc.

iv. Qualified Privilege:

In this case a person is entitled to communicate a defamatory statement so long as no malice is proved on his part. They include statements made by a defendant while defending his reputation, communications made to a person in public position for public good, etc.

v. Apology or offer of Amends:

The defendant is at liberty to offer to make a suitable correction of the offending statement coupled with an apology. Such offers maybe relied upon as a defense.

vi. Consent:

In case whereby the plaintiff impliedly consents to the publication complained of, such consent is a defence in defamation.

Remedies for defamation Damages:

The plaintiff can recover damages for injury to his reputation as well as his feelings. Apology: An apology is another remedy available to the plaintiff. This is because it has the effect of correcting the impression previously made by the offending statement about the plaintiff.

Ques 16. Define Consumer, and his rights under consumer protection act 1986?

Ans. consumer 1.2 Section 2(d) of the Consumer Protection Act says that consumer means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment, and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

Explanation.—For the purposes of the sub-clause (i),

"commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment. 1.2-1 Consumer of goods - The provision reveals that a person claiming himself as a consumer of goods should satisfy that— 1-2-1a THE GOODS ARE BOUGHT FOR CONSIDERATION - There must be a sale transaction between a seller and a buyer; the sale must be of goods; the buying of goods must be for consideration. The terms sale, goods, and consideration have not been defined in the Consumer Protection Act. The meaning of the terms 'sale', and 'goods' is to be construed according to the Sale of Goods Act, and the meaning of the term 'consideration' is to be construed according to the Indian Contract Act. 1-2-1b ANY PERSON WHO USE THE GOODS WITH THE APPROVAL OF THE BUYER IS A CONSUMER - When a person buys goods, they may be used by his family members, relatives and friends. Any person who is making actual use of the goods may come across the defects in goods. Thus the law construe users of the goods as consumers although they may not be buyers at the same time. The words "....with the approval of the buyer" in the definition denotes that the user of the goods should be a rightful user. Example : A purchased a scooter which was in B's possession from the date of purchase. B was using it and taking it to the seller for repairs and service from time to time. Later on B had a complaint regarding the scooter. He sued the seller. The seller pleaded that since B did not buy the scooter, he was not a consumer under the Act. The Delhi State Commission held that B, the complainant was using it with the approval of A, the buyer, and therefore he was consumer under the Act.

Rights and Duties of Consumer
Right to Safety: The right to be protected against goods which are hazardous to life and property. Right to Information:

The right to be informed about the quality, quantity, purity, price and standards of goods. Right to Choose:

The right to be assured access to a variety of products at competitive prices, without any pressure to impose a sale, i.e., freedom of choice.

Right to be Heard: The right to be heard and assured that consumer interests will receive due consideration at appropriate forums.

Right to Seek Redressal: The right to get relief against unfair trade practice or exploitation.

Right to Education: The right to be educated about rights of a consumer.

Duties of consumer

Illiteracy and Ignorance: Consumers in India are mostly illiterate and ignorant. They do not understand their rights. So its our duty to know about our rights and to use it in the right place.

Unorganized Consumers: In India consumers are widely dispersed and are not united. They are at the mercy of businessmen. On the other hand, producers and traders are organized and powerful.

Spurious Goods: There is increasing supply of duplicate products. It is very difficult for an ordinary consumer to distinguish between a genuine product and its imitation. It is necessary to protect consumers from such exploitation by ensuring compliance with prescribed norms of quality and safety. Always check the norms of the product.

False Advertising: Some businessmen give misleading information about quality, safety and utility of products. Consumers are misled by false advertisement. To stop this, we the consumer have to know about the product.

Malpractices of Businessmen: Only consumer can avoid and stop the mal practises of the businessmen by opposing them. So this is one of the duty of consume

Ques 17. State the composition of District Commission?

Ans. S. 28. (1) The State Government shall, by notification, establish a District Consumer Disputes Redressal Commission, to be known as the District Commission, in each district of the State:

- Provided that the State Government may, if it deems fit, establish more than one District Commission in a district

Each District Commission shall consist of—

- (a) a President; and
- (b) not less than two and not more than such number of members as may be prescribed, in consultation with the Central Government

S. 29. The Central Government may, by notification make rules to provide for the qualifications, method of recruitment, procedure for appointment, term of office, resignation and removal of the President and members of the District Commission.

S. 30. The State Government may, by notification, make rules to provide for salaries and allowances and other terms and conditions of service of the President, and members of the District Commission

Jurisdiction of District Commission

S. 34. (1) Subject to the other provisions of this Act, the District Commission shall have jurisdiction to entertain complaints where the value of the goods or services paid as consideration does not exceed **one crore rupees**: Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit.

Ques 18. State Composition of State Commission and National Commission?

Ans. State Commission

- S. 42. (1) The State Government shall, by notification, establish a State Consumer Disputes Redressal Commission, to be known as the State Commission, in the State.
- (2) The State Commission shall ordinarily function at the State capital and perform its functions at such other places as the State Government may in consultation with the State Commission notify in the Official Gazette:
- Provided that the State Government may, by notification, establish regional benches of the State Commission, at such places, as it deems fit.

Composition of State Commission

Each State Commission shall consist of—

- (a) a President; and
- (b) not less than four or not more than such number of members as may be prescribed in consultation with the Central Government.

Qualification

- S. 43. The Central Government may, by notification, make rules to provide for the qualification for appointment, method of recruitment, procedure of appointment, term of office, resignation and removal of the President and members of the State Commission.
- S. 44. The State Government may, by notification, make rules to provide for salaries and allowances and other terms and conditions of service of the President and members of the State Commission.

Jurisdiction

- S. 47. (1) Subject to the other provisions of this Act, the State Commission shall have jurisdiction—
- (a) to entertain—
- (i) **complaints** where the value of the goods or services paid as consideration, exceeds rupees one crore, but does not exceed rupees ten crore:
- Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;
- (ii) complaints against unfair contracts, where the value of goods or services paid as consideration does not exceed ten crore rupees;
- (iii) **appeals** against the orders of any District Commission within the State; and

National Commission

- S. 53. (1) The Central Government shall, by notification, establish a National Consumer Disputes Redressal Commission, to be known as the National Commission.
- (2) The National Commission shall ordinarily function at the National Capital Region and perform its functions at such other places as the Central Government may in consultation with the National Commission notify in the Official Gazette:
- Provided that the Central Government may, by notification, establish regional Benches of the National Commission, at such places, as it deems fit.

Composition of National Commission

Sec 54. The National Commission shall consist of—

- (a) a President; and
- (b) not less than four and not more than such number of members as may be prescribed.

Qualification

- S. 55. (1) The Central Government may, by notification, make rules to provide for qualifications, appointment, term of office, salaries and allowances, resignation, removal and other terms and conditions of service of the President and members of the National Commission:
- Provided that the President and members of the National Commission shall hold office for such term as specified in the rules made by the Central Government but not exceeding five years from the date on which he enters upon his office and shall be eligible for re-appointment.

Jurisdiction

- 58. (1) Subject to the other provisions of this Act, the National Commission shall have jurisdiction—
- (a) to entertain—
- (i) complaints where the value of the goods or services paid as consideration exceeds rupees ten crore.
- Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;
- (ii) complaints against unfair contracts, where the value of goods or services paid as consideration exceeds ten crore rupees;
- (iii) appeals against the orders of any State Commission;
- (iv) appeals against the orders of the Central Authority; and

Ques 19. What are the remedies available under consumer protection act 1986?

Ans. Under this Act, the remedies available to consumers are as follows:

(a) Removal of Defects:

If after proper testing the product proves to be defective, then the 'remove its defects' order can be passed by the authority concerned.

(b) Replacement of Goods:

Orders can be passed to replace the defective product by a new non-defective product of the same type.

(c) Refund of Price:

Orders can be passed to refund the price paid by the complainant for the product.

(d) Award of Compensation:

If because of the negligence of the seller a consumer suffers physical or any other loss, then compensation for that loss can be demanded for.

(e) Removal of Deficiency in Service:

If there is any deficiency in delivery of service, then orders can be passed to remove that deficiency. For instance, if an insurance company makes unnecessary delay in giving final touch to the claim, then under this Act orders can be passed to immediately finalise the claim.

(f) Discontinuance of Unfair/Restrictive Trade Practice:

If a complaint is filed against unfair/restrictive trade practice, then under the Act that practice can be banned with immediate effect. For instance, if a gas company makes it compulsory for a consumer to buy gas stove with the gas connection, then this type of restrictive trade practice can be checked with immediate effect.

(g) Stopping the Sale of Hazardous Goods:

Products which can prove hazardous for life, their sale can be stopped. If there is any deficiency in delivery of service, then orders can be passed to remove that deficiency. For instance, if an insurance company makes unnecessary delay in giving final touch to the claim, then under this Act orders can be passed to immediately finalise the claim.

(h) Discontinuance of Unfair/Restrictive Trade Practice:

If a complaint is filed against unfair/restrictive trade practice, then under the Act that practice can be banned with immediate effect. For instance, if a gas company makes it compulsory for a consumer to buy gas stove with the gas connection, then this type of restrictive trade practice can be checked with immediate effect.

(i) Stopping the Sale of Hazardous Goods:

Products which can prove hazardous for life, their sale can be stopped.

Ques 20. What are kinds of Nuisance?

Ans. Nuisance is of two kinds: ·

Public Nuisance Under Section 3 (48) of the General Clauses Act, 1897, the words mean a public nuisance defined by the Indian Penal Code.

Section 268 of the Indian Penal Code, defines it as "an act or illegal omission which causes any common injury, danger or annoyance, to the people in general who dwell, or occupy property, in the vicinity, or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

Simply speaking, public nuisance is an act affecting the public at large, or some considerable portion of it; and it must interfere with rights which members of the community might otherwise enjoy.

Thus acts which seriously interfere with the health, safety, comfort or convenience of the public generally or which tend to degrade public morals have always been considered public nuisance.Public nuisance can only be subject of one action, otherwise a party might be ruined by a million suits. Further, it would give rise to multiplicity of litigation resulting in burdening the judicial system. Generally speaking, Public Nuisance is not a tort and thus does not give rise to civil action.

In the following circumstances, an individual may have a private right of action in respect a public nuisance.

1. He must show a particular injury to himself beyond that which is suffered by the rest of public i.e. he must show that he has suffered some damage more than what the general body of the public had to suffer.

2. Such injury must be direct, not a mere consequential injury; as, where one is obstructed, but another is left open.

3. The injury must be shown to be of a substantial character, not fleeting or evanescent. In Solatu v. De Held (1851) 2 Sim NS 133, the plaintiff resided in a house next to a Roman Catholic Chapel of which the defendant was the priest and the chapel bell was rung at all hours of the day and night. It was held that the ringing was a public nuisance and the plaintiff was held entitled to an injunction.

In **Leanse v. Egerton, (1943) 1 KB 323**, The plaintiff, while walking on the highway was injured on a Tuesday by glass falling from a window in an unoccupied house belonging to the defendant, the window having been broken in an air raid during the previous Friday night. Owing to the fact that the offices of the defendant's agents were shut on the Saturday and the Sunday and to the difficulty of getting labour during the week end, no steps to remedy the risk to passers by had been taken until the Monday. The owner had no actual knowledge of the state of the premises.

It was held that the defendant must be presumed to have knowledge of the existence of the nuisance, that he had failed to take reasonable steps to bring it to an end although he had ample time to do so, and that, therefore, he had "continued" it and was liable to the plaintiff.

In Attorney General v. P.Y.A. Quarries, (1957)1 All ER 894:, In an action at the instance of the Attorney General, it was held that the nuisance form vibration causing personal discomfort was sufficiently widespread to amount to a public nuisance and that injunction

was rightly granted against the quarry owners restraining them from carrying on their operations.

Without Proving Special Damage

In India under Section 91 of the Civil Procedure Code, allows civil action without the proof of special damage. It reads as follows:

"S. 91.(1) In the case of a public nuisance or other wrongful act affecting, or likely to affect, the public, a suit for a declaration and injunction or for such other relief as may be appropriate in the circumstances of the case, may be instituted

-by the Advocate General, or with the leave of the court, by two or more persons, even though no special damage has been caused to such persons by reason of such public nuisance or other wrongful act.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions."

Thus, a suit in respect of a public nuisance may be instituted by any one of the followings:

By the Advocate-General acting ex officio; or

By him at the instance of two or more persons or

by two or more persons with the leave of the Court.

Private Nuisance

Private nuisance is the using or authorising the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property by physically injuring his property or affecting its enjoyment by interfering materially with his health, comfort or convenience.

In contrast to public nuisance, private nuisance is an act affecting some particular individual or individuals as distinguished from the public at large. The remedy in an action for private nuisance is a civil action for damages or an injunction or both and not an indictment.

Elements of Private Nuisance Private nuisance is an unlawful interference and/or annoyance which cause damages to an occupier or owner of land in respect of his enjoyment of the land.

Thus, the elements of private nuisance are:

1. unreasonable or unlawful interference;

2. such interference is with the use or enjoyment of land, or some right over, or in connection with the land; and

3. damage. Nuisance may be with respect to property or personal physical discomfort

Nuisance may be with respect to property or personal physical discomfort

1. Injury to property In the case of damage to property any sensible injury will be sufficient to support an action.

In **St. Helen Smelting Co. v. Tipping, (1865) 77 HCL 642:,** the fumes from the defendant's manufacturing work damaged plaintiff's trees and shrubs. The Court held that such damages being an injury to property gave rise to a cause of action.

In **Ram Raj Singh v. Babulal, AIR 1982 All. 285**:, the plaintiff, a doctor, complained that sufficient quantity of dust created by the defendant's brick powdering mill, enters the consultation room and causes discomfort and inconvenience to the plaintiff and his patients.

The Court held that when it is established that sufficient quantity of dust from brick powdering mill set up near a doctor's consulting room entered that room and a visible thin red coating on clothes resulted and also that the dust is a public hazard bound to injure the health of persons, it is clear the doctor has proved damage particular to himself. That means he proved special damage.

2. Physical discomfort

In case of physical discomfort there are two essential conditions to be fulfilled:

a. In excess of the natural and ordinary course of enjoyment of the property – In order to be able to bring an action for nuisance to property the person injured must have either a proprietary or possessory interest in the premises affected by the nuisance.

b. Materially interfering with the ordinary comfort of human existence-The discomfort should be such as an ordinary or average person in the locality and environment would not put up with or tolerate.

Following factors are material in deciding whether the discomfort is substantial:

its degree or intensity;

its duration;

its locality;

the mode of user of the property.

In **Broadbent v. Imperial Gas Co. (1856) 7 De GM & G 436:**, an injunction was granted to prevent a gas company from manufacturing gas in such a close proximity to the premises of the plaintiff, a market gardener, and in such a manner as to injure his garden produce by the escape of noxious matter.

In **Shots Iron Co. v. Inglis, (1882) 7 App Cas 518**: An injunction was granted to prevent a company from carrying on calcining operations in any manner whereby noxious vapours would be discharged, on the pursuer's land, so as to do damage to his plantations or estate.

HISTORY-II-

BA LLB 106

Q. No. 1. Explain briefly the establishment of East India Company

Ans.
East India Company, also called English East India Company**,** Originally chartered as the Governor and Company of Merchants of London Trading into the East Indies. The company received a Royal Charter from Queen Eligabeth I on 31 December 1600. English company formed for the exploitation of trade with East and South East Asia and India incorporated by royal charter on December 31, 1600 granted by . Starting as a monopolistic trading body, the company became involved in politics and acted as an agent of British imperialism in India from the early 18th century to the mid-19th century. In addition, the activities of the company in China in the 19th century served as a catalyst for the expansion of British influence there.

Q. No.2. When and where the first East India Company settlement was established.

Ans.
The company received a Royal Charter from Queen Eligabeth I on 31 December 1600. Thereafter, the East India Company arrived first at Surat, India in 1608 in the ship named Hector commanded by William Hawkins and within a few years had established a permanent factory there. Surat in Gujarat was the port used by the textile manufacturers of Gujarat and was the most important centre for the overseas trade during the Mughal Empire.

The East India Company was an English company formed for the exploitation of trade with East and Southeast Asia and India. Incorporated by royal charter, it was started as a monopolistic trading body so that England could participate in the East Indian spice trade

Q No. 3. Briefly Explain establishment of Supreme Court of 1774, under the Regulating Act, 1773.

Ans.

The Regulating Act of 1773 established a supreme court at Fort William, Calcutta. This Supreme Court consisted one Chief Justice and three other regular judges or Puisne Judges. Sir Elijah Imphey was the first Chief Justice of this Supreme Court.

The Supreme Court was the supreme judiciary over all British subjects including the provinces of Bengal, Bihar and Orissa. This was the starting point of Modern Constitutional History of India, under the British.

