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FAIRFIELD

Institute of Management & Technology

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Reference Material for Five Years

Bachelor of Law (Hons.)

Code : 038

Semester – IV

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Bachelor of Law (Hons.)

Code : 038

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Subject code: BA LLB-202

Subject: Family law

QUESTION 1 Define Joint Family under Mitakshara Law and state features of joint and undivided family and Hindu Coparcenary?

ANSWER: INTRODUCTION

Before began with the study firstly we will understand the layman language what is Joint Family Property? According to Oxford dictionary Joint Family means were an extended family consisting of two or more generation and their spouses living together as a single household. So similarly the Hindu Joint Family is the composition of a common ancestor along with his lineal male descendants and their wives, daughter's etc. So for the existence of joint family there must be a common ancestor but it doesn't mean that for the continuance of Joint Family the common ancestor must require, by this it's meant that whenever a common ancestor dies there is always an addition to the lower link of the Family. So once an upper link is removed it doesn't means that the Joint Family will end. This concept is followed under both Mitakshara and Dayabhaga but it is an area where it makes distinguish between each of them. In most parts of India the Mitakshara concept of Joint Family is followed but in West Bengal, Assam, and other part the Dayabhaga concept of Joint Family is followed by the people.

In a case Rajgopal v Padmini1whenever if two or more families agree to live together by sharing their food, work, resources, gains etc. into a common stock, then there will be an existence of Joint Family.

In other case Ram Kumar v Commr. Income Tax It was observed that Hindu Joint Family is considered as a unit and it is headed by a Person called as Karta.

In Mitakshara Joint Family Property son has a right over the property since the birth, even an illegitimate son or a widowed daughter has a right over the property of their father's Joint Family Property.

Another feature is the right to Maintenance and right of survivorship which will be given to the unmarried daughters and other members respectively in the Joint Family. Under Mitakshara only Joint Family property will be acquired by the coparcenary by the concept of succession and survivorship.

In case Board of Revenue v. Muthu Kumar it was observed that when a son inherit the father's separate property, he w0ill acquire it as a separate property even if he has a son under Section 8 of Hindu Succession Act. Whereas in Dayabhaga Joint Family Property son have no right over the properties by birth. Even the concept of Survivorship is not given to son and therefore there is no joint family between the son and the father. Under Dayabhaga it includes all the properties both self-acquired and joint family property will be devolve by succession.

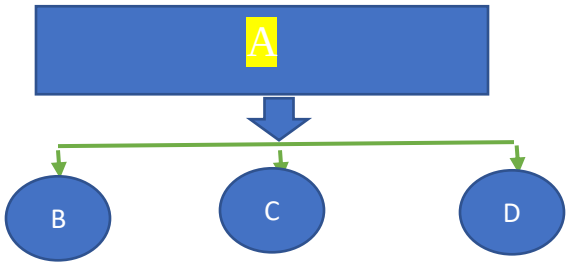
COPARCENARY UNDER MITAKSHARA SCHOOL OF JOINT FAMILY

Coparcenary idea under Hindu Law was mainly by the male member of the family where just children, grandsons and great-grandsons son who have a right by birth, who has an interest in the coparcenary property.

No female of a Mitakshara coparcenary could be a coparcener but she will always be a part of the Joint Family. So under Mitakshara a son, son's son, son's son's son can a coparcenary i.e. father and his three lineal male descendants can be a coparcener.

For Example: Suppose in a Joint Family a Coparcenary will be consisting of four members including father and his three male lineal descendants. They will be form a coparcenary with the limit of four degree Fig. No. 1.

FIG.NO. 1



Suppose if a Joint Family consist of eight male lineal descendants i.e. B, C, D, E, F, G, H, I. then they will not be forming a coparcenary because we have understood from the above example that only a coparcenary can be consisted on four degree, then B, C, D, E, F, G, H, If they have to a coparcener in the family then only four degree members should be taken into the consideration i.e. B, C, and D along with a common ancestor. Then if anyone of the coparcener dies, the next person be added to the coparcenary subsequently.

In case Venugopala v. Union of India it was held that under Mitakshara School of coparcenary is based on the notion of birth right of son, son's son, son's son's son. All this concept were followed by the Hindu Succession Act, 1956 but there was recent amendment made to the Hindu Succession (Amendment) Act, 2005 that even a daughter is entitled to a coparcenary under the joint family.

In SubhashEknathraoKhandekar v. PragyabaiManoharBirader it was held that even a daughter can be a coparcener according to the Section 6 of the Act7, but widows of the son can't be a coparcener according to the Act. So all the examples it's clear that a coparcenary can't be consist of a female under Mitakshara School either by entering into the agreement between the members of Joint Family nor with the coparceners. It is a creation of law that only four degree lineal male descendants can be coparcenary. We have noted under Mitakshara School the coparcener's acquires a birth right over the properties of the Joint Family property but the main issue is that the interest acquire them will be fluctuating and unpredictable. It means that until the partition is done in the Joint Family property share will not be fixed or specified. The interest of person will be fluctuating and unpredictable because there can be birth and death happens in the family by which the share of each individuals will be effected.

Suppose, in a Joint Family a coparcenary consist of a father F, and two son A and B. then if partition happens in this family each of them will be entitled to a share of 1/3. But suppose if one more son is born to Father (F) i.e. C and partition was not done in that family then we can say that

the share of each person will be fluctuating because one more person is added to that family members. So it is understood that only by the concept of partition the shares can be fixed for each persons.

Under Mitakshara School there's a concept of community of interest and unity of possession. The coparceners have the following rights:

- Right to maintenance: Every person in the joint family property is entitled to get maintenance. Mainly the female members, the persons who doesn't receive any share from the family because of disqualification grounds, or unmarried daughters, then all of them will be getting maintenance from the Joint family.
- Right to challenge alienation: The term alienation means transfer of property in case of any legal necessity or benefit of the estate. The coparcener, karta and the sole surviving coparceners have the right to alienate the property for the debts of the family or for any kind of legal necessity of the Joint family. If the above mentioned person alienate the property with any kind of improper intention or without any clear intention then the coparcener can challenge the alienation.
- Right to partition: The coparcener's have the right to partition in the joint family property. Until the partition is done, the shares of the each individuals will be fluctuating and unpredictable.

COPARCENARY WITHIN THE COPARCENARY

In Mitakshara school there's a concept of Coparcenary within the Coparcenary i.e. a separate coparcenary's can be existed within a coparcenary. Suppose a coparcener consist of P and three sons Q, R and S. Q having two sons QS1, QS2. R having three sons RS1, RS2, RS3. Suppose P and three sons Q, R and S acquire the separate property then when Q dies his separate property can be acquired by his sons QS1, QS2 and they can form a separate coparcenary themselves. This concept is called Coparcenary within the Coparcenary.

CLASSIFICATION OF PROPERTY

Apratibandha Daya (unobstructed heritage) property inherit from direct male ancestor but not exceeding three degree who is higher than him.

In case Radha v Ram8 it was held that the property can be acquired by son and son's son by the interest of birth. Under the concept heritage is devolved by survivorship.

Sapratibandha Daya (Obstructed Heritage) property inherited from any other relations i.e. paternal uncle or brother, nephew etc., under this its devolved by inheritance.

Under Hindu Law, the property is furthered divided into:

- Joint Family Property: Important aspect of Hindu Joint Family. Mainly under this properties are inherited from ancestral Property by any Ancestor or ancestress.
- Separate Property: In this property acquired by individuals will be involved.

The term "Hindu undivided family" has not been defined in the Income Tax Act. "Hindu undivided family" was included within the meaning of the word Person in section 2(31) of the Income Tax Act but "Hindu undivided family" is not defined in the Income tax Act. The exclusion has been because the term "Hindu undivided family" has already been defined in the Hindu law and the

legislature wanted the meaning of the "Hindu undivided family" remain the same as that of the Hindu Law. There are two schools of Hindu Law. They are:

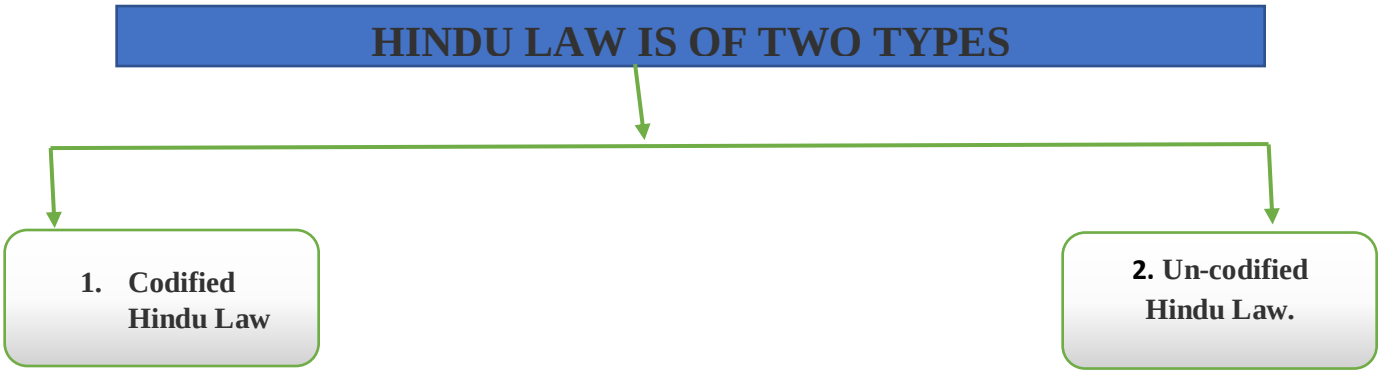
- Dayabhaga School in West Bengal
- Mitakshara School in Rest of India

QUESTION 2

A) What are the various schools of Hindu Law?

B) Differentiate between Mitakshara and Dayabhaga Schools?

ANSWER



1. **The codified Hindu Law** applies to all Hindu equally.
2. **Un-codified Hindu Law** the situation is different. The application of Un-codified Hindu Law depends upon the context of different schools.

As per the context of schools, Hindu Law is of two types :-

The Mitakshara School has further the following sub schools:

a) Banaras or Varanasi sub school.

b) Mithila Sub School.

c) Maharashtra or Mumbai sub school.

Case : Collector of Madrai v/s Mottaramlingam 1868:

It was said that, " There is only one remote source among the various schools of Hindu Law, but due to different beliefs of Digest and its commentaries several schools and sub schools of Hindu Law have developed. "There are mainly two causes to differentiate between several schools of Hindu Law:-

1 .Different Customs and Usages prevail in different parts of the country.

2. These different areas are governed by different Digest and Commentaries.

MIKAKSHARA SCHOOL

The name of this school came from the Digest Mitakshara of Vigyaneshwa. The area of its application is whole India excluding the Assam State.

Case : Rohan v/s Laksman – 1976.

It was held that the effect of Mitakshara School is so strong that it also applies to even undescribed subjects in Bengal and Assam.

Sub-Schools of Mitakshara

a) Banaras Sub-School:- The area of Banaras sub school is complete North India, rural area of Punjab, south Bihar, Orissa and few parts of Madhya Pradesh. The important books concerning to this are Mitakshara of Vigyaneshwa, Veer Mitrodaa and Niranaya Sandhu of Mitr Mishra.

b) Mithila sub school: Tirhut and few districts of North Bihar. Books are Vivadh Chintamani and Vivadh Ratnakar.

c) Maharashtra sub school: - It is also called as Mayuk sub school. Area of this sub school is Maharashtra, Saurashtra, Madhya Pradesh and few parts of Andhra Pradesh. Books are Vyavhar Mayuk, Veer Mitradaya and Nirnaya Sandhu.

d) Dravid sub school: - The whole south of India, i.e. Madras, Kerala, Mysore. Books are Smriti Chandrika, Parashar Madhviya, saraswati Vilas, Vyavhar Niranaya.

e) Punjab sub school: - Area of the school is Punjab, Rajasthan, Jammu-Kashmir. This sub school emphasized on Customs and Usages. Books are Digest on Yagyavalkya Smriti written by Aprak, Mitakshara & Veer Mitrodaya.

DAYALBHAGA SCHOOL

Its name came from the Digest Dayabhaga of Jimuthvahan. The area of its application is Bengal and Assam. The period of writing of Dayabhaga is considered to be 1090-1130 A.D. Dayabhaga is mainly on essay on partition and succession.

(A) Difference between Mitakshara and Dayabhaga schools

The above two schools has the principally differences on two subjects:-

1.MITAKSHARA SCHOOL:

i) Inheritance in Mitakshara is based on:

1. Relation by blood.

2. A relative by blood receives succession in property which is the basic principle of Hindu succession law. 3. Women have been excluded in succession.

4. Agnates supersedes the cognates.

5The area of its application is whole India except Assam State.

ii) **Coparcenary** evolves with the birth of a son. Property over which all coparceners have similar ownership. No coparcenary can say before partition that he is the owner of that particular property. Coparcenary has been recognised by this school.

2. DAYABHAGA SCHOOL:-

1. The succession of property in Dayabhaga School based on spiritual principles.

2. In this school successor of property is such person who earns maximum peace and religious profit for the soul of deceased by performing 'Pindadaan' & religious rituals etc.

3. This law is liberal because few women and cognates can also receive property in succession, but after passing of Hindu Succession Act this has been ceased.

4 The coparcenary evolves after the death of the father. In Dayabhaga School the son has no right during the lifetime of the father.

5. On the death of a Hindu Person his property shall devolve among his heirs on the basis of succession.

6. Coparcenary has been recognised by this school.

QUESTION 3 (A) Who is karta?

(B) Can minor be a karta?

Answer:

(A) The head of the Hindu Joint Family is called the Karta or manager of the joint family occupies a unique position unlike any other member of the family. The senior most male member of the Hindu joint family is usually the Karta or head of the family.

Often Karta is called Manager of the joint family, this is when there exists a family business or if it is a trading family, there has to be a manager to take care of the proper functioning and supervision of the business. The Karta has innumerable rights and powers.

He can exercise these rights in any manner he thinks fit as long as it's for the greater good of the family. Along with such great power he has a number of liabilities such as maintenance of family members and keeping proper accounts.

The senior most member male member of a joint Hindu family is considered as the karta of the family provided he is otherwise fit to act as such that he is not suffering from any physical or mental deficiency.

He is not an agent or trustee of the family but as the head of the family he is the custodian or guardian of the property and affair s of the family and of the interest of the family.

The karta of the joint Hindu family is certainly the manager of the joint family property but undoubtedly possesses powers which the ordinary manager does not possess. The Karta, therefore, cannot be just equated with the manager of property.

(B) **Minor as a karta** –

As regards, junior male members, as long as a senior member is present they cannot become Karta, unless all the coparceners agree to the junior member occupying managerial position.

This was re-affirmed by **the Narendra Kumar V. CIT.** If it turns out that a minor is the only one left to be manager, he can as long as a capable guardian represents him. Section 21 of the Guardians and Wards Act, 1890 recognises the competence of minors to occupy managerial position in an undivided family.

Father as karta:-If the manager or the karta is the father, he has certain additional powers of alienation under the Hindu law and in exercise of those powers, he can alienate joint family property so as to bind the interests of his minor sons in such property.

QUESTION 4 what are the position of karta?

Answer It is the duty of the karta to see that all reasonable wants of the members are satisfied. If the karta fails to fulfil his duty, the members could enforce it by legal action. An undivided Hindu family is ordinarily joint not only in estate, but also in food or worship; therefore, not only the concerns of the joint property, but whatever relates to their commensality and their religious duties and observances, must be regulated by its members or the business manager to whom they have expressly, or by implication, delegated the task of regulation. The Karta represents his joint family on all matters, whether they are religious, social or legal in character.

Legal position of the Karta

a. The karta can file suits or take other legal proceedings to safeguard the interest of the family and its properties and business.
b. He can represent the family effectively in a proceeding even if he has not been named as such.

c. Where a transaction purports to have been entered into by two or more persons described as kartas or managers of the joint family, they must all join as plaintiffs in the suit. However, it is not necessary that all members of the joint family should join in the suit.
d. The manager as the head of the family has control over the income and expenditure, and he is the custodian of the surplus, if any. Besides the expenses of management, realization and protection of the family estate, the family purposes are ordinarily maintenance, residence, education, marriage, sraddha and religious ceremonies of the coparceners and their families. The expenses of each coparcener or his branch cannot in law, in the absence of usage, be debited to the particular coparcener. If he spends more than the other members approve, their remedy is to demand a partition
e. Position regarding debts He can acknowledge liability to pay debts due and payable by the family, to give discharge for debt; to pay interest on money borrowed etc. due and payable by the family. If the manager revives a time barred debt by passing a promissory note, he alone is liable for the debt. If a decree is passed against the karta or manager of the joint Hindu family in respect of a liability properly incurred for the necessities of the family, the binding character of this decree upon the interest of the other members depends, not upon their having or not having been parties to the suit but on the authority of the manager to incur the liability.
f. Position regarding business If the family has ancestral business the karta has a right to carry on the business with or without the help of the other family members and for that purpose to do all acts and things required to be done to carry on the business such as buying and selling or manufacturing goods, engaging employees, to enter into contracts for sale and purchase of goods, to borrow money, etc. He can carrying on any ancestral business. The power of a manager to carry on a family bus also enter into partnerships with any other person or persons when the family itself necessarily implies a power to mortgage or sell the family property for a legitimate and proper purpose of the business. The manager can make contracts, give receipts and compromise or discharge claims incidental to the business.

QUESTION 5 How can a Karta use power of alienation?

Answer Although no individual coparcener, including the karta has any power to dispose of the joint family property without the consent of all others, the Dharma Shastra recognizes it. That in certain circumstances any member has the power to alienate the joint family property.

The Mitakshara is explicit on the matter.

The formulation of Vijnaneshwara has undergone modification in two respects: -

1. The power cannot be exercised by any member except the karta.
2. The joint family property can only be alienated for three purposes: -

(a) Apatkale (Legal Necessity)

(b) Kutumbarthe (Benefit of Estate)

(c) Dharmamarthe (Religious obligations)

(A) Legal Necessity: - It cannot be defined precisely. The cases of legal necessity can be so numerous and varied that it is impossible to reduce them into water –tight compartments. Loosely speaking it includes all those things, which are deemed necessary for the members of the family. What need to be shown is that the property was alienated for the satisfaction of a need. The term is to be interpreted with due regard to the modern life. Where the necessity is partial, i.e. where the money required to meet the necessity is less than the amount raised by the alienation, then also it is justified for legal necessity.

(B) Benefit of Estate: - Broadly speaking, benefit of estate means anything, which is done for the benefit of the joint family property. There are two views as to it. One view is that only construction, which is of defensive character, can be a benefit of estate. This view seems to be no longer valid. The other view is that anything done which is of positive benefit, will amount to benefit of estate. The test is that anything which a prudent person can do in respect of his own property.

(C) Indispensable Duties: - This term implies performance of those acts, which are religious, pious, or charitable.

A karta can even alienate a portion of the family property for charitable/pious purposes. However, in this case, the powers of the karta are limited i.e. he can alienate a small portion of the joint family property, whether movable/immovable.

QUESTION 6: How can Father use the power of Alienation?

Answer A father possesses more power even than Karta as there are situations in which only the father has the authority to make alienation.

The two cases are dealt with below-

1. **Gifts of love and affection** –

The father can make a gift of reasonable amount of the ancestral movable property out of love and affection to the family members who are not entitled to any share at the time of the partition. Even in the case of the coparcener, however the rule in this case is that the value of the property gifted must be very small in comparison to the entire movable property. Thus the gift of affection may be made to the daughter, wife or even the son.

In the case of ***Subbarami*** v. ***Rammamma*** an important principle was laid down that such gifts cannot be made by a will, since as soon as a coparcener dies, he loses his interest in the joint property which he cannot subsequently alienate.

A classic example of such a gift came up before the Privy Council in the case of ***Bachoo*** v. ***Mankore Bai***- In this a gift made to the daughter of Rs.20000 was held to be valid as the total value of the estate was 10-15 lakhs.

Father's Debt- Father can alienate family property to pay his personal debts if the following two conditions are fulfilled-

1. The debt is antecedent.
2. The debt should not be *Avyavaharik* i.e. for unethical or immoral purpose

UNIT – II

QUESTION 1 What are the properties/subject matters which are included at the time of partition?

Answer The Partition as a subject under the following heads :

(A) Subject-matter of partition, i.e., the property to be divided;

(B) persons who have a right to partition, and who are entitled to a share on partition;

(C) How partition is effected and mode of partition;

(D) Rules relating to the allotment of shares;

(E) Reopening of partition; and reunion.

As a general rule, the entire joint family property is, and the separate property of coparceners is not, subject of partition. A plaintiff seeking partition must prove the existence of joint family property. But where existence of joint family is not disputed,

every coparcener is entitled to equal share. However, some properties may be held jointly by two or more coparceners, such as when there exists a coparcenary within a coparcenary's', and if a general partition takes place, these properties may also be divided among such coparceners, though other coparceners might claim a share in them. If the joint family is in possession of property held by it as a permanent lease, such property is also available for partition even though lease may be liable to cancellation in certain circumstances. The impartibly estates which constitute joint family property are not liable to partition.

Properties which are not capable of division by their very nature: - Although the general rule is that the entire joint family property is available for partition, yet there may be certain species of joint family property which are, by their very nature, incapable of division, then such properties cannot be divided.

In respect of those properties, three methods of adjustment are available

a. Some of these properties may be enjoyed by coparceners jointly, or by turns, (under this head will fall properties like wells and bridges, temples and idols),
b. Some of these properties may be allotted to the share of coparcener and its value adjusted with the other property allotted to other coparceners, or
c. Some of these properties may be sold and sale proceeds distributed among the coparceners. We may discuss the subject with particular reference to :

(a) the dwelling house, and the family temples and idols, and

(b) the staircases and wells.

Dwelling house—The Smritikars were of the view that the dwelling house should not be partitioned. It was understandable in a predominantly agricultural society. It is understandable even in our modern times when the dwelling house is too small. But the modern law does not consider the rule as sacrosanct.' Ordinarily, in a partition, the court will, if possible, try to effect an arrangement which will leave the dwelling house entirely in the hands of one or more coparceners. If no arrangement which is agreeable to the parties, or which is equitable can be possibly made, the dwelling house may be sold and sale proceeds divided among the coparceners. This alternative is available with respect to any property, the division of which cannot be made equitably and coparceners fail to arrive at a satisfactory arrangement among themselves. This has

been facilitated by the Partition Act, 1893.

Family shrines, temples and idols.—The family shrines, temples and idols constitute such species of joint family property which can neither be divided nor sold. The same may apply to certain sentimental and rare items of property which the family cherishes and which may not be easily subject to any valuation,

The courts have adopted the following courses in respect of family shrines, temples and idols:

(A) The possession of idols or temples or shrines may be given to the senior coparcener (or to a junior member, if he happens to be the most religious and suitable among the others, with the liberty to other coparcensors to have an access to them for the purpose of worship at all reasonable times.

(B) In case the family consists of pujaris who make a living out of the offerings, the court may settle a scheme under which each coparcener worships and takes the offerings by turns.3 The court may also devise a scheme under which it may entrust the worship to one of the coparceners with the direction that offering may periodically be distributed among the coparceners in accordance with their shares.

Staircases, wells, etc.—Staircases, courtyards, wells, tanks, pastures, roads, right of way and the like things are species of property which are, by their nature, incapable of division or valuation. In respect of them, an arrangement has to be devised so that they remain in the common use of all coparceners. Yajmans cannot be said to be property much less movable property, hence it cannot be partitioned.

Deductions and Provisions: - Ordinarily, the joint family property existing at the date when severance of status occurs, subject to what has been said under the preceding head, are available for division. However, before division can take place, the Shastrakars have ordained that out of the joint family properties, provisions should be made for certain liabilities of the family.

These liabilities fall under the following heads:

(1) Debts,

(2) Maintenance,

(3) Marriage expenses of daughters, and

(4) Performance of certain ceremonies and rites.

Debts.—A provision for the payment of outstanding debts binding on the joint family should be made. This will include:

(A)debts taken by the Karta for a purpose binding on the joint family, and

(B) Untainted personal debts of the father, in case joint family consists of the father and sons. No provision is to be made for the individual debts of the coparceners.

Maintenance.—There are certain members of the joint family who do not take a share on partition but have a right to be maintained out of the joint family funds. A provision is to be made for their maintenance. Such persons are

(A) Disqualified coparceners and their immediate dependants such as wife, daughter, son, and, in certain circumstances, illegitimate Sons;

(B) Mother, stepmother, grandmother and other females entitled to be maintained out of the joint family property;

(C) Unmarried sisters till they are married; and

(D) Widowed daughters of deceased coparceners, when they are entitled to be maintained out of the joint family assets.

Marriage.—When the coparcenary consists of father and sons, a provision should be made Tor the marriage expenses of the daughters of the father.' When a coparcenary consists of brothers, they should make provision for the marriage of their unmarried sisters. The scale of expenses must be commensurate with the wealth of the family. In case a coparcener dies before partition, leaving behind an unmarried daughter and no male issue, then a provision should also be made for her marriage. No provision has to be made for the marriage of unmarried coparceners, or for the daughters of other coparceners, since the marriage of such daughters is the responsibility of their respective fathers.

Performance of ceremonies.—If a partition takes place among the brothers, a provision has to be made for the funeral expenses of their mother. Similarly, provision is to be made for the performance of other essential ceremonies, such as upanayana (sacred thread) ceremony.

QUESTION 2 Which coparcener has right to ask partition?

Answer After the Amendment Act of 2005 a daughter since would be a coparcener shall have a right to ask for partition.

As a general rule, both under the Mitakshara and the Dayabhaga schools, every coparcener has a right to partition and every coparcener is entitled to a share on partition. Apart from the coparceners, no one else has a right to partition. No female except the daughter has a right to partition, but, if partition takes place, there are certain females who are entitled to a share. These females are Father's wife, mother and grandmother. Under the Hindu Succession Act, when a coparcener's interest devolves by succession by virtue of the application of Section 6, widow, daughter, mother, predeceased son's daughters, and widow, predeceased son of a predeceased son's widow and daughter, pre-deceased daughter's daughter are the females who are entitled to a share, and they can get their share demarcated by partition. An alienee of coparcener's interest, wherever such an alienation is valid, has also a right to partition. However, when the widow, under the Hindu Women's Right to Property Act, or a female under S. 6, Hindu Succession Act, 1956, or the alienee of coparcener's undivided interest files a suit for partition, such a partition is entirely different than that made at the instance of a coparcener. In such a partition, severance of status does not take place. What happens is this the female or the alienee gets her or his share ascertained, and the property falling to her or his share is separated, while the family continues to be joint in the rest of the property as before.

Father.—The father has not merely a right to partition between himself and his sons but he has also the power to effect a partition among the sons inter Se, This seems to be the last survival of father's absolute powers. The Mitakshara expressly confers this power on the father in respect of not only father's separate property (every person has the power to distribute or give away one's own property as one wishes to do) but also in respect of joint family property.1 No other person has this power. In the exercise of this power, the consent or dissent of sons is immaterial. The father can impose even a partition, partial or total, between his minor sons and himself. However, it is necessary that the father must act bona fide. He should not be unfair to anyone. If the division of property made by the father is unequal, or fraudulent, or vitiated by favoritisms, the partition can be re-opened. The

father cannot exercise this power by will except with the consent of his sons. An unequal partition made by the father may be binding on sons as family arrangement if A acquiesced in by them, Son, grandson and **great-grandson**.— Under the Dayabhaga school, there is no coparcenary consisting of the father and his lineal male descendants and, therefore, sons, grandsons or great- grandsons have no right to partition. On the other hand, under the Mitakshara School, son, son's son and son's son's son have a right to partition. If the father is not joint with anyone of the aforesaid relations, sons have a right of partition against their father.

Son born after partition. —the after born son could get the share of his father alone. The Mitakshara reconciled the conflict by holding that the latter texts lay down the general rule, while the former texts lay down a particular rule applicable to a son in the womb at the time of the partition. On the basis of the Mitakshara formulation, we have now two rules; one in respect of a son in the womb at the time of partition, and the other in respect of a son who comes into the womb after partition.

Son conceived at the time of partition but born after partition.—The Hindu law has for many purposes equated person in the womb to a person in existence. The texts lay down that if the pregnancy is known, the partition should be postponed till the child is born. But if the coparceners do not agree to this, then a share equal to the share of a son should be reserved for the child in the womb. If the child is born a son, he takes it, but if it is born a female, a marriage provision should be made for her out of the share reserved and the surplus, if any, should be distributed among the coparceners. In case no share is reserved for the son in the womb, he can, after his birth, demand reopening of the partition. If pregnancy is not known and consequently no share is reserved, then also the redistribution of the estate should take place after the birth of the son. In other words, in such a case also the after-born son can get partition re-opened. This rule applies to partition between father and sons.

Son begotten and born after partition.—In this case, the Mitakshara's general rule applies. Two situations may arise (a) when the father has taken his share in a partition, and (b) when the father has not taken any share.

Adopted son — The Hindu Adoptions and Maintenance Act, 1956, has codified and reformed Hindu law of adoption. Section 12 of the Act lays down that "an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes."

It is submitted that this provision could be marshalled to establish equality between the adopted son and the aurasa son in partition also.

Son of void marriage or annulled voidable marriage.—since son of a void marriage or annulled voidable marriage is not a coparcener, he cannot sue for partition. The contrary view is not correct.

Illegitimate son—illegitimate sons fall under two categories:

(a) The Dasiputra, or a son born to a concubine (avarudha dasi) exclusively and permanently kept by a Hindu, and

(b) An illegitimate son born of a woman who is not a dasi. Their position is as under:

(1) An illegitimate son of both categories is not entitled to partition or to a share on partition among the first three classes as he is not a coparcener. He is entitled to maintenance.

(2) Among the Sudras, the dasiputra has a somewhat superior position. The Mitakshara states the position thus : "A dasiputra obtains a share by the father's choice or at his pleasure, but after (the death of) the father, if there be sons of wedded wife, let these brothers allow dasiputra to participate for half a share, that is let them give him half [as much as is the amount of one brother's allotment.

Minor coparcener—Hindu law makes no distinction between a major coparcener and a minor coparcener in respect of their rights in the joint family property. As in other matters so in partition, the right of the minor coparceners is precisely the same as those of major coparceners. The minor coparcener has also a right of partition. A suit for partition may be filed on behalf of the minor by his next friend or guardian. It is here that some distinction is made. A minor is a person of immature intellect, and the court acting as parent's patriae has the duty to protect a minor's interest. Thus, if a Karta is squandering the joint family property to the prejudice of the minor coparcener, if he is ill-treating him or discriminating him, or is, on the whole, unfavorably disposed towards the minor, the minor's guardian may deem it proper to effect a partition on behalf of the minor. When the guardian or the next friend files a suit for partition on behalf of the minor, the court has to be satisfied that the partition will be for the benefit of the minor. If the court comes to the finding that the proposed partition is not for the benefit of the minor, the partition will not be allowed.

Alienee—A purchaser of a coparcener's interest in a court sale, or in a private sale

where the coparcener has such a power (In Bombay, Madras and Madhya Pra4esh he has such a power), can demand partition as he steps into the shoes of the coparcener for the purpose of working out his equity. But an alienee's suit for partition does not necessarily mean that the alienating coparcener's interest or other coparcener's interest is severed.

Absent Coparcener — When the coparcener is absent at the time of partition, a share has to be allotted to him. In case no share is allotted to him, he has a right to get the partition re-opened. A coparcener who had already taken a share by way of partition, is not entitled to another share when the rest of the coparceners partition.

QUESTION 3 Which are the family members entitled to take a share if partition takes place?

Answer All the persons discussed under the previous head are those who have a right to partition and who are also entitled to a share if partition takes place either at their instance or at the instance of some other person, There is another category of members of the joint family who have no right to partition but, if partition takes place, they are entitled to share. In this category fall three females father's wife, mother and grandmother.

Father's wife.—if a partition takes place between her husband and his son, the father's wife is entitled to a share equal to the share of a son. She can hold it and enjoy it separately from her husband. If there are more than one wife, each wife is entitled to a share equal to the share of a son. It is immaterial that a wife has no son of her own.' If no share is allotted to her she can get the partition re-opened, Under the Dayabhaga School, she has no such right

Mother.—a widowed mother has a right to take a share equal to the share of a son if a partition takes place among the sons. This right accrues to her only when partition by metes and bounds is made.