This was though a Supreme Court, but still it was not above the Company. The act of 1773 was obscure with regard to the relation of the Supreme Court with the Government of Bengal. The Supreme Court subjected the company to the control of British Government. Later an amendment in this act was made (The amending act of 1881), in which the actions of the public servants in the company in their official capacity were exempted from the jurisdiction of the Supreme Court. The Supreme Court was also made to consider and respect the religious and social customs of the Indians. Appeals could be taken from the provincial court to the Governor–General in Council and that was the first court of appeal. The rules and Regulation made by the GG-in Council were not to be registered with the Supreme Court.

Q No. 4. Explain in detail the fact of case and critical appraisal or the Trail of Raja Nand Kumar.

Ans.

Raja Nand Kumar Raja Nand Kumar, a Hindu Brahmin was a big Zamindar and a very influential person of Bengal. He was loyal to the English company ever since the days of Clive and was popularly known as "black colonel" by the company. Three out of four members of the council were opponents of Hastings, the Governor-General and thus the council consisted of two distinct rival groups, the majority group being opposed to Hastings. The majority group comprising Francis, Clavering and Monson instigated Nand Kumar to bring certain charges of bribery and corruption against warren Hastings before the council whereupon Nand Kumar in march, 1775 gave a latter to Francis, one of the members of the council complaining that in 1772, Hastings accepted from him bribery of more than one Lakh for appointing his son Gurudas, as Diwan. The letter also contained an allegation against Hastings that he accepted rupees two and a half lakh from Munni begum as bribe for appointing her as the guardian of the minor Nawab Mubarak-ud-Daulah. Francis placed his letter before the council in his meeting and other supporter, monsoon moved a motion that Nand Kumar should be summoned to appear before the Council. Warren Hastings who was presiding the meeting in the capacity of Governor-General, opposed Monson's motion on the ground that he shall not sit in the meeting to hear accusation s against himself nor shall he acknowledge the members of his council to be his judges. Mr. Barwell ,the alone supporter member of Hastings ,put forth a suggestion that Nand Kumar should file his complaint in the supreme court because it was the court and not the council ,which was competent to hear the case. But Monson's motion was supported by the majority hence Hastings dissolved the meeting. Thereupon majority of the members objected to this action of Hastings and elected Clavering to preside over the meeting in place of Hastings .Nand Kumar was called before the council to prove his charges against Hastings. The majority members of the council examined Nand Kumar briefly and declared that the charges leveled against Hastings were proved and directed Hastings to deposit an amount of Rs.3, 54,105 in treasury of the company, which he had accepted as a bribe from Nand Kumar and Munni Begum. Hastings genuinely believed that the council had no authority to inquire into Nand Kumar's charges against him. This event made Hastings a bitter enemy of Nand Kumar and he looked for an opportunity to show him down.

FACT OF THE CASE :- Soon after, Nand Kumar was along with Fawkes and Radha Charan were charged and arrested for conspiracy at the instance of Hastings and barwell. In

order to bring further disgrace to Raja Nand Kumar, Hastings manipulated another case of forgery against him at the instance of one Mohan Prasad in the conspiracy case. The Supreme Court in its decision of July 1775 fined Fawkes but reserved its judgment against Nand Kumar on the grounds of pending fraud case. The charge against Nand Kumar in the forgery case was that he had forged a bond in 1770. The council protested against Nand Kumar's charge in the Supreme Court but the Supreme Court proceeded with the case unheeded. Finally, Nand Kumar was tried by the jury of twelve Englishmen who returned a verdict of 'guilty' and consequently, the supreme court sentenced him to death under an act of the British parliament called the Forgery Act which was passed as early as 1728. Serious efforts were made to save the life of Nand Kumar and an application for granting leave to appeal to the king-in-council was moved in the Supreme Court but the same was rejected. Another petition for recommending the case for mercy to the British council was also turned down by the Supreme Court. The sentence passed by the Supreme Court was duly executed by hanging Nand Kumar to death on August 5, 1775.In this way, Hastings succeeded in getting rid of Nand Kumar.

CRITICAL APPRAISAL:- Chief Justice Impey in this case acted unjustly in refusing to respite to Nand Kumar. No rational man can doubt that he took this course in order to gratify the Governor-General. The trial of Nand Kumar disclosed that the institution of Supreme Court hardly commanded any respect from the natives as it wholly unsuited to their social conditions and customs. The trial has been characterized as "judicial murder" of Raja Nand Kumar which rudely shocked the conscience of mankind. Raja Nand Kumar's trial was certainly a case of miscarriage of justice.

Q No. 5. Explain Judicial plan of 1793, introduced by Lord Cornwallis.

Ans. **Judicial Plan of 1793;**

1. **Separation of Executive and the Judiciary, -**The powers vested in the collector were administrative and judicial as he was also in charge of collection of revenue and for deciding cases arising out of revenue matter. Now, the collector was only responsible for the collection of revenue.
2. **Mal Adalats were abolished,-**Revenue courts which exclusively tried cases arising out of revenue matters and presided by the Collector as Judge, was now abolished. All powers and pending suits of the Revenue courts were now transferred to Mofussil Diwani Adalats and thus not tried by the collector.
3. **Executive subjected judicial control,-**The Governor General and his council were now subject to judicial control. Any wrong acts committed by them while carrying out their functions and outside of it could be heard or tried and punished by the Diwani Adalats. Suits against the Government by private individuals could be brought forward and were tried by the Diwani Courts.
4. **Indian natives had to sign a bond with the British Subjects agreeing to go to court,-**British could recover claims from Indian natives and vice versa by signing a bond with each other agreeing to go to court.
5. **Establishment of Provincial Courts of Appeal at the four divisions,-** Earlier the appeal from the Mofussil Diwani Adalats lay to the Sadr Diwani Adalat situated at Calcutta. But this process for time consuming and expensive so provincial courts of appeal were established at each division i.e. Patna, Calcutta Murshidabad and Dacca. Appeals from the Mofussil Adalat now lay to the provincial court of appeal which were to be heard within three months of filing them. These courts were presided by three covenant English servants of the company. Quorum was of two servants. It was an open court and could try revenue, civil and criminal cases. They could also try

cases referred to them by the Sadr Diwani Adalats. Cases valued more than Rs. 5000 were referred to the King-in-council.

6. **Native Officers given important posts,-** Native officers were appointed by the Governor General-in-council.Native officers were made Munsiffs of the Munsiff courts at district level. This court could try cases upto Rs.50. Zamindars, Tehsildars, etc appointed as Munsiffs.Personal Laws of Hindus and Muslims were applicable in cases relating to marriage, inheritance, caste, religious usages and institutions. These personal laws were interpreted by the native officers who were appointed to assist the court to expound the personal law
7. **Sadr Diwani Adalat,-**It was highest court of appeal in India. It was presided over by the Governor General and the Council who were the Judges of the Sadr Diwani Adalat. Their function was to supervise the lower courts and to hear appeals from the provincial courts of appeal when the sum of the matter of the case was more than Rs.1000.Further an appeal from the Sadr Diwani Adalat lay to the King-in-council, when the sum of the matter of the case was more than Rs.5000.
8. **Reforms in criminal judicature,-** The court of circuit was merged with the provincial court of appeal. The power of the collector as a magistrate was taken away and was vested in the judges of the diwani adalats instead.
9. **Uniform pattern of Regulations,-** Until now, any new regulation that was issued did not follow an uniform pattern. This was changed by making it a rule that any new regulation that would be made would have a title to explain the nature of the subject matter and contain a preamble which would state the purpose for enacting the regulation.
10. **Reforms in Muslim Personal Law,-** The Sadr Nizamat Adalat was directed to to follow the muslim personal law to try and punish criminal cases, but with some modifications. The relatives of murder victims did not have a provision to pardon the murderer. The cruel and inhuman punishments such as cutting off limbs of the offender were replaced with punishment of imprisonment and hard labour for 14 years.
11. **Court Fees abolished, -**Court fees which was imposed in the judicial plan of 1787 was abolished. The court fee was abolished so that the people could easily reach to the court for securing justice.
12. **Legal Profession recognised for the first time in India,-**The legal profession was recognised in India for the first time. The pleaders of the case had to have prior legal knowledge to be eligible to be a pleader of the court.

UNIT 2. Evolution of Law and Legal Institution

Q No. 1. Explain Personal Law and growth of codification of personal Law in India during British Period?

Ans;

Personal Law,- Personal law is defined as a law that applies to a certain class or group of people or a particular person, based on the religions, faith, and culture. In India, everyone belongs to different caste, religion and have their own faith and belief. Their belief is decided by the sets of laws. And these laws are made by considering different customs followed by that religion. Indians are following these laws since the colonial period.

Personal Laws and customs as recognised by the statutory law regulate the Hindus and other religions. These are applicable to legal issues related to matters of inheritance, succession, marriage, adoption, co-parenting, the partition of family property, obligations of sons to pay their father's debts, guardianship, maintenance and religious and charitable donations.

Personal Law, -Personal Law was codified in the following different Acts which are applicable to people of different religion. These acts are:

- The Converts' Marriage Dissolution Act, enacted during 1866
- The Indian Divorce Act, enacted in 1869
- The Indian Christian Marriage Act, enacted during 1872
- The Anand Marriage Act, enacted in 1909
- The Indian Succession Act, enacted during 1925
- The Child Marriage Restraint Act, enacted in 1929
- The Parsi Marriage and Divorce Act, enacted in 1936
- The Dissolution of Muslim Marriage Act, enacted during 1939

Q No. 2. Explain development criminal law in during British Period?

Ans.

Criminal law on the advent of British in India;

During the Islamic rule in India, criminal laws in several parts of the country saw major changes. Even prior to the Mughal rule, the Delhi sultanates had already introduced offences based on Islamic laws of Shariat. The main influence of these laws was Islamic religious texts like the Quran, Sunna, Hadis, Ijma, Qiya, etc.

During the Mughal rule, the codification of criminal law of law became more sophisticated. Muslim criminal law came under three broad categories: crimes against God, crimes against sovereignty, and crimes against individuals. The law even divided modes of punishments into categories. These included death, dismembering of limbs, stoning, levy of fines, confiscation of property, the punishment of exile, etc.

After the British arrived in India, they initially decided not to interfere much with existing Muslim criminal laws. They implemented changes in a phased manner so as to not upset the locals.

Criminal law in the British period;-

When Warren Hastings introduced his Judicial Plan of 1772, he did not many any severe changes to substantive criminal law. In 1773, he slowly started changing rules of procedure and evidence in existing criminal laws. For example, he abolished the practice of allowing male relates of victims to pardon their killers.

During this time, serious offences like homicide became crimes against the state instead of being private offences. This laid the foundation of the modern practice of the state prosecuting people who commit public offences.

From 1790 onwards, Lord Cornwallis extended the process of codifying criminal law. Major changes took place in the subject of sentencing. As a result, the process of levying punishments physically harming and dismembering convicts slowly started fading.

Lord Wellesley made even more changes to the offences of murder and homicide in the early 1800s. For example, the law now made distinctions between intentional and unintentional killing. Furthermore, rules of evidence became stricter and the threshold of proof to indicate guilt increased greatly. In presidency towns like Madras, Bombay and Calcutta, the British made many changes keeping local conditions in mind.

Codification of Substantive Criminal Laws

According to the Charter Act, 1833, India's first law commission in 1834 recommended drafting of the Indian Penal Code. Lord Macaulay, who was the chairman of that law commission, spearheaded its drafting. The Code was basically a comprehensive enactment describing all major crimes in existence at that time. Despite several revisions over almost thirty years, the law did not come into force until 1860. It was only after the Rebellion of 1857 that the British decided to implement it.

Even the Indian Evidence Act came into existence in 1872 under the guidance of Lord Macaulay. Its foundation was largely the British law of evidence, but it has seen many changes since then.

Codification of Procedural Criminal Laws

Although the British had enacted a Criminal Procedure Code for India in 1862, modern procedural laws came much later. The Code of 1862 was amended and replaced many times later to make procedural laws modern.

Q No. 3. Explain main provision of Charter Act 1833?

Ans. Charter Act of 1833 was the outcome of Industrial Revolution in England which envisages that Indian's had to function as market for the English mass production on the basis of *'Laissez Faire'*. Thus the Charter act of 1833 was institutionalised on basis of liberal concept. This was an Act of the Parliament of the United Kingdom that gave East India Company to rule India for another 20 years. The act legalized the British colonization of India and the territorial possessions of the company but were held "in trust for his majesty" for the service of Government of India.

Main Features of Charter Act ;-

1. It made the Governor-General of Bengal as the Governor-General of India and vested in him all civil and military powers. Thus, the act created, for the first time, a Government of India having authority over the entire territorial area possessed by the British in India. Lord William Bentick was the first governor-general of India.

2. It deprived the governor of Bombay and Madras of their legislative powers. The Governor-General of India was given exclusive legislative powers for the entire British India. The laws made under the previous acts were called as Regulations while laws made under this act were called as Acts.

3. It ended the activities of the East India Company as a commercial body, which became a purely administrative body. It provided that the company's territories in India were held by it 'in trust for His Majesty, His heirs and successors'.

4. This Act attempted to introduce a system of open competition for selection of civil servants, and stated that the Indians should not be debarred from holding any place, office and employment under the Company. However, this provision was negated after opposition from the Court of Directors.

Q No. 4. Explain establishment of High Court under The provisions of the Indian High Court Act , 1861?

Ans.

The High Courts of Calcutta, Madras and Bombay were established by Indian High Courts Act 1861. The objective of this act was to effect a fusion of the Supreme Courts and the Sadar Adalats in the three Presidencies and this was to be consummated by issuing Letter Patent. The jurisdiction and powers exercised by these courts was to be assumed by the High Courts.

Composition of the High Court's: The Indian High Courts Act 1861 had also spelled the composition of the High Court. Each High Court was to consist of a Chief Justice and not more than 15 regular judges.

- The chief Justice and minimum of one third regular judges had to be barristers and minimum one third regular judges were to be from the "covenanted Civil Service".

- All Judges were to be in the office on the pleasure of the Crown.

The High Courts had an Original as well as an Appellate Jurisdiction the former derived from the Supreme Court, and the latter from the Sudder Diwani and Sudder Foujdari Adalats, which were merged in the High Court.

Important facts:

- The Charter of High Court of Calcutta was issued on 14th May, 1862 and Madras and Bombay was issued on June 26, 1862.
- So, the Calcutta High Court has the distinction of being the first High Court and one of the three Chartered High Courts to be set up in India, along with the High Courts of Bombay, Madras.
- High Court at Calcutta which was formerly known as High Court of Judicature at Fort William was established on July 1, 1862. Sir Barnes Peacock was its first Chief Justice.
- On 2nd February, 1863, Justice Sumboo Nath Pandit was the first Indian to assume office as a Judge of the Calcutta High Court.
- The Bombay High Court was inaugurated on 14th August ,1862.
- Indian High Court Act 1861 also gave power to set up other High Courts like the High Courts of the Presidency Towns with similar powers.
- Under this power, a High Court was established in 1866 at High Court of Judicature for the North-Western Provinces at Agra on 17 March 1866 by the Indian High Courts Act of 1861 replacing the Sadr Diwani Adalat.
- Sir Walter Morgan, Barrister-at-Law was appointed the first Chief Justice of the High Court of North-Western Provinces. However it was shifted to Allahabad in 1869 and the name was correspondingly changed to the High Court of Judicature at Allahabad from 11 March 1919.

Q No. 5. Explain the role of Privy Council in Indian legal system?

Ans. British regime in India has also developed a hierarchical judicial system in India. Accordingly, the highest judicial authority was conferred on a body of jurists, popularly called as 'Privy Council'. It has played a significant role in shaping the present legal system in India. The Judicial Committee of the Privy Council was situated in Englad

The *Privy Council* has contributed a lot in development of ***Indian*** Legal System. It served a cause of justice for more than two hundred years for ***Indian*** Courts before independence. As far as the judicial institution is concerned, the ***Privy Council*** was a unique and unparallel among all the Courts round the world.

The Privy Council formally advises the sovereign on the exercise of the Royal Prerogative, and corporately (as Queen-in-**Council**) it issues executive instruments known as Orders in Council, which among other powers enact Acts of Parliament.

UNIT 3. Constitutional Development and framing of Indian Constitution

Q No. 1. Write a short note on the main features of the Indian Council Act 1861.

Ans. Indian Council Act of 1861was institutionalized to serve the necessities of cooperation of Indians in the administration of the country. The act restored the power of the Government

and the composition of the Governor General's council for executive & legislative Purposes. It was the first instance in which the portfolio of Council of Governor-General was incorporated.
The three separate presidencies (Madras, Bombay and Bengal) were brought into a common system.

Main Features of the Act,- The Act added to the Viceroy's Executive Council a fifth member - a jurist.

- Viceroy's Executive Council was expanded by the addition of not less than six and not more than 12 additional members for the purposes of legislation, who would be nominated by the Governor-General and would hold office for two years. Therefore, the total membership increased to 17.

- Not less than half of these members were to be non-officials.
- The legislative power was to be restored to the Council of Bombay and Madras, while Councils were allowed to be established in other Provinces in Bengal in 1862 and North West Frontier Province (NWFP) in 1886, Burma and Punjab in 1897.
- Canning had introduced the Portfolio system in 1859 that divided into several branches, which entrusted to different members of the Governor General's council. It also envisages that the member in-charge of his department could issue final orders with regard to matters which concerned his department.
- Lord Canning nominated three Indians to his legislative council-the Raja of Banaras, the Maharaja of Patiala and *Sir Dinkar Rao* .