Under the Mitakshara School, when partition takes place after the death of the father among the sons, the mother, including a stepmother even if she is childless, is entitled to a share. Mother and stepmother each take a share equal to the share of a son.' Under the

Dayabhaga school, a childless stepmother is not entitled to a share on partition.6 In Mullah's Hindu Law the law is stated thus : 'On a partition between sons by different mothers when more than one mother is alive, the rule is first divide the property in as many shares as there are sons, and then to allot to each surviving mother a share equal to that of each of her sons in the aggregate portion allotted to them,"8 It is submitted that this view is not correct so far as it relates to the Mitakshara law. This proposition should be confined to the Dayabhaga School.

Grandmother.—In the Mitakshara School, the paternal grandmother and step-grandmother are entitled to a share on partition in the following situations

(1) When partition takes place between her grandsons (son's sons), her son being dead, she is entitled to a share equal to the share of a grandson.'

(2) When partition takes place between her son and sons of a predeceased son, she is entitled to a share equal to the share of a grandson."

(3) When partition takes place between her sons and their sons, according to the Allahabad and Bombay High Courts,'2 she is not entitled to a share, but according to the Calcutta and Patna High Courts," she is entitled to the share equal to the share of a grandson.

Coparcener's widow.—It, now seems to be settled law that when two or more widows succeed to the property of their husband (each widow having a right of survivorship), either widow has the right to partition (with or without the consent of the other or others), and put an end to joint status. Even when a father's widow succeeds along with her sons, she has the right to partition. If a partition takes place among the brothers, after the death of the brother, his widow is entitled to a share.

Daughter—In Pachi Krishnamma v. Kunaram, the daughter claimed a share equal to the son in a partition. But she failed to prove this custom. It seems that if such a custom is established she can claim the share, since under the uncodified Hindu Law, custom still overrides the rules of the Hindu Law.

Partition by daughter.—the daughter was not in possession of any property, her father had died leaving behind his self-acquired property which was in possession of other heirs. Daughter should be presumed notionally that she was in possession and enjoyment of Joint family property.

QUESTION 4 How partition effected?

Answer A partition can be effected by the father even during his lifetime among his sons. A partition could also take place by-

(i) Agreement,

(ii) Institution of a suit to that effect,

(iii) Arbitration. It is not necessary for partition that the joint family property is divided by every bit of it. The severance in the joint status could be brought about by any of the above mode and some property could be used by the coparceners as joint tenants.

The following modes of partition are important:—

- **Partition by Mere Declaration**: Partition under the Mitakshara law is severance of joint status and as such it is a matter of individual volition. An unequivocal indication of desire by single member of joint family to separate is sufficient to effect a partition. The filing of a suit for partition is a clear expression of such an intention. The oral or written communications by a coparcener could be enough to sever the joint status but the communication could be withdrawn with the consent of other coparceners and with its withdrawal partition would not take place.

  In **Raghvamma v. Chenchemma**, the Supreme Court laid down that it is settled law that a member of joint Hindu family can bring about a separation in status by a definite declaration of his intention to separate himself from the family and enjoy his share in severalty. Severance in status is brought about by unilateral exercise of discretion. One cannot, however, declare or manifest his mental state in a vaccum. To declare is to make known, to assert to others. 'Others' must necessarily be those affected by the said declaration. Therefore a member of a joint Hindu family seeking to separate himself from others will have to make known his intention to the other members of the family from whom he seeks to separate. The process of manifestation may vary with circumstances.

- **Partition by Will**: Partition may be effected by a coparcener by making a will containing a clear and unequivocal intimation to the other coparceners of his desire to sever himself from joint family or containing an assertion of his right to separate.

  In Potti Laxmi v. Potti Krishnamma, The Supreme Court observed, "Where there is nothing in the will executed by a member of Hindu coparcenary to unmistakably show that

the intention of the testator was to separate from the joint family, the will does not affect severance of status."

- **Conversion to another Faith:** Conversion of a coparcener to any other religion or faith operates as partition of the joint status as between him and other members of the family. The coparcener, who has converted, no longer possesses the right of survivorship as he ceases to be a coparcener from the moment of his conversion and he takes his share in the family property as it stood at the date of his conversion. Reconversion of the convert to Hinduism does not ipso facto bring about his coparcenary relationship in absence of subsequent act or transactions pointing out to a reunion.
- **Marriage under Special Marriage Act, 1954**: Marriage of a Hindu under the Special Marriage Act, 1954 causes severance of joint status.
- **Partition by Agreement:** An unequivocal expression of the desire to use the joint family property in certain defined shares may lead the members of joint family to enter an agreement to effect a partition. The two ideas, the severance of joint status and a de facto division of property are distinct. As partition under the Mitakshara law is effected on severance of joint status, the allotment of shares may be done later. Once the members of joint family or heads of different branches of the coparcenary agree to specification of shares, the same can be treated to result in severance of joint status though the division by metes and bounds may take place later on.
- **Partition by Arbitration**: An agreement between the members of joint family whereby they appoint an arbitrator to arbitrate and divide the property, operates as a partition from the date thereof. The mere fact that no award has been made is no evidence of a renunciation of the intention to separate. Where all the coparceners jointly have referred the matter relating to the partition of their shares in the joint family to an arbitrator, this very fact expressly indicates their intention to separate from joint status. In such cases even if award is not given, their intention is not dissipated.
- **Partition by Father:** The father may cause a severance of sons even without their consent. It is the remnant of the ancient doctrine of 'Patria Potestas'. The father during his lifetime is competent to effect such partition under Hindu law and it would be binding on his sons. It would be binding on the sons not because they have assented to it but because the father has got the power to do so, although this power is subject to certain limitations on the basis of

its utility and general interest of the family. It has to be considered as to whether it is lawful in accordance with the spirit of Hindu law or not.

- **Partition by Suit**: Mere institution of a partition suit disrupts the joint status and a severance of joint status immediately takes place. A decree may be necessary for working out the resultant severance and for allotting definite shares but the status of a plaintiff as separate in estate is brought about on his assertion of his right to separate whether he obtains a consequential judgment or not. Exception: The general rule mentioned above will not apply where a suit is withdrawn before trial by the plaintiff on the ground that he did not want separation any more. In such a case there would be no severance of joint status. Where the suit is proved to be fraudulent transaction resorted to with an intent to create evidence of separation, no severance in the joint status takes place. If the defendant dies and the suit is withdrawn on that ground there is no separation.

QUESTION 5 Discuss the concept of reunion with the help of cases?

Answer To constitute a reunion, there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status. No writing is necessary for a reunion. Persons who were parties to a registered partition deed may reunite by an oral agreement.' Since an agreement to reunite is necessary, coparcener cannot be deemed to be reunited by the mere withdrawal of the unilateral declaration of the intention to separate which had resulted in the division of status. When a reunion is attempted to be established by implied agreement, the conduct must be of an incontrovertible character and the burden lies heavily on the person who asserts reunion.'

The mere fact that parties who have separated, live together or trade together after the partition, is not enough to establish reunion.'

The burden of proof whether reunion has taken place is on the person who alleges reunion. Possession of joint family property at the time of reunion is not necessary.'

Minor's Right to Demand Partition: - A minor coparcener has an equal right with the adult coparceners to demand partition of a JFP But since a minor lacks legal capacity, he has to exercise this right through a next friend/ guardian. When the guardian, etc. files a suit for partition on behalf of the minor, the court has to be satisfied that the partition will be for the minor's benefit.

Partition takes effect from the date of institution of the suit and not from the date of the court's order finding that the partition is for the welfare of the minor.

In Pedasubhajya v Akanamma (AIR 1958 SC 1042) the court observed: "The true effect of a court's decision that the action is beneficial to the minor is not to create in the minor proprio vzgore ('by its own force') a right which he did not possess before but to recognize the right which had accrued to him, when the person acting on his behalf instituted the action. Thus, what brings about the severance in status is the action of the next friend in instituting the suit. Therefore, if minor dies during pendency of the suit, which was so in the present case, the same can be continued by legal representative of minor (mother of the plaintiff)."

It is not necessary that the minor can claim partition only by instituting a suit. He can do so by giving a notice through his friend or guardian. In other words, the partition can be effected out of the court. The suit becomes necessary when the adult coparceners are not willing to effect a partition. It may also be noted that when father partitions, it does not mean that his minor son's interest also gets severed.

Effect of reunion: - There has been some controversy whether the effect of reunion is to restore the parties to the original position or whether it merely establishes unity of possession, the severance of status continuing. It is, now, an established view both under the Mitakshara and Dayabhaga schools that after reunion status quo ante is fully restored. Under the Mitakshara School, both the community of interest and unity of possession are established. A Full Bench of the Madras High Court held that reunited coparceners are not tenants-in-common, but are coparceners with rights of survivorship, inter Se, and that their sons shall be deemed to be coparceners with them. The descendants of the reunited coparceners, born after reunion, are also full-fledged members of the re-united family

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UNIT – III

QUESTION 1 Discuss stridhan with cases?

Section 14 provides that any property possessed by a Hindu female, whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as limited owner.

Sub-section (1) explains further that 'property' in this sub- section includes both movable and immovable property acquired by her by inheritance, partition, gift or will or acquired in lieu of maintenance or arrears of maintenance or acquired by her own skill or exertion or by purchase or by prescription or any other manner whatsoever, and also any property held by her as *stridhan* immediately before the commencement of the said Act. It is immaterial whether it be obtained by inheritance of the deceased husband's separate property or of his share in coparcenary property by virtue of the proviso to section 6of the Act, or by devise of her deceased husband or gift from a relative or any other person, and whether before, at or after her marriage.

But, as expressly provided by sub section (2) of this section, a Hindu female shall not be entitled to hold any property as an absolute owner if she has acquired the same by way of gift, or under a will or any other instrument, or under a decree or order of a civil court or under an award, where the terms of the gift, will or other instrument or the decree order or award prescribe a restricted estate in such property.

Thus Section 14 has abolished women's estate by converting it into stridhan and woman's estate and has converted existing woman's estates into full estates. It has introduced fundamental changes in the traditional Hindu law of property of woman.

The objects of this section are:

- To remove all disability of Hindu woman to acquire and deal with property, that is, all the property that she acquires will be her absolute property.
- To convert existing woman's estate into full estate.

Stridhan And Woman's Estate

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Stridhan means woman's property. In the entire history of Hindu Law, woman's rights to hold and dispose of property has been recognized.

Kinds of Woman's Property

What is the character of property that is whether it is stridhan or woman's estate, depends on the source from which it has been obtained. They are:

(A) **Gifts and bequests from relations**- Such gifts may be made to woman during maidenhood, coverture or widowhood by her parents and their relations or by the husband and his relation. Such gifts may be inter vivos or by will. The Dayabhaga School doesn't recognize gifts of immovable property by husband as stridhan.

(B) **Gifts and bequests from non-relations**- Property received by way of gift inter vivos or under a will of strangers that is, other than relations, to a woman, during maidenhood or widowhood constitutes her stridhan. The same is the position of gifts given to a woman by strangers before the nuptial fire or at the bridal procession. Property given to a woman by a gift *inter vivos* or bequeathed to her by her strangers during coverture is stridhan according to Bombay, Banaras and Madras schools.

(C) **Property acquired by self-exertion, science and arts**-A woman may acquire property at any stage of her life by her own self exertion such as by manual labour, by employment, by singing, dancing etc., or by any mechanical art. According to all schools of Hindu Law, the property thus acquired during widowhood or maidenhood is her stridhan. But, the property thus acquired during coverture does not constitute her stridhan according to Mithila and Bengal Schools, but according to the rest of the schools

(D) **Property purchased with the income of stridhan**- In all schools of Hindu Law it is a well settled law that the properties purchased with stridhan or with the savings of stridhan as well as all accumulations and savings of the income of stridhan, constitute stridhan

(E) **Property purchased under a compromise**- When a person acquires property under a compromise; what estate he will take in it, depends upon the compromise deed. In Hindu Law there is no presumption that a woman who obtains property under a compromise takes it as a limited estate. Property obtained by a woman under a compromise where under she gives up her rights, will be her stridhan. When she obtains some property under a family

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arrangement, whether she gets a stridhan or woman's estate will depend upon the terms of the family arrangement.

(F) **Property obtained by adverse possession- Any** property acquired by a woman at any stage of her life by adverse possession is her stridhan.

(G) **Property obtained in lieu of maintenance-** Under all the schools of Hindu Law payments made to a Hindu female in lump sum or periodically for her maintenance and all the arrears of such maintenance constitute stridhan. Similarly, all movable or immovable properties transferred to her by way of an absolute gift in lieu of maintenance constitute her stridhan.

(H) **Property received in inheritance-** A Hindu female may inherit property from a male or a female; from her parent's side or from husband's side. The Mitakshara constituted all inherited property a stridhan, while the Privy Council held such property as woman's estate.

(I) **Property obtained on partition-** When a partition takes place except in Madras, father's wife mother and grandmother take a share in the joint family property. In the Mitakshara jurisdiction, including Bombay and the Dayabhaga School it is an established view that the share obtained on partition is not stridhan but woman's estate.

Stridhan has all the characteristics of absolute ownership of property. The stridhan being her absolute property, the female has full rights of its alienation. This means that she can sell, gift, mortgage, lease, and exchange her property. This is entirely true when she is a maiden or a widow. Some restrictions were recognised on her power of alienation, if she were a married woman. For a married woman stridhan falls under two heads:

The ***sauadayika*** (gifts of love and affection)- gifts received by a woman from relations on both sides (parents and husband).

The ***non-saudayika***- all other types of stridhan such as gifts from stranger, property acquired by self-exertion or mechanical.

Powers

(A) Power of Management- like the *Karta* of a Hindu joint family she has full power of management. The *Karta* is merely a co-owner of the joint family, there being other coparceners, but she is the sole owner. She alone is entitled to the

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possession of the entire estate and its income. Her power of spending the income is absolute. She need not save and if she saves, it will be her stridhan. She alone can sue on behalf of the estate and she alone can be sued in respect of it.[4] Any alienation made by her proper or improper is valid and binding so long as she lives. She continues to be its owner until the forfeiture of estate by her re-marriage, adoption, death or surrender.

(B) Power of Alienation- She has limited powers of alienation, Like Karta her powers are limited and she can alienate property only in exceptional cases.

She can alienate the property for the following:

Legal necessity (that is, for her own need and for the need of the dependants of the last owner) **For the benefit of estate,** and **For the discharge of indispensable duties** (such as marriage of daughters, funeral rites of her husband, his shrada and gifts to brahmans for the salvation of his soul; that is, she can alienate her estate for the spiritual benefit of the last owner, but not for her own spiritual benefit.)Under the first two heads her powers are more or less the same as that of the Karta. Restrictions on her powers of alienation are an incident of the estate and not for the benefit of the reversioners. As to the power of alienation under the third head, a distinction is made between the indispensable duties for which the entire property could be alienated, and the pious and charitable purposes for which only small portion of property can be alienated. She can make alienation for religious acts, which are not essential or obligatory but are still pious observances which conduce to the bliss of her deceased husband's soul.

Surrender- means renunciation of estate by the female owner. She has the power of renouncing the estate in favour of the nearest reversioner. This means that by a voluntary act she can accelerate the estate of the reversioner by conveying absolutely the estate thereby destroying her own estate. This is an act of self-effacement on her part and operates as her civil death. For a valid surrender, the first condition is that it must be of the entire estate, though she may retain a small portion of her maintenance[9]. The second condition is that it must be in favour of the nearest reversioner or reversioners, in case there are more than one of the same category. Surrender can be made in favour of female

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reversioners also. The third condition is that the surrender must be bonafide and not a device of dividing the estate with the reversioners.

Reversioners- On the death of the female owner the estate reverts to the heir or the heirs of the last owner as if the latter died when the limited estate ceased. Such heirs may be male or female known as reversioners. So long as the estate endures there are no reversioners though there is always a presumptive reversioner who has only a *spas successions* (an exception). The property of the female devolves on the reversioners when her estate terminates on her death, but it can terminate even during her lifetime by surrender.

QUESTION 2 What are the principles of male inheritance under Hindu law?

Answer <u>Succession of A Hindu Male Dying Intestate Under The Hindu Succession Act:</u>

Sections 8 to 13 of the Hindu Succession Act, 1956 lay down the general rules as to the order of succession when a Hindu male dies intestate.

Section 8 lays down certain rules of succession of property of a Hindu male who dies intestate after the commencement of the Act. These rules are to be read along with the Schedule as well as other sections pertaining to the same (Sections 9 to 13).

- **Section 8: General rules of succession in the case of males.** - The property of a male Hindu dying intestate shall devolve according to the rules set out in this chapter:

  (a) firstly, upon the preferential heirs, being the relatives specified in Class I of the Schedule; (b) secondly, if there is no preferential heir of Class I, then upon the preferential heirs being the relatives specified in class II of the Schedule;

  (c) thirdly, if there is no preferential heir of any of the two classes, then upon his relatives being the agnates specified in Section 12; and

  (d) lastly, if there is no agnate, then upon his relatives being the cognates specified in Section 13.

- Thus, Section 8 groups the heirs of a male intestate into four groups and lays down that the property first devolves upon the heirs of Class I of the Schedule.

  They are the son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter,

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widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son and widow of a predeceased son of a predeceased son. All these heirs inherit simultaneously.

If heirs of Class I are not available, the property goes to the enumerated heirs specified in Class II of the Schedule, wherein an heir in a higher entry is preferred over an heir in a lower entry.

Section 9. Orders of succession among heirs in the Schedule. - Among the heirs specified in the Schedule, those in Class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in Class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession. Section 9 explicitly points out the order of succession between the Class I and the Class II heirs and also among the Class II heirs.

Section 10. Distribution of property among heirs in Class I of the Schedule.- The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules:

Rule 1- The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2- The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3- The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4- The distribution of the share referred to in Rule 3-

Section 11. Distribution of property among heirs in Class II of the Schedule.- The property of an intestate shall be divided between the heirs specified in any one entry in Class II of the Schedule so that they share equally. This Section provides that when there are more than one heirs in one entry of Class II, they shall inherit equally. For example, Entry III contains four heirs: (a) the daughter's son's son (b) the daughter's son's daughter (c) the daughter's daughter's son (d) the daughter's daughter's daughter.

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QUESTION 3 What are the class 1, class 2 , agnates and cognates under Hindu succession act 1956?

Answer **Heirs In Class I:**

- The adopted children (sons or daughters) are also to be counted as heirs.
- The children born out of void or voidable marriages are considered to be legitimate by virtue of Section 16, and hence they are entitled to succession.
- The widow is also entitled to property along with the other heirs and in case there is more than one widow, they will inherit jointly one share of the deceased's property, which is to be divided equally among them.
- The widow is entitled to inherit from her deceased husband's property even if she remarries after his death.
- The widow of the predeceased son will inherit with the other heirs. However, her right along with rights of the children of the predeceased son will exist to the extent of the share of the predeceased son, had he been alive. However, if she remarries before the death of the intestate, then she is not entitled to the property.
- The daughter inherits simultaneously along with the other heirs in her individual capacity. Moreover, even if she is married, she is entitled to such property. vii. The mother also succeeds to her share along with other heirs by virtue of Section 14.

  It has been held in Jayalakshmi v. Ganesh Iyer that the unchastity of the mother is no bar as to her inheriting from her son. Even if she is divorced or remarried, she is entitled to inherit from her son. Here the term mother also includes an adoptive mother. Moreover, if there is an adoptive mother, the natural mother has no right to succeed to the property of the intestate. A mother is also entitled to inherit the property of her illegitimate son by virtue of Section 3(i)(j).

Heirs in Class II: All heirs in Class II take cumulatively and not simultaneously, i.e. they succeed in the order of Entries I to IX, as held in the **case of Kumuraswami v. Nanjappa**. An heir in the higher entry excludes all the heirs in the lower entries. ii. The father in Entry I includes an adoptive father. However, a father is not entitled to any property from the illegitimate son as opposed to the

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mother. However, he is entitled to share from children born out of void or voidable marriage under Section 16. Also, a step mother is not entitled to inherit from the step son. iii. All brothers and sisters inherit simultaneously. Here the term 'brother' includes both a full and a half-brother. However, a full brother is always preferred to a half-brother (according to Section 18). Uterine brother is not entitled to the intestate's property. However, when the intestate and his brother are illegitimate children of their mother, they are related to each other as brothers under this entry.

Agnates: A person is said to be the agnate of another if the two of them are related by blood or adoption entirely or wholly through males [Section 3(1) (a)]. What is to be noted is that agnates of the intestate do not include widows of lineal male descendants because the definition of agnates does not include relatives by marriage but only relatives by blood or adoption. Since these widows would be relatives by marriage hence they will not fall under the definition of agnates and hence, they will not be entitled to inherit in this capacity. Moreover, there is no limit to the degree of relationship by which an agnate is recognized. Hence, an agnate however remotely related to the intestate may succeed as an heir. Also, this relationship does not distinguish between male and female heirs. There is also no distinction between those related by full and half blood. However, uterine relationship is not recognized.

Cognates: A person is said to be the cognate of another if the two of them are related by blood or adoption, but not entirely through males [Section 3(1) (c)]. It does not matter if the intervention in the line of succession is by one or more females. As long as there is at least one female intervening, it is a cognate relationship. As in agnate relationship, cognate relationship is also not based on marriage and only on blood or adoption. Hence widow or widowers of those related by cognate relationship do not fall under this category and hence they are not entitled to succeed on this ground.

QUESTION 4 what are the rules of Succession if a Hindu Female Dying Intestate under The Hindu Succession Act?

Answer The great ancient law gives Manu and Baudhyana had described the good woman as a profoundly non-autonomous self, ruled by father in childhood, by husband in youth, by son in old age. In the 19th century debates, on the contrary, she came to be re-envisaged as a person with a core of inviolate autonomy, possessing a cluster of entitlements and immunities, even when the

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family, the community or religion refused to accept them. The demand for the new laws stemmed from an understanding about Indian a necessary, autonomous core of female personhood that the state must underwrite. Under the Hindu law in operation prior to the coming into force of the Act, a woman's ownership of property was hedged in by certain delimitations on her right of disposal and also on her testamentary power in respect of that property. Doctrinal diversity existed on that subject. Divergent authorities only added to the difficulties surrounding the meaning of a term to which it sought to give technical significance. Women were supposed to, it was held and believed, not have power of absolute alienation of property. The restrictions imposed by the Hindu law on the proprietary rights of women depended upon her status as a maiden, as a married woman and as a widow. They also depended upon the source and nature of property. Thought there were some fragmented legislation upon the subject (regard being made to the Hindu Woman's Right to Property Act, 1937), the settled law was still short of granting a status to woman where she could acquire, retain and dispose off the property as similar to a Hindu male. The Hindu Succession Act, 1956 and particularly Section 14 brought substantial change, thus, upon the aspect of a right of a Hindu female over her property and thereby settled the conflict.

Section 15. General rules of succession in the case of female Hindus

The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16,-

Firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

Secondly, upon the heirs of the husband;

Thirdly, upon the mother and father;

Fourthly, upon the heirs of the father; and

Lastly, upon the heirs of the mother.

Notwithstanding anything contained in Sub-Section (1), -

Any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-Section (1) in the order specified therein, but upon the heirs of the father; and

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Any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-Section (1) in the order specified therein, but upon the heirs of the husband.

This Section propounds a definite and uniform scheme of succession in the property of a female Hindu who dies intestate after the commencement of the Act. The rules laid down under this Section are to be read with Section 16. This Section groups the heirs of a female intestate into five categories as laid in sub-Section (1).

However sub-Section (2), similar to the scheme of Section 14, is in the nature of an exception to the general rule as laid in sub-Section (1). The two exceptions are, if a female dies without leaving any issue then,

(i) in respect of property inherited by her from her father or mother, that property will devolve not according to the order laid down as in sub-Section (1) but upon the heirs of her father, and

(ii) in respect of the property inherited by her from her husband or father-in-law, that property will not devolve according to the order laid down in sub-Section (1) but upon the heirs of her husband.

It is important to note that the two exceptions herein referred are confined to only the property inherited from the father, mother, husband and father-in-law of the female and does not affect the property acquired by her by gift or other by other device. The Section has changed the entire concept of stridhan and the mode and manner of acquisition of property by the female, which earlier determined how the property would be inherited, has been changed and amended by the Section. Considering Section 17, it is important to note that Section 16 does not apply to persons governed by Marumakkattayam and Aliyasantana laws.

As specified in the beginning of the sub-Section (1), in the devolution of heritable property of a female intestate, those in a higher entry are preferred to those in a lower entry.

The order of succession, as by the effect of rules under Section 15 can be summarized as follows:

(1) the general order of succession laid down in entries (a) to (e) in sub-Section (1) applies to all property of a female intestate however acquired except in case of property inherited by her from

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her father, mother, husband or father-in-law.

(2) In case of a female intestate leaving a son or a daughter or a child of a predeceased son or of a predeceased daughter, that is leaving any issue, all her property, howsoever acquired, devolves on such issue regardless of the source of acquisition of the property and such issue takes the property simultaneously; and if the husband of the intestate is alive they take simultaneously with him in accordance with entry (a). In such a case, sub-Section (2) does not apply.

(3) In case of a female intestate dying without issue but leaving her husband, the husband will take her property, except property inherited by her from her father or mother which will revert to the Heirs of the father in existence at the time of her death.

In case of female intestate dying without issue property inherited by her from her husband or father-in-law (the husband being dead), will go the heirs of the husband and not in accordance with the general order of succession laid in sub-Section (1).

(4) Case of a female intestate dying without issue property inherited by her from her father or mother will revert to the heirs of the father in existence at the time of her death and not in accordance with the general order of succession laid down in sub-Section (1).

Section 16. Order of succession and manner of distribution among heirs of a female Hindu.-

The order of succession among the heirs referred to in Section 15 shall be and the distribution of the intestate's property among those heirs shall take place according, to the following rules, namely:

Rule 1. - Among the heirs specified in sub-Section (1) of Section 15, those in one entry shall be preferred to those in any succeeding entry and those including in the same entry shall take simultaneously.

Rule 2.- If any son or daughter of the intestate had predeceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the intestate's death.

Rule 3. - The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-Section (1) and in sub-Section (2) to Section 15 shall be in the same order and according to the same rules as would have applied if the property would have been the father's, the mother's or the husband's as the case maybe, and

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such person had died intestate in respect thereof immediately after the intestate's death.

Rule 1 explicitly declares that among the heirs enumerated in entries (a) to (e) of Section 15, those heirs referred to in prior entry are to be preferred to those in any subsequent entry and those included in the same entry are to succeed simultaneously.

Rule 2 states that in case of the children of a predeceased son or daughter, they shall not take per capita with the son and daughter of the intestate but shall take per stripes i.e. the children and the predeceased son or daughter shall succeed to the property of the intestate as if the predeceased son or daughter was alive at the time of inheritance.

Rule 3 is applicable only when succession is in terms of entry (b), (d) or (e) of Section 15(1). This rule 3 is to be invoked when under rule 1 the heirs of the husband or the father or the mother are to be ascertained for purpose of distribution of property.

QUESTION 5 what is testamentary succession?

Answer Everybody likes to make sure that the life he has led has been meaningful and is concerned about his property after his death. A person can ensure as to how his property should devolve and to whom it shall devolve, after his death, through a Will. If a person dies without leaving behind his Will, his property would devolve by way of law of intestate succession and not testamentary succession (i.e. in accordance to the Will) Hence, it is preferable that one should make a Will to ensure that one's actual intension is followed and the property is devolved accordingly. Will is an important testamentary instrument through which a testator can give away his property in accordance to his wishes. The importance and impact of a will can be seen through the controversy that arose with regards to the will of Priyamwada Birla, widow of M.P.Birla, which decided the fate of the Birla group of Industries.

The origin and growth of Will amongst the Hindus is unknown. However Wills were well known to the Mohammedans and contact with them during the Mohammedan rule, and later on with the European countries, was probably responsible for the practice of

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substituting informal written or oral testamentary instruments with formal testamentary instruments. The Indian Succession Act, 1925, consolidating the laws of intestate (with certain exceptions) and testamentary succession supersedes the earlier Acts, and is applicable to all the Wills and codicils of Hindus, Buddhists, Sikhs and Jainas throughout India. The Indian Succession Act, 1925, does not govern Mohammedans and they can dispose their property according to Muslim Law.

QUESTION 6 what are the rules of succession under Muslim law?

Answer In Islamic law **distinction between the joint family property and the separate property never existed.** Since under Muslim Law all properties devolve by succession, **the right of heir-apparent does not come into existence till the death of the ancestor**, and then alone the property vests in the heirs.

The four basic principles of the pre-Islamic law of succession were:

(A) The nearest male agnates succeeded to the total exclusion of remoter agnates. E.g., if a Muslim died leaving behind a son and a son of a predeceased son, then the son inherited the entire property and the grand son was totally excluded.

(B) Females were excluded from inheritance; so were cognates.

(C) The descendants were preferred over ascendants, and ascendants over collaterals. E.g., in the presence of a son father could not succeed. Similarly in the presence of father, brother could not inherit.

(D) Where there were more than one agnates of equal degree, all of them inherited the property and shared it equally.

- **Islamic or Koranic Principles of Succession**
- **Principles of customary law of succession:**

- the husband or wife was made an heir
- females and cognates were made competent to inherit
- parents and ascendants were given the right to inherit even when there were male descendants and The newly created heirs are given specific shares.

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- The newly created heirs inherit the specified share along with customary heirs and not to their exclusion.

It is necessary notice that **Koran did not create new structure of law of succession but merely amended** and modified customary law of succession as to bring it in conformity with the Islamic philosophy.

Those heirs **who were not included earlier were now included** and given specified share.

Koranic principles of customary law of inheritance has led to **divergence of opinions among the Shias and the Sunni**.

Sunnis or Hanafis have developed or altered the pre-Islamic customs in specific manner mentioned in the Koran.

Shias on the other hand have raised up a completely altered set of principles in-building both principles of pre-Islamic customs and principles expressed in Koran.

Doctrine of Representation

Under Hindu law the doctrine of representation determines the quantum of share of an heir or a group of heirs.

The per stripes rule means that where there are branches; division of property takes place according to the each branch and then the branches bifurcate the share according to **per capita rule.**

Hanafis law or Sunni law does not recognize the doctrine of representation.

Shia law also does not recognize this doctrine. But it recognizes this doctrine for a second purpose i.e. for determining quantum of shares in certain cases.

Sunni law

Sunnis interpreted the principles of customary laws and principles of Koran in such a manner to **blend them harmoniously.**

The **customary heirs were not depraved of their right** of inheritance in the estate of the deceased as only a portion of the estate was given to the heirs enumerated in the Koran.

The basic structure of the customary succession that is the rule of **agnatic preference was retained.**

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The Koranic succession takes the agnatic principles further by recognizing the **right of female agnates.**

The rule was that the **male agnate takes twice a share of the female agnate.**

That most of the newly created heirs are **the near blood relations of the deceased who were ignored in the customary law.**

The **Koranic imposition of new heirs does not deprive the male agnates of their inheritance**, but their rights are liable to be affected if there exists a Koranic heir.

Under the Hanafis law the general rule of distribution of the estate **is per capita and not per stripes.**

1. **Who are the heirs of the deceased?**
2. **What share are the heirs entitled to?**

Categories of Heirs

Under the sunni law the heirs of the deceased Muslim male or female falls under the same category i.e.

1. **The sharers**
2. **The residuaries**
3. **The distant kindered**

Distribution of Assets among Sharers and Residuaries

- Among the heirs, **the sharers are to be given share first.**
- **The residue is then is to be distributed among the residuaries.**
- In the **absence of sharers the residuaries take the entire estate.**
- In the **absence of both the estate will go to the distant kindered.**
- Further, in **absence of all of them the estate goes to the State.**
- The **general rule of preference is that nearer heir excludes the remoter one.**
- In Sunni inheritance law there are **five heirs** who are always entitled to a share they are **Husband, wife, child, father and mother.** They are called **primary heirs**.