Q No. 2. What were the main causes of failure of Government of India Act, 1909?

Ans .
The Act was no doubt was an improvement upon the preceding Act but it fell far short of the national expectations. What disappointed the people most was the admixture of the two incompatible elements of constitutionalism and autocracy. Main Causes of its failure are as follow;

- Supreme power continued to be vested in the Executive on the principle that the responsibility to rule over India had devolved exclusively on the British people. Indians were considered ill-fitted for higher posts in the administration.
- The local bodies continued to be officialised. The Councils established under the new Act remained Government majority and monopoly .
- Another cause of the failure of Reforms was the introduction of indirect elections for returning the members to the Legislative Councils.
- The system of communal representation also proved a them in the sides of the discerning leaders. v On proper analysis they found it nothing better than a political game of the Government to inflame communal passions and crack national solidarity.
- The public opinion also objected to the excessive importance that the Act gave to vested interests by giving them special representation.
- It perpetuated division by creeds and classes which meant the creation of political camps organized against each other and taught them to think as partisans and not citizens. It stereotyped existing relation and was a very serious hindrance to the development of the self governing principle.
- The exclusion of Indian from senior posts and from public services also pin-pricked the educated unemployed youths of India.

Q No. 3. Explain salient features of the Government of India Act 1919?

Ans.

During the World War Britain and her allies had said that they were fighting the war for the freedom of nations. However without conceding to the demand of swaraj, the British government introduced following Changes in the administrative system as a result of the *Montagu-Chelmsford Reforms,* called the *Government of India Act, 1919.*

Main features of the Act;

1 .It relaxed the central control over the provinces by demarcating and separating the central and provincial subjects. The central and provincial legislatures were authorised to make laws on their respective list of subjects. However, the structure of government continued to be centralised and unitary.

2. It further divided the provincial subjects into two parts—transferred and reserved. The transferred subjects were to be administered by the governor with the aid of ministers responsible to the legislative Council. The reserved subjects, on the other hand, were to be administered by the governor and his executive council without being responsible to the legislative Council. This dual scheme of governance was known as 'dyarchy'—a term derived from the Greek word di-arche which means double rule. However, this experiment was largely unsuccessful.

3. It introduced, for the first time, bicameralism and direct elections in the country. Thus, the Indian Legislative Council was replaced by a bicameral legislature consisting of an Upper House (Council of State) and a Lower House (Legislative Assembly). The majority of members of both the Houses were chosen by direct election.

4. It required that the three of the six members of the Viceroy's executive Council (other than the commander-in-chief) were to be Indian.

5. It extended the principle of communal representation by providing separate electorates for Sikhs, Indian Christians, Anglo-Indians and Europeans.

6.It granted franchise to a limited number of people on the basis of property, tax or education.

7. It created a new office of the High Commissioner for India in London and transferred to him some of the functions hitherto performed by the Secretary of State for India.

8. It provided for the establishment of a public service commission. Hence, a Central Public Service Commission was set up in 1926 for recruiting civil servants.

9. It separated, for the first time, provincial budgets from the Central budget and authorised the provincial legislatures to enact their budgets.

Q No. 4. Write Short note on the Accession of Princely states in India?

ANS;

It was announced by the British that with the end of their rule over India, supremacy of the British crown over Princely States would also lapse.

This meant that all these Princely states, as many as 565 in all, would become legally independent. The British government took the view that all these states were free to join either India or Pakistan or remain independent if they so wished.This decision was left not to the people but to the princely rulers of these states. This was a very serious problem and could threaten the very existence of a united India.

The Indian Independence Act of 1947 gave princely states an option to accede to the newly born dominions India or Pakistan or continue as an independent sovereign state. At that time more than 500 princely states have covered 48 percent of the area of pre Independent India and constituted 28% of its population.These kingdoms were not legally part of British India, but in reality, they were completely subordinate to the British Crown.For the British these states were the necessary allies, to keep in check the rise of other colonial powers and nationalist tendencies in India.Accordingly, the princes were given autonomy over their territories, but the British acquired for themselves the right to appoint ministers and get military support as and when required.

Sardar Vallabhbhai Patel (India's first deputy prime minister and the home minister) with the assistance of **V.P menon** (the secretary of the Ministry of the States) was given the formidable task of integrating the princely state. From invoking the patriotism of the princes to remind them of the possibility of anarchy on event of their refusal to join, Patel kept trying to convince them to join India. He also introduced the concept of "privy purses"— a payment to be made to royal families for their agreement to merge with India. Bikaner, Baroda and few other states from Rajasthan were the first ones to join the union of India. There were several other states such as Junagarh, Hyderabad and Kashmir that not joined India till then.

Q No. 5. Briefly Explain Reorganisation of states post independence period?

Ans.

The grouping of the States at Independence was done more on the basis of historical and political principles than social, cultural or linguistic divisions. There was not enough time to undertake a proper reorganisation of the units at the time of making the Constitution.

Article 2 of the Constitution of India empowers Parliament to admit into the Union, or establish new States on such terms and conditions as it thinks fit. By Article 3, Parliament has the power by law to form a new State from the territory of any State or by uniting two or more States, increase or decrease the area of any State, or alter the boundaries or the name of any State.

In 1953, the government was forced to create a separate state of Andhra Pradesh for Telugu-speaking people following the long-drawn agitation and death of Potti Sriramulu after a hunger strike for 56 days. Thus, the first linguistic state of Andhra Pradesh was created under pressure.This led to the demand for creation of states on linguistic basis from other parts of country and on December 22, 1953, Jawaharlal Nehru announced the appointment of a commission under Fazl Ali to consider this demand.

The commission recommended the reorganization of the whole country into sixteen states and three centrally administered areas. However, the government did not accept these recommendations in toto.

While accepting Commission's recommendation to do away with the four-fold distribution of states as provided under the original Constitution, it divided the country into 14 states and 6 union territories under the States Reorganization Act 1956.

The states were Andhra Pradesh, Assam, Bihar, Bombay, Jammu and Kashmir, Kerala, Madhya Pradesh, Madras, Mysore, Orissa, Punjab, Rajasthan, Uttar Pradesh and West Bengal. The six union territories were Andaman and Nicobar Islands, Delhi, Himachal Pradesh, Laccadive, Minicoy and Amindivi Islands, Manipur and Tripura. The Act was implemented in November, 1956**.** Thus, the states were reorganised, accordingly.

UNIT 4. Modern and Contemporary India

Q No. 1 Write a short note on Imperialism.

Ans. Imperialism is the policy or act of extending a country's power into other territories or by gaining some kind of control over another country's politics or economics. According to early 20th-century economist J.A. Hobson in his book "Imperialism: A Study," history has shown that imperialism often exploits the conquered country's resources and may be the economic justification of creating an empire by controlling other nations.The word "imperialism" comes from the Latin term *imperium*, meaning to command. It can be done through settlement, sovereignty, or some indirect mechanisms of control.

Imperialism is understood as a policy of a country in which that said country influences other countries or territories through military force, as well as other means of power. So, the key point to understanding imperialism has to do with the emphasis on the idea of overtaking others based on power. It is using their power to control others outside of their state.

Q No. 2. Briefly Explain Colonialism.

Ans. Colonialism is defined as a practice in which a power sets up colonies or settlements elsewhere (in other countries or territories) for the political and economic benefit of the colonizing country. So, this state will often take over other areas, setting up their own political and economic systems, with the intent of using the colonies' materials, land, etc… to benefit the colonizing country. So, the establishment of administrative influence over an area is a type of imperialism that has been implemented in the history.

Colonialism is now normally used in a pejorative sense and is associated with crude exploitation. The colonial powers primary aim in reality has been oppression, economic exploitation and an unconcern for human and civil rights. The colonial powers' primary object were usually selfish and largely economic.

Q No. 3. What were the main causes of rise in the nationalist movements in India?

ANS. India as a nation has witnessed an increase in the nationalistic feelings somewhere in the latter half of the 19th century. Prior to that, there were mini battles here and there but nothing much at the national level as such. We may say that with the onset of the Indian National Congress, this nation saw a surge of patritism and a desire to fight against the oppression of British rule collectively with an organized means.

Causes of the Rise in National Movement,- For any movement to take roots there are several causes that lead up to the final culmination point. Similarly, the making of the National Movement is a result of many things that eventually led to the creation of Indian National Congress. Some of these reasons are briefly listed here.

1. Education ,-British came up with several educational institutes in the nation to ensure that their local subjects could understand their language. The motive behind was to enable the subjects to serve the Raj better. However, things didn't go as planned.The language helped the educated Indians to better understand the world. It instilled in them ideas of liberty and equility that was propagated by many European liberal thinkers. This helped to unite India in a common goal.

2. Unity through Language ,-Since the educated elite of India came from all parts of the country, so language could often become a barrier, but with the introduction of english language, the thinkers from across the nation found a common language to communicate their ideas, surpassing the barriers of language.

3. Vernaculars,- These same people would take their knowledge and spread it across to other parts of the country by propagating them in their respective languages, thereby spreading the revolutionary ideas far and wide.

4. Socio-religious Movements ,-Some revolutionary thinkers like Raja Ram Mohan Roy challenged the conventional and biased orders of the society and enlightened people about the various social evils plaguing our nation. With the rise of knowledge in this department, the nation witnessed the rise of evolving new generation of revolutionaries.

5. British Economic Policies ,-The economic policies propounded by the British resulted in widespread poverty and hunger in India. Famines were a constant occurrence leading to lakhs dying. This instilled a feeling of deep-seated resentment against British, which in turn let to the national movement.

6. Building of Infrastructure ,-British built infrastructure such as roads, railways, and telegraph system in order to improve trade within the country. This, however, helped in

connecting the nation. People could easily move from one place to another and also communicate with each other through means of a telegraph, which helped to propagate the idea of nationalism far and wide.

7. Introduction to Press ,- With the presence of the press, Indians found a way of circulating their angst against the British Monarch by nationalistic journals in vernacular language and circulating it.

Q No. 4. Communalisation the politics led to Partition of the Country in 1947, Write short note?

ANS.

Communalism and Indian Politics, in its most commonly perceived-form, is the phenomenon of religious differences between groups often leading to tension, and even rioting, between them. In its not- so violent manifestation communalism amounts to discrimination against a religious group in matters of employment or education or whatever. By the same logic secularism seeks to negate discrimination and tension based on creed by treating all religions with equal degree of respect in private and public life and by recognising equal title of citizens belonging to all religious groups to participate in and benefit from the country's progress.

The Muslim League was established with a goal to define and advance the Indian Muslim's civil rights and to provide them protection. The Morley-Minto reforms introduced separate communal electorates which sowed the seeds of communalism and widened the gulf between Hindus and Muslims. In the run up to independence in 1947, **c**ommunalism and nationalism came to be competing ideologies and led to the division of British India into the Republics of India and Pakistan.

The bloody Partition violence gave a clear sense to every one what communalism leads to, and it has since been frowned upon in India. At that time the Hindu-Muslim communal rivalry led to the formation of the theocratic Pakistan state in 1947.

Q No. 5. Explain changing notions of justice and gender in the modern times?

ANS. 'Gender Justice' is a wide term that takes in its sweep every facet of life. For centuries, in fact ever since known history, we have been living in a patriarchal and feudal society which assigns to women a subordinate position in the social hierarchy.

"Women may be respected and loved, but they have been confined to home and home-making, and looking after the children, the sick and the elderly in the family, most of the unpaid work in the world is done by women. Their lack of socio-economic independence has led to their exploitation. But a new awareness of this exploitation and the need to restructure society on a more just basis has led to serious attempts to reform and transform our social, moral, economic and political structure, including our legal and constitutional framework.

Need for Gender Justice and Equality There is need to strengthen the capabilities of the women to achieve gender justice and equality. "The problems of women in developing countries call urgently for new forms of analysis and for an approach that moves beyond utilitarian economics to identify a number of distinct components of human being's quantity of life, including life-expectancy, maternal mortality, access to education, access to employment, and the meaningful exercise of political rights. Even when a nation seems to be doing well in terms of GNP per capita, its people may be doing poorly in one or more of these areas.Despite concerted efforts Violence and discrimination women fails to subside in India and even in the Developed countries.

SOCIOLOGY (108)

1 WHAT WAS KARL MARX'S VIEW ON LAW AND SOCIETY AND CLASS?

Marxian class theory asserts that an individual's position within a class hierarchy is determined by their role in the production process, and argues that political and ideological consciousness is determined by class position. A class is those who share common economic interests, are conscious of those interests, and engage in collective action which advances those interests. Within Marxian class theory, the structure of the production process forms the basis of class construction.

To Marx, a class is a group with intrinsic tendencies and interests that differ from those of other groups within society, the basis of a fundamental antagonism between such groups. For example, it is in the laborer's best interest to maximize wages and benefits and in the capitalist's best interest to maximize profit at the expense of such, leading to a contradiction within the capitalist system, even if the laborers and capitalists themselves are unaware of the clash of interests. Karl Marx's class theory derives from a range of philosophical schools of thought including left Hegelianism, Scottish Empiricism, and Anglo-French political-economics. Marx's view of class originated from a series of personal interests relating to social alienation and human struggle, whereby the formation of class structure relates to acute historical consciousness. Political-economics also contributed to Marx's theories, centering on the concept of "origin of income" where society is divided into three sub-groups: Rentier, Capitalist, and Worker. This construction

is based on David Ricardo's theory of capitalism. Marx strengthened this with a discussion over verifiable class relationships.

Marx distinguishes one class from another on the basis of two criteria: ownership of the means of production and control of the labor power of others. From this, Marx states "Society as a whole is more and more splitting up into two great hostile camps, into two great classes directly facing each other":

I. Capitalists, or bourgeoisie, own the means of production and purchase the labor power of others

II. Workers, or proletariat, do not own any means of production or the ability to purchase the labor power of others. Rather, they sell their own labor power.

Class is thus determined by property relations, not by income or status. These factors are determined by distribution and consumption, which mirror the production and power relations of classes.

The Manifesto of the Communist Party describes two additional classes that "decay and finally disappear in the face of Modern Industry":

iii. A small, transitional class known as the petite bourgeoisie own sufficient means of production but do not purchase labor power. Marx's Communist Manifesto fails to properly define the petite bourgeoisie beyond "smaller capitalists" (Marx and Engels, 1848, 25).

iv. The "dangerous class", or Lumpenproletariat, "the social scum, that passively rotting mass thrown off by the lowest layers of the old society."

2 ELABORATE WEBBER'S STAND ON CLASS DISCRIMINATION?

Marx saw class divisions as the most important source of social conflict. Weber's analysis of class is similar to Marx's, but he discusses class in the context of social stratification more generally. Class is one dimension of the social structure. Social status, or "social honor," is another. Both are significant contributors of social difference.

Weber's treatment of class and status indicates the manner in which the material basis of society is related to the ideological. Social conflict can result from one or the other, or both. Social action is motivated by both, though in some cases more one than the other. By bringing in status, Weber provides a more flexible view of the details of social differences, and their implications for the lived experience of social actors.

In order to fully understand Weber's perspective on stratification, we need to be familiar with a few general concepts: (i) power; (ii) domination; and, (iii) communal and societal action.

Weber defines power as the ability of a actor (or actors) to realize his or her will in a social action, even against the will of other actors. Power relates to the ability to command resources in a particular domain. Economic power, then, is the ability to control material resources: to direct production, to monopolize accumulation, to dictate consumption.

Societal power includes economic power, social power, legal or political power, and so forth. Although the control of these domains of resources usually go together, they represent different mechanisms of power, and are conceptually distinct.

Domination is the exercise of authority. Possession of power in a sphere results in dominance. Weber articulated three ideal types of domination: charisma, tradition and rational-legal.

Charismatic domination rests on the character of the leader. Through inspiration, coercion, communication and leadership, a particular individual may succeed in occupying a central role in the planning and co-ordination of social action. Charisma, Weber believed, emerges in times of social crisis. People lose confidence in existing forms of authority, and the charismatic leader takes advantage of the crisis. Because it is a personalized form of authority, it tends to be unstable. It does not normally survive the death of the original leader, and it often abandons the leader while he or she is alive. For charismatic authority to be sustained, it must be routinized.

Traditional authority is based on the belief in the legitimacy of well-established forms of power. Tradition implies an inherent, natural, or metaphysical quality in the state of affairs that makes it resistant to challenges by reason. Tradition often functions in a society with rigid forms of social hierarchy, because of the role of social inheritance and custom.

Traditional authority is based on loyalty to the leadership. Power is exercised by commands issued from the leader or leadership group. Officials are obedient to that person or group, and the lines of authority are often unstated and vague. Traditional authority tends not to distinguish between public and private affairs. The task specialization, in terms of the exercise of power, is minimal.