Distribution of Assets among Distant Kindred

- **When among the claimants there are descendants, ascendants and collaterals** then

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descendant's distant kindred are preferred over ascendants and collateral.

- When only descendants are claimants then **one having fewer degrees of descent will be preferred**.

UNIT – IV

QUESTION 1 what is Gift? How a Muslim person can gift the property? What are the condition of valid gift?

Answer

Declaration of Gift: Declaration is a statement which signifies the intention of the transferor that he intends to make a gift. The person who declares that he is transferring his property through a gift is called donor. The person in whose favour the gift is made is called donee. •Declaration is, therefore, the manifestation of the intention of the donor to divest his ownership in the property and to vest it in the donee.

Oral or Written: A Hiba may be made orally. Writing is not necessary. The donor may declare the gift of any kind of property, of any valuation, either orally or write a deed. Under Muslim Law, writing is not necessary for the validity of gift whether property is movable or immovable. Section 123 of the Transfer of Property Act which provides that gift of immovable property must be in writing and registered, is not applicable to gift made by Muslims.

In Ilahi Samsuddin v. Jaitunbi Maqbul. The Supreme Court held that under Muslim Law, declaration as well as acceptance of gift may be oral whatever may be the nature of property gifted. Hibanama:- Where a gift is made in writing, it is called Hibanama. This gift-deed (Hibanama) need not be on stamp- paper and also need not be attested or registered.

Express Declaration: The declaration must be made in clear words. A declaration of gift in ambiguous words is void. That is to say, the declaration must expressly suggest that the donor is relinquishing his ownership completely. In Maimuna Bibi v. Rasool Mian, The Patna High Court has held that while oral gift is permissible under Muslim law, to constitute a valid gift it is

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necessary that donor should divest himself completely of all ownership and dominion over subject (i.e., property) of gift.

Free Consent: The declaration for the gift must be made voluntarily. Consent of the donor in making the gift must be a free consent. If the donor makes the gift under threat of force, coercion, undue influence or fraud, the gift is not valid. By voluntary declaration we also mean that the donor has fully understood the nature of the transaction and there was no external influence in his taking the decision for making the gift. Where the donor claims that he or she had declared or signed the gift- deed without understanding the consequences, the act of donor cannot be said to be a free act and the gift is void.

Bona fide Intention: Gifts must be made honestly, i.e. with a bona fide intention to give the property to the donee. A declaration of gift with an intention to defraud the creditors of the donor is voidable at the option of such creditors. However, the mala fide or fraudulent (dishonest) intention of the donor cannot be presumed only by the fact that he incurs certain debts. The mala fide intention must be fully established.

Competency of the Donor: Declaration of a gift is made by the donor. Donor must be a competent person. Every Muslim is competent to make a gift if he has capacity as well as the right. Capacity: For a valid Hiba, the donor must be (i) adult (ii) of sound mind, and (iii) Muslim.

Adult: At the time of making the gift the donor must be adult. He must have attained the age of majority i.e., must be of eighteen years. If a minor is under the supervision of the Court of Wards, the majority is attained on the completion of twenty-one years. Thus, a Muslim becomes major for making a gift only upon attaining the age of eighteen or twenty-one years, as the case may be. A gift by a minor is void.

Sound Mind: The donor must also be of sound mind. An insane person has no capacity to understand the legal implications of his or her activities. However, a declaration of gift by a person of unsound mind during 'lucid interval' is lawful and the gift is valid**.**

QUESTION 2 Discuss Muslim will with the help of cases?

Answer When a Muslim dies there are four duties which need to be performed. These are:

1. payment of funeral expenses

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2. payment of his/her debts
3. execution his/her will
4. distribution of the remaining estate amongst the heirs

The Islamic will is called ***al-wasiyya***.

A will is a transaction which **comes into operation after the testator's death**. The will is executed **after payment of funeral expenses and any outstanding debts**.

The one who makes a will (***wasiyya***) is called a **testator** (***al-musi***).

The one on who gets some property in a will is made is generally referred to as a **legatee** (***al-musa lahu***). Technically speaking the term "testatee" is perhaps a more accurate translation of *al-musa lahu.*

A document embodying the will is called the ***wassiyatnama***.

Under **Section 2(h) of the Indian Succession Act, 1925**, a will has been defined as: "A will is the legal declaration of the intention of the testator, with respect to his property which he desires to be carried into effect after his death".

A will from a Muslim's point of view is a divine institution, since its exercise is regulated by Quran. It offers to the testator the means of correcting to certain extend the law of succession, and of enabling some of those relatives who are excluded from inheritance to obtain a share in his goods and of recognizing the services to him by a stranger, or the devotion to him in his last moments.

Under Muslim Law a will may be made **either orally or in writing.** It is not necessary that a testamentary disposition should be in writing. If it is made orally, no particular form of words are required, so long as the intention of the testator is clear.

Muslim Law of will and the Indian Succession Act, 1925

1. The provisions of the Indian Succession Act, 1925 are not applicable to Muslims. However, a Muslim cannot claim immunity if his marriage was held under the Special Marriage Act, 1954. In such a case the provisions of **the Indian Succession Act, 1925** shall be applicable even though the will was made before or after the marriage. Where a will is governed by Muslim Law it will be subject to the provisions of the **Shariat Act, 1937**.

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Importance of the Wassiyat

The importance of the Islamic will (*wasiyya*) is clear from the following two *hadith*:

"It is the duty of a Muslim who has anything to bequest not to let two nights pass without writing a will about it." (Sahih al-Bukhari)

"A man may do good deeds for seventy years but if he acts unjustly when he leaves his last testament, the wickedness of his deed will be sealed upon him, and he will enter the Fire. If, on the other hand, a man acts wickedly for seventy years but is just in his last will and testament, the goodness of his deed will be sealed upon him, and he will enter the Garden." (Ahmad and Ibn Majah)

Requisites of a valid will

The essential requisites of a valid Will under Mohammedan Law are as follows:-

1. The testator must **be competent to make the will**.
2. The **legatee must be competent to take the legacy** or bequeath.
3. **The subject of the bequeath must be a valid one.**
4. The bequeath must **be within the limits imposed** on the testamentary power of a Muslim.

Appointment of the Executer of the Will.

Testator & his competence

- Every adult Muslim of **sound mind** can make a Will.
- A **minor or a lunatic** are not competent to execute a will.
- But a will is made by a minor it may be **subsequently be validated by his ratification** on attaining majority.
- A **bequeath made by a person of unsound mind cannot be deemed valid,** if he becomes of sound mind subsequently**. Also in the converse case**, a bequeath made by a person, while of sound mind, becomes invalid if the testator is permanently disabled by unsoundness of mind.
- According to Muslim Law the **age of majority is 15 years** and minority terminated at that age. But this rule is **not applicable to wills in India** since the age of majority, in case of will is governed by the Indian Majority Act and not by personal Laws.

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- According to the **Indian Majority Act** the minority terminates at the age of **18 years**, but **if the minor is one whose guardian has been appointed by the court,** the minority will terminate at the age of **21 years**. Thus a person of 18 years or 21 years, as the case may be, is competent to make a will.
- Under **Sunni Law the will of a person committing suicide is valid.** Under **Shia Law** a will made by a person who has done any act towards the commission of suicide **is not valid**, but if the will is made before the doing of any act towards the commission of suicide, it is valid.

Legatee & his competence

- Any **person capable of holding property**, may be the legatee under a will. Thus **sex, age, creed or religion are no bar** to the taking of a legacy.
- The legatee must be **capable of owning the bequeath**.
- No one can be made the beneficiary owner of the estate against his will. Therefore, the title to the subject of the bequeath can only be completed **with the express or implied assent of the legatee** after the death of the testator.
- **Acceptance or rejection of a bequeath by the legatee is only relevant after the death of the testator** and not before. Generally speaking once a legatee has accepted or rejected a bequeath he cannot change his mind subsequently.
-
- **Types of bequeath**
- Bequeath may be made **for the benefit of an Institution**.
- Bequeath can be made **in favour of a non-Muslim.**
- According to **Sunni Law** a bequeath to a person who has **caused the death of the testator** whether intentionally or unintentionally is **invalid.** According to **Shia Law** it is valid if the death is unintentionally caused or accidently caused.
- Under **Sunni law** a child who is **in womb but born within 6 months** of the date of making the will is treated as a legatee in existence and hence is competent to take the legacy. But under the **Shia law** a bequeath to a child in womb is valid if it is born in the longest period of gestation i.e. 10 months.

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- A bequeath **for the benefit of a religious or charitable object** is also valid.

Subject of Will & its validity

The following are the requisites of a valid will:-

1. The property must be **capable of being transferred**
2. The property **must be in existence at the time of the testator's death**. It is not necessary that it should be in existence at the time of the making of the will
3. The **testator must be the owner of the property** to be disposed by will.

Testamentary Power and its limitations

Under the Testamentary Capacity the power of the Muslim testator is limited in two ways:

- **Limitation as regards the person**

The testator **cannot make a bequest in favour of a legal heir under traditional Sunni Muslim law.** However, some Islamic countries do allow a bequest in favour of a legal heir providing the bequest does not exceed one-third.

According to **Shia Law** a testator may give a legacy to an heir so long as it does not exceed 1/3 of his estate. Such a legacy is valid without the consent of the other heirs.

- **Limitation as regards the property**

The general rule with regard to extend of property that may be disposed of by will is that **no Muslim can bequeath more than 1/3 of his net estate unless the other heirs consent to the bequeath or there are no legal heirs at all**. A Muslim can bequeath 1/3 of his estate only after payment of the funeral charges and debts.

Appointment of the Executor of the Will

The executor **(*al-wasi Al- mukhtar*)** of the will is the manager of the estate appointed by the testator. The executor has to carry out the wishes of the testator according to Islamic law, to watch the interests of the children and of the estate. The authority of the executor should be specified. **Hanafi Law** state that the executor should be trustworthy, truthful and must be just. The Hanafi Law considers the appointment of a **non-Muslim executor to be valid**. The testator may appoint **more than one executor**, **male or female**. The testator should state if each executor can act independently of the other executor(s). If one starts acting as an executor, one will be

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regarded as having accepted the appointment, both in Islamic and in English law.

Revocation of will

Muslim Law confers on a testator unfettered right to revoke his will. He may revoke it any time. The revocation may be either:-

1. Express revocation; or
2. Implied revocation

QUESTION 3 Discuss the concept of Wakf with cases?

Answer Literal meaning of Wakf is detention, stoppage, or tying up as observed **in M Kazim vs A Asghar Ali AIR 1932**. Technically, it means a dedication of some specific property for a pious purpose or secession of pious purposes. As defined by Muslim jurists such as Abu Hanifa, Wakf is the detention of a specific thing that is in the ownership of the waqif or appropriator, and the devotion of its profits or usufructs to charity, the poor, or other good objects.

Wakf Act 1954 defines Wakf as, "Wakf means the permanent dedication by a person professing the Islam, of any movable or immovable property for any purpose recognized by Muslim Law as religious, pious, or charitable."

Essentials of a valid Wakf

Permanent Dedication of any property - There are actually three aspects in this requirement. There must be a dedication, the dedication must be permanent, and the dedication can be of the property. There is no prescribed form of dedication. It can be written or oral but it must be clear to convey the intention of dedication. According to Abu Yusuf, whose word is followed in India, mere declaration of dedication is sufficient for completion of Wakf. Neither delivery of possession or appointment of Mutawalli is necessary.

The dedication must be permanent. A temporary dedication such as for a period of 10 yrs or until death of someone is invalid.

The subject of Wakf can be any tangible property (mal) which can used without being consumed. In Abdul Sakur vs Abu Bakkar 1930, it was held that there are no restrictions as long as the property can be used without being consumed and thus, a valid Wakf can

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be created not only of immovable property but also of movable property such as shares of a company or even money. Some subjects that Hanafi law recognizes are immovable property, accessories to immovable property, or books.

The subject of the Wakf must be in the ownership of the dedicator, wakif. One cannot dedicate someone else's property.

By a Muslim - A Wakf can only be created by a Muslim. Further, the person must have attained the age of majority as per Indian Majority Act and should be of sound mind.

For any purpose recognized by Muslim Law - The purpose is also called the object of Wakf and it can be any purpose recognized as religious, pious, or charitable, as per Muslim Law. It is not necessary that a person must name a specific purpose. He can also declare that the property may be used for any welfare works permitted by Shariat.

In Zulfiqar Ali vs Nabi Bux, the settlers of a Wakf provided that the income of certain shops was to be applied firstly to the upkeep of the mosque and then the residue, if any, to the remuneration of the mutawalli. It was held to be valid however, it was also pointed out that if a provision of remuneration was created before the upkeep of the mosque, it would have been invalid.

The following are some of the objects that have been held valid in several cases - Mosques and provisions of Imam to conduct worship, celebrating birth of Ali Murtaza, repairs of Imambaras, maintenance of Khanqahs, burning lamps in mosques, payment of money to fakirs, grant to an ideas, grant to colleges and professors to teach in colleges, bridges and caravan sarais.

In Kunhamutty vs Ahman Musaliar AIR 1935, Madras HC held that if there are no alms, the performing of ceremonies for the benefit of the departed soul is not a valid object.

Some other invalid objects are - building or maintaining temple or church, providing for the rich exclusively, objects which are uncertain.

Creation of Wakf

Muslim law does not prescribe any specific way of creating a Wakf. If the essential elements as described above are fulfilled, a Wakf is created. Though it can be said that

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a Wakf is usually created in the following ways -

a. **By an act of a living person (inter vivos)** - when a person declares his dedication of his property for Wakf. This can also be done while the person is on death bed (marj ul maut), in which case, he cannot dedicate more than 1/3 of his property for Wakf.
b. **By will** - when a person leaves a will in which he dedicates his property after his death. Earlier it was thought that Shia cannot create Wakf by will but now it has been approved.
c. **By Usage** - when a property has been in use for charitable or religious purpose for time immemorial, it is deemed to belong to Wakf. No declaration is necessary and Wakf is inferred.

QUESTION 4 what are the Kinds of Wakfs?

A Wakf can be classified into two types - Public and Private.

As the name suggests, a public Wakf is for the general religious and charitable purposes while a private Wakf is for the creators own family and descendants and is technically called Wakf alal aulad.

It was earlier considered that to constitute a valid wakf there must be a complete dedication of the property to God and thus private wakf was not at all possible. However, this view is not tenable now and a private wakf can be created subject to certain limitation after Wakf Validating Act 1913. This acts allows a private wakf to be created for one's descendants provided that the ultimate benefits are reserved for charity. Muslim Law treats both public and private wakfs alike. Both types of wakf are created in perpetuity and the property becomes inalienable.

Wakf alal aulad (can a wakf be created for one's family?)

Wakf on one's children and thereafter on the poor is a valid wakf according to all the Muslim Schools of Jurisprudence. This is because, under the Mohammedan Law, the word charity has a much wider meaning and includes provisions made for one's own

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children and descendants. Charity to one's kith and kin is a high act of merit and a provision for one's family or descendants, to prevent their falling into indigence, is also an act of charity. The special features of wakf-alal- aulad is that only the members of the wakif's family should be supported out of the income and revenue of the wakf property. Like other wakfs, wakf alal-aulad is governed by Muhammad an Law, which makes no distinction between the wakfs either in point of sanctity or the legal incidents that follow on their creation. Wakf alal aulad is, in the eye of the law, Divine property and when the rights of the wakif are extinguished, it becomes the property of God and the advantage accrues to His creatures. Like the public wakf, a wakf-alal-aulad can under no circumstances fail, and when the line of descendant becomes extinct, the entire corpus goes to charity.

The institution of private wakf is traced to the prophet himself who created a benefaction for the support of his daughter and her descendants and, in fact, placed it in the same category as a dedication to a mosque.

Thus, it is clear that a wakf can be created for one's own family. However, the ultimate benefit must be for some purpose which is recognized as pious, religious or charitable by Islam.

Quasi-public Wakf

Sometimes a third kind of wakf is also identified. In a Quasi-public wakf, the primary object of which is partly to provide for the benefit of particular individuals or class of individuals which may be the settler's family, and partly to public, so they are partly public and partly private.

Contingent Wakf

A wakf, the creation of which depends on some event happening is called a contingent wakf and is invalid. For example, if a person creates a wakf saying that his property should be dedicated to god if he dies childless is an invalid wakf. Under Shia law also, a wakf depending on certain contingencies is invalid.

In Khaliluddin vs Shri Ram 1934, a Muslim executed a deed for creating a wakf, which contained a direction that until payment of specified debt by him, no proceeding under

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the wakfnama shall be enforceable. It was held that it does not impose any condition on the creation of the wakf and so it is valid.

Conditional Wakf

If a condition is imposed that when the property dedicated is mismanaged, it should be divided amongst the heirs of the wakf, or that the wakif has a right to revoke the wakf in future, such a wakf would be invalid. But a direction to pay debts, or to pay for improvements, repairs or expansion of the wakf property or conditions relating to the appointment of Mutawalli would not invalidate the wakf. In case of a conditional wakf, it depends upon the wakif to revoke the illegal condition and to make the wakf valid, otherwise it would remain invalid.

Completion of wakf

The formation of a wakf is complete when a mutawalli is first appointed for the wakf. The mutawalli can be a third person or the wakif himself. When a third person is appointed as mutawalli, mere declaration of the appointment and endowment by the wakif is enough. If the wakif appoints himself as the first mutawalli, the only requirement is that the transaction should be bona fide. There is no need for physical possession or transfer of property from his name as owner to his name as mutawalli.

In both the cases, however, mere intention of setting aside the property for wakf is not enough. A declaration to that effect is also required.

In Garib Das vs M A Hamid AIR 1970, it was held that in cases where founder of the wakf himself is the first mutawalli, it is not necessary that the property should be transferred from the name of the donor as the owner in his own name as mutawalli.

Shia law -

Delivery of possession to the mutawalli is required for completion when the first mutawalli is a third person.

Even when the owner himself is the first mutawalli, the character of the ownership must be changed from owner to mutawalli in public register.

Legal Consequences (Legal Incidents) of Wakf

Once a wakf is complete, the following are the consequences -

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Dedication to God - The property vests in God in the sense that nobody can claim ownership of it. In Md. Ismail vs Thakur Sabir Ali AIR 1962, SC held that even in wakf alal aulad, the property is dedicated to God and only the usufructs are used by the descendants.

Irrevocable - In India, a wakf once declared and complete, cannot be revoked. The wakif cannot get his property back in his name or in any other's name.

Permanent or Perpetual - Perpetuality is an essential element of wakf. Once the property is given to wakf, it remains for the wakf forever. Wakf cannot be of a specified time duration. In Mst Peeran vs Hafiz Mohammad, it was held by Allahbad HC that the wakf of a house built on a land leased for a fixed term was invalid.

Inalienable - Since Wakf property belongs to God, no human being can alienate it for himself or any other person. It cannot be sold or given away to anybody.

Pious or charitable use - The usufructs of the wakf property can only be used for pious and charitable purpose. It can also be used for descendants in case of a private wakf.

Extinction of the right of wakif - The wakif loses all rights, even to the usufructs, of the property. He cannot claim any benefits from that property.

Power of court's inspection - The courts have the power to inspect the functioning or management of the wakf property. Misuse of the property of usufructs is a criminal offence as per Wakf Act.1995.

Question 5 Revocation of Wakf?

In India, once a valid wakf is created it cannot be revoked because nobody has the power to divest God of His ownership of a property. It can neither be given back to the wakif nor can it be sold to someone else, without court's permission.

A wakf created inter vivos is irrevocable. If the wakif puts a condition of revocability, the wakf is invalid. However, if the wakf has not yet come into existence, it can be canceled. Thus, a testamentary wakf can be canceled by the owner himself before his death by making a new will. Further, wakf created on death bed is valid only up till 1/3 of the wakif's property. Beyond that, it is invalid and the property does not go to wakf but goes to heirs instead.

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Mutawalli

Mutawalli is nothing but the manager of a wakf. He is not the owner or even a trustee of the property. He is only a superintendent whose job is the see that the usufructs of the property are being utilized for valid purpose as desired by the wakif. He has to see that the intended beneficiaries are indeed getting the benefits. Thus, he only has a limited control over the usufructs.

In Ahmad Arif vs Wealth Tax Commissioner AIR 1971, SC held that a mutawalli has no power to sell, mortgage, or lease wakf property without prior permission of the court or unless that power is explicitly provided to the mutawalli in wakfnama.

Who can be a mutawalli - A person who is a major, of sound mind, and who is capable of performing the functions of the wakf as desired by the wakif can be appointed as a mutawalli. A male or female of any religion can be appointed. If religious duties are a part of the wakf, then a female or a non-muslin cannot be appointed.

In Shahar Bano vs Aga Mohammad 1907, Privy council held that there is no legal restriction on a woman becoming a mutawalli if the duties of the wakf do not involve religious activities.

Who can appoint a mutawalli - Generally, the wakif appoints a mutawalli. He can also appoint himself as a mutawalli. If a wakf is created without appointing a mutawalli, in India, the wakf is considered valid and the wakif becomes the first mutawalli in Sunni law but according to Shia law, even though the wakf remains valid, it has to be administered by the beneficiaries. The wakif also has the power to lay down the rules to appoint a mutawalli. The following is the order in which the power to nominate the mutawalli transfers if the earlier one fails -

A. Founder
B. executor of founder
C. mutawalli on his death bed
D. the court, which should follow the guidelines -

#. it should not disregard the directions of the settler but public interest must be given more importance.

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#. preference should be given to the family member of the wakif instead of utter stranger.

Powers of a mutawalli - Being the manager of the wakf, he is in charge of the usufructs of the property. He has the following rights -

He has the power to utilize the usufructs as he may deem fit in the best interest of the purpose of the wakf. He can take all reasonable actions in good faith to ensure that the intended beneficiaries are benefited by the wakf. Unlike a trustee, he is not an owner of the property so he cannot sell the property. However, the wakif may give such rights to the mutawalli by explicitly mentioning them in wakfnama.

He can get a right to sell or borrow money by taking permission from the court upon appropriate grounds or if there is an urgent necessity.

He is competent to file a suit to protect the interests of the wakf.

He can lease the property for agricultural purpose for less than three years and for non-agricultural purpose for less than one year. He can exceed the term by permission of the court.

He is entitled to remuneration as provided by the wakif. If the remuneration is too small, he can apply to the court to get an increase.

Removal of a mutawalli -

Generally, once a mutawalli is duly appointed, he cannot be removed by the wakif. However, a mutawalli can be removed in the following situations -

By court -

if he misappropriates wakf property.

even after having sufficient funds, does not repair wakf premises and wakf falls into disrepair.

knowingly or intentionally causes damage or loss to wakf property. In Bibi Sadique Fatima vs Mahmood Hasan AIR 1978, SC held that using wakf money to buy property in wife's name is such breach of trust as is sufficient ground for removal of mutawalli.

he becomes insolvent.

By wakf board - Under section 64 of Wakf Act 1995, the Wakf board can remove mutawalli from his office under the conditions mentioned therein.

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By the wakif - As per Abu Yusuf, whose view is followed in India, even if the wakif has not reserved the right to remove the mutawalli in wakf deed, he can still remove the

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CONSTITUTION LAW (204)

Que1 : What are the remedies available in the Constitution against infringement of Fundamental Right.

ANS. : There is a right in India which states that a person can move to Supreme court if he/she wants to get their fundamental rights protected. This right comes under article 32 for Supreme court an article 226 for the high court. It is known as the right to constitutional remedies. In this right, the Supreme court, as well as high court, is given the power to instill the fundamental rights. Furthermore, the power can be issued by local courts also to extend the rights. Although, there is one act which comes under the military law known as the court-martial which is exempted from this right.

Right to constitutional remedies

- Article 32 is known as the "spirit of the constitution and exceptionally heart of it by Dr. Ambedkar. Preeminent Court has included it in fundamental structure regulation. Further, it is clarified that privilege to move to Supreme Court can't be suspended with the exception of generally given by the Constitution. This suggests this privilege suspended amid a national crisis under article 359.
- Article 32 makes the Supreme Court the safeguard and underwriter of the major rights. Further, the capacity to issue writs goes under the original jurisdiction of the Apex Court. This implies an individual may approach SC straightforwardly for a cure as opposed to by appeal.
- Article 32 can be used only to get a remedy for fundamental rights enshrined in Article 12-35. It isn't there for some other legal right for which diverse laws are accessible.

What is WRIT?

A precept in writing, couched in the form of a letter, running in the name of the king, president, or state, issuing from a court of justice, and sealed with its seal, addressed to a sheriff or other officer of the law, or directly to the person whose action the court desires to

command, either as the commencement of a suit or other proceeding or as incidental to Its progress, and requiring the performance of a specified act, or giving authority and commission to have it done. For the names and description of various particular writs, see the following titles.

- In old English law . An Instrument In the form of a letter; a letter or letters of attorney. This is a very ancient sense of the word.
- In the old books, "writ" is used as equivalent to "action;" hence writs are sometimes divided into real, personal, and mixed.
- Writing; an instrument in writing, as a deed, bond, contract, etc.

Comparative Analysis of Article 32 & 226

Article 32 isn't to be conjured for encroachment of an individual right of the agreement (contract), nor is to be summoned for unsettling questions which are fit for transfer under other laws. **Article 226(1)** of the Constitution of India, on the other hand says," Notwithstanding anything in Article 32, every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

As is obvious from the uncovered dialect, this Article ensures a person to move the High Court for implementation of the fundamental rights and also for implementation of some other lawful right. Article 226 gives wide powers on the High Courts. It fills in as a major repository of legal capacity to control organization. Its capacity under Article 226 can't be diminished by enactment. In this manner, forces of High Courts gave under Article 226 are more extensive when contrasted with forces presented on the Supreme Court under Article 32 of the Constitution of India.

Types of WRITS

- **Habeas Corpus:**

- **Meaning:** This writ is in the nature of an order calling upon the person who has detained another to produce the latter before the Court, in order to let the Court, know on what ground he has been confined and to set him free if there is no legal justification for the confinement. In **Rudul Sah v. State of Bihar** added a new dimension to judicial activism and raised a set of vital questions, such as, liability of State to compensate for unlawful detention, feasibility of claiming compensation from the State under Article 32 for wrongful deprivation of fundamental rights, propriety of the Supreme Court passing an order for compensation on a habeas corpus petition for enforcing the right to personal liberty.
- **The General Principle:** The principle on which Habeas Corpus function is that a person illegally detained in confinement without legal proceedings is entitled to seek the remedy of habeas corpus.
- **Nature of Writs:** While deciding whether Habeas Corpus writs are civil or criminal in nature, it was held in **Narayan v. Ishwarlal** that the court would rely on the way of the procedures in which the locale has been executed.

How a Writ of Habeas Corpus is filed?

1. An application for habeas corpus can be made by any person on the behalf of the prisoner/detenu as well as the prisoner/detenu himself.
2. Even a letter to the judge mentioning illegalities committed on prisoners in jail can be admitted. In **Sunil Batra v. Delhi Administration**., a convict had written a letter to one of the Judges of the Supreme Court alleging inhuman torture to a fellow convict. The late justice Krishna Iyer treated this letter as a petition of habeas corpus and passed appropriate orders.
3. Courts can also act suo moto in the interests of justice on any information received by it from any quarter/source.

Habeas Corpus is not issued in certain cases

1. Where the person who is detained or against whom the writ is issued is not within the jurisdiction of the Court.
2. To save the release of a person who has been imprisoned by a Court for a criminal charge.
3. To interfere with a proceeding for contempt by a Court of record or by Parliament.

- **Implication in Emergency:** In the Landmark case of **ADM Jabalpur v. Shivakant Shukla** which is also known as the Habeas Corpus case, it was held that the writ of Habeas Corpus cannot be suspended even during the emergency **(Article 359).**

- **Damages:** The Court may also award exemplary damages. In **Bhim Singh v. State of Jammu & Kashmir** , the Hon'ble Apex Court awarded the exemplary damages of Rs.50,000/- (At that time this was a very significant amount.

.Notable Cases for Writ of Habeas Corpus:

- In **Kanu Sanyal v. District Magistrate**, while enunciating the real scope of writ of habeas corpus, the Supreme Court opined that while dealing with a petition for writ of habeas corpus,the court may examine the legality of the detention without requiring the person detained to be produced before it.
- In **Nilabati Behera v. State of Orissa**, the Orissa police took away the son of the petitioner for the purposes of interrogation & he could not be traced. During the pendency of the petition, his dead body was found on railway track the petitioner was awarded compensation of Rs. 1, 50,000.

Mandamus

- **Meaning:** "A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act." It is used for enforcement of various rights of the public or to compel the

public statutory authorities to discharge their duties and to act within the bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties.

- **The rule of Locus Standi:** is strictly followed in while issuing writ of mandamus. The petitioner has to prove that he has a right to enforce public duty in his favour. The *mandamus* is "neither a writ of course nor a writ of right but that it will be granted if the duty is in nature of public duty and it especially affects the right of an individual, provided there is no more appropriate remedy."

- **Conditions for Issue of Writ of Mandamus**

1. Their ought to be a legal right of the applicant for the performance of the legal duty.
2. The nature of the duty must be public. In **The Praga Tools Corporation v. C.V. Imanual**, and **Sohanlal v. Union of India**,the Supreme Court stated that mandamus might under certain circumstances lie against a private individual if it is established that he has colluded with a public authority.
3. On the date of the petition, the right which is sought to be enforced must be subsisting.
4. The writ of Mandamus is not issued for anticipatory injury. But Anybody who is likely to be affected by the order of a public officer is entitled to bring an application for mandamus if the officer acts in contravention of his statutory duty

- **Exceptions & Limitations (Mandamus)**

In India, mandamus will lie not only against officers who are bound to do a public duty but also against the Government itself as Article 226 and 361 provided that appropriate proceedings may be brought against the Government concerned.

- The courts are unwilling to issue writ of mandamus against high dignitaries like the President and the Governors. In the case of **S.P. Gupta v. Union of India**,

judges were of the view that writ cannot be issued against the President of India for fixing the number of judges in High Courts and filling vacancies.

- In **C.G. Govindan v. State of Gujarat**, it was refused by the court to issue the writ of mandamus against the governor to approve the fixation of salaries of the court staff by the Chief Justice of High Court under Article 229. Hence, it is submitted that the Governor or the President means the state or the Union and therefore issuance of mandamus cannot take place.

Prohibition

- **Meaning:** A writ of prohibition, also known as a 'stay order', is issued to a lower court or a body to stop acting beyond its powers.
- **The Purpose:** The basic purpose is to secure that the jurisdiction of an inferior court or tribunal is properly exercised and that it does not usurp the jurisdiction which it does not possess. Thus, writ of prohibition is available during the pendency of the proceedings and before the order is made.
- **The Principle:** Prohibition is a writ of preventive nature. The principle of this is 'Prevention is better than cure'.

- In the case of **East India Commercial Co. Ltd v. Collector of Customs** a writ of prohibition was passed directing an inferior Tribunal prohibiting it from continuing with the proceeding on the ground that the proceeding is without or in excess of jurisdiction or in contradiction with the laws of the land, statutes or otherwise.
- Also, it was held in the case of **Bengal Immunity Co. Ltd ,** the Supreme Court pointed out that where an inferior tribunal is shown to have seized jurisdiction which does not belong to it than that consideration is irrelevant and the writ of Prohibition has to be issued as a right.

Certiorari

- **Meaning:** The writ of certiorari issued to quash a decision after the decision is taken by a lower tribunal while prohibition is issuable before the proceedings are

completed. The law has always been, that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi-judicial body conferred with power to determine question affecting the rights of subjects and obliged to act judicially.

- **The Purpose:** of the writ of certiorari is not only negative in the sense that it is used to quash an action but it contains affirmative action as well. It is preventive as well as curative in nature. The power of judicial review is not restricted where glaring injustice demands affirmative action.

- In **Naresh S. Mirajkar v. State of Maharashtra ,** it was said that High Court's judicial orders are open to being corrected by certiorari and that writ is not available against the High Court.
- In the case of **T.C. Basappa v. T. Nagappa & Anr.,** it was held by the constitution bench that certiorari maybe and is generally granted when a court has acted (i) without jurisdiction or (ii) in excess of its jurisdiction.