Rational-legal authority is based on a set of rules, and the belief in the legitimacy of the process of rule creation and enforcement. This form of domination is routinized through bureaucracy. It tends to remain independent of particular individuals, because authority resides in the office, or the organizational position of the role.

In the bureaucracy, rational-legal power is exercised on the basis of knowledge and experience, not on personality or custom. Authority functions by means of obedience to the rules rather than persons. Bureaucracy tends to separate the personal and public spheres. Task specialization is extensive within the bureaucracy.

A communal action is oriented on the basis of a shared belief of affiliation. In other words, actors believe that they somehow belong together in some way. Their action stems from, and is co-ordinated by this sentiment. In contrast, societal action is oriented to a rational adjustment of interests. The motivation is not a sense of shared purpose, but rather, a recognition of shared interests.

Weber identified three aspects of class: (i) a specific causal component of actors life chances (ii) which rests exclusively on economic interests and wealth, and (iii) is represented under conditions of labor and commodity markets. The possession of material resources, accumulated by advantage in the marketplace, results in distinctive qualities in terms of the standard of living.[1]

The possession of property defines the main class difference, according to Weber. The owners of property have a definite advantage, and in some cases a monopoly on, action in the market of commodities and, especially, labor. They have privileged access to the sources of wealth creation, by virtue of ownership and control of the markets.

Weber identified a subdivision among property owners based on the means of their wealth creation. Entrepreneurs use wealth in commercial ventures. Rentiers profit by interest on their property, through investments or rent of land.[2] Both forms of ownership yield advantages resulting from the ability to convert property to money.

The property-less class is defined by the kinds of services individual workers provide in the labor market. Workers are classified as skilled, semi-skilled and unskilled. These distinctions are based on the value of different kinds of labor. Different wages result in different qualities in terms of the standard of living.[3]

Weber did not believe that class interests necessarily led to uniformity in social action. Neither communal nor societal action is the inexorable result of class interest. Weber challenges, here, the Marxian notion of the primarily material basis of social action. He is not denying it outright, but rather, introducing an element of unpredictability. Weber did not believe that proletarian revolutionary action would arise as a certain result of structural contradiction.

Communal or societal action may develop from a common class situation in certain conditions. Weber believed that the general cultural conditions played a large role in this determination. Intellectuals occupy a key position in this regard. Weber argued that the extent of the contrasts between the property owners and the property-less workers must become transparent to the workers in order for collective action around the issue of class to occur. Intellectuals function either to call attention to and explain these contrasts, or, to obscure them.

For communal or societal action to take place, the workers must not only recognize the differences in wealth and opportunity, but these differences must be seen as the result of the distribution of property and economic power. If the differences are believed to be a natural characteristic of society, as a given fact, then only occasional and irrational action is possible.

Very often, collective action centers on the labor market. Workers seek higher wages, and see this as the goal of their struggle. Most class antagonism, Weber noted, is directed at managers, rather than at owners—stockholders and bankers—because they appear to be have the power to set the price of labor power.

While class groups do not constitute communities, according to Weber, status groups normally are communities. Status is defined as the likelihood that life chances are determined by social honor, or, prestige. Status groups are linked by a common style of life, and the attendant social restrictions.

Wealth is not necessarily the primary cause of status, though it is generally associated with it. Some forms of property ownership are connected with prestige, others are not. "Old money" typically confers greater status than "new money." Rentiers usually hold greater status than entrepreneurs, because their wealth is less visibly connected to labor.

Class and status interests interact in the realm of the legal order, the arena of politics. Political power is, obviously, often based on class and status interests. Parties are the organizations of power. Their purpose is the struggle for domination. Parties commonly operate in the political/legal domain, but as an ideal type, parties are not restricted to this field.

Although parties are based on class and status, they are usually organized across these distinctions. That is, it is rare for parties to be based solely on class or status interests, such that a

party of entrepreneurial class interest would be in competition with one based on high status. Since economic power binds class status together in some way, it is no surprise that parties reflect these complex patterns of interest.

Parties represent a high degree of rationality in social action. Parties require planning; their motives are strategic. Irrational types of social action are not completely excluded, however. Tradition and affect are a part of the operation of parties.

3 EXPLAIN IN DETAIL WHAT IS CASTE ?

There was a segmental division of society in which they were classified in several units called as caste. The term caste used to present race or breed of a person. There have been 2800 different castes found in India and they have their own set of norms and beliefs.

Hierarchy system was evolved in those times. There has been the degree of highness and lowness amongst people.

Endogamy can be seen as a vital feature of the caste system. Endogamy is practicing marriage function in the same caste and it has been followed in India till now up to maximum extent. For example, even if anyone wishes to marry someone of other caste and class, he/she can face a powerful opposition and sometimes it can lead to Honor Killing. Honor killing is practicing death of people in love with different castes. In UP a couple was killed brutally just to satisfy caste ego which does not permit people to marry someone from other castes.

Hereditary Status and Hereditary occupation are some of the basic features which can be called as an ascribed status of a person. It clearly means that caste is not something which is achieved by a man on the basis of merit. Indeed it is clearly a place which cannot be altered or switched. For example, a person born in Shudra category will do chores like cleaning toilets till his/her death. Likewise, a Brahmin's son was bound to follow the priest culture; he was not allowed to go to his career choices.

One of the most negative influences of the Caste system is also counted in its feature that is Food and Drinks indifference attitude by upper-class people. For example, if a Shudra prepared food and a Brahmin arrived at a temple where he is hungry. He will die of hunger but will not touch the food prepared by the lower class people. Such was the influence of caste practice in India. They were considered some garbage of society whose presence can be infectious to other people of society.

Cultural Difference lingered in every caste and this cultural difference led to some of the major differences. For example in Brahmins, the people do not even touch meat or other non-veg materials but in other cases, people were interested in eating meats which acted as a barrier to cultural practice in different castes.

Social segregation was also a deciding factor. It differentiated people on the basis of their economic status. For example, poor people were obliged to stay away from some of the richest people. For example, there was a different path for lower caste people; it was a general practice to not even have a tinge of a shadow of lower caste people.

Ascribed status was one of the most fundamental characteristics of a caste system. The caste of a person was assigned to him and this will not change no matter he/she achieves any other things in life or not.

Hereditary occupations;

The desire of the Brahmins to keep themselves pure;

The lack of rigid unitary control of the state;

The unwillingness of rulers to enforce a uniform standard of law and custom

The 'Karma' and 'Dharma' doctrines also explain the origin of caste system. Whereas the Karma doctrine holds the view that a man is born in a particular caste because of the result of his action in the previous incarnation, the doctrine of Dharma explains that a man who accepts the caste system and the principles of the caste to which he belongs, is living according to Dharma. Confirmation to one's own dharma also remits on one's birth in the rich high caste and violation gives a birth in a lower and poor caste.

Ideas of exclusive family, ancestor worship, and the sacramental meal;

Clash of antagonistic cultures particularly of the patriarchal and the matriarchal systems;

Clash of races, colour prejudices and conquest;

Deliberate economic and administrative policies followed by various conquerors

Geographical isolation of the Indian peninsula;

Foreign invasions;

Rural social structure.

A caste may be said to be dominant when it preponderates numerically over other castes and when it also wields preponderant economic and political power. A large and powerful caste group can be more easily dominant if its position in the local caste hierarchy is not too low." —M.N. Srinivas

McKim Marriott viewed that the concept of dominant caste in various studies of anthropological research lies on the political power which traditionally called as juridical power in village community and at times yields religious and quasi-divine power and the power to employ physical force.

"A caste to be dominant, it should own a sizable amount of the arable land locally available, have strength of numbers and occupy a high place in the local hierarchy. When a caste has all the attributes of dominance, it may be said to enjoy a decisive dominance." —M.N. Srinivas

Functions of Dominant Caste

. The dominant caste often acts as a reference model to the lower caste group. The lower caste people imitate their behaviour, ritual pattern, customs etc. In this way, they help in cultural transmission.

2. The dominant castes of a particular locality act as watch dogs of pluralistic culture and system. They set norms and regulations for social life. Anyone who violates the norms Is severely

punished. Anil Bhatt has pointed out that the leaders of the locally dominant caste may arbitrate in village disputes. They decide the mode of rewards and punishment. They may determine civic and economic privileges.

3. Dominant castes are the main power holders. They establish contacts with the outside government officials, elected representatives and political leaders. They influence the political process.

4. Dominant castes because of their dominant position exploit all the developmental sources in their favour. They act as agents of rehabilitation programmes. They accelerate the process of socio-economic developments.

5. The Dominant castes set values and norms for the community. Traditionally, its primary functions were Judicial, executive and legitimacy. They form the vital link between the villages and the other world. They also help in the socialisation process.

6. Due to dominant position in rural society, they control the rural economy in various ways and means.

7. Dominant castes play a greater role in the process of modernisation.

4 WHAT DO YOU UNDERSTAND BY GENDER EQUALITY AND NEUTRALITY?

Gender equality, also known as sexual equality or equality of the sexes, is the state of equal ease of access to resources and opportunities regardless of gender, including economic participation and decision-making; and the state of valuing different behaviors, aspirations and needs equally, regardless of gender.

To avoid complication, other genders (besides women and men) will *not* be treated in this gender equality article.

Gender equality is the goal, while gender neutrality and gender equity are practices and ways of thinking that help in achieving the goal. Gender parity, which is used to measure gender balance in a given situation, can aid in achieving gender equality but is not the goal in and of itself. Gender equality is more than equal representation, it is strongly tied to women's rights, and often requires policy changes. As of 2017, the global movement for gender equality has not incorporated the proposition of genders besides women and men, or gender identities outside of the gender binary.

There has been criticism from some feminists towards the political discourse and policies employed in order to achieve the above items of "progress" in gender equality, with critics arguing that these gender equality strategies are superficial, in that they do not seek to challenge social structures of male domination, and only aim at improving the situation of women within the societal framework of subordination of women to men,and that official public policies (such as state policies or international bodies policies) are questionable, as they are applied in a patriarchal context, and are directly or indirectly controlled by agents of a system which is for the most part male.[21] One of the criticisms of the gender equality policies, in particular, those of the European Union, is that they disproportionately focus on policies integrating women in public life, but do not seek to genuinely address the deep private sphere oppression.

The effect of gender inequality on health

Social constructs of gender (that is, cultural ideals of socially acceptable masculinity and femininity) often have a negative effect on health. The World Health Organization cites the example of women not being allowed to travel alone outside the home (to go to the hospital), and women being prevented by cultural norms to ask their husbands to use a condom, in cultures which simultaneously encourage male promiscuity, as social norms that harm women's health. Teenage boys suffering accidents due to social expectations of impressing their peers through risk taking, and men dying at much higher rate from lung cancer due to smoking, in cultures which link smoking to masculinity, are cited by the O as examples of gender norms negatively affecting men's health. The World Health Organization has also stated that there is a strong connection between gender socialization and transmission and lack of adequate management of HIV/AIDS.

Violence against women

Violence against women is a technical term used to collectively refer to violent acts that are primarily or exclusively committed against women. This type of violence is gender-based, meaning that the acts of violence are committed against women expressly *because* they are women, or as a result of patriarchal gender constructs. Violence and mistreatment of women in marriage has come to international attention during the past decades. This includes both violence committed inside marriage (domestic violence) as well as violence related to marriage customs and traditions (such as dowry, bride price, forced marriage and child marriage).

According to some theories, violence against women is often caused by the acceptance of violence by various cultural groups as a means of conflict resolution within intimate relationships. Studies on Intimate partner violence victimization among ethnic minorities in the United Studies have consistently revealed that immigrants are a high-risk group for intimate violence.

In countries where gang murders, armed kidnappings, civil unrest, and other similar acts are rare, the vast majority of murdered women are killed by partners/ex-partners.By contrast, in countries with a high level of organized criminal activity and gang violence, murders of women are more likely to occur in a public sphere, often in a general climate of indifference and impunity.In addition, many countries do not have adequate comprehensive data collection on such murders, aggravating the problem.

In some parts of the world, various forms of violence against women are tolerated and accepted as parts of everyday life.

In most countries, it is only in more recent decades that domestic violence against women has received significant legal attention. The Istanbul Convention acknowledges the long tradition of European countries of ignoring this form of violencE

In some cultures, acts of violence against women are seen as crimes against the male 'owners' of the woman, such as husband, father or male relatives, rather the woman herself. This leads to practices where men inflict violence upon women in order to get revenge on male members of the women's family. Such practices include payback rape, a form of rape specific to certain cultures, particularly the Pacific Islands, which consists of the rape of a female, usually by a group of several males, as revenge for acts committed by members of her family, such as her father or brothers, with the rape being meant to humiliate the father or brothers, as punishment for their prior behavior towards the perpetrators

Violence against trans women

In 2009, United States data showed that transgender people are likely to experience a broad range of violence in the entirety of their lifetime. Violence against trans women in Puerto Rico started to make headlines after being treated as "An Invisible Problem" decades before. It was reported at the 58th Convention of the Puerto Rican Association that many transgender women face institutional, emotional, and structural obstacles. Most trans women don't have access to health care for STD prevention and are not educated on violence prevention, mental health, and social services that could benefit them.

Trans women in the United States have encountered the subject of anti-trans stigma, which includes criminalization, dehumanization, and violence against those who identify as transgender. From a societal stand point, a trans person can be victim to the stigma due to lack of family support, issues with health care and social services, police brutality, discrimination in the work place, cultural marginalisation, poverty, sexual assault, assault, bullying, and mental trauma. The Human Rights Campaign tracked over 128[] that ended in fatality against transgender people in the US from 2013–2018, of which eighty percent included a trans woman of color. In the US, high rates of Intimate Partner violence impact trans women differently because they are facing discrimination from police and health providers, and alienation from family. In 2018, it was reported that 77 percent of transgender people who were linked to sex work and 72 percent of transgender people who were homeless, were victims of intimate partner violenc

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5 ELABORATE ON SEXUAL VIOLENCE AGAINST WOMEN

- Interpersonal violence against perceived or real weaker partner is a widespread phenomenon. Sexual violence is a profoundly negative and traumatic life event with widespread psychological and sociological effects on the victim irrespective of their gender. It often gives rise to a wide range of negative emotions, embarrassment, and existential questions such as “Why me?” It increases feelings of helplessness and powerlessness in the victim affecting their self-esteem and producing feelings which suggest that they may be vulnerable to further violence. It is likely that the fear of sexual violence in women will restrict their freedom and occupational opportunities and affect their long-term psychological well-being.

- Sexual violence is rarely discussed within professional circles partly because of ignorance and partly due to inexperience in asking serious personal sexual questions as well as associated

social stigma and shame for the victim and those related to the victim. It is both a health and a social concern with patriarchal, misogynist, and gender-shaming undertones.

- The World Health Organization (WHO) defines sexual violence as “any sexual act or an attempt to obtain a sexual act, unwanted sexual comments, or advances, acts to traffic or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim in any setting, including but not limited to home and work.”Sexual violence happens in all cultureSwith varying definitions of what constitutes sexual violence

- Prevalence

- Cultural aspects of sexual violence can be understood from observations and literature on interpersonal violence (IPV) in the context of sexual acts. Higher rates of sexual violence are expected to be more prevalent in cultures that encourage objectification of women, thus making them appear inferior to men.However, not all cases are reported to the respective authorities and as high as 67%-84% of cases of sexual violence may go unreporteddue to the sensitivity of the issue,thereby making it difficult to gather exact figures and true sense of the problem. It has been postulated that the rates of unreported sexual offences are higher in some Asian cultures where virginity is highly valued and a woman's modesty is of utmost importance that gives her family the much required respect.

- There have been suggestions that sex ratio may contribute to prevalence of sexual violence. The male-female sex ratio (ratio of men to women in the population) in India has been “*historically negative*”ranging from 930 females per 1000 males in 1971 to 940 per 1000 males in 2011reflecting a dismal situation. A sex ratio of 940 in 2011 represents a male population of about 623.7 million and a female population of 586.4 million that amounts to a difference of around 37.3 million in the two genders.In parallel, the incidence of sexual violence cases has also risen, but it is difficult to ascertain correlation between the two. According to the National Crime Records Bureau, the number of registered rape cases in India increased by 873.3% from 2,487 in 1971 to 24,206 in 2011.he cases of sexual violence on children in India have also increased by almost 336% from 2,113 cases reported in 2001 to 7,112 cases in 2011.

- Within the evolutionary psychology framework, a higher male-female sex ratio (more men than women) gives rise to competition among males for female mates. This may lead to sexual jealousy and frustration among men contributing to sexual violence.This theoretical framework looks at sexual violence as a method used by men to ensure the sexual fidelity of their female mates.However, this may also mean that this theory is applicable only to

intrarelationship sexual violence as it refers to fidelity, which occurs within the context of a relationship. This hypothesis may, thus, not explain the rise in cases of child sexual abuse where there is no question of fidelity. It is, of course, entirely possible that this rise is likely with better and accurate reporting.