Quo Warranto

- **Meaning:** The writ of Quo Warranto (by what warrant) is issued to inquire about the legality of a claim by a person or authority to act in a public office, which he or she is not entitled to. The writ of Quo Warranto is a mode of judicial control in the sense that the proceedings review the actions of the administrative authority which appointed the person.

The writ **is issued to the person** ousting him from holding a public post to which he has no right. It is used to try the civil right to a public post. Accordingly, the use of the writ is made in cases of usurpation of a public office and removal of such usurper. Conversely, it protects citizen from being deprived of public office to which he may have a right. A petition for the writ of Quo Warranto **can be filed by any** person though he is not an aggrieved person.

The conditions necessary for the issue of a writ of Quo Warranto are:

1. The office must be public and it must be created by a statute or by the constitution itself. In the case of **Jamalpur Arya Samaj v. Dr D. Ram** , the writ was denied

on the ground that writ of quo warranto cannot lie against an office of a private nature. And also, it is necessary that office must be of substantive character.

2. The office must be a substantive one and not merely the function or employment of a servant at the will and during the pleasure of another.
3. There has been a contravention of the Constitution or a statute or statutory instrument, in appointing such person to that office.
4. The claim should be asserted on the office by the public servant i.e. respondent.

The court issues the Writ of Quo Warranto in the following cases:

1. When the public office is in question and it is of a substantive nature. A petition against a private corporation cannot be filed.
2. The office is created by the State or the Constitution.

Conclusion

In the hands of the Supreme Court PIL in India has taken a multidimensional character. The deep-rooted ill-disposed framework has been given a pass by. With the coming of legal activism, letters, paper reports, dissensions by open lively people, social activity bunches conveying to the notice of the Court in regards to infringement of major rights were managed regarding them as writ petitions and the alleviation of pay was additionally allowed through writ jurisdiction.

Que 2 It is the heart and soul of the Constitution, To which Article Ambedkar said this this line ?

Ans: Article 32 is the right to constitutional remedies enshrined under Part III of the constitution. Right to constitutional remedies was considered as a heart and soul of the constitution by Dr. Bhim Rao Ambedkar. Article 32 makes the Supreme court as a protector and guarantor of the Fundamental rights. Article 32(1) states that if any fundamental rights guaranteed under Part III of the Constitution is violated by the government then the person has right to move the Supreme Court for the enforcement of his fundamental rights. Article 32(2) gives power to the Supreme court to issue writs, orders or direction. It states that the

Supreme court can issue 5 types of writs habeas corpus, mandamus, prohibition, quo warranto, and certiorari, for the enforcement of any fundamental rights given under Part III of the constitution. The Power to issue writs is the original jurisdiction of the court.

Article 32(3) states that parliament by law can empower any of courts within the local jurisdiction of India to issue writs, order or directions guaranteed under Article 32(2). Article 32(4) states that rights given under Article 32 cannot be suspended except such suspension provided by the constitution.

Babasaheb Ambedkar called Article 32 as ***heart and soul of the constitution***?

Article 32 is called the heart and soul of the constitution because it gives rights to people to move Supreme court directly for enforcement of their fundamental rights. Article 32 is itself a fundamental right and it makes article 32 soul of the constitution. According to the Supreme court, Article 32 is the basic feature of the constitution it cannot be amended even by way of amendment in the constitution.

The scope of Article 32

The scope of Article 32 is not wide enough as Article 226. Article 32 can be invoked only to enforce fundamental rights under Part III. one cannot approach the Supreme court for enforcement for other rights except fundamental rights. Power to issue writs under Article 32 is mandatory for the Supreme court because Article 32 is itself a fundamental Right and Supreme Court is the protector of these the Fundamental Rights. The writs are strong instruments issued against the government and government officials.

How Article 32 is different from the Article 226

1. Article 32 gives power to Supreme Court whereas Article 226 gives power to the High court
2. Article 32 is invoked for the enforcement of fundamental Rights whereas Article 226 is invoked for enforcement of fundamental right as well as other legal rights too.
3. The power to High court under Article 226 is wide than the power of the Supreme court under Article 32
4. Power to issue writs under Article 32 is mandatory for the Supreme court whereas High court has discretionary power to issue writs under Article 226
5. Article 32 is suspended during the period of the emergency whereas Article 226 cannot be suspended during emergency
6. Territorial Jurisdiction of the High court under Article 226 is narrower than the Territorial jurisdiction of Supreme court under Article 226.
7. The order passed by the Supreme court under Article 32 will always supersede the order passed by the High courts under Article 226.

8. Article 32 is itself a fundamental right (Right to constitutional Remedies) whereas Article 226 is not a fundamental Right.

What are the similarities between Article 32 and Article 226?

1. Both Article 32 and 226 is invoked for the enforcement of Fundamental Rights
2. Both the Supreme court and High court has the power to issue writs under Article 32 and Article 226 respectively.

The scope of Article 226 is wider than Article 32 but still, Article 32 is called the heart and soul of the Constitution? Why?

It is because : (i) Article 32 is itself a fundamental Right

(ii) Supreme court is guarantor and defender of the Fundamental Rights and Constitution.

Does member of any Armed forces can approach the Supreme court or High court for enforcement of Fundamental Rights?

No, According to Article 33 of the constitution, member of armed forces cannot approach the Supreme Court or High court under Article 32 and Article 226 respectively. Article 33 empowers the parliament to restrict the fundamental Rights of the members of Armed and

Parliamentary forces. The idea behind inserting this provision is to oblige them to perform their duties and make discipline among them.

Does the Supreme Court have the power to grant compensation for violation of fundamental Rights under Article 32?

Yes, Scope of the Supreme court is wide under Article 32 to grant compensation to the victim for violation of his fundamental Rights[1] In the case of the Rudul Shah vs. the State of Bihar[2], Supreme court Court invented new doctrine called compensatory jurisprudence under Article 32. The court directed the State of Bihar to give compensation for illegally detaining the victim for the 14 years on a wrongful charge of the Murder.

Conclusion

Article 32 is a fundamental right which empowers the Supreme court to issue direction, order, and writs. Article 226 is the constitutional right which empowers High court to issue a direction, order, and writs for enforcement of fundamental rights and other legal rights. The writs in form of Habeas Corpus, Mandamus, Quo Warranto. Prohibition, Certiorari can be issued under Article 32 and Article 226. It is concluded that the scope of Article 226 is wide

than the Article 32. Unlike 32, Article 226 cannot be suspended during the period of the emergency.

Que 3 : Critically analyse the scope of Article 32 or 226.

ANS. : Article 32 is the right to constitutional remedies enshrined under Part III of the constitution. Right to constitutional remedies was considered as a heart and soul of the constitution by Dr. Bhim Rao Ambedkar. Article 32 makes the Supreme court as a protector and guarantor of the Fundamental rights. Article 32(1) states that if any fundamental rights guaranteed under Part III of the Constitution is violated by the government then the person has right to move the Supreme Court for the enforcement of his fundamental rights. Article 32(2) gives power to the Supreme court to issue writs, orders or direction. It states that the Supreme court can issue 5 types of writs habeas corpus, mandamus, prohibition, quo warranto, and certiorari, for the enforcement of any fundamental rights given under Part III of the constitution. The Power to issue writs is the original jurisdiction of the court.

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The scope of Article 32

The scope of Article 32 is not wide enough as Article 226. Article 32 can be invoked only to enforce fundamental rights under Part III. one cannot approach the Supreme court for enforcement for other rights except fundamental rights. Power to issue writs under Article 32 is mandatory for the Supreme court because Article 32 is itself a fundamental Right and Supreme Court is the protector of these the Fundamental Rights. The writs are strong instruments issued against the government and government officials.

Article 226 is enshrined under Part V Chapter V of the Constitution. It empowers the High Courts to issue certain writs. Article 226 gives discretionary power to the High courts to issue direction, order, writs including the writs in nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari. Article 226 is invoked not only to for the fundamental rights but also a violation for other rights.

Article 226(1) states that in spite of Article 32, High court has the power to issue direction, order, or writs, including the writs in the nature of the writs in nature of habeas corpus,

mandamus, prohibition, quo warranto, and certiorari to any person, authority, government or public officials for enforcement of fundamental rights or any other rights under its own local jurisdiction.

Article 226(2) states that in spite of the seat of government or authority or residence of the person is not in the local jurisdiction of the High court still high court can issue direction, order to such government, authority or person if the cause of action wholly or in part arises in relation to its own jurisdiction.

Article 226(3) states that the (i) When against a party any interim order is issued by high court in way of interim injunction or stay, or any proceedings relating to a petition under Article 226 without (a) giving copy of the petition or copies of all documents of the interim order to such party and (b) giving opportunity to hear.

(ii) And if such party makes an application to the High court for the vacation of such interim order or petition and also furnishes a copy of the application of vacation to the party in whose favor such interim order or petition is made, or to the counsel of the party.

(iii) Then High court shall dispose of the application

- within a period of two weeks from the date on which it is received or,
- from the date on which the copy of such application is so furnished, whichever date is later

or

- where the High Court is closed on the last day of that period, before the expiry of the next day afterward on which the High Court is open

(iv) and if the application is not so disposed of by the High court, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the aid next day, will be vacated

Article 226(4) states that the power given to the high court to issue direction, order or writ will not derogate the power given to the Supreme court under Article 32(2)

The scope of Article 226

The scope of Article 226 is much wide than Article 32. Article 226 not only gives the power to issue direction, order or writs not enforce fundamental rights but also for the enforcement of other rights too. Article 226 empowers High court to issue directions, orders or writs to any person, authority, government, or public officials. Article 226 also talks about the interim order for writs and also states the mechanism of how interim order will be disposed of by the High courts.

Writs under Article 32 and Article 226

1. **Habeas Corpus –** It means to produce the body of or have a body of. This writ is issued by the court to the person or the authority who has detained or imprisoned another person to bring that person before the court So that court can examine the reason and validity of his detention. If no valid justification or reason for his detention is found by the court then the court will release him from that detention. Writ of Habeas corpus can be issued to both public and private persons. It can be filed by anybody on the behalf of the detainee.
2. **Mandamus** – Mandamus literally means "We Command". In this, court order the public authorities directing them to perform their duty imposed by the law. The writ of mandamus can be issued to the government, govt officials, public corporations, inferior courts or tribunals, etc. It cannot be imposed on private persons. It is issued when public authority refused to perform an obligation under law but it cannot be issued where duty is discretionary.
3. **Quo Warranto** – It is means "what is your Authority". This writ is issued by the court to the person holding the public office questioning him under What authority he is holding the public office. If he fails to prove his authority than the court will issue order refraining him to hold that office and court also mah declare office vacate.
4. **Certiorari** – The writ of Certiorari means "to be certified". This writ is issued to the inferior court or tribunals directing them to transmit the matter to the court of record proceedings pending before them. This writ gives power to Supreme court or High court to determine the validity or legality of matter disposed of by the lower courts or tribunals
5. **Prohibition** – Th writ of the Prohibition is issued to the lower courts or tribunals when:
   (i) They act contravene to rule of natural justice

   (ii) They Act without jurisdiction or excess to their jurisdiction

   (iii) They act ultra vires i.e. beyond the powers

   (iv) They act in contravention of Fundamental Rights.

How Article 32 is different from the Article 226

1. Article 32 gives power to Supreme Court whereas Article 226 gives power to the High court
2. Article 32 is invoked for the enforcement of fundamental Rights whereas Article 226 is invoked for enforcement of fundamental right as well as other legal rights too.
3. The power to High court under Article 226 is wide than the power of the Supreme court under Article 32

4. Power to issue writs under Article 32 is mandatory for the Supreme court whereas High court has discretionary power to issue writs under Article 226
5. Article 32 is suspended during the period of the emergency whereas Article 226 cannot be suspended during emergency
6. Territorial Jurisdiction of the High court under Article 226 is narrower than the Territorial jurisdiction of Supreme court under Article 226.
7. The order passed by the Supreme court under Article 32 will always supersede the order passed by the High courts under Article 226.
8. Article 32 is itself a fundamental right (Right to constitutional Remedies) whereas Article 226 is not a fundamental Right. **Article 32** isn't to be conjured for encroachment of an individual right of the agreement (contract), nor is to be summoned for unsettling questions which are fit for transfer under other laws. **Article 226(1)** of the Constitution of India, on the other hand says," Notwithstanding anything in Article 32, every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

Conclusion

As is obvious from the uncovered dialect, this Article ensures a person to move the High Court for implementation of the fundamental rights and also for implementation of some other lawful right. Article 226 gives wide powers on the High Courts. It fills in as a major repository of legal capacity to control organization. Its capacity under Article 226 can't be diminished by enactment. In this manner, forces of High Courts gave under Article 226 are more extensive when contrasted with forces presented on the Supreme Court under Article 32 of the Constitution of India.

Que 4 Explain the writ habeas corpus and its importance .

Ans: The writ of *habeas corpus* is known as the "great and efficacious writ in all manner of illegal confinement".It is a summons with the force of a court order court order it is addressed to the custodian (a prison official, for example) and demands that a prisoner be brought before the court, and that the custodian present proof of authority, allowing the court

to determine whether the custodian has lawful authority to detain the prisoner. If the custodian is acting beyond their authority, then the prisoner must be released. Any prisoner, or another person acting on their behalf, may petition the court, or a judge, for a writ of *habeas corpus*. One reason for the writ to be sought by a person other than the prisoner is that the detainee might be held incommunicado. Most civil law jurisdictions provide a similar remedy for those unlawfully detained, but this is not always called *habeas corpus*. For example, in some Spanish-speaking nations, the equivalent remedy for unlawful imprisonment is the ("protection of freedom").

Habeas corpus, or the Great Writ, is the legal procedure that keeps the government from holding you indefinitely without showing cause. When you challenge your detention by filing a habeas corpus petition, the executive branch must explain to a neutral judge its justification for holding you. Habeas corpus prevents the King from simply locking up subjects in secret dungeons and throwing away the key. It's been a pillar of Western law since the signing of the Magna Carta in England in 1215.

The Founders of our nation believed habeas corpus was so essential to preserving liberty, justice, and democracy that they enshrined it in the very first article of the United States Constitution.

What happened to habeas corpus?

In its waning days, the last Congress passed the Military Commissions Act (MCA) of 2006. Among many ill-considered and dangerous provisions, the MCA revoked the right to habeas corpus for anyone detained at Guantánamo Bay as well as for any foreigner the government detains anywhere and labels an "enemy combatant." This provision applies to legal residents of the U.S. as well, meaning someone who has lived in the U.S. for years could potentially be labeled an "enemy combatant" and then thrown into prison with no legal recourse to challenge their detention.

How does it relate to Guantanamo?

The government has little or no evidence against most of the men detained at Guantánamo. We now know that almost none of the Guantánamo prisoners were taken into custody by U.S. forces or captured on any battlefield. The overwhelming majority were sold into captivity by Northern Alliance and Pakistani warlords for substantial bounties—$5,000 and more for each person they turned in; enough money, as leaflets the U.S. military distributed throughout Afghanistan said, "to take care of your family . . . for the rest of your life." In fact, of the nearly 800 men that have been held at Guantánamo, only 10 have ever been charged with any crime.

Soon after the first 20 detainees were flown to Guantánamo, CCR began filing habeas corpus petitions asking the government to explain why it was holding these men outside of the reach of the U.S. court system in what has since become a notorious offshore penal colony. Despite

numerous legal victories that affirm the detainees' right to challenge their detention, the Bush administration has managed to prevent the detainees from getting a fair hearing in the courts.

What does it mean for the detainees?

In June 2007, the Supreme Court decided to hear CCR's most recent case challenging the detention of many Guantanamo detainees. These men have faced indefinite detention, sham trials, and conditions rapidly inducing psychological deterioration for nearly six years. In the coming Supreme Court term, for the third time, the high court will hear the detainees' cases and, we hope, once more seek to hold the Administration accountable and uphold habeas corpus.

The MCA extends a second-class system of justice far beyond Guantánamo to any non-citizen – including legal permanent residents of the U.S. – anywhere in the world whom the executive unilaterally declares to be an "unlawful enemy combatant."

What does it mean for everyone else?

Habeas corpus was originally meant to act as a bulwark precisely against this type of executive power. The founders of our nation considered habeas corpus the most fundamental of rights because it insured that the executive branch could not hold people without cause. Since the founding of the U.S., the writ has been suspended on only four occasions, each for a brief period of time and each in territory that was an active combat zone. By compromising this core legal value and necessary protection against the executive branch, the MCA has eroded the very foundation of our legal and constitutional framework. If we do not defend the right to habeas corpus, we all lose.

Few important aspects relating to this writ of habeas corpus are:

Nature of Proceedings: Regarding the question of whether habeas corpus proceedings are civil or criminal in nature, it was held by the court of law in Narayan v. Ishwarlal7 that it would depend on the nature of the proceedings in which the jurisdiction has been implemented. Who may apply:Regarding the question of who may apply for the writ it has been stated by the rule of law that not only the prisoner or the detained, but anyother person who know that merits of the case, acquainted with the facts and circumstances and has recognized interest in moving of such application in front of the court can apply under Art. 32 and Art. 226 of the Constitution.

Conditions of refusal: There may be conditions under which the habeas corpus may be refused which are as follows: i) when the person or authority i.e. detainer does not come under the territorial jurisdiction of the court, ii) when the imprisonment is in nexus with the order or decision rendered by the court, iii) when the detenu has already been set free, iv) when the detention has been validated by removal of defects, v) when the writ is sought

during emergency situations, vi) when the petition has been dismissed by a competent court by looking into the merits.

Alternative remedy: Habeas corpus being a writ of course or right may be refused if there is no cause shown. It, however, cannot be refused on the ground that an alternative remedy is available to the applicant.

Improper pleading: The question regarding whether the writ petition can be setaside if the pleading made is improper has been made clear by the court of law in Ranjit Singh v State of Pepsu9 by stating that "the whole object of proceedings for a writ of Habeas Corpus is to make them expeditious, to keep them as free from technicality as possible and to keep them as simple as possible".

Burden of proof In regard to the question pertaining to upon whom the burden of proof lies, it was stated that it is the responsibility of the authority which is questioned for unlawfully detaining a person to prove that the grounds were satisfactory enough to arrest and confine a person behind the bars. But if it is alleged by the detenu (viz. the person detained) that the order of detention is mala fide, the burden of proof is on the detenu and he has to establish it.

10 New pleadings: The question regarding whether or not a new plea can be raised during the hearing of the writ petition, it has been stated that no fresh issue can be evoked during the pleadings of writs but Habeas Corpus is an exception to this.But no such plea can be allowed if the respondent has no opportunity to rebut or controvert the plea and it may result in prejudice to the other side.

11 Territorial jurisdiction :Regarding the territorial jurisdiction, Supreme Court‟ s jurisdiction under article 32 extends over all the authorities; be it inside the territory of India or outside it, provided they must be under the control of the Government. Whereas in case of High Courts‟ jurisdiction by article 226, it applies to all the authorities lying within the control of that high court or where the cause of action arises.

Que 5: Explain the writ mandamus

Ans: Mandamus means command and it is a judicial remedy in the form of an order from a court to any government, subordinate court, corporation, or public authority to do (or forbear from doing) some specific act which that body is obliged under law to do (or refrain from doing), and which is in the nature of public duty, and in certain cases one of a statutory duty. It cannot be issued to compel an authority to do something against statutory provision. For example, it cannot be used to force a lower court to reject or authorize applications that have been made, but if the court refuses to rule one way or the other then a mandamus can be used to order the court to rule on the applications.

Mandamus may be a command to do an administrative action or not to take a particular action, and it is supplemented by legal rights . In the American legal system it must be a

judicially enforceable and legally protected right before one suffering a grievance can ask for a mandamus. A person can be said to be aggrieved only when they are denied a legal right by someone who has a legal duty to do something and abstains from doing it.

Purpose

The purpose of mandamus is to remedy defects of justice. It lies in the cases where there is a specific right but no specific legal remedy for enforcing that right. Generally, it is not available in anticipation of any injury except when the petitioner is likely to be affected by an official act in contravention of a statutory duty or where an illegal or unconstitutional order is made. The grant of mandamus is therefore an equitable remedy a matter for the discretion of the court, the exercise of which is governed by well-settled principles.

Mandamus being a discretionary remedy, the application for it must be made in good faith and not for indirect purposes. Acquiescence cannot, however, bar the issue of mandamus. The petitioner must, of course, satisfy the Court that they have the legal right to the performance of the legal duty as distinct from mere discretion of authority. A mandamus is normally issued when an officer or an authority by compulsion of statute is required to perform a duty and that duty, despite demand in writing, has not been performed. In no other case will a writ of mandamus issue unless it be to quash an illegal order.

A writ or order that is issued from a court of superior jurisdiction that commands an inferior tribunal, corporation, municipal corporation. or individual to perform, or refrain from performing, a particular act, the performance or omission of which is required by law as an obligation.The Supreme Court set forth some guidelines on writs of mandamus in *Kerr v. United States District Court*, 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976). In *Kerr*, the Court upheld the denial of a writ of mandamus sought by prison officials to prevent the district court from compelling them to turn over personnel and inmate files to seven prisoners who had sued the prison over alleged constitutional violations. The officials argued that turning over the records would compromise prison communications and confidentiality

The Supreme Court observed in *Kerr* that the writ of mandamus was traditionally used by federal courts only to confine an inferior court to a lawful exercise of its jurisdiction, or to compel an inferior court to exercise its authority when it had a duty to do so. The Court also noted that mandamus is available only in exceptional cases because it is so disruptive of the judicial process, creating disorder and delay in the trial. The writ would have been appropriate, opined the Court, if the trial court had wrongly decided an issue, if failure to

reverse that decision would irreparably injure a party, and if there was no other method for relief. Because the prison officials could claim a privilege to withhold certain documents, and had the right to have the documents reviewed by a judge prior to release to the opposing party, other remedies existed and the writ was inappropriate.

Que 6 Explain the writ quo warranto , prohibition and certiorari.

Ans Quo warranto is a special form of legal action used to resolve a dispute over whether a specific person has the legal right to hold the public office that he or she occupies.

Quo warranto is used to test a person's legal right to hold an office, not to evaluate the person's performance in the office. For example, a quo warranto action may be brought to determine whether a public official satisfies a requirement that he or she resides in the district; or whether a public official is serving in two incompatible offices. Quo warranto is not available to decide whether an official has committed misconduct in office. A person who commits misconduct in a public office may be penalized or even removed from office, but quo warranto is not the proper forum for those cases. Other processes are available for that purpose.

The term "quo warranto is Latin term which means by what authority"—as in, "by what authority does this person hold this office?" The term "quo warranto" is still used today, even though the phrase no longer appears in the statutes.

PROHIBITIO

A writ of prohibition is an order directed to the judge and parties of a suit in a lower court, ordering the court not to exercise jurisdiction in a particular case. It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person. The writ may be issued when an inferior court is acting outside the normal rules and procedures in the examination of a case or headed towards defeating a legal right.

The writ of prohibition is the counterpart of the writ of mandamus.

Relevant legal forms include:

Writ of Prohibition overturning lower court judgment and awarding relief - template Order for Writ of Prohibition

Writ of Certiorari :– A writ of certiorari is a writ which is issued against body enjoying legal authority and through this authority this body enjoys the powers to scrutinize the legal aspect of legally enforceable rights and duties, their outcome and other related matters.

A writ of certiorari has much in common with a writ of prohibition. The only difference between the two is, whereas a writ of prohibition is issued to prevent an inferior court or tribunal to go ahead with the trial of a case in which it has assumed excess of jurisdiction, a writ of certiorari is issued to quash the order passed by an inferior court or tribunal in excess of jurisdiction.

Writ of certiorari and writ of prohibition both lie against body exercising legal authority. Like writ of certiorari, writ of prohibition can also be issued against body exercising judicial or quasi-judicial powers.

Writ of prohibition is nugatory in nature. It prevents or prohibits the inferior court from exercising assuming jurisdiction which is **not** vested in it by law. Writ of prohibition lies for both excess and absence of jurisdiction.

Both writs look alike but there is major difference between the two on the basis of stage at which they are issued. If a legal authority takes up a dispute on which it has no jurisdiction and decides the matter, then other party can approach High Court on the ground of absence of jurisdiction through a petition for issuance of **writ of certiorari**, however if the case is still pending and has not been finally decided yet then the aggrieved party can ask for issuance of **writ of prohibition** and thereby can prevent the inferior authority from proceeding further in the case.

Que: Critically analyse the judicial review system of India.

Ans. Judicial review is a process under which executive or legislative actions are subject to review by the judiciary . A court with authority for judicial review may invalidate laws, acts and governmental actions that are incompatible with a higher authority: an executive decision may be invalidated for being unlawful or a statute may be invalidated for violating the terms of a constitution . Judicial review is one of the checks and balances in the separation of powers the power of the judiciary to supervise the legislative and executive branches when the latter exceed their authority. The doctrine varies between jurisdictions, so the procedure and scope of judicial review may differ between and within countries.

Judicial review, power of the courts of a country to examine the actions of the legislative, executive and administrative arms of the government and to determine whether such actions are consistent with the constitution . Actions judged inconsistent are declared unconstitutional and, therefore, null and void. The institution of judicial review in this sense depends upon the existence of a written constitution.

The conventional usage of the term *judicial review* could be more accurately described as "constitutional review," because there also exists a long practice of judicial review of the actions of administrative agencies that require neither that courts have the power to declare those actions unconstitutional nor that the country have a written constitution. Such "administrative review" assesses the allegedly questionable actions of administrators against standards of reasonableness and abuse of discretion. When courts determine challenged administrative actions to be unreasonable or to involve abuses of discretion, those actions are declared null and void, as are actions that are judged inconsistent with constitutional requirements when courts exercise judicial review in the conventional or constitutional sense. Judicial review means the Supreme Court can declare any law unconstitutional. Its use solidifies the judiciary's role as an equal branch of the government—along with the legislative and executive branches. It was established by the *Marbury v. Madison* Supreme Court case of 1803.

The examples set by outstanding men helped shape the national government. The presidency was molded by George Washington; the Supreme Court was shaped by John Marshall—the fourth Chief Justice. Marshall, known as the Great Chief Justice, was an extraordinary figure. He was Chief Justice from 1801 to 1835. Without Marshall, judicial review probably would not have developed.

Judicial review has been decisive in determining some historic and momentous cases. For example, *Roe v. Wade* overturned state laws that outlawed abortion. And *Citizens United* nullified laws that limited spending by corporations on elections.
Judicial review is the fundamental principle of the U.S. system of federal government, and it means that all actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary branch. In applying the doctrine of judicial review, the U.S. Supreme Court plays a role in ensuring that the other branches of government abide by the U.S. Constitution. In this manner, judicial review is a vital element in the separation of powers between the three branches of government.

Judicial review was established in the landmark Supreme Court decision of *Marbury v. Madison*, which included the defining passage from Chief Justice John Marshall: "It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each."

Marbury vs. Madison and Judicial Review

The power of the Supreme Court to declare an act of the legislative or executive branches to be in violation of the Constitution through judicial review is not found in the text of the Constitution itself. Instead, the Court itself established the doctrine in the 1803 case of *Marbury v. Madison*.

On February 13, 1801, outgoing Federalist President John Adams signed the Judiciary Act of 1801, restructuring the U.S. federal court system . As one of his last acts before leaving office, Adams appointed 16 (mostly Federalist-leaning) judges to preside over new federal district courts created by the Judiciary Act.

However, a thorny issue arose when new Anti-Federalist President Thomas Jefferson 's Secretary of State, James Madison refused to deliver official commissions to the judges Adams had appointed. One of these blocked "Midnight Judges ," William Marbury , appealed Madison's action to the Supreme Court in the landmark case of *Marbury v. Madison*,

Marbury asked the Supreme Court to issue a writ of mandamus ordering the commission be delivered based on the Judiciary Act of 1789. However, Chief Justice of the Supreme Court John Marshall ruled that the portion of the Judiciary Act of 1789 allowing for writs of mandamus was unconstitutional.

QUE 8 : What are the directive principles of state policy under the constitution of India?

Ans : The Directive Principles constitute a very comprehensive social, economic and political programme for a modern and welfare state.

These principles emphasises that the State shall try to promote welfare of people by providing them basic facilities like shelter, food and clothing.

Unlike Fundamental Rights, the Directive Principles of State Policy (DPSP) are non-binding in nature which means they are not enforceable by the courts for their violation.

However, the Constitution itself declares that 'these principles are fundamental in the governance of the country and it shall be the duly of the state to apply these principles in making laws'. Hence, they impose a moral obligation on the state authorities for their implementation.

Features of Directive Principles of State Policy (DPSP)

1. It denotes the ideals that the State should keep in mind while formulating policies and enacting laws.

2. It resembles the 'Instrument of Instructions' enumerated in the Government of India Act of 1935. In the words of Dr B R Ambedkar, 'the Directive Principles are like the instrument of instructions, which were issued to the Governor-General and to the Governors of the colonies of India by the British Government under the Government of India Act of 1935.

What is called Directive Principles is merely another name for the instrument of instructions. The only difference is that they are instructions to the legislature and the executive'.

3. It constitutes a very comprehensive economic, social and political programme for a modern democratic State which *aimed at realising the high ideals of justice, liberty, equality and fraternity as outlined in the Preamble to the Constitution.* They embody the concept of a 'welfare state' which was absent during the colonial era.

Classification of Directive Principles of State Policy (DPSP)

The Constitution of India does not formally classify the Directive Principles of State Policy but for better understanding and on the basis of content and direction- they can be classified into three categories: Socialistic Principles, Gandhian Principles, and Liberal-Intellectual Principles.

These principles contemplate the ideology of socialism and lay down the framework of a democratic socialist state. The concept envisages providing social and economic justice, so that state should achieve the optimum norms of welfare state. They direct the state through- **Article 38, Article 39, Article 39 A, Article 41, Article 42, Article 43, Article 43** A and **Article 47.**

These principles reflect the programme of reconstruction enunciated by Gandhi during the national movement. In order to fulfil the dreams of Gandhi, some of his ideas were included in DPSP and they direct the state through- **Article 40, Article 43, Article 43 B, Article 46, Article 47** and **Article 48.**

These principles inclined towards the ideology of liberalism and they direct the state through- **Article 44, Article 45, Article 48, Article 48 A, Article 49, Article 50** and **Article 51.**

Criticism of Directive principles of State Policy.

The following reasons are responsible for the criticism of Directive Principles of State Policy:

1. It has no legal force

2. It is illogically arranged
3. It is conservative in nature
4. It may produce constitutional conflict between centre and state

What is the conflict between fundamental rights and Dpsp ?

With the help of four court cases given below, candidates can understand the relationship between Fundamental Rights and Directive Principles of State Policy:

Champakam Dorairajan Case (1951)

Supreme Court ruled that in any case of conflict between Fundamental Rights and DPSPs, the provisions of the former would prevail. DPSPs were regarded to run as a subsidiary to Fundamental Rights. SC also ruled that Parliament can amend Fundamental Rights through constitutional amendment act ti implement DPSPs.

Result: Parliament made the First Amendment Act (1951), the Fourth Amendment Act (1955) and the Seventeenth Amendment Act (1964) to implement some of the Directives.

Golaknath Case (1967)

Supreme Court ruled that Parliament cannot amend Fundamental Rights to implement Directive Principles of State Policy.

Result: Parliament enacted the 24th Amendment Act 1971 & 25th Amendment Act 1971 declaring that it has the power to abridge or take away any of the Fundamental Rights by enacting Constitutional Amendment Acts. 25th Amendment Act inserted a new Article 31C containing two provisions:

-
- No law which seeks to implement the socialistic Directive Principles specified in Article 39 (b)22 and (c)23 shall be void on the ground of contravention of the Fundamental Rights conferred by Article 14 (equality before law and equal protection of laws), Article 19 (protection of six rights in respect of speech, assembly, movement, etc) or Article 31 (right to property).
- No law containing a declaration for giving effect to such policy shall be questioned in any court on the ground that it does not give effect to such a policy.