- A paradoxical hypothesis by Guttentag and Secord argues that a high sex ratio with fewer women compared to men raises the value that men give to women thus reducing the chances of him resorting to intimate partner violence including sexual violence.
- Burt described rape as the psychological extension of a dominant-submissive sex-role stereotyped culture. Socioculturally transmitted attitudes toward women, rape, and rapists can predict sexual violence.Such stereotypes are often internalized from the male dominated sociocultural milieu. Sexual violence can result from a misogynist attitude prevalent in a culture. It has been pointed that cows are treated better than women in IndiaIn rural India, for example, girls have no independent control of their sexuality. They are expected to get married and produce children, thus shifting the control of their sexuality from one man (the father) to the other (the husband). A man, thus, plays the most important role in a woman's life in India as he does in many other cultures which may have traditional patriarchal attitudes.
- It is possible that in cultures where man and his manly role are prized better, additional perceived or real power may encourage them to think of their "rights." If a woman resists sexual intercourse, it may be perceived as a direct threat by men to their masculinity, triggering a crisis of male identity and contributing to sexual control and violence as it is seen as a way of resolving this crisis. It has been reported that victims who attempt resistance or escape from the situation are more likely to be brutalized by the offender, thereby giving an inflated sense of power to the abuser as was seen in the New Delhi gang rape case of *Nirbhaya* in December 2012. It is likely that in patriarchal cultures, any resistance from the woman victim is perceived by the offender as an insult to his "manhood" further provoking him to resort to more violent means to control the victim.
- Sexual violence can have widespread consequences not only violating its immediate victims but also the wider meaning of freedom and basic human rights. The perceived consequences of sexual violence vary across cultures. In sociocentric societies where shame is a more prevalent emotion, the victims of sexual violence may not open up about their trauma and hence may not report it. This not only affects the victim negatively but also affects an understanding of the true nature of trauma and rates of these acts, thereby influencing policy-making. In sociocentric cultures, relations between people are at the core and individual identity is subsumed in the family or kinship. Comparatively in ego-centric cultures, relations

with the "self" are at the core with "independence" being given more importance than "interdependence." Socio- and ego-centric cultures are said to have different emotional expressions and experiences in terms of shame and guilt, respectively

- hese different emotional experiences are due to the very basic tenet of these cultures: Sociocentric cultures being more socialized tend to give rise to a more social feeling of shame which cannot be felt in the absence of social relations. In contrast, egocentric cultures are more individualistic and give rise to a more private feeling of guilt.Thus, the emotions in a victim of sexual violence are shaped by the culture of the victim. In sociocentric cultures, where the dignity of the family (*izzat*) comes before that of the individual member, the notion about harm resulting from sexual violence is shared more by the family members. On the contrary, in ego-centric cultures, this harm from sexual violence is much concentrated around the dignity and identity of the individual member. Thus, concepts of self also vary. Hofstede has also divided a cultural dimension on masculinity and femininity of cultures where gender roles are different.

- Although the issue of sexual violence has remained largely ignored until now, ignoring it further is no longer acceptable. It, thus, becomes crucial to acknowledge that sexual violence transcends national and cultural boundaries. In the absence of such acknowledgment, sexual violence may continue to grow. The causes of sexual violence are complex and like many other crimes, sexual violence may not be completely understood and explained by a single factor; culture is one of the many factors that may be important in our understanding of sexual violence. It is an important research question as to what causes variation in the incidence of sexual violence in different cultures. Cross-cultural aspect of sexual violence is a highly under-investigated and under-researched area. An important step toward understanding sexual violence and its victims would be to re-phrase and re-understand various models of patriarchy/matriarchy and various gender roles and gender expectations. It is high time we start understanding barriers and cultural strengths that are responsible for higher or lower rates of sexual violence cases in different cultures.

6 WHAT DO YOU UNDERSTAND BY DIFFRENTY ABLED ? HOW ARE THEY MARGINALISED?

Differently-Abled and their Educational Rights India's population with disabilities has increased by 22.4 per cent between 2001 and 2011. The number of disabled, which was 2.19 crore in 2001, rose in 2011 to 2.68 crore—1.5 crore males and 1.18 crore females. The growth rate of disabled population is more in urban areas and among urban females. The decadal growth in urban areas is 48.2 per cent and 55 per cent among urban females. Among scheduled castes, it is 2.45 per

1. SSA Inclusive education scheme has included 10.71 lakh children with special needs. (Source: Unified District Information System for Education (UDISE) 2013-14)

2. Inclusive education of children with disabilities in Secondary schools-(IEDSS)- around 2 lakhs children with special needs

.• 3. Around one lakh children with special needs studying in 977 special schools. (An NGO study)

ndia must introduce mandatory registration of persons with disabilities at community level/ school level/ICDS levels. It could be achieved by introducing village disability registers, school special needs registers, ward level disability registers and issue add on card to Aadhaar card /ration cards.This digitized data could be used to provide smart ID cards replacing existing paper based disability ID cards.

The other issues which are seen as a major barrier for inclusion are listed below:

Children with disabilities remain invisible to the education system;

2. Families are not supportive;

3. Teachers lack training, leadership, knowledge and support to adapt curriculum;

4. Poor quality education;

5. Poor access to knowledge and information for – parents,teachers, administrators and policy makers

6. No inclusive education infrastructure – governance, policy, planning, financing, implementation and monitoring

7. Lack of public support for inclusion; and

8. Lack of accountability and monitoring mechanisms .

On the whole, it could be argued that the political vacuum of leadership and accountability for inclusive education was not adequate. there are huge gaps in educational rights of persons with special needs

Skill Development for Differently-Abled The situation in India is ripe for persons with disability to be part of the economic workforce. We need to capitalize on the successful models for persons with diverse disabilities with special focus on severe physical and mental disabilities and by giving equal importance to all forms of employment across the country . Self employment skill training has been successful in growing areas such as beauty and wellness, mobile repairing and other geographic specific growth areas

The National Skill Policy launched by the Prime Minister has a target for skilling 38 lakh persons with disability in the next seven years. The Department of Empowerment Of Persons with Disability (DePWD) created inside Ministry of Social Justice and Empowerment has helped create focus on the ecosystem for PwD by launching the NationalActionPlan for PwD and the Accessible India Campaign. The Skill Council for Persons With Disability (ScPWD) has been formed to take the skill policy forward. Hence, the situation in India is ripe for persons with disability to be part of the economic workforce. We need to capitalize on the successful models

for persons with diverse disabilities with special focus on severe physical and mental disabilities and by giving equal importance to all forms of employment across the country

In the last ten years, more than 27 3 job roles across 26 sectors have been opened up for persons with different disabilities by identifying solutions and the environment which will enable them to work effectively. More jobs need to be opened up by finding solutions for persons with different severe disabilities. There has to be a systematic effort to develop leaders to absorb more persons with disability. Holistic support systems have to be scaled to provide services such as job analysis services, workplace solutions, inclusion services, awareness and sensitization, leadership development and more. This is critical for skilling initiatives to be successful. NGOs like the Enable Academy provide a platform for fostering collaborations among communities working to mainstream livelihoods for persons with disability. It is a platform where all stakeholders can use and share resources and launch campaigns which unleashes the power of collaborative efforts and provides the much needed holistic support required.

Differently-Abled and Accesibility Accessibility is a preconditio for inclusion of persons with disabilities. It enables persons with disabilities to live independently and to participate comfortably and safely in their community. Disability and accessibility can be said to be inversely proportional, where with an increase in accessibility, the level of disability decreases. Accessibility may be considered as an inherent right that benefits everybody and not only a concern to persons with a condition like disability, or to a demographic group like the elderly

7 WHAT DO YOU UNDERSTAND BY LABELLING THEORY ?

- **Labeling theory** posits that self-identity and the behavior of individuals may be determined or influenced by the terms used to describe or classify them. It is associated with the concepts of self-fulfilling prophecy and stereotyping. Labeling theory holds that deviance is not inherent in an act, but instead focuses on the tendency of majorities to negatively label minoritiesor those seen as deviant from standard cultural norms. The theory was prominent during the 1960s and 1970s, and some modified versions of the theory have developed and are still currently popular. Stigma is defined as a powerfully negative label that changes a person's self-concept and social identity.

- Labeling theory is closely related to social-construction and symbolic-interaction analysis.Labeling theory was developed by sociologists during the 1960s. Howard Saul Becker's book *Outsiders* was extremely influential in the development of this theory and its rise to popularity.

- Labeling theory is also connected to other fields besides crime. For instance there is the labeling theory that corresponds to homosexuality. Alfred Kinsey and his colleagues were the main advocates in separating the difference between the role of a "homosexual" and the acts one does. An example is the idea that males performing feminine acts would imply that they are homosexual. Thomas J. Scheff states that labeling also plays a part with the "mentally ill".

The label doesn't refer to criminal but rather acts that aren't socially accepted due to mental disorders.

8 WHAT DO YOU UNDERSTAND BY SUBCULTURE THEORY ?

- In criminology, **subcultural theory** emerged from the work of the Chicago School on gangs and developed through the symbolic interactionism school into a set of theories arguing that certain groups or subcultures in society have values and attitudes that are conducive to crime and violence. The primary focus is on juvenile delinquency because theorists believe that if this pattern of offending can be understood and controlled, it will break the transition from teenage offender into habitual criminal. Some of the theories are functionalist assuming that criminal activity is motivated by economic needs, while others posit a social class rationale for deviance.

9 WHAT DO UNDERSTAND BY FUNCTIONAL THEORY?

the functional theory of stratification provided by Kingsley Davis and Wilbert Moore suggests that social inequalities are functional for society because they provide an incentive for the most talented individuals to occupy jobs that are essential to the orderly maintenance of a society. Critics of Davis and Moore's theory suggest that stratification actually undermines the stability within a society due to unequal access to opportunities, the disproportionate amount of power given to elites, and the institutionalization of social distance between diverse members of a society.

10 WHAT DO YOU UNDERSTAND BY THE CONCEPT OF KINSHIP ?

KINSHIP

In biology, kinship typically refers to the degree of genetic relatedness or coefficient of

relationships between individual members of a species.One of the founders of the anthropological relationship research was Lewis Henry Morgan,in his Systems of Consanguinity and Affinity of the Human Family (1871). The most lasting of Morgan's contributions was his discovery of the difference between descriptive and classificatory kinship. Ideas about kinship in sociology and anthropology do not necessarily assume any biological relationship between individuals, rather just close associations.

A unilineal society is one in which the descent of an individual is reckoned either from the

mother's or the father's line of descent.With matrilineal descent individuals belong to their mother's descent group. Similarly, with patrilineal descent, individuals belong to their father's descent group. The Western model of a nuclear family consists of a couple and its children With patrilineal descent, individuals belong to their father's descent group. The Western model of a nuclear family consists of a couple and its children.

Kinship is a term with various meanings depending upon the context. In anthropology, kinship refers to the web of social relationships that form an important part of human lives.

In other disciplines, kinship may have a different meaning. In biology, it typically refers to

the degree of genetic relatedness or coefficient of relationships between individual members

of a species. In a more general sense, kinship may refer to a similarity or affinity between entities on the basis of some or all of their characteristics.

SYSTEM OF KINSHIP

One of the founders of anthropological relationship research was Lewis Henry Morgan, who

wrote Systems of Consanguinity and Affinity of the Human Family (1871). Members of a

society may use kinship terms without being biologically related, a fact already evident in Morgan's use of the term "affinity" within his concept of the "system of kinship. " The most lasting of Morgan's contributions was his discovery of the difference between descriptive and classificatory kinship, which situates broad kinship classes on the basis of imputing abstract social patterns of relationships having little or no overall relation to genetic closeness. Kinship systems as defined in anthropological texts and ethnographies were seen as constituted by patterns of behavior and attitudes in relation to the differences in terminology for referring to relationships as well as for addressing others. Many anthropologists went so far as to see, in these patterns of kinship, strong relations between kinship categories and patterns of marriage, including forms of marriage, restrictions on marriage, and cultural concepts of the boundaries of incest.

BIOLOGICAL RELATIONSHIPS

Ideas about kinship do not necessarily assume any biological relationship between individuals, rather just close associations. Malinowski, in his ethnographic study of sexual behavior on the Trobriand Islands, noted that the Trobrianders did not believe pregnancy to be the result of sexual intercourse between the man and the woman, and they denied that there was any physiological relationship between father and child. Nevertheless, while paternity was unknown in the "full biological sense," for a woman to have a child without having a husband was considered socially undesirable. Fatherhood was therefore recognized as a social role; the woman's husband is the "man whose role and duty it is to take the child in his arms and to help her in nursing and bringing it up"; "Thus, though the natives are ignorant of any physiological need for a male in the constitution of the family, they regard him as indispensable socially.

11 WHAT IS DESCENT ?

Descent, like family systems, is one of the major concepts of anthropology. Cultures worldwide possess a wide range of systems of tracing kinship and descent. Anthropologists break these down into simple concepts about what is thought to be common among many different cultures. A descent group is a social group whose members have common ancestry. An unilineal society is one in which the descent of an individual is reckoned either from the mother's or the father's line of descent. With matrilineal descent, individuals belong to their mother's descent group. Matrilineal descent includes the mother's brother, who in some societies may pass along inheritance to the sister's children or succession to a sister's son. With patrilineal descent, individuals belong to their father's descent group. Societies with the Iroquois kinship system are typically uniliineal, while the Iroquois proper

are specifically matrilineal. The Western model of a nuclear family consists of a couple and its children. The nuclear family is ego-centered and impermanent, while descent groups are permanent and reckoned according to a single ancestor.

12 DISCUSS IN DETAIL WHAT IS INCEST AND WHY IT IS CONSIDERED TABOO?

Incest taboo is a cultural norm or rule that forbids sexual relations between relatives. Inbreeding is reproduction resulting from the mating of two genetically-related individuals.

The Westermarck effect is essentially a psychological phenomenon that serves to discourage inbreeding. Through this effect, people who have grown up together are less likely to feel sexually attracted to one another later in life. Exogamy is a social arrangement in which marriage is permitted only with members from outside the social group.Endogamy is a social arrangement in which marriage can occur only within the same social group.

KEY TERMS

exogamy: Marriage to a person belonging to a tribe or group other than your own as

required by custom or law.

inbreeding: Breeding between members of a relatively small population, especially one in

which most members are related.

endogamy: The practice of marrying or being required to marry within one's own ethnic,

religious, or social group.

Inbreeding: An intensive form of inbreeding where an individual S is mated to his daughter

D1, granddaughter D2 and so on, in order to maximise the percentage of S's genes in the offspring. D3 would have 87.5% of his genes, while D4 would have 93.75%. An incest taboo is any cultural rule or norm that prohibits sexual relations between relatives. All human cultures have norms regarding who is considered suitable and unsuitable as sexual or marriage partners. Usually certain close relatives are excluded from being possible partners. Little agreement exists among cultures about which types of blood relations are permissible partners and which are not. In many cultures, certain types of cousin relations are preferred as sexual and marital partners, whereas others are taboo. One potential explanation for the incest taboo sees it as a cultural implementation of a biologically evolved preference for sexual partners without shared genes, as inbreeding may have detrimental outcomes. The most widely held hypothesis proposes that the so-called Westermarck effect discourages adults from engaging in sexual relations with individuals with whom they grew up. The existence of the Westermarck effect has achieved some empirical support. The Westermarck effect, first proposed by Edvard Westermarck in 1891, is the theory that children reared together, regardless of biological relationship, form a sentimental attachment that is by its nature non-erotic. Another school argues that the incest prohibition is a cultural construct that arises as a side effect of a general human preference for group exogamy. Intermarriage between groups construct valuable alliances that improve the ability for both groups to thrive. According to this view, the incest taboo is not necessarily a universal, but it is likely to arise and become stricter under cultural circumstances that favor exogamy over endogamy; it likely to become more lax under circumstances that favor endogamy. This hypothesis has also achieved some empirical support. Societies that are stratified often prescribe different degrees

of endogamy. Endogamy is the opposite of exogamy; it refers to the practice of marriage between members of the same social group. A classic example is seen in India's caste system, in which unequal castes are endogamous. Inequality between ethnic groups and races also correlates with endogamy. Class, caste, ethnic and racial endogamy typically coexists with family exogamy and prohibitions against incest.

13 WHAT DO YOU UNDERSTAND BY THE TERM FILATION ?

Filiation is the legal term for the recognized legal status of the relationship between family members, or more specifically the legal relationship between parent and child. As described by the Government of Quebec:

Filiation is the relationship which exists between a child and the child's parents, whether the parents are of the same or the opposite sex. The relationship can be established by blood, by law in certain cases, or by a judgment of adoption. Once filiation has been established, it creates rights and obligations for both the child and the parents, regardless of the circumstances of the child's birth. Filiation differs from, but impacts, both parental rights and inheritance. The statute of limitations period for filiation is thirty years.An example of law regarding filiation is found in the Civil Code of Quebec, Book 2, Title 2"Filiation",[3] which details how filiation may be established, claimed, and transferred.

14 WHAT IS CONSANGUITY ?

We are all connected to life. Every choice we make and every belief we hold exerts influence upon the whole of life. And we live with the consequences of our choice. As part of our biological health, this unique truth has physical expressions in honor, loyalty, family and group bonds. Probably this forms the basis of marriage, one of the most vital and powerful of our relationships. The human population has seen modern civilization and is still within family boundaries. One such familial-social bond in consanguineous marriage.