Kesavananda Bharti Case (1973)

Supreme Court ruled out the second provision of Article 31C added by the 25th Amendment Act during Golaknath Case of 1967. It termed the provision 'unconstitutional.' However, it held the first provision of Article 31C constitutional and valid.

Result: Through the 42nd amendment act, Parliament extended the scope of the first provision of Article 31C. It accorded the position of legal primacy and supremacy to the Directive Principles over the Fundamental Rights conferred by Articles 14, 19 and 31.

Minerva Mills Case (1980)

Supreme Court held the extension of Article 31C made by the 42nd amendment act unconstitutional and invalid. It made DPSP subordinate to Fundamental Rights. Supreme Court also held that '**the Indian Constitution is founded on the bedrock of the balance between the Fundamental Rights and the Directive Principles**.'

Supreme Court's rulings following the case were:

- Fundamental Rights & DPSPs constitute the core of the commitment to social revolution.
- The harmony and balance between Fundamental Rights and Directive Principles of State Policy is an **essential feature of the basic structure** of the Constitution.
- The goals set out by the Directive Principles have to be achieved without the abrogation of the means provided by the Fundamental Rights.

Conclusion: Today, Fundamental Rights enjoy supremacy over the Directive Principles. Yet, Directive Principles can be implemented. The Parliament can amend the Fundamental Rights for implementing the Directive Principles, so long as the amendment does not damage or destroy the basic structure of the Constitution.

QUE 9 What are the fundamental duties granted to Indian Citizens, Are they justiciable in nature.

ANS. Fundamental Duties of the citizens have also been enumerated for the Indian citizens By the *42nd Amendment of the Constitution, adopted in 1976*. **Article 51 'A'** contained in Part IV A of the Constitution deals with Fundamental Duties. Fundamental Duties are **taken from the Constitution of Russia.**

The Following are the Duties in Our Constitution:

a) To abide by the constitution and respect its ideals and institutions, the National Flag and the National Anthem- It is the duty of every citizen to respect the ideals, which include liberty, justice, equality, fraternity and institutions namely, executive, the legislature and the judiciary. Hence all of us are supposed to maintain the dignity of constitution by not indulging in any activities which violate them in letter and spirit. It also states that if a citizen by any overt or covert act shows disrespect to the constitution, the National Anthem or the National Flag it would spell doom to all our rights and very existence as citizens of a sovereign nation.

b) To cherish and follow the noble ideals which inspired our national struggle for freedom- The citizens of India must cherish and follow the noble ideals which inspired the national

struggle for freedom. These ideals were those of building a just society and a united nation with freedom, equality, non violence, brotherhood and world peace. If the citizens of India remain conscious of and committed to these ideals, we will be able to rise above the various separatist tendencies raising their ugly heads now and then, here and there.

c) To uphold and protect the sovereignty, unity and integrity of India- it is one of the pre eminent national obligations of all the citizens of the India. India is a vast and diverse nation with different caste, religion, sex and linguistic people; if freedom and unity of the country are jeopardized then united nation is not possible. Hence in a way sovereignty lies with the people. It may be recalled that these were first mentioned in preamble and also under 19(2) of fundamental rights reasonable restrictions are permitted on freedom of speech and expression in the interest of the sovereignty and integrity of India.

d) To defend the country and render national service when called upon to do so – it is the duty of every citizen to defend our country against external enemies. All the citizens are bound to be conscious of any such elements entering India and also when in need, they should be ready to take up arms to defend themselves. It is addressed to all the citizens other than those belonging to army, navy and the air force.

e) To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women – Given the vast diversities among people, the presence of one flag and single citizenship strengthens the spirit of brotherhood among the citizens. It states that people should rise above narrow cultural differences and strive towards excellence in all spheres of collective activity.

f) To value and preserve the rich heritage of our composite culture – our cultural heritage is one of the noblest and richest, it is also part of the heritage of the earth. Hence it is our duty to protect what we have inherited from the past, preserve it and pass on to the future generations. India is also one of the most ancient civilizations of the world. Our contributions towards art, science, literature is well known to the world, also this land is birth place of Hinduism, Jainism and Buddhism.

g) To protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures – these natural reserves are the most valued assets of our country hence it is the duty of every citizen to protect it. Rising pollution, large scale degradation of forests is causing immense harm to all the human lives on earth. Increasing natural calamities is a proof to it. It is also reinforced in other constitutional provision under article 48A i.e. Directive Principles of State Policy which states that, to protect and improve the environment and safeguard the forests and wildlife

h) To develop the scientific temper, humanism and the spirit of inquiry and reform – It is a known fact that it is necessary to learn from the experiences and developments around the world for our own development. It is duty of every citizen to protect and promote scientific temper and spirit of inquiry to keep pace with fast changing world.

i) To safeguard public property and to abjure violence – it is unfortunate that in a country which preaches non-violence to the rest of the world, we ourselves see from time to time incidents of senseless violence and destruction of public property. Among all the fundamental duties this one holds a great significance in current scenario when strike, protest etc have become a common phenomenon. Whenever there is a strike or bandh or rally, mob develops

mentality to harm public properties like buses, buildings and to loot them and citizens who are protectors become mute spectators.

j) To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. –As responsible citizens whatever work we take up should be directed towards achieving the goal of excellence so that our country constantly rises to higher levels of endeavour and achievement. This clause has potential to not only regenerate and reconstruct the country but also to raise it to the highest possible level of excellence.

k) Who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years – it was the recommendation of National Commission to Review the Working of constitution, to make education a fundamental right of all the children up to age of 14. 86th Constitutional amendment Act, 2002 however provided for free and compulsory education as a legally enforceable fundamental right for all children between 6 to 14 years of age.

Criticism of Fundamental Duties:

• Some of them are difficult to be understood by common people

• Criticized for being moral precepts, pious platitudes, vague and repetitive

• No need to be implemented as they all are performed by the people even if not included

• Their inclusion in Part IV-A after fundamental rights has reduced their value and significance.

• Some of the important points which were recommended by Swaran Singh committee were not included, such as

1. Parliament should impose penalty or punishment in case of non compliance of duties

2. If punishment is imposed according to above clause, it cannot be called in question in any court on any ground

3. Duty to pay taxes to be incorporated as fundamental duty

• Other important duties like family planning, voting etc should be included

Thus, finally it can be said that the government efforts cannot be successful unless citizens of the country generally participate in the decision making process of the government. Even the unstated duties like voting should be effectively discharged by the citizens. Public spirited people and politicians should come forward to take interest in local community problems. These duties are a constant reminder to us of the national goals as well as the basic norms of political order. They may inspire us to inculcate in ourselves a sense of social responsibility.

Que 10 : what are the relation between fundamental right and directive principle of state policy?

Ans.: Introduction

The constitution of India is considered as the longest written constitution of any sovereign nation in the world. At its birth, it had 395 articles in 22 parts and 8 Schedules and it currently has a Preamble, 25 Parts with 12 schedules, 5 appendices, 101 amendment and 448 articles. January 26 is celebrated as the Republic Day every year. The importance of the Constitution was given effect after 67 years and later on, it was amended 101 times also.

Fundamental rights and DPSP as cherished in the Constitution of India together comprises the human rights of an individual. The Constitution expresses fundamental rights as an idea which appeared in India in 1928 itself. The Motilal Committee Report of 1928 clearly shows inalienable rights derived from the Bill of Rights enshrined in the American Constitution to be given to the individual. These rights were preserved in Part III of the Indian Constitution. of India.

Fundamental rights are also known as Inherent rights because they are inherent to every person by birth. These are the rights which provide an individual with some basic rights for the purpose of survival. No discrimination is made on the basis of religion, caste, race etc. and if any person feels so that his fundamental rights are being infringed then he can surely approach to court for the violation of his rights.

Relationship between Fundamental Rights and DPSP

Constitution of India is a Grundnorm all the law which are made must conform to the constitution of India.

The difference between DPSP and FR are:

Fundamental Rights	DPSP
Limited scope.	Scope of DPSP is limitless.
Protect the rights of the individual and work at a micro level.	Protect the rights of a citizen and work at a macro level.
If anybody feels that his rights are being violated can approach the court of law.	DPSP are not enforceable by law.

The first case we are going to study is about ***Golak Nath vs the State of Punjab, A.I.R. 1976 SCR (2) 762*** Firstly, we will see what the Supreme Court has said and then we will discuss what the parliamentary action was taken. In this case, S.C. said Fundamental rights cannot be diluted, abridged, diminished, finish or taken away and then in response to it by bringing Amendment Act of the Constitution and inserted ***Article 31 (C)*** in part III now what does Article 31 (C) say:

By making a law under **Article 39 (B)** which talk about material resources of community and ***Article 39 (C)*** discuss the operation for an economic system. They say that if any law is framed with effect to DPSP and if it violates ***Article 14 19*** and ***21*** then the law should not declare constitution as void merely on this ground.

In ***Champak Dorairajan vs. the State of Madras***, the Supreme Court held that DPSP cannot override the provisions of Part III of the Constitution of India i.e. the Fundamental Rights. Now DPSP has to run subsidiary to the Fundamental rights and have to confirm them and this

was very important judgement the parliament responded by amending various fundamental rights which were coming in conflict with DPSP.

So, now we will move to our next Case Kerala Education Bill where the Doctrine of Harmonious Construction was introduced by the Supreme Court.

Now, what is the Doctrine of Harmonious Construction? It says that you need to constitute the provision of the constitution in such a way that fundamental rights and DPSP go hand in hand so this was there to avoid the situation of conflict while enforcing DPSP and Fundamental rights. So you should construe each and every provision of the constitution is such a way so they work harmoniously.

Now as per this doctrine the court held that if no inherent power is present then no conflict will arise but if any conflict comes in force just because the court is trying to interpret a particular law so they should attempt to give effect to both as far as possible.

So to connect them together by doing something without doing any kind of amendment. After all the efforts to make everything look balanced if any interpretation is done then the court has to implement Fundamental rights over DPSP.

In the case of Kesavananda Bharathi, 1973 Supreme Court held that Parliament can amend any part of the Constitution but without destroying the basic structure of the constitution. Now, the second clause of Article 31 (C), as we have read earlier, was declared unconstitutional and void because that was against the basic structure. However, the first clause of Article 31 (C) was said to be valid. In response, the parliament brought the 42nd Amendment Act, 1976 and extended the scope of the above provisions of Article 31 (C).

Now in the case of Pathumma vs. the State of Kerala, 1978 the Supreme Court emphasised on the purpose of DPSP that is to fix some social- economic goals. The constitution aims at bringing about a combination between DPSP and Fundamental rights which is reflected in several other cases as well.

In Minerva Mills Case the Court held that the law under Article 31 (C) would be protected only if it is made to implement the directive in Article 39 (b) and (c) and not in any other DPSP. Earlier protection was given to all the DPSP but after this case, it becomes restrictions and was declared that if protection is given to all DPSP it will be declared as void and unconstitutional in nature.

In State of Kerala vs. N.M.Thomas, 1976 the Supreme Court said that Fundamental rights and DPSP should be built in such a way to be with each other and every effort should be taken by the court to resolve the dispute between them.

In Olga Tellis vs. Bombay Municipal Corporation, 1985 the Supreme Court has submitted that DPSP are fundamental in the governance of the country so equal importance should be given to meaning and concept of fundamental rights

In *Dalmia Cement vs. Union of India***,** the Supreme Court said that Fundamental rights and DPSP are supplementary and complementary to each other and the preamble to the constitution which gives an introduction, fundamental rights, DPSP are conscience of the Constitution.

In **,** the Supreme Court said that no difference can be made between the 2 sets of rights. Fundamental rights deal with Civil and political rights whereas DPSP deals with social and economic rights. DPSP are not enforceable in a court of law doesn't mean it is subordinate.

So basically, in all these cases, what they are trying to explain is that Fundamental rights and DPSP go together. Neither of them is supreme to each other.

Government has done several acts for the implementation purpose like panchayat were established by 73rd amendment, Nagar Palika under Article 41, compulsory education to every child who is below the age of 14 years and it was made Fundamental rights, to protect monuments of national importance now this right was converted into a law that is *Ancient and Historical Monuments and Archaeological sites and remains (Declaration of National Importance) Act, 1951*

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Question 11: Discuss the General Characteristics of the Fundamental Rights provided in part III of the Constitution ?

Answer: **General Characteristics of Fundamental Rights**

The Indian Constitution guarantees essential human rights in the form of Fundamental Rights under Part III. Article 12 to 35 of the Constitution pertains to Fundamental Rights of the people. The Fundamental Rights in India, apart from guaranteeing certain basic civil rights and freedom to all also fulfills the important function of giving a few safeguards to minorities. Outlawing discrimination and protecting religious freedom and cultural rights.

The Fundamental Rights are a necessary consequence of the declaration in the Preamble to the Constitution that people of India solemnly resolved to Constitute India a Sovereign, Democratic, Republic and to secure to all of its citizen , Justice , Social , Democratic , Republic and to secure to all of its citizenjustice , social , economic, political, liberty of thoughts expression , belief , faith and worship, equality of status and opportunity. Part III of the Constitution protects substantive as well as procedural rights.

The fundamental rights in Indian constitution have been grouped under seven heads as follows :

(a) Rights to Equality (Articles 14 to 18)

(b) Rights to Freedom (Articles 19 to 22)

(c) Rights Against Exploitation (Articles 23 to 24)

(d) Rights to Freedom of Religion (Articles 25 to 28)

(e) Cultural and Educational Rights (Articles 29 to 30)

(f) Rights to Constitutional Remedies (Articles 32 to 35)

"The Fundamental Rights represent the basic values cherished by the people of this country since its Vedic times and they are calculated to protect the dignity of individual and create condition in which every human being can develop his personality to the fullest extent ".

The general characteristic of the fundamental rights are as follows :

1. **Fundamental Rights are guaranteed by the constitution** –

The Fundamental Rights are guaranteed by the constitution. For this purpose the constitution provides :

(a) All laws in force in the territory of India immediately before commencement of the constitution, in so far as they are inconsistent with the provision of the part III(which deals with the fundamental rights) shall to the extent of such inconsistency be void (Article 13(1))

(b) The state shall not make any law which takes away or abridges the rights conferred by part III and any law made in contravention of this clause shall to extent of the contravention be void (Article 13 (2))

(c) The Supreme court has been given the power for the protection of the Fundamental Rights.

(d) A person may directly move the Supreme court or High Court for the protection of his Fundamental Rights under Article 32 or 226 respectively.

2. Fundamental Rights are Judiciable and Enforceable by Court : If any law or any executive action infringes the Fundamental Rights, the aggrieved person may challenge the validity of such law or executive action in either the Supreme Court under Article 32 or in a High Court under Article 226 and the judiciary may declare such law or executive action ultra vires the constitution if it contravenes any Fundamental Rights.

3. Fundamental Rights are enforceable against the state : Fundamental Rights provides protection against the state action and not against a private individual action.

4. Fundamental Rights are not Absolute Rights : fundamental rights are not absolute and such reasonable restriction may be imposed upon them in interest of the society .

5. The Fundamental Rights may be Suspended – According to Article 359 of the Constitution while the proclamations of Emergency is in operation the president may by order declare that the right to move any court for enforcement of such of the Fundamental Rights as may be mentioned in order (except Articles 20 and 21) shall remain suspended during the period when the proclamation is in force .

Articles 358 provides that while a proclamation of Emergency is in operation nothing in Article 19 shall restrict the power of the state to make any law or take any executive action abridging or taking away the rights guaranteed by Article 19.

6. Fundamental Rights may restricted or abridged with regard to Armed Forces - parliament may by law determine to what extent any Fundamental Rights may be restricted or abridged in their application to Armed Forces so to ensure the proper discharge of duties and maintenance of discipline among members of the forces.

7.Amendment of Fundamental Rights (Article 368) : Fundamental Rights may be amended by amendment of the constitution under Articles 368 by the parliament . However the parliament can not amend the basic features of the Constitution. (Kesavanand Bharti vs State of Kerala AIR 1973)

Question 12: **Define the word 'State' as used in context of Fundamental Rights in part III of the Constitution ?**

Answer: Definition of the word 'State' as used in the context of Fundamental Rights – Article 12 of the constitution defines the term 'State'. It lays down , 'In this part, unless the context otherwise requires, the state includes the government and parliament of India and the Government and the legislature of each of the state and all local or other authorities within the territory of India or under the control of the Government of India.

Thus, the term 'State' includes : (i) The Government and Parliament of India: the term "State" includes Government of India (Union Executive) and the Parliament of India (i.e., the Union Legislature)

(ii) The Government and the Legislature of a State i.e., the State Executive and the legislature of each state.

(iii) All local authorities; and

(iv) Other authorities within the territory of India; or under the control of the Central Government.

Thus, the term 'State' includes Executive and the Legislative organs of the Union and State besides the local or other authorities within the territory of India or under the control of the Government of India.

Here three important terms need to be interpreted:

1. **Territory of India:** Territory of India should be taken to mean territory of India as defined in Article 1(3). According to Article 1(3) the territory of India shall comprise the territories of the States, the Union Territories specified in the first schedule and such other territories as may be acquired.
2. **Authorities ;** 'Authority' means a person, or body exercising power to command. Thus in the context of Article 12 the word 'authority' means the person or body, having the power to make laws, orders, regulation, bye- laws, notification etc which have the force of law and have the power to enforce those laws.
3. **Local Authority:** according to sub-section (31) of Section 3 of the General Clauses Act, 1897 "Local Authority" shall mean a municipal committee, district board, body of commissioner or other authority legally entitled to or entrusted by the Government within the control or management of a municipal or local fund. According to Entry 5 of the List II of 7th Schedule ' local government' includes municipal corporation, improvement trust, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration. Village

panchayat is also included within the meaning of the term local authority. In **Mohammad Yasin v. Town Area Committee** , the Supreme Court held that the Bye-laws of a Municipal Committee charging a prescribed fee on the wholesale dealer was an order by the State Authority contravened Article 19(1) (g). These bye-laws in effect and in substance have brought about a total stoppage of the wholesale dealers' business in the commercial sense. The Supreme Court has ruled that to be characterized as a 'local authority' the authority concerned must have separate legal existence as a corporate body, it must not be a mere government agency but must be legally an independent entity; it must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. It must also enjoy a certain degree of autonomy either complete or partial, must be entrusted by statute with such governmental functions and duties as are usually entrusted to locally like health and education, water and sewerage, town planning and development roads, markets, transportation, social welfare services, etc. Finally, such body must have the power to raise funds for furtherance of its activities and fulfilment of its objectives by levying taxes, rates, charges or fees.

4. **Other Authorities:** The term 'other authorities' in Article 12 has nowhere been defined. Neither in the Constitution nor in the general clauses Act, 1897 nor in any other statute of India. Therefore, its interpretation has caused a good deal of difficulty, and judicial opinion has undergone changes over time.

Today's government performs a large number of functions because of the prevailing philosophy of a social welfare state. The government acts through natural persons as well as juridical persons. Some functions are discharged through the traditional governmental departments and officials while some functions are discharged through autonomous bodies existing outside the departmental structure, such as, companies, corporations etc. Hence, the term 'other authorities' has been interpreted by the following judicial pronouncements in accordance with the facts and circumstances of different cases.

In the case of **University of Madras v. Santa Bai,** the Madras High Court held that 'other authorities' could only indicate authorities of like nature, i.e., ejusdem generis. So construed

it could only mean authorities exercising governmental or sovereign functions. It cannot include persons, natural or juristic. Such as, a university unless it is 'maintained by the State'.

But in **Ujjammabai v. State of U.P.,** The Court rejected this restrictive interpretation of the expression 'other authorities' given by the Madras High Court and held that the ejusdem generis rule could not be resorted to the in interpreting tis expression. In Article 12 the bodies specifically named are the Government of Union and the States, the Legislature of the Union and States and local authorities. There is no common genus running through these named bodies nor can these bodies so placed in one single category on any rational basis.

In **Electricity Board, Rajasthan v. Mohan Lal** the Supreme Court held that 'other authorities' would include all authorities created by the constitution or statute on whom powers are conferred by law. It was not necessary that the statutory authority should be engaged in performing government or sovereign functions. The court emphasized that it is not material that some of the power conferred on the concerned authority are of commercial nature. This is because under Art. 298 the government is empowered to carry on any trade or commerce. Thus, the court observed : " The circumstances that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does not, therefore give any indication that the 'Board" must be excluded from the scope of the word 'State' is used in Article 12.

The next important case relating to the interpretation of the term 'other authorities' is, **Sukhdev Singh V. Bhagatram**, The Supreme Court, following the test laid down in *Electricity Board Rajasthan's Case* by 4:1 majority has stated that the three statutory bodies viz., LIC, ONCG & FCI were held to be 'authorities' and thus fall within the term 'State' in Article 12. These corporations were created by the statutes, had the statutory power to make binding rules & regulations and were subject to the pervasive governmental control. These corporations do have independent personalities in the eyes of law, but that does not mean that "they are not subject to the control of the government or they are not instrumentalities of the government. The employees of these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in

contravention of statutory provisions. The employees are entitled to claim protection of Articles 14 and 16 against the corporations. Mathew, J., in a separate but concurring judgement, held that the Public Corporations is a new type of institution which sprang from the new social and economic functions of the government, and instead of classifying it into old legal category, it should be adopted to the changing time and conditions. The State being an abstract entity, could undertake trade or business as envisaged under Article 298 through an agency, instrumentality or juristic person. He preferred a broader test that if the functions of the Corporation are of public importance and closely related to governmental functions it should be treated an agency or instrumentality of government and hence a 'State' within the ambit of Article 12 of the Constitution.

In simple terms, Statutory corporations are agencies or instrumentalities of the state for carrying on trade or business which otherwise would have been carried out by the state departmentally. Therefore it has to be seen whether a body is acting as an agency or instrumentality of the state.

The approach in **Sukhdev Singh case**, was reiterated with approval in **R D Shetty V. International Airport Authority Bhagwati, J.,** speaking for the Court, pointed out the corporations acting as instrumentality or agency of government would obviously be subject to the same limitation in the field of constitutional or administrative as the government itself, though in the eye of the law they would be distinct and independent legal entities. If the government acting through its officers is subject to certain constitutional and public law limitations, it must follow *a fortiori*, that government acting through the instrumentality or agency of corporations should equally be subject to the same limitations.

Bhagwati, J., discussed in detail various factors relevant for determining whether a body is an instrumentality or agency of the state. These factors as they were finally summarized by him in **Ajay Hasia V. Khalid Mujib**,are:
1. if the entire share capital of the corporation is held by the government, it would go a long way towards indicating that the corporation is an instrumentality or authority of the government.

2. Where the financial assistance of the state is so much as to meet almost entire expenditure of the corporation it would afford some indication of the corporation being impregnated with government character.
3. Whether the corporation enjoys monopoly status which is state conferred or state protected.
4. Existence of deep and pervasive state control may afford an indication of that the corporation is a state agency or instrumentality.
5. If the functions of the corporation are of public importance and closely related to government functions it would be relevant factor in classifying a corporation as an instrumentality or agency of government.
6. If a department of the government is transferred to corporation it would be a strong factor supporting the inference of the corporation being an instrumentality or agency of government.

   The Supreme Court ruled in the instant case that where a corporation in an instrumentality or agency of the government, it must be held to be an authority under Article 12.However, these tests are not conclusive or clinching, and it must be realised that it would not be stretched so far as to bring in every autonomous body which has some nexus with the government within the sweep of the expression. Following this approach, it was held that the international Airport Authority constituted under the International Airport Agency Act, 1971 was an authority and, therefore, 'State' within the meaning of Article 12.

"The concept of the instrumentality or agency of the government is not limited to a corporation created by statute but is equally applicable to a company or society."

This line of approach to the meaning of other authorities has been finally confirmed in **Som Prakash Rekhi V. Union of India**. Applying the criteria laid down in the International Airport Authority case, the Supreme Court reached the conclusion that there is enough material to hold that the Bharat Petroleum Corporation registered as a company under the Companies Act, is State within the enlarged meaning of Art. 12. Consequent upon takeover of Burmah Shell under the Burmah Shell (Acquisition of Undetakings in India) Act, 1976, the

right, title and interest of the company stood transferred and vested in the Government of India. Thereafter, the Central Government took necessary steps for vesting the undertaking in the BPC Ltd. which became the statutory successor of the petitioner employer. **Krishna Iyer, J.,** speaking for himself and **Chinnapa Reddy. J., Pathak, J.** concurring, observed that the various provisions of the Act of 1976 have transformed the corporation into an instrumentality of the Central Government with a strong statutory flavour super-added are clear indicia of power to make it an 'authority'. Although registered as a company under the Companies Act, the BPC is clearly a creature of the statute, a limb of government, an agency of the State and is recognized and clothed with rights and duties by the Statute.

In **Ajay Hasia v. Khalid Mujib,** the question arose whether the Regional Engineering College, Srinagar, established, administered and managed by a society registered under the J & K Registration of Societies Act, was a State within the meaning of Article 12. **Bhagwati, J.,** speaking for the unanimous five judge-bench, reiterated that the tests for determining as to when a corporation falls within the definition of State in Article 12 is whether it is an instrumentality or agency of government. The enquiry must be not how the juristic person is born but why it has been brought into existence. It is, therefore, immaterial whether the corporation is created by the statute or under a statute. The concept of instrumentality or agency of government, is not limited to a corporation created by the statute but is equally applicable to a company or society considering the relevant factors as explained in the **International Airport Authority case.** Applying this criterion, it was held that the Society registered under the J&K Registration of Societies Act was an instrumentality or agency of the State and the Central Government, for the reason that these governments had full control of the working of the society and the society was merely a projection.

Following the law laid down in the **Ajay Hasia case, the Indian Statistical Institute, Indian Council of Agricultural Research, Sainik School Society U.P. State Cooperative Land Development Bank Ltd.,** all societies registered under the Societies Registration Act; Project and Equipment Corporation of India Ltd., a Government of India Undertaking; Food Corporation of India, a statutory corporation; the Steel Authority of India Ltd., a public limited company owned, controlled and supervised by the Central Government the Indian Oil

Corporation, a company registered under the Companies Act of 2013, a State-aided school, whose employees enjoy statutory protection and which is subject to regulations made by the State education department a medical college run by a municipal corporation several electricity boards created on the lines of Rajasthan Electricity Board; Central Government and two State Governments; a Government Company constituted as a development authority under a State town Planning Act; regional rural banks established under the Regional Rural Banks Act, 1976; port trusts created under the Major Port Trusts Act, 1889 or 1963 have been held to be "other authorities" within the meaning of Article 12.

In **Zee Telefilms Ltd vs Union of India AIR 2005 the court noted that the union of India has been exercising certain control over activities of the Board in regard to organizing cricket matches and travel of Indian team abroad as also granting**

On the same basis, in the case of **Chandra Mohan Khanna v. NCERT,** NCERT, has been held to be outside the scope of Article 12. NCERT is a society registered under Societies Registration Act. It is largely an autonomous body; its activities are not wholly related to governmental functions; governmental control is confined mostly to ensuring that its funds are properly utilized; its funding is not entirely from government sources. Another example of the expansive interpretation of the expression 'other authorities' in Art. 12 is furnished by the decision of the Supreme Court in **Pradeep Kr. Biswas V. Indian Institute of Chemical Biology**. In this case, the Supreme Court held that the Council of Scientific and Industrial Research (CSIR) is an authority under Art. 12 and was bound by Art. 14. The Court has ruled that the "Control of the Government in CSIR is ubiquitous. The court has now laid down the following proposition for identification of 'authority' within Art. 12.

The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a state within Article 12. On the other hand, when control is merely regulatory whether under statute or otherwise it would not serve

to make the body a state.

IS JUDICIARY INCLUDED IN THE WORD 'STATE'?

Unlike in U.S.A, where the judicial decision implies ' State action' for the purposes of enforcement of fundamental rights, in India the 'judiciary' is not specifically mentioned in Art. 12. The judicial view is that the judgements of courts cannot be challenged on the ground that hey contravene fundamental rights. Now, the question arises does it mean that the term judiciary is not be included in the concept of 'state'? The answer depends upon the distinction between the judicial and non-judicial functions of the courts. In the exercise of the non-judicial functions, the courts fall within the definition of the 'State'. The exercise of judicial functions will not occasion the infringement of fundamental rights and, therefore, the question of bringing the courts within the definition of the 'state' would not arise.

In **Naresh v. State of Maharashtra,** it was held that even if a court is thee State a writ under Art. 32 cannot be issued to a High Court of competent jurisdiction against its judicial orders, because such orders cannot be said to violate the fundamental rights. What the judicial decisions purports to do is to decide the controversy between the parties and nothing more. The court said that the 'judiciary' while exercising its rule-making power under Art. 145 would be covered by the expression 'State' within the meaning of Art. 12, but while performing its judicial functions, it is not so included.

In **Rupa Ashok Hurra v. Ashok Hurra,** the apex court has re-affirmed and ruled that no judicial proceeding could be said to violate any of the fundamental rights. It was said to be settled position of law that the superior courts of justice did not fall within the ambit of 'State' or 'other authorities' under Art. 12.

In **A. R. Antulay v. R.S. Nayak,** it was held that the court could not pass an order or issue a direction which would be violative of the fundamental rights, thus, it can be said that the expression 'state' includes judiciary also.

It is submitted that the judiciary, though not expressly mentioned in Art. 12, it should be included so, since the courts are set up by statute and exercise power conferred by law. It is

so suggested that discrimination may be brought about… even (by) judiciary. The courts, like any other organ of the state, are limited by the mandatory provisions of the Constitution.

Question 13: how can you say that the fundamental rights have been guaranteed in the constitution? What is the difference between pre – constitution laws and post constitution laws ?

Answer : Guarantee of Fundamental Rights by the Constitution – On the basis of the following provision enshrined in the Constitution , it may be said that the Fundamental Rights have been guaranteed by the Constitution.

1.**Law inconsistent with or in derogation of the Fundamental Rights are Constitutionally void – Validity of pre- Constitutional Laws –** Article 13(1) lays downthat all in force in the territory of India immediately before the commencement of this Constitution, i.e 26th January 1950 in so far as they are inconsistent with the provision of part III shall to extent of such inconsistency be void.

2. Validity of post- Constitutional Laws –Article **13(2)** lays down that the State shall not make any law which takes away or abridges the Fundamental Rights and any law in Contravention of this clause shall to the extent of such contravention be void.

Difference between Pre Constitution Laws and Post Constitution Laws –

Pre Constitution Laws means the laws which were Article 13(1) lays down that all in force in the territory of India immediately before the commencement of this Constitution, i.e 26th January 1950 in so far as they are inconsistent with the provision of part III shall to extent of such inconsistency be void to extent to which they are inconsistent with the fundamental rights from the date of the commencement of the constitution. However, Article 13(1) is prospective in nature. All pre- constitutional laws will become void only after the

commencement of the constitution. They are not void- ab-initio. such inconsistent law is not wiped out so far as the past acts are concerned. Similarly a declaration of invalidity by the courts will also be necessary to make laws invalid. In **Keshava Madhav Menon vs State of Bombay AIR 1951,** the Apex Court has held that there is no Fundamental Rights that a person shall not be prosecuted and punished for an offence committed before the Constitution came into force. So far as the past acts are concerned the law exists notwithstanding that it does not exist with respect to the future exercise of the fundamental rights.

Post constitution laws means the laws enacted after the commencement of the constitution. Article 13(2) prohibits state to make any law which takes away or abridges rights conferred by part III of the constitution. If state makes such a law then it will be ultra vires and void to the extent of the contravention. Such law is still born law and can not be revived by removal of the constitutional prohibition by subsequent amendment of the constitution. Article 13 (2) makes such laws void – ab-initio. Like Pre – Constitution laws, a declaration by the courts of their invalidity is necessary.

Question 14: Is making of classification contrary to guarantee of 'Right of equality" under Article 14 of the Constitution? Discuss fully with the help of decided cases.?

Answer : Every human being is born equally and therefore the makers of the Indian Constitution had also made provision for equality of the people. Article 14 is one of the most important Articles of the Indian constitution and it is also regarded as part of the golden triangle of the Constitution along with Article 19 and 21.

Article 14 is the embodiment of equality which has been provided in the Preamble. Another important point about this Article is that it not only imposes a duty on the State to abstain from discriminating people but it also puts a positive duty to take such action by which the inequalities can be bridged between the people.

Article 14 : According to Article 14, the State cannot deny equality before law and equal protection of law to any person within India. The expression 'equality before law' is a negative concept and the State has a duty to abstain from doing any act which is discriminatory in nature.

Under it, there is an absence of any special privilege to any particular group of people and regardless of the rank of a person, he is subject to the same provisions of law. Thus, no person is above the law of the land/lex loci and all have to abide by it.

The term **'equal protection of law'** is based on the 14th Amendment of the US Constitution. It directs that equal protection of the law should be provided to all the people of India for the enjoyment of their rights without any privileges or favouritism towards any person. This is a positive concept because it implies a duty on the State to take actions for ensuring this right to all the citizens.

Thus both these expressions make the provision of equal treatment binding on the State. In the case of **Sri Srinivas Theatre v. Government of Tamil Nadu,** the Supreme Court explained that both these expressions may appear to be same but they have different meanings. The term equality before the law is a dynamic concept with many aspects, one such aspect being that there should be an absence of any privilege or a person being above the law.

The doctrine of **:Equality before Law :**Under equality before the law, the principle of like should be treated alike is followed. It means that the right to sue and be sued for the same cause of action should be the same for the people who are equals i.e. the people who are in similar circumstances and such right should be available to them without any discrimination on the basis of religion, sex, caste or any other such factor.

In the case state of **West Bengal vs Anwar Ali,** the court held that the term 'equal protection of law' is a natural consequence of the term 'equality before law' and thus it is very difficult to imagine a situation in which there has been a violation of equal protection of law is not a violation of equality before law. So, while they have different meanings, both the terms are interrelated.

The Rule of Law : **Dicey** had given the concept of the rule of law. Rule of law means that no person is above the law. Equality of law is part of the Rule of Law which has been explained by **Dicey.**

Dicey had given three meanings to this term:

The supremacy of law: It means that the law is supreme and the Government cannot act arbitrarily. If a person has violated any law, he can be punished but he cannot be punished for anything else at the whim of the Government.

Equality before Law: It means that all the people should be subject to the same provisions of law which is administered by the ordinary courts of the land. Thus, no person is above the law and has to follow the law. Dicey had given an exception to the Monarch under this rule because in England it is believed that the King can do no wrong.

Constitution originates from the ordinary law: It means that the rights of the people is not granted by the constitution but instead it is the result of the law of the land which is administered by the courts.

In India, the first and second rule has been adopted but the third rule has been omitted because the Constitution is the supreme law of the land and the rights of the people originate from it and all the other laws which are passed by the Legislature should not violate the provisions of the Constitution.

Exception to Equality before Law : There is some exception to the rule of equality which has been provided under the Indian Constitution. Under Articles 105 and 194, the Members of the Parliament and the State Legislatures respectively are not held liable for anything which they say within the House.

Under Article 359 when there is a proclamation of Emergency, the operation of Fundamental Rights including Article 14 can be suspended and if any violation of this right is done during such proclamation, it cannot be challenged in the Courts after the proclamation ends.

Under Article 361 the President and the Governors are not liable to any court for any act which is done by them in exercising their power and duties of the office.

Equal Protection of Laws

It imposes a duty on the State to take all the necessary steps to ensure that the guarantee of equal treatment of people is followed. Like people being treated alike is followed under this rule and another important point under this rule is that unlike should not be treated alike. Thus, even if people who are under different position and circumstances are governed by the same rule then it will also have a negative effect on the rule of equality.

Article 14 and its Reasonable Classification : Article 14 has provided the provision for equality of all people before the law but every person is not the same and therefore it is not practically possible to have a universal application of equality. Thus, the laws cannot be of a general character and some classification is permitted under Article 14.

Thus, the legislature has been allowed to identify and classify different people in groups because it has been accepted that treating the unequal in the same manner is likely to cause more problems instead of preventing them. So for the society to progress, classification is important.

This classification cannot be done arbitrarily because in such case, there will be no justification, so even though Article 14 allows for classification such classification should not confer special privileges to any group arbitrarily and such a classification has to be done on a rational basis. For e.g. the Legislature cannot pass a law which favours a particular caste of people without any rational basis for it and if such a law is passed, it is bound to be held unconstitutional by the Judiciary.

Such arbitrary classification by the legislature is known as class legislation ad it is forbidden by the Constitution but it allows for reasonable classification in which the legislation is passed on a rational basis for the purpose of achieving some specific objectives.

Test of Reasonable Classification : For determining whether a classification made by the legislature is a reasonable one or not, a test is used and when a classification fulfils the conditions of the test, it is held to be a reasonable one.

The following are the tests for identifying the reasonable classification: The classification should not be arbitrary, evasive and artificial in nature. This is the first test for checking the reasonability of a classification. This test is used to check whether the classification is based on some substantial distinction or not. The classification should be based on an intelligible differentia (which can be understood) and should not be some made up the distinction. For e.g. classification of people based on their income is a reasonable classification for the purpose of Article 14.

The differentia which has been applied in the classification should have some real and important connection with the objective which is sought to be achieved by the classification. For e.g., if the legislature has classified the people on the basis of their income, one of the objectives can be to provide some benefits to the people with low incomes such as exemption from tax.

Here the differentia for classification is connected with the objective of providing some benefits to the people earning low income and therefore, this classification is valid.

But the Supreme Courthad warned against overemphasizing the classification. The court observed that the doctrine of classification is a subsidiary rule which has been used by the court to facilitate the doctrine of equality. If there is an overemphasis on the doctrine of classification it would inevitably result in the doctrine of equality under Article 14 to erode and will lead to the substitution of equality by classification.(Re Special Courts Bills)

The New Concept of Equality

After several cases, the concept of equality under Article 14 has gone through many changes and now the present concept of equality has a greater scope as compared to its scope at the time of Constitution's enactment. While the tradition concept of equality is based on the doctrine of classification, the new concept is based on the doctrine of arbitrariness. Article 14 has activist magnitude and a embodies a guarantee against arbitrariness. Arbitrariness is the very antithesis of equality.

In **E.P Royappa vs State of T.N (AIR 1974)** held that equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. In **Maneka Gandhi case**, the court observed that principle of reasonableness, which legally as well as philosophically, in an essential element of equality or non – arbitrariness, pervades Art. 14 like a brooding omnipresence.

In **A.L Kalra vs Project & Equipment Corpn.(1984**) the court said that for the application of Art. 14 one need not allege any discrimination vis a vis others. Arbitrary or unreasonable actions, according to court are per se discriminatory. In **Ajay Hasia case** held that allocation of one -third of total marks for interview was plainly arbitrary and violative of Art. 14

In the case of**Air India vs NargeshMeerza,** the regulation of the Indian Airlines provided that an Air Hostess had to retire from their services on attaining the age of 35 or if they married within 4 years of their service or on their first pregnancy whichever occurred earlier. The court held that terminating the services of an air hostess on the grounds of pregnancy

amounted to discrimination as it was an unreasonable ground for termination. The regulations provided that after 4 years of service the air hostess could marry therefore the grounds of pregnancy was not reasonable. Thus, it was held that this regulation flagrantly violated Article 14 and such termination would not be valid.

Similarly in the case **D.S Nakara vs UOI**Rule 34 of the Central Services rules was held to be violating Article 14 and thus unconstitutional. Under this rule, a classification was made between the pensioners who retired before a specific date and those who retired after that date. Such classification was held irrational by the Court and it was arbitrary. Thus it was an infringement of Article 14 and as a result, was set aside.

In the case of**Bachan Singh vs State of Punjab,** explaining the new dimensions of Article 14, Justice PN Bhagwati had observed that Rule of law permeated the entire fabric of the Indian Constitution and it excludes arbitrariness. According to him whenever there is arbitrariness, there is a denial of Rule of Law. So, every action of the State should be free from arbitrariness otherwise the Court will strike the act as unconstitutional.

The scope of the new concept of Article 14 is far greater than just being equated with the principle of reasonable classification. It guarantees against any arbitrariness which may exist in the actions of the State and the doctrine of classification is merely a subsidiary to this Article.

To Sum Up: Under Article 14 the concept of Rule of law has been adopted under which no person can be said to be above the law and every person has to abide to the provisions of law. But the equality which has been provided for under Article 14 is not universal and the principle of equality among the equals is followed. This is the reason why many laws are made which some people such as laws for the benefit of children. Such classification is reasonable and not arbitrary.

The new dimensions of Article 14 have been developed by the judiciary and the main purpose of Article 14 is to remove any arbitrariness which may exist in the actions of the State and thus this Article has a much wider scope in the present time as compared to its scope at the time of enactment of the Constitution. Thus, the scope of this article has been enlarged by various judicial pronouncements.

Question 15 Discuss the importance of the freedom of speech and expression. Does the constitution permits its curtailment ? if so on what ground and to what extent ?

Answer : Right to freedom of Speech and Expression (Article 19) : Freedom of Speech and expression means free propagation of thoughts and free exercise of right to knowand includes publicity of the thoughts of others as well. Freedom of speech and of the press lay at the foundation of all democratic organizations, for without and free from political discussion on public education, so essential for the proper functionand proper functioning of the process of Government, is possible.The Constitution of India guarantees freedom of speech and expression to all citizens. It is enshrined in Article 19(1)(a).

A basic element of a functional democracy is to allow all citizens participation in the political and social processes of the country. There is ample freedom of speech, thought and expression in all forms (verbal, written, broadcast, etc.) in a healthy democracy.

Freedom of speech is guaranteed not only by the Indian Constitution but also by international statutes such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms, etc.

- This is important because democracy works well only if the people have the right to express their opinions about the government and criticise it if needed.
- The voice of the people must be heard and their grievances be satisfied.
- Not just in the political sphere, even in other spheres like social, cultural and economic, the people must have their voices heard in a true democracy.
- In the absence of the above freedoms, democracy is threatened. The government will become all-too-powerful and start serving the interests of a few rather than the general public.
- Heavy clampdown on the right to free speech and free press will create a fear-factor under which people would endure tyranny silently. In such a scenario, people would feel stifled and would rather suffer than express their opinions.
- Freedom of the press is also an important factor in the freedom of speech and expression.
- In the Indian context, the significance of this freedom can be understood from the fact that the Preamble itself ensures to all citizens the liberty of thought, expression, belief, faith and worship.
- Liberal democracies, especially in the West, have a very wide interpretation of the freedom of speech and expression. There is plenty of leeway for people to express dissent freely.
- However, most countries (including liberal democracies) have some sort of censorship in place, most of which are related to defamation, hate speech, etc.
- The idea behind censorship is generally to prevent law and order issues in the country.

The Need to Protect Freedom of Speech

There are four justifications for freedom of speech. They are:

1. For the discovery of truth by open discussion.

2. It is an aspect of self-fulfilment and development.
3. To express beliefs and political attitudes.
4. To actively participate in a democracy.

In Maneka Gandhi vs Union of India AIR 1978 emphasized – Democracy is based essentially on free debate and open discussion, for that is the only corrective of government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matter is absolutely essential.

Director of film festival vs Gaurav AshvinJain air 2007 an exhibiter of video films it has been held, can not claim protection of Article 19 (1) (a) as he is not propagating or circulating any of his own views. The producer of a film can, but a mere exhibitor of video film cannot exhibit his film is a part of his Fundamental Rights of freedom of speech and expression under Article 19(1) (a) and the restriction imposed under section 4 and 5A of the Cinematograph Act, 1952 relating to certification by Censor Board by applying the guiding principles set out in Section 5B is a reasonable restriction contemplated under Article 19(2).

The right to speech implies the right to silence. It implies freedom not to listen and not to be forced to listen. The right comprehends the freedom to be free from what one not to hear. The use of a loudspeaker may be incidental to the exercise of the right but its use is not a matter of right or part of the rights guaranteed by Article 19(1).

In Tata Press Ltd vs Mahanagar Telephone Nigam Ltd (1995) the Supreme Court has held that a commercial speech (advertisement) is a part of the freedom of speech and expression and it can be restricted only on grounds specified in clause (2) of Article 19. However, deceptive and misleading and untruthful advertisement can be regulated by the Government by law.

In People's union of Civil Liberties vs Union of India AIR 1997 the Supreme court has held that the tapping of telephone of citizen is invasion on right to privacy under Article 21and violation of right to freedom of speech and expression under Article 19 of the Constitution and should be resorted to only on the grounds specified in clause (2) of Article 19. The court has laid down exhaustive guidelines for the exercise of discretion vested in the State under Section 5(2) of Indian Telegraph Act against arbitrary and unlawful exercise of power by the Government.

In communist Party of India vs Bharat Kumar and others AIR 1998 it has been held by a three judge Bench of the Supreme Court that calling for and holding of **" Bundh**" by a political party or organisation is unconstitutional and therefore illegal as it violates the Fundamental Rights of the citizen guaranteed by Articles 19 (1) (a) and 21 of the constitution and in addition to it causes nation loss.

Freedom of Press (Article 19 (1) (a)) – unlike American Constitution Article 19 (1) (a) does not expressly mention the freedom of press. But it is now well – settled law that the freedom of speech and expression includes the freedom of press. (Brij Mohan vs State 1950) , Express News Papers (p) Ltd vs UOI 1958 ,The liberty of press consists in printing without any licence subject to the consequence of law. The freedom of press is not confirmed to newspaper and periodicals. Its also includes pamphlets, circulars and every sort of publication which affords a vehicle of information and opinion. Freedom of press is implicit in the freedom of speech and expression guaranteed to every citizen under Article 19(1) (a). it follows that this freedom cannot be claimed by a newspaper or other publication run by a non – citizen . it is subject to the same limitations as are imposed by Article 19(2).

In the Bennet Coleman vs Union of India AIR 1973 Supreme Court observed that the freedom of press is both quantitative and qualitative and lies both in circulation and contents. Hence in a number of cases such restriction on press as to reduce the circulation e,g taxes on newsprint, reducing the number of pages or periodicity etc have been held to be set by Article 19 (1) (a) and hence invalid.

In Hindustan Times vs State of U.P AIR 2003 the court observed that advertisements in Newspaper play an important role in the matter of revenue of the Newspaper and have a direct nexus with its circulation by making the newspaper available to the readers at a price at which they can afford and they have no other option but to collect more funds by publishing commercial and other advertisements. Every executive action which operates to the prejudice of any person must have the sanction of law and the executive cannot interfere with the rights and liabilities of any person unless the legality thereof supportable in any court of law.
in **AjaiGoswani vs UOI AIR 2007** the real objective is to restrain freedom of press or any censorship prior to the publication of articles or other materials. The court held that in order to shield minor and children should not forfeit that the same content can't be offensive to the sensibilities of adult men and women.

Pre – Censorship – Unconstitutional - Pre – Censorship is Unconstitutional, the **supreme court in Brij Bhushan vs State of Delhi AIR 1950 ,** held that the imposition of censorship on a journal previous **Bennet Coleman and Co. vs UOI 1973** the court held that the newsprint policy is no reasonable restriction within the ambit of Article 19(2) . The newsprint policy abridges petitioners rights of freedom of speech and expression.

In K.A Abbas vs UOI AIR 1971 it has been held that the Pre – Censorship of films is justified under Article 19(2) on the ground that films have to be treated differently from other forms of art and expression because of its instant effect on persons who watch it particularly on adolescents.
Right to Information – UOI vs Association for Democratic Reforms AIR 2002, a three judge Bench of the apex court directed the election Commission to issue a notification making it obligatory for those who contest election to make available information about their education, assets, liabilities and criminal antecedents for the benefit of voters. The court said that the voters have rights to know about the antecedents of the candidates before giving their votes. This right implicit under Article 19(1) (a).

What is Restriction on Freedom of Speech and Expression :

The freedom of speech is not absolute. Article 19(2) imposes restrictions on the right to freedom of speech and expression. The reasons for such restrictions are in the interests of:

1. Security
2. Sovereignty and integrity of the country
3. Friendly relations with foreign countries
4. Public order
5. Decency or morality
6. Hate speech
7. Defamation
8. Contempt of court

1. Decency or Morality

Article 19(2) inserts decency or morality as grounds for restricting the freedom of speech and expression. Sections 292 to 294 of the Indian Penal Code gives instances of restrictions on this freedom in the interest of decency or morality. The sections do not permit the sale or distribution or exhibition of obscene words, etc. in public places. However, the words decency or morality are very subjective and there is no strict definition for them. Also, it varies with time and place.

2. Security of the State – under clause (2) of Article 19 reasonable restriction can be imposed on freedom of speech and expression in the interest of security the state. The term 'security' of the State' refers only to serious and aggravated forms of public disorder like rebellion or waging war.

3. **Friendly Relation with Foreign State**: this ground was added by the Constitution (First Amendment) Act 1951

In India, the Foreign Act (XII OF 1932) provides punishment for libel by Indian citizen against foreign state would not justify the suppression of fair comment of foreign of the Government.

4. **Public Order -in SuptdCentral Jail vs Ram Manohar Lohia AIR 1950** public order was declared as synonymous with public peace, safety and tranquillity. Public order and public tranquillity though connected but are not the same.

The phase in the interest of public order includes directs intention to lead disorder as well as the tenancy to lead to disorder. A law punishing these is valid as it restricts right to free speech in the interest of public order.

5. **Contempt of Court** : Article 129 and 215 of the Constitution authorise the Supreme court and High Court respectively to punish for their contempt .

6. **Defamation** – Section 499 and 500 of I.P.C define defamation means exposing a man to hatred, contempt or ridicule. The sections are constitutional as they impose reasonable restriction on the freedom of speech and expression.

Question16 :Protection of Life and Liberty (Article 21) ?

Right to life and personal liberty is an essential part of human life. In its wider connotation, it includes all the basic necessities of life without which one could not even survive.

Right to Life The expression "human rights" embraces the rights of man both as individual and as a member of society. Human rights promote individual welfare as well as social welfare. Right to life has been considered as the most fundamental of all human rights. Denial of the right to life means refutation of all other human rights because none of other rights would have any existence without it. Because of its great value it has been recognized in various international, national, and regional documents. Similarly "right to life "under Article 21 of the Indian Constitution is supreme amongst all fundamental rights, enshrined in Part III of the Constitution of India.

In its true sense, Right to life means a way of living which empowers every individual to enlighten his or her inner and outer contents, to enjoy dignified and humane life, to get

pleasure of fundamental freedoms, etc. Every civilized state is bound to protect individuals‟ right to life.

Indian judiciary has played an active role in enforcing the true spirit of right to life mentioned under Article 21 of the Indian Constitution. It has been observed that the courts assumed the role of poor man's court after the **Maneka Gandhi's landmark judgment** and, started protecting the interests of the poor section of the society. During 1980s, the Supreme Court of India promoted public interest litigations by allowing public interest advocates and non government organizations to file petitions on behalf of traditionally powerless persons, including bonded labourers, rickshaw drivers, pavement dwellers, inmates of mental infirmaries and workhouses and victims of environmental damage.

By doing so, the courts recognized even those fundamental rights which were not explicitly mentioned in the Constitution of India. The Indian judiciary widely interpreted and gave progressive meanings to the words of „life‟, „personal liberty‟, and „procedure established by law‟ for protecting individuals‟ fundamental rights. Hence, the right to life under Article 21 of the Indian Constitution includes Right to education, Right to clean environment, Right to reputation, Right to food, Right to shelter, Right against exploitation, Right to dignified living, right to release and rehabilitation of bonded labourers , right to legal aid, and the right to know, Right to go abroad, Right to privacy, Right against solitary confinement etc.

Article 21 of the Constitution of India provides: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

Right to life is not an absolute right. State can impose reasonable restrictions by adopting some procedure. But the expression "**procedure established by law**‟ in Article 21 does not mean any arbitrary law rather it should be reasonable, fair and just. Justice H.R. Khanna rightly observed that sanctity of life and liberty was existed and was prevailing in the civilized societies even before the commencement of the Indian Constitution. In that sense, the Indian Constitution adopted the idea and spirit of life and liberty, and freedom from

arbitrary authority of law. Despite of it being most precious fundamental right, it is submitted that, the term ‚life" has not been defined anywhere in the Constitution of India. Therefore, we will have to analyse various Indian judicial pronouncements for its interpretation. Furthermore, it is pertinent to mention here that the United States" judicial decisions also guided Indian courts at many fronts for defining the term **"life"** and "personal **liberty".**

While referring the **Fourteenth Amendment** of the U.S. Constitution, Mr. Justice Field explained the meaning of "life" and "personal liberty" in **Munn v Illinois**. He said that the meaning of the term "life" is very wide and, is more than mere animal existence. Similarly, the term **"liberty"** is something more than mere freedom from physical restraint or the bounds of a prison.

Right to life with human dignity :In **Kharak Singh v State of UP**, the word "life" in Article 21 doesmean and acknowledged that the observation rightly explained the meaning of right to life and personal liberty. Such observations were again approved by the Hon"ble Supreme Court of India in Sunil Batra v Delhi Administration. It has been observed that the inspired courts started giving new dimensions to the „right to life" under Article 21 of the Indian Constitution. The Supreme Court of India in Francis Coralie Mullin v Union Territory of Delhi observed Right to life includes the right to live with human dignity. It further includes the basic necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Therefore, this was the time in India when the real soul of "right to life" took rebirth in the form of "right to live with human dignity". The Hon'ble Supreme Court again in **Samatha v State of U.P.**

Interpretation of Article 21

Judicial intervention has ensured that the scope of Article 21 is not narrow and restricted. It has been widening by several landmark judgements.

A few important cases concerned with Article 21:

1. AK Gopalan Case (1950): Until the 1950s, Article 21 had a bit of a narrow scope. In this case, the SC held that the expression 'procedure established by law', the Constitution has embodied the British concept of personal liberty rather than the American 'due process'.
2. Maneka Gandhi vs. Union of India Case (1978): This case overturned the Gopalan case judgement. Here, the SC said that Articles 19 and 21 are not watertight compartments. The idea of personal liberty in Article 21 has a wide scope including many rights, some of which are embodied under Article 19, thus giving them 'additional protection'. The court also held that a law that comes under Article 21 must satisfy the requirements under Article 19 as well. That means any procedure under law for the deprivation of life or liberty of a person must not be unfair, unreasonable or arbitrary.
3. Francis Coralie Mullin vs. Union Territory of Delhi (1981): In this case, the court held that any procedure for the deprivation of life or liberty of a person must be reasonable, fair and just and not arbitrary, whimsical or fanciful.
4. Olga Tellis vs. Bombay Municipal Corporation (1985): This case reiterated the stand taken earlier that any procedure that would deprive a person's fundamental rights should conform to the norms of fair play and justice.
5. Unni Krishnan vs. State of Andhra Pradesh (1993): In this case, the SC upheld the expanded interpretation of the right to life. The Court gave a list of rights that Article 21 covers based on earlier judgements. Some of them are:
    1. Right to privacy
    2. Right to go abroad
    3. Right to shelter
    4. Right against solitary confinement
    5. Right to social justice and economic empowerment
    6. Right against handcuffing
    7. Right against custodial death
    8. Right against delayed execution
    9. Doctors' assistance
    10. Right against public hanging
    11. Protection of cultural heritage
    12. Right to pollution-free water and air
    13. Right of every child to a full development
    14. Right to health and medical aid
    15. Right to education
    16. Protection of under-trials

Is there is Right to Life and Suicide

Section 309 of the Indian Penal Code (IPC) makes attempted suicide a criminal offence which is punishable with imprisonment and fine.

- There were many debates on whether this should continue since mental health experts have argued that people who attempt suicide need adequate counselling and not punishment.
- The Mental Healthcare Act, 2017 was passed by the Parliament and the law came into force in 2018. This Act is meant to provide "for mental healthcare and services for persons with mental illness and to protect, promote and fulfill the rights of such persons during delivery of mental healthcare and services."
- This law decriminalises suicide in India.
- The law states, "Notwithstanding anything contained in section 309 of the Indian Penal Code, any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said Codeendorsed an individual's right to live with human dignity, and observed that the life becomes meaningful only when an individual enjoys the social, cultural and intellectual life etc.

Arguments in favour of decriminalising suicide:

1. This is the only case where an attempt to a crime is punishable and not the crime itself (because a person becomes beyond the reach of law if suicide is complete).
2. Suicide is committed/attempted by people who are depressed and under severe stress. People who attempt suicide need counselling and medical help, not a jail warden's severe authority.
3. Decriminalising an attempt to suicide is different from conferring the 'right to die'.

Right to Life and Euthanasia

There are many debates on whether the right to life also extends to the right to die, especially to die with dignity. Euthanasia is a topic that is frequently seen in the news. Many countries have legalised euthanasia (the Netherlands, Belgium, Colombia, Luxembourg).

Euthanasia is the practice of intentionally ending life in order to relieve suffering and pain. It is also called 'mercy killing'.

There are various types of euthanasia: Passive and Active.

Passive Euthanasia: This is where treatment for the terminally-ill person is withdrawn, i.e., conditions necessary for the continuance of life are withdrawn.

Active Euthanasia: This is where a doctor intentionally intervenes to end someone's life with the use of lethal substances.

This is different from **physician-assisted suicide** where the patient himself administers the lethal drugs to himself. In active euthanasia, it is a doctor who administers the drugs.

Voluntary euthanasia: Under this, euthanasia is carried out with the patient's consent.

Non-voluntary euthanasia: Under this, patients are unable to give consent (coma or severely brain-damaged), and another person takes this decision on behalf of the patient.

Involuntary euthanasia: Euthanasia is done against the will of the patient, and this is considered murder.

International Position on Euthanasia:

In the Netherlands and Belgium, both euthanasia and physician-assisted suicide are legal.

In Germany, euthanasia is illegal while physician-assisted suicide is legal.

Both euthanasia and physician-assisted suicide are illegal in India, Australia, Israel, Canada and Italy.

Euthanasia in India

Passive euthanasia has been made legal in India.

- In 2018, the SC legalised passive euthanasia by means of the withdrawal of life support to patients in a permanent vegetative state.
- This decision was made as a part of the verdict in the famous case involving Aruna Shanbaug, who had been living in a vegetative state for more than 4 decades until her death in 2015.
- The court rejected active euthanasia by means of lethal injection. **Active euthanasia is illegal in India**.
- As there is no law regulating euthanasia in the country, the court stated that its decision becomes the law of the land until the Indian parliament enacts a suitable law.
- Passive euthanasia is legal under strict guidelines.
- For this, patients must give consent through a living will, and should either be in a vegetative state or terminally ill.

Living Will: It is a legal document in which a person specifies what actions should be taken for their health if they are no longer able to make such decisions for themselves due to illness or incapacity.

When the executor (of the living will) becomes terminally ill with no hope of a recovery, the doctor will set up a hospital medical board after informing the patient and/or his guardians.

Question17:what are rights of a Arrested Person ?

Answer: Rights of An Arrested Person

The Supreme Court in **D.K. Basu v State of West Bengal** laid down some basic guidelines as a preventive measures to be observed in all cases of arrest and detention with a view to prevent custodial violence:

1. The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designation and their particulars must be recorded in a register.

2. A memo of arrest shall be prepared by the police officer at the time of arrest, which shall be attested by at least one witness, who may either be a family member of the arrestee or a respectable person of the locality from where the arrest is made. The memo shall be counter-signed by the arrestee and it shall also contain the time and date of arrest.

3. The arrestee or the detenue who is in custody in a police station or interrogation centre or other lock-up, shall be entitled to have a friend, relative or other person known to him or having interest in his welfare to be informed, as soon as practicable, about his arrest or detention at a particular place.

4. If the next friend or relative of the arrestee lives outside the district/town, the police must notify the time, place of arrest and venue of custody of an arrestee to the police station of the area concerned. This should be done telegraphically within a period of 8 to 12 hours after the arrest.

5. The arrestee must be made aware that the moment he is arrested or detained he has the right to give this information to someone.

6. The arrest of the person disclosing the name of his/her next friend who has been informed about the arrest, the names and the details of the police officials in whose custody the arrestee is, must be entered in the diary at the place of detention.

7. The arrestee, as per his request, shall be examined at the time of his arrest. Any major or minor injuries if present on his/her body must be recorded at that time. The "inspection memo" must be signed both by the arrestee and the police officer effecting the arrest. A copy of the same is to be provided to the arrestee.

8. A trained doctor on the panel of approved doctors appointed by the Director, Health Services, should be conducting medical examination of the arrestee every 48 hours while he is detention in custody.

9. Copies of all above stated documents should be sent to Illaqa Magistrate for his record.

10. Permission may be given to the arrestee to meet his lawyer during interrogation, but not throughout the interrogation.

11. The police officer causing the arrest should be communicating the information regarding the arrest to a police control room at all district and state headquarters, within 12 hours of making the arrest. This information should be displayed on a conspicuous notice board at the police control room.

A plain reading of first part of Article 22 of the Constitution of India, clearly indicates that a person who is arrested cannot be detained in custody without being informed, as soon as may be, of the grounds for such arrest. It means that he is to be informed of the grounds for his arrest. The personal liberty being the cornerstone of our social structure, the legal provisions relating to arrests have special significance.10Article 22 makes the minimum procedural requirements which must be included in any law enacted by legislature in accordance of which a person is deprived of his personal liberty. A person when arrested is undeniably deprived of his personal liberty. Some of the procedural protections have been provided to a person to be arrested in Sections 50, 50-A11, 55 and 75 of the CrPC. Section 50 casts a strict duty on the part of the police officer making the arrest immediately to communicate the grounds of arrest to the arrested person.

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In Rural Litigation and Entitlement Kendra Dehradun v. State of Uttar Pradesh, also known as **Doon valley case**, the Supreme Court had to deal with a dispute involving mining in the hilly areas. After proper investigation, the Supreme Court ordered to stop the mining work. The court also ordered to pay the price to the sufferers in order to protect and safeguard the right of the people to live in healthy environment. The court also showed its great concern to the local inhabitants‟ cattle, homes and agricultural land. In Intellectuals Forum, **Tirupathi v. State of A.P.**the Supreme Court made the government responsible for protecting the historical tanks while expanding the scope of concept of „sustainable development‟ and the „public trust doctrine‟. The principle of “InterGenerational Equity‟ was also recognised as part of sustainable development. The same principle was reiterated in several cases including A.P. Pollution Control Board .**In T. N. GodavaramanThirumulpad v Union of India,** the Supreme Court again reminded the governments to make coherent

policies on intergenerational equity. Recently in **M.C. Mehta v Union of India**, Decided on 8 May, 2009, the Supreme Court has suspended all mining operations in the Aravalli Hill Range falling in the State of Haryana till Reclamation Plan. The said Plan has to take initiatives for the rehabilitation of the area.

Question 18: what is 86th Amendment and Right to Education in this context?

Answer : Spurred by the **Unnikrishnan judgment** and a public demand to enforce the right to education, successive governments from 1993 worked towards bringing a constitutional amendment to make education a fundamental right. That led to the 86th amendment in December 2002 which insertedthe following articles in the Constitution. The Constitution 86th Amendment Act, 2002 enshrined right to education as a fundamental right in part-III of the constitution. It came up with the below features:

What are the Changes implies in Fundamental Rights :

A new article 21A was inserted below the Article 21 which made Right to Education a Fundamental Right for children in the range of 6-14 years. This article reads:

"The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine"

What are Changes held in DPSP ;

Article 45 which originally stated:

"The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years."

Was substituted as

"The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years."

Change in Fundamental Duties

- Article 51A was also amended and after clause (J), the clause (k) was added which says:
- "who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years."

As per the above amendments, the 86th Amendment Act came up with the following:

- It made Right to Education a Fundamental Right for Children from Age 6-14.
- It made education for all children below 6 years a Directive Principle for State Policy (DPSP).
- It made the opportunities for education to child a Fundamental duty of the parents of the children.

No child is liable to pay any kind of fee/ capitation fee/ charges. A collection of capitation fee invites a fine up to 10 times the amount collected.