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The word consanguineous comes from the two Latin words "con" meaning shared and "sanguis" meaning blood. Consanguinity describes a relationship between two people who share an ancestor, or share blood. Such marriages are favoured by different populations usually bound to traditional customs, beliefs and to keep property in united form within the family. In Arab Muslim communities, first cousin unions between a man and his father brother&#3s daughter are preferred. However, in population of Dravidian Hindus of South India, marriage of a boy with his mother's brother's daughter, is opposed. But, uncle-niece unions (but not aunt-nephew) are permitted in Judaism. Many studies indicated that consanguineous marriages are strongly favoured in human populations. The highest consanguineous marriages (20% to over 50%) are reported in North of Africa, Asia etc, usually associated with low socioeconomic status, illiteracy, and rural residenceIn India, the main reasons for these marriages are stronger family ties, the integrity of estates and the like. But the current debate in medical sciences is on the health implications of these consanguineous marriages. Consanguineous marriages are major responsible risk factors for Bipolar disorders. This marriage system has been reported as an important factor in the appearance of autosomal recessive

diseases and congenital anomalies, including hydrocephalus, postaxial hand polydactyly and bilateral cleft lip cleft palate, bipolar disorders, depression, dysferlinopathy, reproductive disorders, sterility, infant mortality, child deaths, spontaneous abortions and stillbirths etc. Also there are reports indicating positive association between consanguinity and Down syndrome, and also ventricular septal defect (VSD), atrial septal defect (ASD), atrioventricular septal defect (AVSD), pulmonary stenosis (PS) and pulmonary atresia (PA). The risk for birth defects in the offspring of first cousin matings has been increased to 5-8% compared to 2-3% in non-consanguineous marriages.[3] However, first cousin unions are culturally preferred. The reason is ease of marriage decision making when the potential spouse is well-known and considered to be part of the 'extended family'. And these marriages also tend to reinforce social and kin bonds from one to the next generation. Recently Nalini and Gayathri[4] reported the role of Consanguinity (46.4%) in causing Dysferlinopathy in 28 patients. Further Bindu et al,[5] reported the role of Consanguinity (61.5%) as a etiological factor for Hallervorden-Spatz syndrome (HSS), a rare autosomal recessive neurodegenerative disorder of childhood. Reports from India and west proved beyond doubt that consanguinity plays a significant role in mental health problems. All

these disorders play a significant role on world economy and productivity and become a huge burden on medical fraternity. In spite of medical advancements, literacy rate and urbanization, still this family linked traditions are not able to be broken. In recent times, the situation appears better in urban areas. In a population with a high degree of inbreeding, the formulation of a public health program with multi-approach strategy, including education about the anticipated genetic consequences, prenatal diagnosis, neonatal screening, and genetic counselling, is a necessitycommon ancestor, they both will be carriers for this condition. Hence they will have a one in four chance of begetting an affected offspring. The possibility of both parents being carriers for a recessive condition is influenced by how closely they are related. This means that the offspring risk can be minimized while retaining the social and familial advantages of consanguinity, if weddings are consummated between distant relatives (third cousins rather than second cousins or second cousins rather than first cousins).

An interesting angle is lent to this scenario by "Astrology", an ancient practice prevalent in many communities the world over, especially in India. "Horoscope matching" to check "Marital compatibility" of the boy and girl before wedding, which is religiously and meticulously followed by elders on both the sides, may be viewed as an intelligent form of "Premarital consultation / counseling". Genetic counseling yields best results when done premaritally or at least prior to conception. A non-judgmental attitude towards consanginous couples is essential on the part of the counselor, to establish good communication channels and to foster effective working relationships between the medical profession and communities where consanguineous marriages are prevalent. Some useful tips in counseling consanguineous couples: Refer well before conception occurs especially if they have a family history of a possible autosomal recessive condition. Remember to empathize and not to imply that a child's condition is the parents' fault, even i the couple are consanginous and the child has two identical copies of a mutant gene. Nobody chooses to deliberately pass on an illness to their offspring and no one is to blame. Ensure that the couple referred for premarital genetic counseling are made aware that there are no blood tests available that provide "General Genetic Compatibility" data. They need to be informed that some few basic carrier tests are there for a limited range of specific conditions. Adopt a non-judgmental attitude with a positive mindset to disseminate knowledge and information to the couple, empowering them with the various options available, enabling them to make intelligent decisions. Deal with the issue in a sensitive, caring and sensible manner. The young age of marriage in consanguineous couples further

implicates a need to increase awareness programs among the young generation about the deleterious effects of

consanguineous marriages. It is clear that the social benefits derived from such marriages are of paramount importance to consanguineous couples; however, the availability of preventive measures should be emphasized. Further genetic investigation conducted in this area to elucidate the mode of inheritance is required.

India needs to take a big leap in this direction with consanguineous marriages being moreprevalent. The need of the hour is setting up infrastructure with basic research and good medical facilities with genetic testing and counselling. Many hospitals in our country lack genetic testing facilities with few well trained genetic counsellors to handle the situation. Adopting better translational research concept and intervention strategies help consanguineous couples reach informed and intelligent reproductive decisions, with which they have to live throughout their lives.Historically, some European nobles cited a close degree of consanguinity when they required convenient grounds for divorce, especially in contexts where religious doctrine forbade the voluntary dissolution of an unhappy or childless marriage.[22] Conversely, the consanguinity law of Order of succession requires the next monarch to be of the same blood of the previous one; allowing, for example, illegitimate children to inherit.

15 WHAT DO YOU UNDERSTAND BY FAMILY AS A UNIT OF SOCIAL INTERACTION ? WHAT ARE THE DIFFRENT TYPES OF FAMILIES AND ITS FUNCTIONS ?

As a unit of socialization, the family is an object of analysis for sociologists, and is considered to be the agency of primary socialization. A conjugal family includes only the husband, wife, and unmarried children who are not of age. This is also referred to as a nuclear family The model of the family triangle, husband-wife-children isolated from the outside, is also called the Oedipal model of the family and it is a form of patriarchal family. A matrilocal family consists of a mother and her children. The model, common in the western societies, of the family triangle, husband-wife-children isolated from the outside, is also called the Oedipal model of the family and it is a form of patriarchal family.

KEY TERMS

matrilocal: living with the family of the wife; uxorilocal

A conjugal family: a family unit consisting of a father, mother, and unmarried children who

are not adults consanguinity: a consanguineous or family relationship through parentage or descent; a blood relationship

FAMILIES

In human context, a family is a group of people affiliated by consanguinity, affinity, or co- residence. In most societies, it is theprincipal institution for the socialization of children. Occasionally, there emerge new concepts of family that break with traditional conceptions of family, or those that are transplanted via migration, but these beliefs do not always persist in new cultural space. As a unit of socialization, the family is the object of analysis for certain scholars. For sociologists, the family is considered to be the agency of primary socialization and is called the first focal socialization agency. The values learned during childhood are considered to be the most important a human child will learn during its development.

CONJUGAL AND CONSANGUINEAL FAMILIES

A “conjugal” family includes only a husband, a wife, and unmarried children who are not of age. In sociological literature, the most common form of this family is often referred to as a nuclear family. In contrast, a “consanguineal” family consists of a parent, his or her children, and other relatives. Consanguinity is defined as the property of belonging to the same kinship as another person. In that respect, consanguinity is the quality of beingdescended from the same ancestor as another person.

OTHER TYPES OF FAMILIES

A “matrilocal” family consists of a mother and her children. Generally, these children are

her biological offspring, although adoption is practiced in nearly every society. This kind of

family is common where women independently have the resources to rear children by themselves, or where men are more mobile than women.Common in the western societies, the model of the family triangle, where the husband, wife, and children are isolated from the outside, is also called the oedipal model of the family. This family arrangement is considered patriarchal.From the perspective of children, the family is a family of orientation: the family functions to locate children socially. From the point of view of the parents, the family is a family of procreation: the family functions to produce and socialize children.Marriage fulfills many other functions: It can establish the legal father of a woman’s child; establish joint property for the benefit of children; or establish a relationship between the families of the husband and wife. These are only some examples; the family’s function varies by society.

KEY TERMS

family: A group of people related by blood, marriage, law or custom. Sexual division of labor: The delegation of different tasks between males and females. The primary function of the family is to ensure the continuation of society, both biologically through procreation, and socially through socialization. Given these functions, the nature of one’s role in the family changes over time. From the perspective of children, the family instills a sense of orientation: The family functions to locate children socially, and plays a major role in their socialization. From the point of view of the parents, the family’s primary purpose is procreation: The family functions to produce and socialize children. In some cultures marriage imposes upon women the obligation to bear children. In northern Ghana, for example, payment of bride wealth signifies a woman’s requirement to bear children, and women using birth control face substantial threats of physical abuse and reprisals.

Family Background Matters: From the perspective of children, the family is a family of orientation: The family functions to locatechildren socially, and plays a major role in their socialization. From the point of view of the parents, the family is a family of procreation: The family functions to produce and socialize children

OTHER FUNCTIONS OF THE FAMILY

Producing offspring is not the only function of the family. Marriage sometimes establishes

the legal father of a woman’s child or the legal mother of a man’s child; it oftentimes gives

the husband or his family control over the wife’s sexual services, labor, and property.

Marriage, likewise, often gives the wife or her family control over the husband’s sexual

services, labor, and property. Marriage also establishes a joint fund of property for the benefit of children and can establish a relationship between the families of the husband and wife. None of these functions are universal, but depend on the society in which the marriage takes place and endures. In societies witha sexual division of labor, marriage, and the resulting relationship between a husband and wife, is necessary for the formation of aneconomically productive household. In modern societies marriage entails particular rights and privilege that encourage the formation of new families even when there is no intention of having children.

Size of the family

One of the few things, that decides this whole debate of joint family vs nuclear family, is the size of the family they possess.In joint families, the size of the families will always be very high then as compared to nuclear families.Joint families generally include many generations in a family, that includes, mother, father, son, daughter, and many indirect relatives.Whereas nuclear family is small and limited, that mostly consist genetic members in the family.

2. Financial conditions

The financial condition also differs in a joint family and nuclear familyIn a joint family, it is very rare that you will face any crisis in your family since there is number of earners in the house, but there is always a lack of transparency in it.Whereas in nuclear family, you may suffer some financial crisis but there is always a stability of money in the nuclear family.

3. Privacy

In this whole argument of joint family vs nuclear family, this is where I believe, the nuclear family enjoys an upper hand.In a nuclear family, you have less number of family members that will knock your privacy. but in case of joint family, things are different, you are going to get disturbed by someone, most of the time.

4. Particular focus

It is nearly impossible to focus on a certain member in the joint family, as it contains lots of family members.Whereas in a nuclear family, this is possible and can be implemented easily.

5. Liberty

Liberty and freedom are one of those reasons why this whole argument of joint family vs nuclear family, has risen.It is generally believed that the foundation of a nuclear family is based on the principle of freedom and liberty to the members of the family, which basically everyone misses in the joint family concept.

6. Discipline and strictness

This one may differ according to the environment of the family has.In the joint family, it is believed that discipline and strictness is the biggest key to handle and to hold a family.Whereas, it is believed that nuclear families are comparatively less disciplined and more liberal.

7. Mutual support

Here, the joint family takes a clear lead. It is because, in joint families, there will always be someone to hold your hand, there will always be someone to guide you and teach you a right path.

Here in a nuclear family, the number of members will be less, so there will be fewer chances for you to gain mutual support. This is one of the main reasons, why members of nuclear families, suffer from mental depression.

8. Comparison and animosity

There is no place for comparison and animosity in the family. And this is why family suffers.It is always believed that people living in the joint family has to face a lot of comparison and animosity with each other in the family.Whereas, the nuclear family is free from all these things.

9. Family dispute

Family dispute is arguably the biggest reason, why this whole comparison between joint family vs nuclear family has been brought in to the table.A family living in the nuclear family has almost zero amount of disputes and dramas in life.But in case of joint families, things are totally different, her whole family has to face a lot of disputes in the family, such as property dispute, family relations, jealousy and many others.

10. Recent trends

I would like to sum up this whole debate of joint family vs nuclear family, by putting some highlights on recent trends regarding joint family vs nuclear family.The whole concept of joint family is the oldest and the most orthodox concept of family in the world.But in the past few decades, we have seen an unprecedented rise in the adaption of nucler family concept in the whole world.Countries like United States, Canada, Britain, France and Australia, has adapted this concept long time ago. Whereas countries like India, China and Indonesia is also running after nuclear family concept. Overall it is growing day by day.Well, this was just a comparison based on facts and logic. It is all up to you, which side of the fence, you want to ride on.

16 WHAT DOES COMMUNALISM MEAN? WHAT IS ITS IMPORTANCE IN CONTEMPORARY POLLITICAL SOCIETY

Communalism is today the most serious threat to the mankind and its different forms and nature continuously destructing the civilization of humanity. Communalism is the consciousness which is prompted by one's belonging to a distinctive religious community. Communal roots or similarevents of communal conflicts are behavioural manifestation of that consciousness. However such events, in turn, intensify the consciousness itself, and act as strong inputs for crystallization of the consciousness into a more organized value system or ideology.1 Communalism implies an identity based on religious community, there can be one type communal identity alonebut there can be several secular identities.2 When engage in enquiry of social problem which is considered as the consequence of recent economic reformation and globalization, the issue of communalism cannot be identified exclusively from other associated issues like, ethnicity, regionalism, casteisms and other types of sub-national identity. All these issues are one way or other, the ramification of the main thrust contention of neo-liberal policies of the globalized world. Hence, it is required to have a pre-requisite vision to consider the communalism in a comprehensive perspective.

'Communalism in India

- Communalism as a political philosophy has its roots in the religious and cultural diversity of India.
- It has been used as a political propaganda tool to create divide, differences and tensions between the communities on the basis of religious and ethnic identity leading to communal hatred and violence.
- In ancient Indian society, people of different faith coexisted peacefully.
- Buddha was perhaps the first Indian prophet who gave the concept of secularism.
- Meanwhile, Kings like Ashoka followed a policy of peace and religious tolerance.

- Medieval India witnessed the arrival of Islam in India marked by occasional occurrences of violence such as Mahmud Ghazni's destruction of Hindu temples and Mahmud of Ghor's attack on Hindus, Jains and Buddhists.
- While, religion was an important part of people's lives but there was no communal ideology or communal politics.
- Rulers like Akbar and Sher Shah Suri followed the religious policy of toleration towards different cultures and tradition practiced across country.
- However, some sectarian rulers like Aurangzeb were among the least tolerant towards other religious practises.
- As a modern phenomenon it has arose as a result of British colonial impact and the response of Indian social strata.
- Reasons behind Communalism
- The major factors that contributed towards the emergence and growth of communalism in modern India involves:
- British Imperialism and their Policy of "Divide and Rule".
- Disappointment and disaffection among young and aspiring middle class youth, caused by stagnant agriculture, absence of modern industrial development and inadequate employment opportunities, which is being exploited by political opportunists.
- Hindu and Muslim revivalist movements
- A communal and distorted view of Indian history, taught in school and colleges played a major role in rise and growth of communal feelings among the masses.
- Separatism and isolation among Muslims.
- Rise of communal and fundamentalist parties.
- Major Incidents of Communal Violence in India
- Communal violence is a phenomenon where people belonging to two different religious communities mobilise and attacks each other with feelings of hatred and enmity.
- The partition of India witnessed mass bloodshed and violence that continued up to 1949.
- No major communal disturbances took place until 1961 when the Jabalpur riots shook the country due to economic competition between a Hindu and a Muslim bidi manufacturer than any electoral competition.
- In 1960s – A series of riots broke out particularly in the eastern part of India - Rourkela, Jamshedpur and Ranchi - in 1964, 1965 and 1967, in places where Hindu refugees from the then East Pakistan were being settled.
- In September, 1969, riots in Ahmedabad shook the conscience of the nation. The apparent cause was the Jan Sangh passing a resolution on Indianisation of Muslims to show its intense opposition to Indira Gandhi's leftward thrust.