Children from Disadvantaged Group:

This right provides that "child belonging to disadvantage group" means a child who

- Belongs to SC & ST
- Socially backward class
- Geographical, Linguistic
- Gender or such other matters
- Is differentially abled

The Right to Education Act 2009 did not initially talk about "Physically disabled" children. To enable such provisions, the Right of Children to Free & Compulsory Education (Amendment) Bill 2010 was introduced in the RajyaSabha on April 16, 2010. This bill was later referred to ato a standing committee on Human Resource Development. The bill was passed in both the houses of the parliament by May 2012 thus expanding the definition of "Child belonging to disadvantaged group". Now this group shall also include the children with disability. Disability means blind, leprosy cured, hearing impaired, locomotor disabled and mentally ill. It also includes autism, cerebral palsy, mental retardation & multiple disabilities. These children have the same right as of other children. Please note that Right to Education of persons with disabilities until 18 years of age is laid down under a separate legislation- the Persons with Disabilities Act. A number of other provisions regarding improvement of school infrastructure, teacher-student ratio and faculty are made in the Act.

- Teachers: This act provides that the states will ensure that no non-teaching work is given to the teachers. The act recommends quality teachers and mandates that untrained teachers will have to upgrade themselves in 5 years.

- Schools: The act has listed minimum infrastructure requirements as a part of the schools and mandates the states to ensure that schools have these requirements. The schools which don't conform to the quality standards as mentioned in the act, will upgrade themselves in 3 years or face derecognition.
- Reservation: The act mandates 25% reservation for disadvantage sections of the society as defined by the act.
- Management Committees: The act mandates that parents are to constitute the 75% members in the management committees. The School management committees are to have 50% women members.
- Screening: This act makes the screening of students / parents unlawful. It invites fine up to ` 25000 in the first instance and double in every successive violations.
- Examinations: No child can be put through any exam, not even class V & Class VIII board examinations.
- Monitoring: The act states that National & State Commissions for protection of Child rights would monitor the effective implementation of measures in this act and inquire into complaints.
- National Advisory Council: The act provides that the central Government shall constitute a National Advisory Council of maximum 15 members which shall advise the central government on implementation of the various provisions of the act.

Question 19: what are Constitutional Protections Against Ex Post Facto Laws ?

Article 20 of the Constitution appears in the chapter on 'Fundamental Rights' and deals only with the constitutional protections to a person accused and convicted of an offence. These safeguards have been elevated to the pedestal of constitutional rights and replicate the natural justice principles of fair trial in the administration of criminal justice. The protections embodied in Article 20 of the Constitution guarantee protection in certain respects against conviction to a person who is an accused of a criminal offence, by prohibiting-

1. Retrospective criminal legislation, commonly known as ex post facto legislation.
2. Punishment for the same offence more than once or double jeopardy.
3. Compulsion to give self-incriminating evidence.

Realising the significance of these constitutional safeguards, the Constitution of India was amended by the Constitution Forty-fourth Amendment Act, 1978 to the effect that Article 20 cannot be suspended even during a national emergency.

Protection Against Ex Post Facto Laws: International Scenario :

The essence of non-retroactivity principle is that a person should never be convicted or punished except in accordance with previously declared offence governing the conduct in question. This principle is to be found in Article 11(2) of the Universal Declaration of Human Rights etc.1There is universal acceptance of the legality principle as a result of the international human rights movement after 1945. Article 15 Constitution of Maryland (1776) contained the first explicit prohibition against ex post facto laws, which later found its way into Article 1 (90)(3) of the Constitution of the United States of America. The British Parliament occasionally enacted ex post facto criminal laws well into the 19th century. It was only in 1973 the House of Lords abolished the doctrine of residual judicial discretion to create common law crimes. However, the Scottish judiciary still claims this power, as a part of dynamic system of common law which must be adapted to deal with changing social circumstances.

Historical Development : Article 20 (1)

In the Draft Constitution this protection against ex post facto laws was provided in Article 14(1) that originally provided protection only against imposition of greater penalty retrospectively. At this stage, during the Constituent Assembly Debates an amendment to clause (1) was suggested and finally adopted so as substitute the words 'under the law in force at the time of the commission' in place of 'under the law at the time of the commission'. Another amendment suggested was to insert after the words 'greater than', the words 'or of a kind other than' was however, negative. The provision against ex post facto legislation is contained in Cl. (1) of Article 20 of our Constitution.

Article 20 (1)- No person shall be convicted for any offence except for violation of law in force at the time of the commission of the act charged as an offence, nor be subject to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

It may be noted that the Government of India Act, 1935, did not provide for such prohibition against ex post facto laws.

Constitutional Protection Against Ex Post Facto Laws:

To give retrospective effect to a law by bringing within its operation, acts committed prior to the enactment of the law in question would be prejudicial to the interests of any person, if the act when done was innocent and attracts penal liability by virtue of a subsequent law. Hence, Art. 20(1) limits the right of the sovereign legislature in a limited manner. Such laws are regarded as inequitable and abhorrent to the notions of justice and, therefore, there are constitutional safeguards against such laws.

Scope and Effect of Prohibition Against Ex Post Facto Laws

This Article in broad import, prohibits conviction and sentence under ex post facto laws. No one should be punished for something, which was lawful when it was done. This would be highly inequitable, unjust and contrary to the universal notion of fairness and justice.

Immunity Restricted To Criminal Offences/Liability :

This immunity does not extend to a civil liability and is restricted only to conviction or sentence. The latter half of Art. 20 applies only to cases of retrospective increase of penalty for an offence. In Art.20(1) the expression 'penalty' is used in narrow sense as meaning a payment which has to be made or a deprivation of liberty which has to be suffered as a consequence of a finding that the person accused of a crime is guilty of the charge. However, a penalty imposed by the sales tax authorities is only a civil liability, though penal in character.

Offence Should Be Committed According To 'Law In Force'

If an act when committed is not an offence as per the law in force, no future law can make it an offence.An immunity is provided to a person from being tried for an act, under a law enacted subsequently, which makes the act unlawful.

Applicable To Law Enhancing The Criminal Liability :

Every law that takes away or impairs a vested right is retrospective. But an ex post facto law that only mollifies the rigour of a criminal law or reduces the penalty, does not fall within the prohibition under Art.20 (1). If under a law no minimum sentence of fine has been provided and an unlimited fine can be imposed thereby, subsequent change in law laying down the

minimum fine which the court must compulsorily inflict on a person, does not infringe Art.20 (1).

Prohibition Not Applicable To Trial/Court/Procedure

There is no fundamental right available to a person accused of the commission of an offence, to be tried by a particular court or by a particular procedure, unless there is involvement of any constitutional objection by way of discrimination or the violation of any other fundamental right. Retrospective change in the venue of trial does not attract the application of Art. 20 (1). A statute cannot be said to be retrospective because a part of the requisites for its actions is drawn from a time antecedent to its passing.

Question 20. What are Protections available in Double Jeopardy ?

International Scenario :

In common law if a person is charged again for the same offence in an English court, he can plead, as a complete defence, his former acquittal or conviction, i.e. the plea of autrefois acquit or autrefois convict. The corresponding provision in the American Constitution is embodied in the Fifth Amendment. The expression 'double jeopardy' is one of American law and is not used in our Constitution.

Historical Development: Article 20 (2) The principle of 'double jeopardy' has been embodied in the existing law in India and finds place in Section 26 of the General Clauses Act, 1897 and also in Section 300 of the Criminal Procedure Code, 1973 (Section 403 of the Code of Criminal Procedure, 1898). In the Draft Constitution Article 14(2) ran as under:

" No person shall be punished for the same offence more than once." An amendment for the addition of words 'prosecuted and' was suggested before the word 'punished' and was accepted. The suggestions to extend the immunity also toacquittal and to add the words 'otherwise than as permitted by the Code of Criminal Procedure, 1898' at the end of clause (e) were negatived.

Constitutional Protection Against Double Jeopardy Under Article 20(2)

This Article incorporates the common law plea of autrefois convict.Article 20 (2) bars the retrial of a person, when he has been convicted and sentenced for the same offence.

Article 20 (2) - (2) No person shall be prosecuted and punished for the same offence more than once

It is based upon the principle of 'double jeopardy' clause and lays down that no person should be put in jeopardy of his life or liberty more than once. Article 20 (2) uses the word 'and' in conjunctive sense and it is only where the accused has been both prosecuted and punished for the same offence, a second trial is barred.25 Article 20 (2) can be invoked, if the following two requisites are fulfilled - (i) The person must be accused of an "offence"

(ii) The person must have been prosecuted and convicted before a court or a judicial tribunal.

Extent and Scope of Article 20 (2)

The Article applies when the second trial is for the same offence for which the accused was previously tried and convicted. Section 300 is more comprehensive in its scope than Art. 20(2). Under Section 300(1), even a person who has been acquitted in a previous trial by a competent court, cannot be tried for the same offence.

Narrow in Scope The scope of Art. 20 (2) is even narrower than the English or the American rule against double jeopardy. Second trial is barred even when the accused has been acquitted at the first trial for that offence. Art.20(2) has not incorporated the rule of autrefois acquit and may be invoked only when there has been co-existence of prosecution and punishment in the first instance. That means, if a person has been prosecuted for an offence but acquitted, then he can be prosecuted for the same offence again and punished. The scope of Art.20 (2) has thus been very much narrowed down by judicial interpretation.

Prosecution and Punishment Before a Competent Court: The Article does not give immunity from proceedings other than proceedings before a court of law or a judicial tribunal. Hence, a government servant who has been punished for an offence in a court of law may yet be subjected to departmental proceedings for the same offence or vice- versa. The proceedings before the sea customs authorities or the adjudicatory authorities functioning under the Foreign Exchange Regulation Act are of "adjudicatory" nature and character and

are not “criminal proceedings”. Cannot be Invoked Against Previous Acquittal/Previous Trial Becoming Abortive for Inherent Defects

A trial under Article 20(2) is not barred when the previous trial has become abortive either by virtue of some inherent defect or illegality affecting the validity of the trial itself, like lack of jurisdiction etc. An appeal against an acquittal is in substance a continuation of the prosecution, hence the protection under Art. 20 (2) cannot be pleaded against the appeal.

Bar Operates Only Against Prosecution and Punishment for Identical Offence Tried Previously :

Article20(2) to be operative, both prosecution and punishment must co-exist when the second prosecution and punishment is for the identical offence for which the person concerned had already been prosecuted and punished earlier. The same offence would essentially mean the offence whose ingredients are same. Double punishment is not barred if there are two distinct and separate offences with different ingredients under two different enactments, notwithstanding that some of the ingredients of the two offences may be common.

Effect of Prosecution and Conviction in Foreign Country:

A person liable by any Indian law to be tried for any offence committed beyond India is to be dealt with under the provisions of the Cr.P.C., having regard to the fact that the provisions of the Code would also apply to any offence committed by any citizen of India in any place within and beyond India. If the offences for which a person hadbeen tried and convicted in the USA and for which he is now being tried in India, are distinct and separate will not attract Art 20 (2) of the Constitution.

SUBJECT: LAW OF CRIMES

COURSE: LLB 209

UNIT I

Question No. 1: Define Murder and distinguish it from culpable homicide no amounting to murder.

Answer: Homicide means the killing of a man by man. The homicide may be lawful or unlawful. Culpable homicide means death through human agency punishable by law. All murders are culpable homicide but all culpable homicide is not murder. There are two classes of culpable homicide :

1. Culpable Homicide Amounting to Murder: It is known as simple murder.
2. Culpable homicide not amounting to Murder: There is necessarily a criminal or knowledge in both. The difference does not lie in quality, it lies in the quantity or degree of criminality closed by the act. In murder there is greater intention or knowledge than in culpable homicide not amounting to murder. The culpable homicide is defined in sec. 299 of the IPC which is as under :

CULPABLE HOMICIDE UNDER SEC.299 OF IPC-

Whoever causes death by doing any act :-

(i) With the intention of causing death

(ii) With the intention of causing such bodily injury as is likely to cause death.

(iii) With the knowledge that he is likely, by such act, to cause death commits the offence of culpable homicide.

ILLUSTRATION

'A' knows that Z is behind a bush, B does not know it. A intending to cause or knowing that is likely to cause Z's death induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence, but A has committed the offence of culpable homicide. Here is the three explanations of this section which are as under :-

Explanation No. 1 :- A person who causes bodily injury to another who is labouring under disorder decease, or bodily infirmity and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation No. 2 : Where death is caused by bodily injury the person who causes such bodily injury shall be deemed to have caused death, although by resorting to proper remedy and skilful treatment, the death might have been prevented.

Explanation No. 3 : The causing of death of a child in the mother's womb is not homicide, but it may amount to culpable homicide to cause the death of a living child if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Case: Kedar Parsad V/s State 1992: It was held by the court that the first accused was liable U/s 304 and the other U/s 324 for causing hurt by dangerous weapon & the third U/s 323 for causing simple hurt only.

Case:- Ghanssham V/s State of Maharashtra 1996 : The accused husband stabbed his wife on chest resulting in her death on her refusal to have sexual intercourse with him. It was held that the act was done in sheer frustration and anger and so his liability was based on sec. 299(2) of IPC.

Case: Sarabjeet Singh V/s St ate 1994. The accused did not have good relation with complainant on account of sale transaction of piece of land. He went to the house and assaulted the complainant and his wife. He also picked up the infant child of the complainant and threw him down on the ground with force as a result of which the child died some time later. The accused was held guilty under sec. 304 Part-II. When culpable homicide amounts to murder : According to sec.300 of IPC except the exceptions culpable homicide is murder, it the act by which death is caused:

1. It is done with the intention of causing death or
2. It is done with the intention of causing such bodily injury as the offender knows that it is to be likely to cause the death of the person to whom the harm is caused.
3. If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient ordinary cause of nature to cause death
4. If the person committed the act knows that it is so imminently dangerous that it must in all probability, cause death or such bodily injury as is like to cause death; and commits such act without any excuse for incurring death or such injury as said above.

ILLUSTRATION:

A. A shoots Z with intention of killing him, Z dies in consequence, A commits murder.

B. A knowing that Z is labouring under such disease that a blow is likely to cause his death, strike him with the intention of causing bodily injury, Z dies in consequences of blow. A is guilty of murder.

C. A intention gives Z a sword cut sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequences. Here A is guilty of murder although he may not have intended to cause Z's death.

D. ' A' without any excuse fires a loaded cannon in to a crowd of persons and kills one of them. A is guilty of murder although he may not have had a pre-meditated design to kill any particular individual.

Cases:-

Sridharan Sathesan V/s State of Keral :-

There was a dispute between the accused and the deceased regarding the payment of money. The accused who was a driver caused serious injuries by his mini bus and hit the deceased with great speed in he middle portion of the body. Tyre marks were also found on the thighs of the deceased. It was held that it was an intentional killing and Sec.300 (1) was applicable.

State V/s Sadanand :-

Accused caused the first injury on the stomach of the deceased by Rampuri Knife with a blade of more than six inches long. While the deceased started running away from the place to save himself, the accused gave another blow by the same knife on his back. The injuries caused his death. The SC held that the accused was guilty of murder and Sec.300 (3) was applicable.

Lakha Singh V/s state of Rajasthan: The accused was held guilty on the basis of cause (3) of section 300 of IPC.

Dulal Hazara V/s State: The accused tied the mouth and throat and hands of the deceased causing her death by asphyxiation due to throttling, he was held guilty of murder. He knew that his act was so imminently dangerous as to cause death probability.

Thus except the exceptions cases culpable homicide is murder, if the circumstances described above any of the four clauses are present. In other words, only these four classes of culpable homicide are murder and any other kind of culpable homicide continues to be culpable homicides and does not become murder.

Question No.2. Every murder is a culpable homicide, but every culpable homicide is not murder. Discuss.

Answer: Every murder is a culpable homicide, but every culpable homicide is not murder. There are certain exception which presents when culable homicide is not murder

Five exceptions have been provided u/s 300 wherein causing death does not amount to murder. If any of these exceptions is held to be applicable in a case, the conviction of the accused in that case would be for culpable homicide not amounting to murder. In this sense, therefore, these five exceptions are partial defences to murder thus following are the exceptions:-

1. Grave and sudden provocation: Culpable homicide is not murder if the offended, who deprived of the self control by grave and sudden provocation, causes the death of a person, who gave the provocation or causes the death of any other person by mistake or accident. Thus for the first exception following things are necessary :-

a) There must be provocation.

b) Provocation must be grave and sudden.

c) By reason of such provocation the offender have been deprived of the power of self control.

d) The death must be of that person who gave the provocation or any other person by mistake or accident.

ILLUSTRATION: Y gives grave and sudden provocation to A. A on this sudden provocation fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z who is near him but out of sight. A kills Z here, A has not committed murder but merely culpable homicide.

Ajit Singh v/s State l991 : In this case the accused found his wife and a neighbours in a compromising position and shot both of them dead. It was held that he was acting under provocation and is liable for sudden provocation.

2. RIGHT OF PRIVATE DEFENCE;- For the application of this exception the following conditions must be fulfilled :-

A. Act must be done in good health.

B. Act must be done in exercise of the right of private defence of person or property.

C. The person doing the act must have exceeded in his right given to him by law and thereby caused death.

D. The act must be done without premeditation and without any intention of causing more harm then was necessary for the purpose of such defence.

ILLUSTRATION:- Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. A believing in good faith that he can by no other mean, prevent himself from being horsewhipped shoots Z and kills. A has not committed murder but culpable homicide.

Bahadur Singh v/s State 1993 :The complainant party assaulted the accused person who were also armed with sharp weapons like Gandasa by the use of which death caused. It was held they had excluded their right of private defence in good faith and so exception N's was available to them.

3. OFFENCE BY PUBLIC SERVANT OR PERSON AIDING PUBLIC SERVANT.

Culpable homicide is not murder if the following conditions are there :-

a. Offence must be committed by public servant or by some other person acting in the aid of a public servant in advancement of public justice,

b. Public servant or such person must have exceeded the power given to him by law.

c. Death must be caused by doing an act which he, in good faith, believes to be lawful & necessary for discharge of his duty.

d. The act must have been done without any malafide intention towards the person whose death is caused.

Case : Dakhi Singh V/s State 1955.: It was held by the Court that he was entitled to have the benefit of this exception and so he was liable only for culpable homicide not amounting to murder.

4 Death caused by sudden fight. For the application of this exception

The following conditions must be ful-filled :-

a. Death must be caused by sudden fight.

b. Fight must be without any pre-meditation.

c. It must be occur in the heat of passion upon a sudden quarrel.

d. It must be committed without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation :- It is immaterial in such cases where party offers the provocation or commits the first assault.

Case :- State v/s Jodha Singh : A quarrel between accused and the deceased parties changed in to a sudden fight in which weapon were used by both parties resulting in injuries on both sides and death of the deceased. This exception was held to be applicable.

5. Death caused with the consent: Culpable homicide is not murder when the person whose death is caused being above the age of eighteen years suffers death or takes the risk of death with his own consent.

Illustration :- 'A' by instigation, voluntarily caused Z, (a person under l8 years of age) to commit suicide. Here on account of Z's death (he was incapable of giving consent to his own death). A has, therefore abetted murder.

Case :- Dashrath Paswan V/s State : The accused could not passed the Xth Class examination for three years in a row and become frustrated and decided to commit suicide and informed his wife who asked him to kill her first which he did, the exception was held to apply.

QuestionNo.3. Discuss the difference between SECTION 299 AND 300 OF IPC in reference to Reg. V/s. Govinda.

Answer: One of the most complex matters under the code is to distinguish between culpable homicide and murder. The first real attempt in this regard was made in the case :-

Justice Melwell in Govinda's case held that if death is the likely result it is culpable homicide. But if death is most likely or certain it amounts to murder. Hence in culpable homicide, death is the probable result but in murder, it is the most probable result.

Case : Reg. V/s. Govinda 1876 (Bom): In this case the accused kicked his wife who was 15 years old and gave her a few blow on the body with the result she fell down on the ground. Then he put one knee on her chest and struck her a few more blow resulting in her death. The lower court convicted him of murder. There were different opinions amongst the two judges of the High Court and consequently the matter was referred to a third Judge,
Justice Melvil, who held the accused guilty under clause (2) of sec.299 for culpable homicide and sentenced him u/s 304 part I on the grounds that the death was caused with the intention on the part of the accused to cause such bodily injury as was likely to cause death. Justice Melvil discussed the two sections clause by clause and attempted to bring out the difference between the two offence clearly in following manner :--:
Section 299 deals with Culpable homicide. (Homicide means killing of human by a human being . Culpable means Killing of a person. punishable in nature, is culpable homicide. Section. 300 deals with murder Culpable homicide includes :

(i) Causing death:

a) with the intention of causing death, or

b) With the intention of causing such bodily injury causing such bodily injury as is likely to cause death or, With the knowledge that the act is likely to cause death. which the offender knows to be likely to cause death or

c) With the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death, or

d) With the knowledge that the act is so imminently dangerous that it must in all probability cause death.

Murder includes:

(i) Killing another person:

a) with the intention of causing death, or

b) With the intention of causing such bodily injury which the offender knows to be likely to cause death or

c) With the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death, or

d) With the knowledge that the act is so imminently dangerous that it must in all probability cause death.

The leading cases are :

i) R.V. Gorachand Gopi

ii) Rajwant Singh V State of Kerala

iii) R.V. Govinda iv) R .V. Beg

vi) Harinder singhV Delhi

v) Vjra Singh's case

i) R.V. Gorachand Gopi: The accused struck his wife a blow on her head with a ploughshare. She fell down. The accused thought that she was dead. He hanged her with a rope to create an impression that she has committed suicide. In fact, she died due to strangulation. He was tried for murder. The court made a distinction between culpable homicide and murder. Held accused was not guilty of murder or culpable homicide but was guilty of grievous hurt.

ii) R.V. Govinda: The accused knocked down his wife, and put his knee on her chest and dealt on her face with two or three violent blows with his fist and in consequence she died. Mehvell J made a distinction between culpable homicide and murder, and held, the accused was guilty of culpable homicide not amounting to murder.

iii) In Vira singh's case, the accused had pierced a spear with such force that 3 coils of abdoman of D had come out. Held murder under "thirdly" in Sn 300. See Sn 300

iv) In Harinder singh's case the accused had knifed D who had come to rescue his brother B. D died. Held culpable Homicide.

Q4. Culpable homicide is not murder in the following five circumstances:

Answer: Culpable homicide is not murder, if the offender being deprived of his self control by grave and sudden provocation causes the death of that person, or any other person by mistake or accident.

Ex : A, under grave and sudden provocation given by Z kills Z's child intentionally. This is murder and not culpable homicide.

Exception : a) The provocation should not have been made voluntarily by the accused himself. If he does so it will he murder.

b) It is not a provocation if it is caused to the accused as a result of a public servant exercising lawful powers over the accused. Ex.: A is arrested by P. a Police Officer. This excited A to grave provocation and kills P. This is murder and not culpable homicide.

c) The provocation is not given by anything done in private defense.

Ex : i) A, attempts to pull Z's nose. Z in private defence holds A. A, is moved to sudden passion and kills Z. This is murder.

ii) Nanavathi case : N's wife admitted before N adultery, with one Ahuja. Then, N, went to his office took his revolver, went to Ahuja's house and killed him. Defense was 'grave and sudden provocation'. There was sufficient time between the provocation and the act of killing. The court held that this was murder and not culpable homicide.

iii) Balku's case : A and B were sleeping together outside the house. Sometime in the night B got up, went inside the house and had illegal connection wish A's wife. A saw this through an aperture. B returned and slept in his place. Thereupon A stabbed B several times and killed him. Held : Culpable homicide.

3. Culpable homicide is not murder if the offender being a public servant exceeds his legal power and causes death in good faith. The act must be lawful and necessary. There must be-no malafide intention.

4. Culpable homicide is not murder if it is committed by a person without any premeditation but in sudden fight in the heat of passion and without taking undue advantage over the other person. This is culpable homicide and not murder.

In Raju Ghosh case : There was a pitched qurrel and sudden fight between A and B. While fighting A chanced on a heavy piece of wood. He took it and hit hard B, B died. Held; this is culpable homicide and not murder.

5. Culpable homicide is not murder, when the deceased being above the age of eighteen. suffers death with his own consent. Ex : A instigates Z below 18 commit suicide stating that life, was useless. A has abetted murder.

Other leading case for when C.H is not murder-

(i) Madhavan V. St. of Kerala

(ii) Akhtar V. State

(iii) Chamru Budhwa V. St.. of M. P

(iv) Jagrup V. St. of Haryana

(v) St. of M. P. V. Ram prasad.

Question 5. Discuss law relating to homicide by rash and negligent driving.

Answer: Section 304A, IPC deals with homicide by rash and negligent act. It provides punishment for those cases which under English law are termed manslaughter by negligence. The original Penal Code had no provision for punishment in those cases where a person causes death of another by negligence. That is to say, liability for causing death was limited only to those cases of murder and culpable homicide not amounting to murder. To fill in the gap, section 304A was inserted in the Penal Code (Amendment) Act 27 of 1870 to cover those cases wherein a person causes death of another by such acts as are rash or negligent but there is no intention to cause death or no knowledge that the act will cause death.

Section 304-A of The Indian Penal Code Causing death by negligence.

Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Essential Ingredients – To bring a case of homicide under section 304A, IPC the following conditions must exist, viz.,

1. There must be death of the person in question;
2. The accused must have caused such death; and
3. That such act of accused was rash or negligent and that it did not amount to culpable homicide.

This section applies where there is direct nexus between the death of a person and the rash or negligent act. The act must be causa causans*, it is not enough that it may have been the* causa sine qua non *Rash Act*

A rash act is primarily an overhasty act and is opposed to a deliberate act; even if it is partly deliberate, it is done without due thought and action. An illegal "omission" if negligent, may come under this section. Negligence, on the other hand, is a breach of duty imposed by law.

Contributory negligence

The doctrine of contributory negligence does not apply to the criminal liability.

Medical Negligence

A great care should be taken before imputing criminal negligence to a professional man acting in the course of his profession. A doctor is not criminally responsible for a patient's death unless his negligence shows such regard for life and safety as to amount to a crime against the State.

In Juggan Khan vs State of Madhya Pradesh, Where the accused who was a Homeopath, administered to the patient suffering from guinea worm, 24 drops of mother tincture **Stramonium** and a leaf of *Dhatura* without studying its effect and the patient died of poisoning. It was held that the accused was guilty under Section 304A.

In the case of State of Rajasthan vs Hari Singh The mere fact that a fatal motor run-over accident took place would not be itself, be enough to make the driver liable under Section 304A. In order to impose criminal liability on the accused, it must be found as a fact that a

collision was entirely or at least mainly due to rashness or negligence on the part of the driver. It is not sufficient if it is only found that the accused was driving the vehicle at a fast speed.

In Jagdish Chander vs State , the appellant suddenly turned his auto-scooter rickshaw to the right without paying proper heed to the truck coming from the opposite and stuck it. He then lost control of his scooter-rickshaw and crashed into a tree under which a woman was standing with her baby in her arms. As a result, she received simple injuries and the child received fatal injuries. The trial court and the High Court found the appellant guilty under section 304A. In appeal, the Supreme Court held that as the appellant suddenly turned to the right without paying proper heed to the truck coming from the opposite direction, in doing so he was rash and negligent.

UNIT II

Question 6.: Define "Hurt" and "Grievous Hurt". What are its essential element's? Distinguish between the two.

Answer :- Hurt generally means injury on the body of a person. It is such an injury which causes bodily pain or disease or infirmity or fracture or disfigurement of face etc.

KINDS OF HURT: There are two kinds of Hurt:-

1. Hurt.
2. Grievous Hurt.

Hurt :- simple hurt is defined under section 319 of IPC whereas the grievous hurt has been defined under section 320. Simple hurt causes simple injury with simple bodily pain, while grievous hurt causes serious injury and serious pain in the body too.

Section 319 l.P.C. defines hurt. Hurt means causing bodily pain, disease, infirmity to any person. Pulling a woman by hair is hurt. This is also 'trespass to the person. Voluntarily causing hurt is punishable. In case of Amis Beg's Case ,Court held was guilty of hurt, when he pulled out of a house, D to whom the court decree was not applicable Infirmity may be permanent or temporary.

Section 319 contains the following ingredients:-

a) Bodily Pain:- The words show that there must be some pain in the body of a person. It means mental paid does not come under bodily pain. Any such injury which causes pain on any external part of body comes under simple hurt.

b) Disease : Disease means any illness. By such act which creates weakness and if a man comes into contract of any disease then it will come under simple hurt.

c) Infirmity:- Infirmity means by illness. By such act which creates weakness in the body, comes under simple hurt.

d) To any other Person : The hurt must be caused to any other person not to himself. In this way, in a simple hurt there is no need of physical contact. A hurt may be caused by any mean or method. Such hurt must cause bodily pain or disease or infirmity. Such hurt must be caused to another person and not to himself.
e) Section 319 does not show that there must be direct physical contact with another person for committing simple hurt.

Grievous Hurt : There are various kinds of grievous hurt which have been defined in section 320 in IPC. Thus a hurt is more than a slightly causing harm as defined in section 95 of IPC and less the culpable homicide. If the hurt results into death land fulfils the conditions of section 299 then it becomes culpable homicide, otherwise it grievous hurt.
Grievous hurt : Under section 320 l.P.C. the following are declared as grievous :

a.) Emasculation : The destruction of private organ of a human being is known as emasculation. Any injury which makes a person incapable for functioning of the private organ, person comes under grievous hurt.
b.) Permanent privation of the sight of either eye if there is privation or separation or destruction either eye of a person, is grievous hurt.
c.) Permanent privation of the hearing of either ear. Similarly the destruction or separation of either ear is grievous hurt. Here the power of hearing must be affected. The eye and ears are the main functional organs of a human being. They have is an important role in the life.
d.) Privation of any member or joint: Privation of any member or joint also comes under grievous hurt.
e.) Destruction or permanent loss of the power of any member or joint:- If there is destruction of any member of joint of the body then it is also a grievous hurt or if any member or joint fails to work properly then also it will comes under grievous hurt.
f.) Permanent disfiguration of the head or face :- Permanent disfiguration of the head or face means to cause such an injury on the head or face that they look bad or head becomes crucial.
g.) Fracture or dislocation of Bone or tooth:- When any bone or tooth is dislocated it means they loss their original place. Fracture of any bones comes under grievous hurt.
h.) When there is an such hurt which endangers to life or which causes paid continuously for a period of 20 days.

Endanger to life mean there must be death from such hurt. If the death is caused by grievous then it will not be culpable homicide or murder because there is no intention to cause death. So any hurt to create danger to life is also called grievous hurt. Mere hospitalization for twenty days will not make the hurt grievous. That person must not be in a position to attend his day to day work for twenty days. This is the test adopted by the courts.

ILLUSTRATION: i) A with an intention to disfigure Z: s face hits him. Z suffer.-. for more than twenty days in the hospital. There is grievous hurt.

ii) A hits-hard with his fist on the left ear of B, with an intention to cause hurt, but B lost his hearing permanently. Held A is guilty of Grievous hurt. Hurt becomes grievous, when it endangers life.

In the case of Panduranga V. State , A blow on the head of B with an axe, which made a deep half inch wound was likely to endanger life in Voluntarily Causing hurt is punishable under Sn. 321. Voluntarily causing grievous hurt is punishable under Section 323 to 336

In the case of Palani Goudon v/s Emperor Madras. It was held by a full bench of the Madras High Court that the accused was guilty of either murder or culpable homicide not amounting to murder. However Their Lordship held that on the facts found the accused could not be convicted either of murder or culpable homicide, he could of course be punished both of his original assault on his wife and for his attempt to create false evidence by hanging her. He was convicted under section 326 Of IPC.

Following are the difference between Hurt and Grievous Hurt:

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HURT	GRIEVOUS HURT
Simple hurt is defined in Section. 319	Grievous hurt defined in sec.320
In simple hurt injury is committed on the external part of The body causing bodily pain.	There may be injury of external or internal part of the body.
Simple hurt is a form of simple Injury.	Grievous hurt is a serious form of hurt
The types of injury are bodily Pain, disease, infirmity etc	Important organs of the body like eye Ear, joints, face dislocation or broken
Punishment is of one year or Fine.	Punishment is of seven years with fine

Punishment for hurt & grievous hurt:

Section 323 : Punishment for voluntarily causing hurt is one year or fine or with both.
Section 325: For voluntarily causing grievous hurt, the punishment is 7 years with fine.
Section 326: Whoever except the case provided for by sec.335 voluntarily causes grievous hurt by means or any instrument for shooting or cut or any instrument which is used as a weapon of offence is likely to cause death or by means of fire. Punishment imprisonment of life, it is ten years with fine.