- In April, 1974, violence occurred in the chawl or tenement, in the Worli neighborhood of Mumbai after the police attempted to disperse a rally of the Dalit Panthers that had turned violent, angered by clashes with the Shiv Sena.
- In February, 1983, the violence took place in Nellie as fallout of the decision to hold the controversial state elections in 1983 in the midst of the Assam Agitation, after Indira Gandhi's decision to give 4 million immigrants from Bangladesh the right to vote. It has been described as one of the worst pogroms since World War II.
- In October, 1984, the anti-Sikh riots broke out after the assassination of Indira Gandhi, where more than 4000 Sikhs were killed in Delhi, Uttar Pradesh and other parts of India.
- Meanwhile, the Bombay-Bhiwandi riots were instigated by the Shiv Sena when it jumped on the Hindutva bandwagon to revive the political fortunes of the Shiv Sena which had lost its appeal.
- The Shah Bano controversy in 1985 and the Babri Masjid-Ram Janmabhoomi controversy became powerful tools for intensifying communalism in the Eighties.
- The communal violence touched its apogee in December 1992 when the Babri Masjid was demolished by right wing parties.
- This was followed by the worst riots of post-independence India - in Mumbai, Surat, Ahmadabad, Kanpur, Delhi and other places.
- In 2002, Gujarat witnessed communal riots when violence was triggered by burning of a train in Godhra.
- In May, 2006 riots occurred in Vadodara due to the municipal council's decision to remove the dargah (shrine) of Syed Chishti Rashiduddin, a medieval Sufi saint.
- In September, 2013, Uttar Pradesh witnessed the worst violence in recent history with clashes between the Hindu and Muslim communities in Muzaffarnagar district.
- Since 2015, mob lynching is quite prevalent in India as near 90 people have been killed.
- It can be termed as manufactured communal violence as through the use of social media and rumours society is polarized along religious lines.
- Factors Responsible for Communal Violence
- Divisive Politics – Communalism is often defined as a political doctrine that makes use of religious and cultural differences in achieving political gains.
- Economic Causes – Uneven development, class divisions, poverty and unemployment aggravates insecurity in the common men which make them vulnerable to political manipulation.
- History of Communal Riots – Probability of recurrence of communal riots in a town where communal riots have already taken place once or twice is stronger than in a town when such riots have never occurred.

Politics of Appeasement – Prompted by political considerations, and guided by their vested interests, political parties take decisions which promote communal violence.

Isolation and Economic Backwardness of Muslim Community – The failure to adopt the scientific and technological education and thus, insufficient representation in the public service, industry and trade etc has led to the feeling of relative deprivation among Muslims.

The resurgence of Hindu-Muslim economic competition, especially among the lower and middle class strata has fuelled the communal ideology.

Administrative Failure – A weak law and order is one of the causes of communal violence.

Psychological Factors – The lack of inter-personal trust and mutual understanding between two communities often result in perception of threat, harassment, fear and danger in one community against the members of the other community , which in turn leads to fight, hatred and anger phobia.

Role of Media – It is often accused of sensationalism and disseminates rumours as "news" which sometimes resulted into further tension and riots between two rival religious groups.

Social media has also emerged as a powerful medium to spread messages relating to communal tension or riot in any part of the country.

Measures to Deal with Communalism

There is need to reform in present criminal justice system, speedy trials and adequate compensation to the victims, may act as deterrent.

Increase in representation of minority community and weaker sections in all wings of law-enforcement, training of forces in human rights, especially in the use of firearms in accordance with UN code of conduct.

Codified guidelines for the administration, specialised training for the police force to handle communal riots and setting up special investigating and prosecuting agencies can help in damping major communal disgruntlement.

Emphasis on value-oriented education with focus on the values of peace, non-violence, compassion, secularism and humanism as well as developing scientific temper (enshrined as a fundamental duty) and rationalism as core values in children both in schools and colleges/universities, can prove vital in preventing communal feelings.

Government can adopt models followed by countries like Malaysia that has developed early-warning indicators to prevent racial clashes.
The Malaysian Ethnic Relations Monitoring System (known by its acronym Mesra) that makes use of a quality of life index (included criteria such as housing, health, income and education) and a perception index to gauge people's needs and feelings about race relations in their area.

Also the Hong Kong model of combating communalism by setting up a "Race Relation Unit" to promote racial harmony and facilitate integration of ethnic minorities, can be emulated by India.

RRU has established a hotline for complaints and inquiries on racial discrimination. Meanwhile, to create awareness about communal harmony, RRU talks to schools on culture of ethnic minorities and concept of racial discrimination.

Government can encourage and support civil society and NGOs to run projects that help create communal awareness, build stronger community relation and cultivating values of communal harmony in next generation.

There is a need for minority welfare schemes to be launched and implemented efficiently by administration to address the challenges and various forms of discrimination faced by them in jobs, housing and daily life.

A pro-active approach by National Foundation for Communal Harmony (NFCH), the body responsible for promoting communal harmony is needed.

NFCH provides assistance for the physical and psychological rehabilitation of the child victims of communal, caste, ethnic or terrorist violence, besides promoting communal harmony, fraternity and national integration.

A legislation is required to curb the communal violence. Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005 must be enacted soon

It is against this background that articulation of communalism as an ideology has become institutionalized through political behaviour, the formal system of education, the media, communal riots, on the acts of various components of the state. That is the social-cultural environment in which the new-found preparation of religious identity among a large section of the urban affluent has intensified communalist consciousness. It may be a mere coincidence in time, but the new phase of communalism in India has evolvedalmost during some period when 'consumer revolution' and 'stock marketrevolution' have been ushered in by state policy. It is difficult to say thatcommunalism has made deep inroads into the consciousness of the poor, therural poor in particular. Communal formation attempt build up new gods –new because the poor's god is not the respectable member of the well-known Hindu Pantheon. But such gods are superimposed and the poor's own folk gods or folk mythology is pushed into the back ground. In essence a new sacred lext is introduced through symbolism and persistent projection of an enemy belonging to another religion.

17 BRIEFLY EXPLAIN SECUALRISM

- The term "Secular" means being "separate" from religion, or having no religious basis.
- A secular person is one who does not owe his moral values to any religion. His values are the product of his rational and scientific thinking.
- Secularism means separation of religion from political, economic, social and cultural aspects of life, religion being treated as a purely personal matter.
- It emphasized dissociation of the state from religion and full freedom to all religions and tolerance of all religions.
- It also stands for equal opportunities for followers of all religions, and no discrimination and partiality on grounds of religion.
- Secularism in the History of India
- Secular traditions are very deep rooted in the history of India. Indian culture is based on the blending of various spiritual traditions and social movements.

- In ancient India, the Santam Dharma (Hinduism) was basically allowed to develop as a holistic religion by welcoming different spiritual traditions and trying to integrate them into a common mainstream.
- The development of four Vedas and the various interpretations of the Upanishads and the Puranas clearly highlight the religious plurality of Hinduism.
- Emperor Ashoka was the first great emperor to announce, as early as third century B.C. that, the state would not prosecute any religious sect.
- In his 12th Rock Edict, Ashoka made an appeal not only for the toleration of all religion sects but also to develop a spirit of great respect toward them.
- Even after the advent of Jainism, Buddhism and later Islam and Christianity on the Indian soil, the quest for religious toleration and coexistence of different faiths continued.
- In medieval India, the Sufi and Bhakti movements bond the people of various communities together with love and peace.
- The leading lights of these movements were Khwaja Moinuddin Chisti, Baba Farid, Sant Kabir Das, Guru Nanak Dev, Saint Tukaram and Mira Bai etc.
- In medieval India, religious toleration and freedom of worship marked the State under Akbar. He had a number of Hindus as his ministers, forbade forcible conversions and abolished Jizya.
- The most prominent evidence of his tolerance policy was his promulgation of 'Din-i-Ilahi' or the Divine Faith, which had elements of both Hindu and Muslim faith.
- That this was not imposed upon the subjects is obvious from the fact that there were few adherents to it. Along with this he emphasized the concept of 'sulh-i-kul' or peace and harmony among religions.
- He even sponsored a series of religious debates which were held in the 'Ibadat Khana' of the Hall of Worship, and the participants in these debates included theologians from amongst Brahmins, Jains and Zoroastrians.
- Even before Akbar, Babar had advised Humayun to "shed religious prejudice, protect temples, preserve cows, and administer justice properly in this tradition."
- The spirit of secularism was strengthened and enriched through the Indian freedom movement too, though the British have pursued the policy of divide and rule.
- In accordance with this policy, the British partitioned Bengal in 1905.

- Separate electorates were provided for Muslims through the Indian Councils Act of 1909, a provision which was extended to Sikhs, Indian Christians, Europeans and Anglo-Indians in certain provinces by the Government of India Act, 1919.
- Ramsay MacDonald Communal Award of 1932, provided for separate electorates as well as reservation of seats for minorities, even for the depressed classes became the basis for representation under the Government of India Act, 1935.
- However, Indian freedom movement was characterized by secular tradition and ethos right from the start.

- In the initial part of the Indian freedom movement, the liberals like Sir Feroz Shah Mehta, Govind Ranade, Gopal Krishna Gokhale by and large pursued a secular approach to politics.
- The constitution drafted by Pandit Moti Lal Nehru as the chairman of the historic Nehru Committee in 1928, had many provision on secularism as: 'There shall be no state religion for the commonwealth of India or for any province in the commonwealth, nor shall the state, either directly or indirectly, endow any religion any preference or impose any disability on account of religious beliefs or religious status'.
- Gandhiji's secularism was based on a commitment to the brotherhood of religious communities based on their respect for and pursuit of truth, whereas, J. L. Nehru's secularism was based on a commitment to scientific humanism tinged with a progressive view of historical change.
- At present scenario, in the context of Indian, the separation of religion from the state constitutes the core of the philosophy of secularism.
- Philosophy of Indian Secularism
- The term 'secularism' is akin to the Vedic concept of 'Dharma nirapekshata' i.e. the indifference of state to religion.
- This model of secularism is adopted by western societies where the government is totally separate from religion (i.e. separation of church and state).
- Indian philosophy of secularism is related to "Sarva Dharma Sambhava" (literally it means that destination of the paths followed by all religions is the same, though the paths themselves may be different) which means equal respect to all religions.
- This concept, embraced and promoted by personalities like Vivekananda and Mahatma Gandhi is called 'Positive secularism' that reflects the dominant ethos of Indian culture.
- India does not have an official state religion. However, different personal laws - on matters such as marriage, divorce, inheritance, alimony varies with an individual's religion.

- Indian secularism is not an end in itself but a means to address religious plurality and sought to achieve peaceful coexistence of different religions.
- Secularism and the Indian Constitution
- There is a clear incorporation of all the basic principles of secularism into various provisions of constitution.
- The term 'Secular' was added to the preamble by the forty-second constitution Amendment Act of 1976, (India is a sovereign, socialist, secular, democratic, republic).
- It emphasise the fact that constitutionally, India is a secular country which has no State religion. And that the state shall recognise and accept all religions, not favour or patronize any particular religion.
- While Article 14 grants equality before the law and equal protection of the laws to all, Article 15 enlarges the concept of secularism to the widest possible extent by prohibiting discrimination on grounds of religion, race, caste, sex or place of birth.
- Article 16 (1) guarantees equality of opportunity to all citizens in matters of public employment and reiterates that there would be no discrimination on the basis of religion, race, caste, sex, descent, place of birth and residence.
- Article 25 provides 'Freedom of Conscience', that is, all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.
- As per Article 26, every religious group or individual has the right to establish and maintain institutions for religious and charitable purposes and to manage its own affairs in matters of religion.
- As per Article 27, the state shall not compel any citizen to pay any taxes for the promotion or maintenance of any particular religion or religious institution.
- Article 28 allows educational institutions maintained by different religious groups to impart religious instruction.
- Article 29 and Article 30 provides cultural and educational rights to the minorities.
- Article 51A i.e. Fundamental Duties obliges all the citizens to promote harmony and the spirit of common brotherhood and to value and preserve the rich heritage of our composite culture.
- Indian vs. Western Model of Secularism
- Over the years, India has developed its own unique concept of secularism that is fundamentally different from the parallel western concept of secularism in the following ways:
- As per the western model of secularism, the "State" and the "religion" have their own separate spheres and neither the state nor the religion shall intervene in each other's affairs.
- Thus, the western concept of secularism requires complete separation of religion and state.

- However, in India, neither in law nor in practice any 'wall of separation' between religion and the State exists.
- In India, both state and religion can, and often do, interact and intervene in each other's affairs within the legally prescribed and judicially settled parameters.
- In other words, Indian secularism does not require a total banishment of religion from the State affairs.
- As per the western model, the state cannot give any financial support to educational institutions run by religious communities.
- On the other hand, Indian model has chosen a positive mode of engagement.
- In India, the state provides all religious minorities the right to establish and maintain their own educational institutions which may receive assistance from state.
- In the western model, State does not intervene in the affairs of religion till the time religion is working within the limits of the law.
- On the other hand, in Indian secularism, state shall interfere in religion so as to remove evils in it.
- India has intervened by enforcing legislation against the practices of sati or widow-burning, dowry, animal and bird sacrifice, child marriage, and preventing Dalits from entering temples.
- In western concept of secularism, religion is relegated entirely to the private sphere and has no place in public life whatsoever.
- The western model prohibits any public policy to be drafted on the basis of religion therefore; state is absolutely distanced from the religious activities and practices of its citizens.
- In India, state has the policy of setting up Departments of Religious Endowments, Wakf Boards, etc. It is also involved in appointing Trustees of these boards.
- Threats to Secularism
- While, the Indian Constitution declares the state being absolutely neutral to all religion, our society has steeped in religion.
- Mingling of Religion and Politics that is mobilisation of votes on grounds of primordial identities like religion, caste and ethnicity, have put Indian secularism in danger.
- Communal politics operates through communalization of social space, by spreading myths and stereotypes against minorities, through attack on rational values and by practicing a divisive ideological propaganda and politics.
- Politicisation of any one religious group leads to the competitive politicisation of other groups, thereby resulting in inter-religious conflict.
- One of the manifestations of communalism is communal riots. In recent past also, communalism has proved to be a great threat to the secular fabric of Indian polity.

- Rise of Hindu Nationalism in recent years have resulted into mob lynching on mere suspicion of slaughtering cows and consuming beef.
- In addition with this, forced closure of slaughterhouses, campaigns against 'love jihad', reconversion or ghar- wapsi (Muslims being forced to convert to Hinduism), etc. reinforces communal tendencies in society.
- Islamic fundamentalism or revivalism pushes for establishing Islamic State based on sharia law which directly comes into conflict with conceptions of the secular and democratic state.
- In recent years there have been stray incidences of Muslim youth being inspired and radicalized by groups like ISIS which is very unfortunate for both India and world.
- Way Forward
- In a pluralistic society, the best approach to nurture secularism is to expand religious freedom rather than strictly practicing state neutrality.
- It is incumbent on us to ensure value-education that makes the younger generation understands and appreciates not only its own religious traditions but also those of the other religions in the country.
- There is also a need to identify a common framework or a shared set of values which allows the diverse groups to live together.
- The prerequisites to implement the social reform initiative like Uniform Civil Code are to create a conducive environment and forging socio-political consensus.

18 WHAT ARE THE DIFFRENT ASPECTS OF FUNDAMENTALISM ?

Fundamentalism is the first of our three concepts and it stresses the infallibility of a scripture (e.g. the Bible, AdiGranths, the Gita or the Quran) in all matters &faith and doctrine. The believer accepts it as a literal historical record. The result is that a militant stand is taken by the followers often preceded or followed by a desire for a separate homeland. At times, this too is taken as a prophecy in the-scriptures.

Fundamentalism thus separates a certain community from the mainstream. However, society, by its various arms (the police, army and so on), attempts to suppress or eliminate the fundamentalists. This is especially so when they begin acting outside of the law. Communalism is associated with eruption of violence and riots, these conflagrations may not have any particular aim or goal (apart from communal ascendancy or, supremacy).

Fundamentalism however is an organised all-encompassing movement which aims at promotion of societal goals specifically in the light of religious enshrinements. Operational strategy includes peaceful as well as war-life uses and movements.

19 WHAT IS FUNDAMENTALISM?

Fundamentalism as a concept was first used in 19 10-19 15 when anonymous authors published 12 volumes of literature called them 'The Fundamentals'. In the early 20s the print media used this word with reference to conservative protestant groups in North America. These groups were concerned about liberal interpretations of the Bible. Alarmed by this the conservatives insisted on some "fundamentals" of faith. These included belief in the virgin birth, divinity, the physical resurrection of Jesus Chrii – and the infallibility of the scripture. As mentioned these and other fundamentals were published in 12 pamphlets called The Fundamentals between 19 10- 19 1 5. Thus began the specialised usage of the concept of "fundamentalism". Thus a fundamental movement is one which takes infallibility of a scripture as a basic issue and as a guide to life. Some fundamentalists add that there is no need to even interpret the scripture as meaning in it is self-evident. This ojlen amounts to intolerance of any form of disagreement or dissent. Thus there is an apprehension that fundamentalists are narrow minded, and bigoted.

T.N. Madan has pointed out that the word Fundamentalism has gained wide currency in the contemporary world. According to him it refers to a variety of norms, values, attitudes which either judge the fundamentalists or condemn them outright. This world is sometimes erroneously used in place of communalism. In fact the word fundamentalism has become a blanket term. That is to say that various fundamental movements across the world 'are actually not identical but differ in various ways. But they are linked by a 'family' resemblance.

Fundamentalist movements are of a collective character. They are often led by charismatic leaders who are usually men. Thus the 1979 Iranian movement was led by Ayatollah Khomeini, and the recent Sikh fundamentalist upsurge by Sant Bhindranwale (Madan, ibid). Fundamentalism leaders need not be religious leaders.Thus Maulana Maududi, founder of the Jamati Islami in India was a journalist. K.B. Hedgewar, founder of the Rashtriya Sewak Sangh was a physician.

The fundamentalists are a practical people and try to purge the way of life of all impurities (religiously speaking). They reject all corrupt lifestyles.

An example of this is Dayanands critique of the traditional, superstition filled way of life. Thus Maududi characterised the present Muslim way of life as 'ignorant' and Bhindranwale talked of the 'fallen' Sikhs who shave off their beards, cut their hair and do not observe the traditional Sikh way of life. Thus fundamental movements are not only about religious beliefs and practices, but lifestyles generally.

Thus, fundamentalist movement are reactive and a response to what the persons involved-the leaders and participants, consider a crisis. The crisis calls for urgent remedies. The basic programme is presented as a return to the original tradition. That is to say to the contemporarily redefined fundamentals, which cover the present-day needs. This usually involves a selective retrieval of tradition. It may even be an invention of tradition. The case of Dayanand illustrates this very well. He tried to evolve a sanitized Hinduism in response to the challenge for conversion by Christian missionaries (Madan, ibid). He claimed that the Vedas were the only true form of Hinduism and his call was back to the Vedas.

In Iran Khomeini developed an Islamic state based on the guardianship of the jurists. Again, Bhindranwale gave a selective emphasis to Guru Gobind Singh's teaching rather than those of his immediate successors. Assertion of spiritual authority and criticising the culture are two aspects of fundamentalism. A third crucial element is that of the pursuit of political power.

The pursuit of political power is very important to fundamentalism, for with out it we would be presented with a case for revivalism. The Arya Samajis were ardent nationalists in North India, and the movement had its political overtones. Again the RSS which has been described as a cultural organisation has had close links with political parties, and contemporarily with the Sangh Parivar. This covers both cultural and political aspects of Hindu nationalism. This explains why fundamentalist movements often turn violent, and the ideology of secularism is rejected. They are totalitarian and do not tolerate dissent. However these movements also perform a particular role in modem society which cannot be ignored.

Thus, an objective intellectual analysis should consider fundamentalism as a distinctive category. It is not theocracy or backward communalism.

20 EXPALIN IN DETAIL THEORIES OF CASTE ?

Traditional Theory

According to this theory, the caste system is of divine origin. It says the caste system is an extension of the varna system, where the 4 varnas originated from the body of Bramha.

At the top of the hierarchy were the Brahmins who were mainly teachers and intellectuals and came from Brahma's head. Kshatriyas, or the warriors and rulers, came from his arms. Vaishyas, or the traders, were created from his thighs. At the bottom were the Shudras, who came from Brahma's feet. The mouth signifies its use for preaching, learning etc, the arms – protections, thighs – to cultivate or business, feet – helps the whole body, so the duty of the Shudras is to serve all the others. The sub-castes emerged later due to intermarriages between the 4 varnas.

The proponents of this theory cite Purushasukta of Rigveda, Manusmriti etc to support their stand.

Racial Theory

The Sanskrit word for caste is varna which means colour. The caste stratification of the Indian society had its origin in the chaturvarna system – Brahmins, Kashtriyas, Vaishyas and Shudras. Indian sociologist D.N. Majumdar writes in his book, "*Races and Culture in India*", the caste system took its birth after the arrival of Aryans in India.

Rig Vedic literature stresses very significantly the differences between the Arya and non-Aryans (Dasa), not only in their complexion but also in their speech, religious practices, and physical features.

The Varna system prevalent during the Vedic period was mainly based on division of labour and occupation. The three classes, Brahma, Kshatra and Vis are frequently mentioned in the Rig Veda. Brahma and Kshatra represented the poet-priest and the warrior-chief. Vis comprised all the common people. The name of the fourth class, the 'Sudra', occurs only once in the Rig Veda. The Sudra class represented domestic servants.

Political Theory

According to this theory, the caste system is a clever device invented by the Brahmins in order to place themselves on the highest ladder of social hierarchy.

Dr. Ghurye states, "Caste is a Brahminic child of Indo-Aryan culture cradled in the land of the Ganges and then transferred to other parts of India."

The Brahmins even added the concept of spiritual merit of the king, through the priest or purohit in order to get the support of the ruler of the land.

Occupational Theory

Caste hierarchy is according to the occupation. Those professions which were regarded as better and respectable made the persons who performed them superior to those who were engaged in dirty professions.

According to Newfield, "Function and function alone is responsible for the origin of caste structure in India." With functional differentiation there came in occupational differentiation and numerous sub-castes such as Lohar(blacksmith), Chamar(tanner), Teli(oil-pressers).

Evolution Theory

According to this theory, the caste system did not come into existence all of a sudden or at a particular date. It is the result of a long process of social evolution.

Political Science I

Paper Code-110

Q.1 Discuss meaning and scope of Political Science.

Ans. Political Science is the subject which deals with the political aspect of human beings. It is the study of man and political institutions in which man live.

According to Garner, Political Science begins and ends with the state.

According to modern approach of Political Science, it includes all aspects of human life.

According to David Easton, Political Science deals with the authoritative allocation of values.

Scope of Political Science-

Political Science is master science which means it includes all aspects of human life. It is the foundation of the study of all the subjects related with the man. It deals with the administration, development, welfare and governance. It deals with the structures of the government. It also deals with the theoretical concepts related with the human conditions of life in a given government.

Q.2 Explain the utility of the study of Political Science in the study of Law.

Ans. The study of Political Science is very intimately related with the study of law. Austin says that law is command of sovereign and sovereignty is very important element of state. Without the study of state government and society we cannot understand the meaning and impact of law' Law is enforced through political authority and law controls the population. The sovereignty and the state are subject matter of Political Science as well as Law. The study of Political Science is related with the all aspects of Law.

Q.3 Define State and its main elements.

Ans. State is most important, powerful and highest institution where man lives. We can define state as "It is the group of people living in a definite territory having a sovereign government. State has following four important elements-

1. Definite Territory- It means that a definite territory is necessary for creation of a state. This territory means the place where people can live with the availability of essential things of life like water, food and air and production. This territory can be big or can be small.

2. Population- Populations means people who constitute society are necessary part of the state. The state cannot work in isolation or blank. This population can be small or big and should be responsible and productive.
3. Government- Government is another very important element of the state. It includes small group of people who manages and controls the affairs of the state. Generally, it has three organs Legislature, Executive and Judiciary. It can have many types of forms like democracy or dictatorship. Government is the agency of the state and it implements the will of the state.
4. Sovereignty- It is the most important element of the state. On the basis of sovereignty, State controls everything in the boundary of the state. It has two aspects one is internal and other is external. Sovereignty gives the permanency and absoluteness to the state.

Q.4 Discuss critically social contract theory of origin of state.

Ans. Social contract theory of origin of state says that the state is a created institution. It is the result of contract among the people and the ruler. Although this theory is found in the writings of classical thinkers like Plato but its main supporters are Hobbes, Lack and Rousseau. They all agree that there was pre-state society which is called as the natural state, which was based on the human nature. There were certain reasons due to which the people agreed to create an institution to regulate the affairs of the society. Hobbes, Lack and Rousseau differ on the nature of society, human nature and nature of the agreement. Hobbes created limited government and Rousseau created the ruler representing the General will. It is widely accepted and popular theory because it is most systematically explained theory.

Q.5 Explain Saptang Theory of State as given by Kautilya.

Ans. In modern understanding of the state, it is made up of four elements-

1. Population
2. Definite Theory
3. Government
4. Sovereignty

But Kautilya gave seven elements of the state in his Saptang Theory which are as under-

1. Swami-King
2. Amatya-Minister
3. Janpad- Population
4. Durga-Fortified Capital
5. Kosh-Treasury

6. Danda-Army
7. Mitra-Ally

Q.6 Define meaning and main features of Liberalism.

Ans. Liberalism stands for liberty, equality and human values. It also stands for rational and scientific thinking. It came as a revolt against traditionalism and orthodox thinking of medieval age where divine rights of king, federalism and undue dominance of religion and church prevailed. Liberalism came as renaissance and awakening and development of human values.

Its main features are as under-

1. Rational Thinking
2. Scientific Temper
3. Democratic Ruler
4. Individual Freedom
5. Adventurism in economic field
6. Secularization
7. Development of human value
8. Open Society
9. Rule by consent
10. Human Brotherhood

Q.7 Explain the features of Fascism and Nazism.

Ans. Both the thinkings of Nazism and Fascism stand for state control over the thought and action of human beings or the citizens of the state. It stands for the unity of state on the basis of superiority of Nationality and race. It believes in racial superiority and emotional unity of the people for the ruler. It believes in free nation, one ruler and one programmer. Fascism was originated in Italy and Nazism was originated in Germany after the first after the First World War to avenge the insult and humiliation in 1st world war.

In Italy, Musalim became the autocratic ruler of Italy and Hitler became the autocratic ruler of Germany.

Q.8 Define main elements of Marxism.

Ans. During the period Karl Marx capitalism prevailed in its worst form in Europe. Marx was German philosopher. He traced the origin, development and impact of the capitalism in his famous book "DesCapital". His views about capitalism are known as Marxism. He also gave the method of end of capitalism by creating communism.

His all thoughts about capitalism can be understood in following concepts-

1. Two Class Theory- He says that there are two classes, one is Exploitative Class and other is Exploited Class.
2. Economic Interpretation of History- He says that history is not the record of war among rulers. He says history is the record of conflict between the two classes.
3. Dialectic Materialism- Here he says that economic conditions determine all other conditions of life. The process of development of society is governed by economic conditions thesis-antithesis and synthesis.
4. Theory of Surplus value- Here he qualify the amount of share in the profit which should have gone to the laborer but is being continuously kept by the capitalist which he called as surplus value.
5. Establishment of polytonal class- He approved the violent agitation against the capitalist and dominance of the dictatorship of polytonal i.e. Labor class.
6. Communism- Finally he is in favor of establishing a casteless, classless and stateless society, which he called as communism.

Q.9 Differentiate between Syndicalism, Fabianism and Guild.

Ans. The opposition of capitalism, socialism became popular in the world, but it was practiced differently in different parts of the world. These are their brands of socialism in the world as the basis of authority implementing the principle of socialism in the three areas include-

1. Syndicalism- Where the authority was constituted and controlled by the representative of Labor class.
2. Fabianism- When the authority was controlled by the intellectual class complement the principle of socialism by discussion and debate and rational method.
3. Guild- Guild was the authority made up of representation of different classes of the society to implement the principle of socialism.

Q.10 Write a brief note on Feminism.

Ans. History bears the fact that women have been exploited a lot in the entire socialite in all the present ages. With the advent of Liberalism, Socialism and development of democratic and human values, the women's plight became the focus of attention of thinkers and people of civil society. In this context thinking developed to change the mindset and approach towards the capabilities, capacities and place of women. This thinking is called as Feminism. This thinking has brought a remarkable change in the position of women in entire world. The program of women empowerment has been accepted and started by all the modern state as a result today women are finding the opportunities in all walks of national life. In this context,

they are contributing a lot in the national development and are also strengthening themselves socially, emotionally, physically and morally also.

Q.11 What are main functions of Legislature in modern state?

Ans. Following are the main functions of Legislature in modern state-

1. Discussion and debate- On issues related with the people
2. Making Laws by following definite procedures.
3. Financial functions- It includes passing the budget and controlling the expenditure on the part of the government.
4. Executive functions- It includes controlling the executive by asking the questions and putting the pressure on the government and bring the no confidence motion against the government. The legislature make executive responsible and accountable to the people.
5. Electoral functions- Legislature take part in the elections of speaker, deputy speaker and president and vice-president.
6. Constitutional Amendment functions- All the constitutional amendments are initiated and passed by the legislature.
7. Judicial Power- Legislature exercises the judicial power by removing the judges, president and vice-president by bringing impeachment against them.

Q.12 What are main types and functions of Executives in modern state?

Ans. Following are the main functions of executives-

1. Policy Making
2. Policy Implementation
3. Administrative Function
4. Legislative Function
5. Budgetary Function
6. Developmental Function
7. Welfare Function
8. Making Important appointment

Q.13 What do you mean by Power of Judicial Review and independence of Judiciary?

Ans. Power of Judicial Review- It is the power of Judiciary to test the constitutional validity of the Laws and executive orders. If it finds that they are violating the provisions of the constitution, it can declare them unconstitutional.

Independence of Judiciary- Following are the necessary conditions for the independence of Judiciary-

1. The decision of Judiciary should be respected and accepted.
2. There should not be any Legislature or executive interference in the working of Judiciary
3. Judges should not depend on executive or Legislature for their appointment or removal.
4. Judges should get good salaries and benefits.
5. The Judges should enjoy long tenure.
6. There should be a check on post retirement benefits for judges.

Q.14 Explain critically the Theory of Separation of Power.

Ans. The theory of separation of power says that all three kinds of power i.e. Legislature, executive and judiciary should not be placed in one hand, these should be placed in three different organs of the government so that no ruler could misuse these powers to become dictator. This theory is given by French philosopher Montesquieu. It will promote independence of all the organs of the government and the liberty of the people will be protected.

Q.15 Discuss various steps of Political process.

Ans. Political process generally takes place in representative democratic systems when people elect their representative to govern them. As a part of political process voting rights are given to adult citizens. Electoral constituencies are created. Political Parties declare their Election manifesto on the basis of which they ask for votes from the voters.

Election commission decides the date of election with the consultation of government. On that date elections are held for which entire machinery works. During election time political parties go for campaigning. After the elections, counting of votes takes place and results are declared. After the declaration of result, government is formed.

Q.16 Explain Plato's theory of Justice.

Ans. To understand the concept of Justice as given by Plato in his book "Republic" it is necessary to understand his Concept of State and the idea of Philosopher King.

He was of the firm view that the ruler must be virtuous and must be free from material comforts. It is because of this he advocated communism of property and wives for the king (Ruler).

He classified the contemporary society in three classes on the basis of screening and training through his educational system. Three classes were as under which are corresponding to the structure of man:

1. Producers class corresponding to appetite of man.

2. Guardian class corresponding to spirit of man.
3. Ruling class corresponding to reason of man.

It is because of this understanding, he said that "State is individual's writ Large".

Plato's Concept of Justice is based on:

Specialization and Perfection: It means that every class must perform its functions perfectly with specialization.

Non-Interference: It means that no class should interfere in another area.

Harmony: It means that all three classes of the state must perform their functions in harmony for the state of unit of the state and Welfare of the society.

Q.17 Explain Aristotle's concept of government and citizenship.

Ans. Aristotle's main anxiety was to find out the best government for which he collected 158 constitutions of the world and then classified them on three basis.

Firstly, Number of the persons in the government and Secondly, the pure form of Government and Lastly the impure form of government.

His classification of the governments is as under:

Number of the Person	Pure Form	Impure Form
1. One Person	Monarchy	Tyranny
2. Two or more than two persons	Aristocracy	Oligarchy
3. Many Persons	Polity	Democracy

Aristotle's view on citizenship :

Aristotle was of the view that every person who is living in the state can not be given citizenship. Every person is not eligible to become the citizen of the state.

He disqualified the persons of many categories for being given the citizenship because he said all people are not equal. He prescribed certain qualifications for being given the citizenship of the State.

1. He must be holding some important public position in Judicial or administrative field.
2. He must be worthy of taking part in legislative process by becoming the member of Legislature.

His above views were criticized on number of basis.

Q.18 Discuss Gandhi's concept of Satyagraha and Swaraj.

Ans. Gandhiji was against the modern state with Parliament, Party System and present electoral system. His concept of state was based on:

1. Self discipline

2. Self Dependence
3. Self Reliance
4. Grass root democracy
5. Indigenous development
6. Development of rural economy

His concept of state i.e. swaraj is also called as Ramrajya where there is need of any type of control from the above. His main weapon was satyagraha which means fight for truth.

Q.19 Explain Nehru's Democratic Socialism.

Ans. Pt. Jawaharlal Nehru's Socialism is also known as the scientific socialism or democratic socialism.

Pt. Nehru played a significant role in National Independence of India. He was the front leader of Indian National Congress of his time. Although he is also known as a supporter of heavy industrialization in India and wanted to make India a modern one.

At the same time he was champion of equality, justice and exploitation free society which are main principles of socialism.

Socialism was the philosophy of socio-economic relations very much popular and relevant in his time. He advocated the implementation of socialistic principles in his own way which was most scientific and planned.

He tried to build India an egalitarian society by starting planned economic development.

Q.20 Write Essay on JP's Total Revolution.

Ans. Jai Prakash Narain who is popularly known as JP was a prominent socialist leader.

He also played significant role in National Movement for independence. He started a massive movement against style of working of Mrs. Indira Gandhi, particularly against Emergency.

He was sent to jail during Emergency along with all prominent opposition leaders.

In jail he wrote a book with the title "PrismDiary". In this book he gave the concept of total revolution.

He wanted to introduce revolutionary changes in all walks of national life i.e. in social structure, administrative structure, economic ideology, political structure, police structure, bureaucratic structure and even in Military structure. This was very much revolutionary vision.

After the end of Emergency, Janta Party came to power in which JP played instrumental role. However he could not see the realization of his vision.