Question 7.what do you mean by Wrongful restraint and wrongful confinement? Distinguish between the two.

Answer: The expression "wrongful restraint" implies keeping a man out of a place where he wishes. Wrongful restraint and wrongful confinement is given Sn339, and 340 The fundamental rule is that 'every man's person is sacred and law visits penalties on the accused who violates this rule and molests the person in his free movement. Wrongful restraint and wrongful confinement are two offences according to the I.P.C. under Sn. 339" and 340, which punish individuals for violation of a person's movements.

Wrongful restraint : A person who voluntarily obstructs another so as to prevent him from proceeding in any direction in which that person had a right to go, is guilty of wrongful restraint. Exception: A person who, in good faith, believes that he has a right to pass.

1) A obstructs Z of his way 'A's intentions are not in good faith. Z is prevented from passing. This is wrongful restraint.

2) A removed the ladder and prevented B from getting down the roof of a house.

3) A builds a wall across a path along which B had a right to pass.

4) A threatens to set his savage dog at Z, to prevent Z from passing along the road where he had a right to pass.

5) B and his family were living in a house. A put a lock in thetemporary absence of the family. Ahad locked without any good faith. in all these cases thee accused is guilty of wrongful restraint.

Wrongful confinement: A person who wrongfully restraints any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits is guilty of wrongful confinement.

eg. a) A causes Z to go within a walled space and locks Z in. Z is thereby prevented from proceeding in any direction beyond the circumscribing line of the wall. A is guilty.

b) A keeps his men with guns and warns Z that if he ever tries to leave the building they would kill him. A is guilty. Punishment: This depends on how many days a person is confined by the accused. In Shamlal's case, a police constable detained some persons for several days as suspects; it was held that he was guilty under this section.

Following are the difference between Wrongful Confinement & Wrongful Restraint.

WRONGFUL CONFINEMENT	WRONGUL RESTRAINT

Wrongful confinement is a Form of wrongful restraint It is keeping a man within Limits out of which he wishes to go and has a right to go	Wrongful restraint is keeping a man Out of a place where he wishes to go and has a right to be.
A person is restrained from moving Beyond a certain area within Which he is confined	He is free to move anywhere other than to proceed in a particular Direction. In other words there is
Full restraint in the movement	Only partial restraint in the movement
It is a more serious offence In as much it prescribes Punishment with imprisonment Simple or rigorous extending to with both One year or fine up to Rs.1000/- or both	This offence is also punishable with simple imprisonment upto one month or with fine of Rs.500/- or

Question: 8. Discuss the essential element of force, criminal force and Assault. How criminal force and assault related to each other.

Answer: Section. 349 define force and Section. 350 defines criminal force.

1) Force : A is said to use force to B, if A causes motion or change of motion to B, or if A causes with any substance such motion or change of motion so as to make that substance come in contact with the body of B or anything he is carrying so as to affect his sense of feeling. The means adopted may be ^

a) By A, with his own bodily power or

b) By setting the substance in motion without further acting on it.

c) By inducing an animal to move

ii) Using criminal force is an offence punishable under l.P.C. Any person who intentionally uses 'force' to another without his consent with a view to commit an offence or knowingly uses force to cause injury, fear or annoyance to him, is guilty of using criminal force.

E.g. 1) Z is sitting on a boat that is moored. A to cause fear and annoyance to Z, releases the mooring. The boat sets out down the stream. A is guilty, of using criminal force.

2) A intentionally pulls the veil (purdha) of a woman without her consent to annoy her. A is guilty under this section.

3) A incites his dog to spring upon Z without Z's consent. This annoys Z. A is guilty.

4) Z is carrying a pot of water. A, without Z's consent, intentionally to annoy Z, hits the pot with a stone. The stone makes a hole and water rushes out causing annoyance to Z. A is guilty.

5) A is riding a chariot. B lashes the house, without A's consent, to frighten or annoy A. B is guilty.

6) A is on the palanquin on a visit to a place. Z holds the pole to rob A. Z has used force there is use of criminal force. If A, the accused forcibly breaks open the lock of B' house &. enters, there is no criminal force, as force should be against a person as defined in Sn. 349.

Section 351 of IPC provides Assault: Any person who intentionally or knowingly makes any gesture or preparation to apprehend another with a preparation to use criminal force is guilty of assault. Mere words do not amount to assault. But the words with the use of gestures or preparations bring such a meaning that criminal force is about to be applied.

Eg. 1) A shakes his fist at Z, and moves towards Z in such a manner that Z believes that criminal force is about to be used on him. This is assault.

2) A begins to let loose a ferocious dog to cause fear and annoyance to Z. This is assault.

3) A takes up a stick saying to Z '! will give you a good beating'. These words will not amount to assault. But, if A with gestures moves towards Z to beat him, this becomes assault. Actual beating is not necessary .

Q. No. 9: What do mean by kidnapping? Elaborate the provision of the two.

Answer :-: Kidnapping and abduction are particular types of offences under the law of crime. Under these offences, a person is taken away secretly or forcible without his consent or without the consent of authorised guardian. Under kidnapping a person is kidnapped from lawful custody. Under section 359 of IPC, there are two types of kidnapping :-

1. Kidnapping from India.
2. Kidnapping from lawful guardianship.

Section 360 : defines that kidnapping from India and section 361 defines that kidnapping from lawful guardian ship. The offence of abduction is defined under section 362 of IPC.

1. KIDNAPPING FROM INDIA:

Section 360 says that whoever conveys any person beyond the limit of India without the consent of that person or of any person legally authorised to consent on behalf of that person, is said to kidnap that person from India. Age limit is immaterial. This has two essentials :

(i) Convey any person beyond the limits of India.

(ii) Such conveying must be without the consent of that person or of the person legally authorised to give consent on behalf of that person.

2. KIDNAPPING FROM LAWFUL GUARDIANSHIP : SEC.361

Sec. 361 says that whoever takes or entices any minor under sixteen years of age if a male or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardianship of such minor or person of unsound mind, without the consent of such guardian is said to kidnap such minor or person from lawful guardianship. The word lawful guardian here mans any person lawfully interested with care or custody of such minor or other person.

3. EXCEPTIONS :- There is one exception of this section, this section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith, believes himself to be entitled the lawful custody of such child unless such act is committed for an immoral or unlawful purpose.

Take or entice away:- Take away or entice away means to induce a person for going to another place. The object of this Sec. Is to protect minor children from being reduced (to corrupt) for improper purpose.

Guardians consent:- The kidnapping must be without the consent of the guardian. The consent may be expressed or implied. Thus, to attract this sec. there must be taking or enticing away any minor or unsound mind person out of lawful guardianship.

ABDUCTION: Section 362 says that whoever by force compels or by any deceitful induces any person to go from any place, is said to abduct that person. This section may read with section 364, 365 and 360.

This section contains two essentials for the offence of abduction :-

1. Forcible compulsion or inducement by deceitful means.
2. The object of such compulsion or inducement must be going of a person from any place. Thus abduction is an offence under sec.362. If by force a person compels or even by fraudulent means induce any other person to go from any place taken is called abduction.

Punishment for kidnapping under sec363 :

Whoever kidnaps any person from India or from Lawful guardianship shall be punished with imprisonment or either description for a term which may extend to seven years and shall be liable to fine.

Question10. What are the difference between Kidnapping and Abduction?

Answer: following are the Difference between Kidnapping and Abduction

KIDNAPPING	ABDUCTION
1. It is committed only in respect of A	1.) It is committed in respect of any person of

minor under 16 years of age if, A male and 18 years of age if a Female, or a person of unsound mind.	any age
2. In kidnapping consent of the Person enticed is immaterial	2.) Consent of the person removed, if Freely and voluntarily given Condones the offence.
3. In kidnapping the intention of The offender is irrelevant	3.) In abduction intention is a very Important factor.
4. It is not a continuing offence The Offence is completed as soon as person is being abducted both The minor is removed from the Custody of his or her guardian	4.)It is a continuing offence A when he is first taken from one Place to and also when he is Removed from one place to Another.

UNITIII

Question No. 11 What is bigamy? Under what circumstances would a woman, who in the life-time of one husband marries another, not be guilty of bigamy?

Answer: Offences Relating To Marriage:- The following are the provisions in the Indian Penal Code dealing with the offences relating to marriage.

Under section 494 defines the offence of bigamy as under: "Whoever having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

In Bigamy case, the second marriage as a fact, that is to say, the essential ceremonies constituting it must be proved. Admission of marriage by the accused is not the evidence of it in bigamy case. Under section 494 and 109 of IPC the evidence of witness called to prove the marriage ceremonies showed that the essential ceremonies had not been performed. On admission of the accused in a written statement that the parties married after the first marriage was dissolved & was not justified, In a case Kanwal Ram v/s Himachal Pradesh Administration 1966.

An another case of Shanti Dev Barma v/s Kanchan Prava Devi 1991 Orissa,"it was held that No plea was raised that the second marriage was performed as per custom which dispensed with 'saptapadi' oral evidence was adduced that the accused and his alleged second wife were living as husband and wife. It was not found sufficient to draw an inference as to performance of ceremonies essential for valid marriage. The accused was entitled to be acquitted.

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage. Dishonestly or fraudulently going through a marriage ceremony knowing that no lawful marriage is hereby created Bigamy i.e. marriage again during the lifetime of the husband or wife where such marriage is void. If the former marriage is concealed from the person with whom the subsequent marriage is contracted, the punishment is ten years or fine or both.

The exception to section 494 provides the circumstances where a woman in the life-time of one husband or vice versa can marry another without incurring the offence of bigamy. It provides that section 494 does not extend :-

a) To any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction.

b) To any person who contracts a marriage during the life of a former husband or wife, it such husband or wife at the time of the subsequent marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, such marriage can takes place.

Question No. 12 What is the law relating to cruelty by husband or relatives of the husband of the woman? How is it punishable?

Answer: Chapter XXA comprising Section 498-A which punishes cruelty by the husband or relatives of the husband to the woman has been inserted by the Criminal Law(Second Amendment)Act 1983, in Act No. 46 of 1983 it received the assent of the President on 25th.December,1983 and the same was published in the Gazette of India Extraordinary, dated 26.12.1983.

The new provision seeks to curb atrocities on women including those arising out of dowry demands. The extremer reticence of Indian women to expose the bestiality and cruelty perpetrated on them led the crusading members to raise the matter in the Parliament which led to the passing of the Criminal Law (First and Second) Amendments, 1983 Section 498-A. Therefore envisages that if a husband or the relatives of the husband of a woman subjects such woman to cruelty, he shall be liable to punishment for three years and fine.

Husband or relative of husband of a woman subjecting her to cruelty :-

Whoever being the husband or the relative of the husband of a woman subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three year and shall also be liable for fine.

EXPLANATION IN THIS REGARD:-

To define the word cruelty according to this section :-

(a) Any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life or health(whether mental or physical) to the woman.

(b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Question No.13:-Define Adultery and distinguish it from rape?

Answer :- INTRODUCTION :- Adultery is an act which requires the consent of both the parties. The male offender alone is liable to punishment and the married woman is not liable even as an abettor.

DEFINITION OF ADULTERY

Under Section 497 of IPC it is defines that," whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery.

The offence under the act 497 of IPC is limited to adultery committed with a married woman. It does not constitute an offence of adultery if one has sexual intercourse with a widow or an unmarried woman. Even in the case of a married woman the adulterer is not liable if the husband consents to it.

Distinguish between Adultery & Rape: Adultery is altogether differs from rape in several ways, which are described as under :-

ADULTERY	RAPE
Adultery is an act which requires The consent of both the parties	In case of rape the consent of woman Is essential.
Woman must be married woman i.e. the wife of another man	It can be committed on any woman Married woman or widow
Adultery cannot be committed By a husband with his own wife	Rape can be committed by a husband. if she is below fifteen years of age
Adultery is an offence relating To marriage	Rape is an offence against the person Of the woman
The aggrieved party is the Husband	In the rape the woman is aggrieved party
the wife having Consented to the act	It is against the will of the women
Adultery is not so serious an Offence as rape	And rape is a serious offence

Question 14. What is Rape? What is its kind? Discuss the changes in the law of rape till date.

Answer: The word rape is derived from the Latin term *rapio*, which mean 'to seize'. Thus rape literally means a forcible seizure. It signifies in common terminology, "as the ravishment of a woman without her consent, by force, fear, or fraud" or "the carnal knowledge of a woman by

force against her will." In other words, rape is violation with violence of the private person of a woman.
In the Indian Penal Code, **Section 375** defines rape, Justice Krishna Iyer in the case of Rafiq v. State of U.P made a remark that, **'A murderer kills the body, but a rapist kills the soul'.**

After the Nirbhaya Delhi Gang Rape case, 'The Criminal Law Amendment Act, 2013' came in to force w.e.f 3rd of Feb, 2013. Now this case was recorded as 'Rarest of Rare case' in the history of Indian Judiciary case laws. By this amendment act, our legislators introduced some new sections and make some amendments in Indian Penal Code, Criminal Procedure Code, Indian Evidence Act and Protection of children from sexual offences act

Some of the important changes brought about by the Act 43 of 1983 and Act 13 of the 2013 and other provisions are listed below:-

- Consent of woman of unsound mind or under intoxication is not to be considered valid defence.
- **Burden of Proof of innocence on accused** – Section 114A was inserted in The Indian Evidence Act, 1872 vide Criminal Law (Amendment) Act 43 of 1983.
- **Prohibition of disclosure of the identity of the victim**– Section 228A IPC added vide Criminal Law (Amendment) Act 43 of 1983.
- **Persistent Vegetative State**– A new section 376 A has been added vide Criminal Law (Amendment) Act 13 of 2013. When an injury caused to the victim results in death of the women or causes women to be in a persistent vegetative state, then the accused shall be liable for imprisonment for a term which cannot be less than 20 years or may extend to imprisonment of life or remainder of that persons natural life or till death.
- **Trial in Camera**– Section 327 CrPC,1973 has been amended vide Criminal Law (Amendment) Act 13 of 2013, to the effect that the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera.
- **Custodial Rape**– Section 376C, IPC comprise a group of sections that create a new category of offence, known as custodial rape which does not amount to rape because in such cases the consent of the victim is obtained under compelling circumstances. (Substituted by Criminal Law (Amendment) Act 13 of 2013)
- **Intercourse with wife during judicial separation**– Section 376 B IPC inserted vide Criminal Law (Amendment) Act 13 of 2013 makes sexual intercourse with one's own wife without her consent under a decree of separation punishable, with a minimum of 2 years that extend to 7 years.
- **Minimum punishment for Rape**– This provision has been made more stringent vide Criminal Law (Amendment) Act 13 of 2013.

- **Character assassination of prosecutrix prohibited**– A 'Proviso clause' to section 146 of the Indian Evidence Act, 1872 inserted vide Criminal Law (Amendment) Act 13 of 2013 has disallowed to put questions about prosecutrix character in cross-examination.

Analysis of the definition: The 2013 Act expands the definition of rape to include oral sex as well as the insertion of an object or any other body part into a woman's vagina, urethra or anus.A man is guilty of rape if he commits sexual intercourse with a woman either against her will or without her consent as enumerated under clauses firstly to seventhly under section 375.

Essential Ingredients of Rape: The crux of the offence of rape under section 375, IPC is sexual intercourse by a man with a woman against her will and without her consent under any one of the seven circumstances mentioned below.

- Against her will.
- Without her consent.
- With consent obtained by putting her or any other person in whom she is interested in fear of death or of hurt,
- With consent but given under the misconception of fact that the man was her husband,
- Consent given by reason of unsoundness of mind, or under influence of intoxication or any stupefying or unwholesome substance,
- Women under eighteen with or without consent.
- When women is unable to communicate consent.

In order to bring home the charge of rape against a man, it is necessary to establish that the 'sexual intercourse' complained of was either against the will or without her consent. Where the consent is obtained under the circumstances enumerated under clauses firstly to seventhly, the same would also amount to rape.

In Deelip Singh vs. State of Bihar**,** the Supreme Court observed that "though will and consent often interlace, an act done against the will of the person can be said to be an act done without consent, the Indian Penal Code categorizes these two expressions under separate heads in order to as comprehensive as possible."

The absence of injury on male organ of accused where a prosecutrix is a minor girl suffering from pain due to ruptured hymen and bleeding vagina depicts same, minor contradictions in her statements they are not of much value. Also, the absence of any injury on male organ of accused is no valid ground for the innocence of accused, a conviction under section 375 IPC was held proper; Mohd. Zuber Noor Mohammed Changwadia vs State of Gujarat.[6]

Penetration: The mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case Prithi Chand vs State of Himachal Pradesh.

Rape or Consensual Sex: Intercourse under promise to marry constitutes rape only from initial stage accused had no intention to keep the promise. An accused can be convicted for rape only if the court reaches the conclusion that the intention of the accused was malafide, and that he had clandestine motives. Deepak Gulati vs State of Haryana.

Exception to Section 375:

'Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.'

Since child marriage in India is not yet void and is only voidable, such a check was necessary to restrain men from taking advantage of their marital rights prematurely. No man can be guilty of rape on his own wife when she is over 15 years of age on account of the matrimonial consent that she has given.

In Bishnudayal vs. State of Bihar, where the prosecutrix, a girl of 13 or 14, who was sent by her father to accompany the relatives of his elder daughter's husband to look after her elder sister for some time, was forcibly 'married' to the appellant and had sexual intercourse with her, the accused was held liable for rape under section 376.

However, under section 376 B, IPC sexual intercourse with one's own wife without her consent under a decree of judicial separation is punishable by 2 to 7 years imprisonment.

Punishment of rape: It states that if the rape is committed by persons listed below, they shall be punished with rigorous punishment of not less than 10 years, but can extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine**.**

- Police officer within the limits of the police station.
- A police officer in the premises of any station house.
- A police officer on a woman in the police officer's custody.
- Public servant on a woman's in his custody.
- Member of the armed forces.
- Any person in the management of the jail, remand home etc. on inmate of such place.
- Staff/management of a hospital on a woman in that hospital.

- By a person who is in a position trust or authority or control or dominance towards a woman on such woman.
- During communal or sectarian violence.
- On a pregnant woman
- On a woman less than 16 years of age
- On a woman incapable of giving consent
- On a mentally or physically disabled woman
- Who causes grievous bodily harms or endangers the life of a woman.
- Who commits rape repeatedly on the same woman

If any other person commits rape on any woman, he shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

Section 376-A of the IPC – Punishment for causing death or resulting in persistent vegetative state of victim: It says if a person commits an offence which is punishable under section 376 which causes the death of the women or causes the women to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than 20 years, but may extend to imprisonment for life or with death.

Section 376-B of the IPC – Sexual intercourse by husband upon his wife during separation: Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of Section 375.

Section 376-C of the IPC– Sexual intercourse by a person in authority

Whoever, being— 1. in a position of authority or in a fiduciary relationship; or

2. a public servant; or

3. superintendent or manager of a jail, remand home or other places of custody established by or under any law for the time being in force, or a women's or children's institution; or

4. on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Section 376-D of the IPC– Gang rape: It prescribes punishment for gang rape and says where a woman is raped by a group of persons, then they shall be punishable with rigorous punishment of not less than 20 years, but may extend to life imprisonment, and with fine.

Note: Such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim. Also, any fine imposed under this section shall be paid to the victim.

Section 376-E of the IPC– Punishment for repeat offenders: Whoever has been previously convicted of an offence punishable under Section 376 or Section 376-A or Section 376-D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.'

UNIT-IV

Question No.15:- Discuss the ingredients of theft with the help of decided case? Also distinguish between theft and extortion.

Answer :- Theft is an offence in which moveable property of a person is taken away without his consent. Such property must be taken away dishonesty. Thus in theft there would be a moveable property. It should be taken dishonestly and without the consent of the owner. Theft has been defined in Section 378 of IPC. Simultaneously the punishment for the commitment of act of theft has also been defined in Section 379 of IPC.

DEFINITION OF THEFT U/S 378 OF IPC

" Whoever intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft."

INGREDIENTS OF DEFINITION

1. There must be a dishonest intention of a person to take the property.
2. Removal of movable property.
3. Such movable property must be taken away.
4. The property must be taken away from the possession of a person. In other words there must be a possession of that property.
5. Such property must be taken away without the consent of such person.

A. Dishonest Intention:- It is also called as malafied intention which can be representation in the form of mensrea. This mensrea is the base of the theft. The petitioner must prove that a thing was taken away with the dishonest intention.

However intention is a mental element which is difficult to prove but circumstantial evidences are considered for this purpose. The main measurement of dishonest intention is to make a wrongful loss to another person then such act is considered to be done with dishonest intention.

B. Movable Property:- The subject of theft is movable property. Immovable property cannot be stolen. A movable property is a property which is able to move easily or which is not immovable. It means the thing permanently attached to the earth is immovable property, is not the subject of theft. It becomes capable of being the subject of theft when it is severed from the earth.

C. Be taken away out of Possession of another Person:- The property must be in the possession of another person from where it is removed. There is no theft of wild animals, birds or fish while at a large but there is a theft of tamed animals.

ILLUSTRATION :- 'A' finds a ring lying on the road which was in the possession of any person. A by taking it commits no theft, though he may commit criminal misappropriation of property.

D. It should be taken without consent of that person:- The consent may be express or implied and may be given either of the person in possession, or by any person having for that purpose express or implied authority.

PUNISHMENT FOR THE OFFENCE OF THEFT

The punishment for committing theft in Indian Penal Code under section 379 for offence of theft is an imprisonment which may extend to three years or with fine or both.

Question 16. What do you mean by Extortion? How it is different from theft and Robbery? Discuss.

Answer: :- The chief elements of extortion are the intentional putting of a person in fear of injury to himself or another and dishonestly inducing the person so put in fear to deliver to any person any property or valuable security.

DEFINITION OF EXTORTION

Whoever intentionally puts any person in fear or any injury to that person, or to any other, and thereby dishonesty induces the person so put in fear to deliver any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'Extortion' under section 383 of IPC.

According to Section 383 of IPC," Whoever intestinally puts any person in fear of any injury to that person or to any other and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into valuable security commits, "Extortion"

ESSENTIALS OF EXTORTION:

According to section 383 of IPC the following are the essentials of extortion :-

1. There must be a show of force or threat.
2. Such force or threat should be in the form of fear of injury.
3. Such injury may be for the person who is put under the fear or for any other persons in which the former person has interest.
4. Such force should be shown with a view take a thing or property or valuable security or sign or seal or a document.
5. There must be a dishonest intention.

Thus if the above elements are present then it is an offence of Extortion dishonest intention is also an essential element of extortion.

DISHONEST INTENTION IS MEASURED FROM THE CIRCUMSTANCES AND FACTS OF EACH CASE.

Any thing taken from a person at the point of pistol is an example of extortion.

ILLUSTRATIONS :-

I) 'A' threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. 'A' has committed extortion.

II) 'A' threatens Z that he will keep Z's child in wrongful confinement unless Z will sign and deliver to A a promissory note binding Z to pay money to 'A'. Z signs and delivers the note. 'A' has committed the offence of extortion

PUNISHMENT FOR EXTORTION U/S 384 IPC: Whoever commits the offence of extortion, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

Following are the difference between Theft & Extortion-

THEFT	EXTORTION
The offender's intention is to Take away something without The owner's consent	Consent is obtained by putting the person, in possession of property In fear of injury to himself or to any Other person, i.e. there is wrongful Obtaining of consent
Theft is limited only to moveable property	Both movable and immovable .Property may be the subject of the Offence of extortion
There is no element of force In theft	There is the element of force, for Property is obtained by putting a Person in fear of injury

	to that Person, or to any other.
The offender takes the Property without the owner Ship's consent and hence There is no delivery by the Owner.	Delivery of property as distinct from taking away property is of its essence.

Question 17. Define Robbery and Dacoity. What is the difference between robbery and Dacoity. Discuss

Answer: Section 390 of the Indian Penal Code, 1860 says that in all robbery there is either extortion or theft. The Black law's dictionary defines robbery as the felonious act of taking the personal property of another from a person or immediate presence against his will accomplished by using force and fear, with the intention of permanently depriving the owner of the thing.

Causing Death, Hurt or Wrongful Restraint or Fear : Death, hurt, wrongful restraint or fear can be caused when theft is a robbery or when extortion is robbery. These two are explained below with the help of illustrations.

When theft is robbery:

Theft is a robbery when in order to commit theft, the offender voluntarily causes or attempts to cause to any person death, subject him to wrongful restraint, cause hurt or induce fear of instant death, instant wrongful restraint or cause instant hurt. Theft can be called as a robbery when the conditions given below are satisfied:

- When the offender voluntarily attempts to cause death;
- wrongful restraint;
- fear of instant death;
- instant wrongful restraint;
- instant hurt.

And the above acts are done: while committing the theft,While carrying away the property acquired by theft, or While attempting to carry away property.

For example, if A holds B down and fraudulently takes B's money from B's clothes without B's consent. Here A has committed theft and by committing theft he has voluntarily caused wrongful restraint to B. Therefore, A has committed robbery.

When extortion becomes robbery: Extortion becomes robbery when the person committing the offence of extortion put the other person in fear and commits extortion by putting that person in fear of death, instant wrongful restraint to that person or to some other person and by doing so induces the person so put in fear then and there deliver the thing that has been extorted.

For example, if A meets B and B's child is on a road. A takes the child and threatens to fling it down a height unless B delivers his purse. B delivers his purse. Here A has extorted the purse from B by causing B to be in fear of instant hurt to the child who is present. A has therefore robbed B. However if A obtains the property by saying that your child is in my hand of my gang and he/she will be put to death unless you send us ten lakh rupees. This will amount to extortion, and punishable as such, but it would not be considered as robbery unless B is put in fear of instant death of his child.

Possession of Stolen Property: Property is an important part of the law. Section 410 to Section 414 of the India Penal Code talks about the concept of stolen property. Section 410 of the Indian Penal code defines it as when a person transfers his/her property to another person. It can happen by way of theft, extortion or robbery. It includes all kinds of properties which a person can misappropriate for criminal breach of trust.

These kinds of instances related to property are known as stolen properties. Section 410 of the Indian Penal Code also says that if a person transfers the property by using any of the means given below that will be considered as stolen property. These means are:

- Theft;
- Extortion;
- Robbery;
- Criminal misappropriation;
- Criminal breach of trust.

Section 411 of the Indian Penal Code says that any person who dishonestly possess or retains the property will be punished with at least 3 years of imprisonment, fine or both.

Punishment for Robbery: Indian Penal Code, 1860 deals with all kinds of punishments related to criminal law. Under Section 392 of this code, the punishment for robbery is defined. This section says that any person who commits robbery shall be punished with imprisonment which may be extended up to ten years and shall also be liable for fine.

Further, this section says that if a person commits a robbery on a highway then the term for imprisonment will be of 14 (fourteen) years. Section 393 of the Indian Penal Code defines the punishment for an attempt to commit robbery. The punishment for this is imprisonment for up to 7 years and also liable for fine.

Following are the distinction between Robbery and Dacoity are:

No	Robbery	Dacoity
1	**Definition** : Section 390 of the Indian Penal Code defines Robbery — In all robbery there is either theft or extortion. **When theft is robbery –** Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. **When extortion is robbery –** Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person, so put in fear then and there to deliver up the thing extorted.	**Definition :** Section 391 of the Indian Penal Code defines Dacoity — "When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".
2	Robbery can be committed by even one accused.	In Dacoity there must be five or more persons.
3	Robbery is not as serious as Dacoity	Dacoity is an aggravated and more

		serious form of robbery.
4	**Punishment –** Section 392 of the Indian Penal Code prescribes the punishment for robbery – Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.	**Punishment –** Section 395 of the Indian Penal Code prescribes the Punishment for dacoity – Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.
5	Cognizable, non-bailable, non-compoundable and triable by Magistrate of the first class.	Cognizable, non-bailable, non-compoundable and triable by Court of session.

Question18: when does extortion amount to Robbery?

Answer: Under section 390 of IPC Extortion is 'robbery' if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, or instant hurt, or of instant wrongful restraint to that person, or to some other person, and by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

To describe in short, "robbery" is :-

1. Theft plus violence causing or attempting to cause death, hurt or wrongful restraint or fear of instant violence.
2. Extortion plus offender present plus fear of instant violence plus immediate delivery of the thing is extorted.

ILLUSTRATION:- 'A' holds Z down, and fraudulently takes Z's money and jewels from Z clothes without Z's consent. Here A has committed theft, and in order to committing of that theft has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

Punishment For Robbery: Imprisonment up to ten years and also fine. But if robbery committed on the highway between sunset and sunrise then up to 14 years

Question 19. What are the essential of criminal misappropriation of property? distinguish criminal misappropriation from criminal breach of trust.

Answer: Introduction : Section 403 and Section 404 of the Indian Penal Code, 1860 deals with Criminal Misappropriation of Property. Section 403 of the Indian Penal code defines criminal misappropriation and prescribes the punishment for the offence. Section 404 of the Indian Penal Code deals with dishonest misappropriation of a deceased persons property.

Meaning of Misappropriation of Property : The word misappropriation means a dishonest appropriation, and use of another's property for ones own use.

Section 403 of the Indian Penal Code 1860 says that, whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Ingredients :

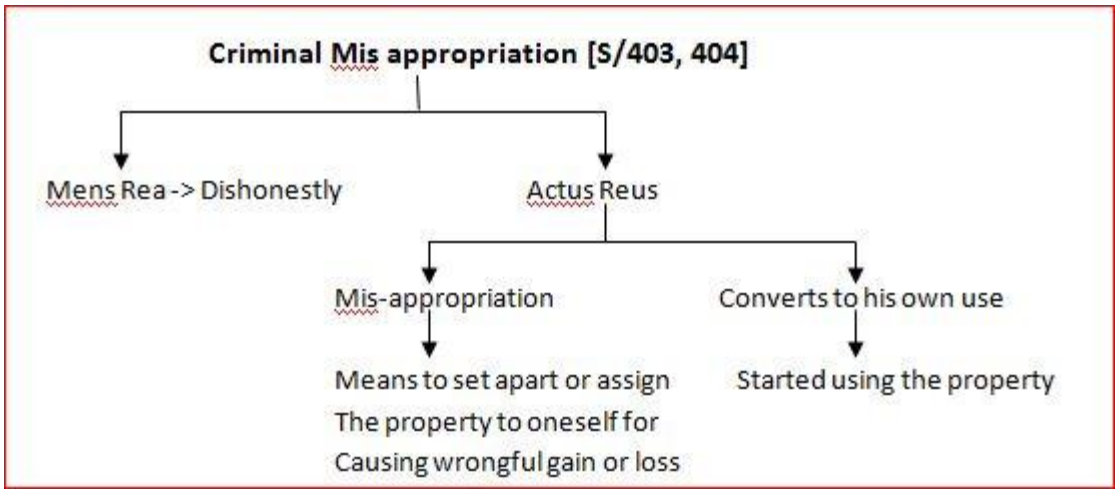
To constitute the offence of misappropriation following ingredients must be satisfied:

(i) The accused misappropriated property and converted the same to his own use.

(ii) He dose does so dishonestly.

(iii) The property is movable; and

(iv) the movable property belonged to complainant



Illustrations

(a) A takes property belonging to Z out of Z's possession in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if

A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

Section 404: Dishonest misappropriation of property possessed by deceased person at the time of his death:

Section 404 of the Indian Penal Code says that, whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

Section 404 of the code is an aggravated form of Criminal Misappropriation and prescribes a punishment of three years of imprisonment which may simple or rigorous and fine.

Ingredients :

To invoke Section 404 of the Indian Penal Code following ingredients are to be satisfied.

(i) The property must be movable property

ii) Such property was in possession of the deceased at the time of his death ;

(iii) The accused misappropriated it or converted it to his own use; and

(iv) The accused did so dishonestly.

Offence under this Section is non-cognizable, bailable, non-compoundable, and triable by Magistrate of the First class.

Sl		

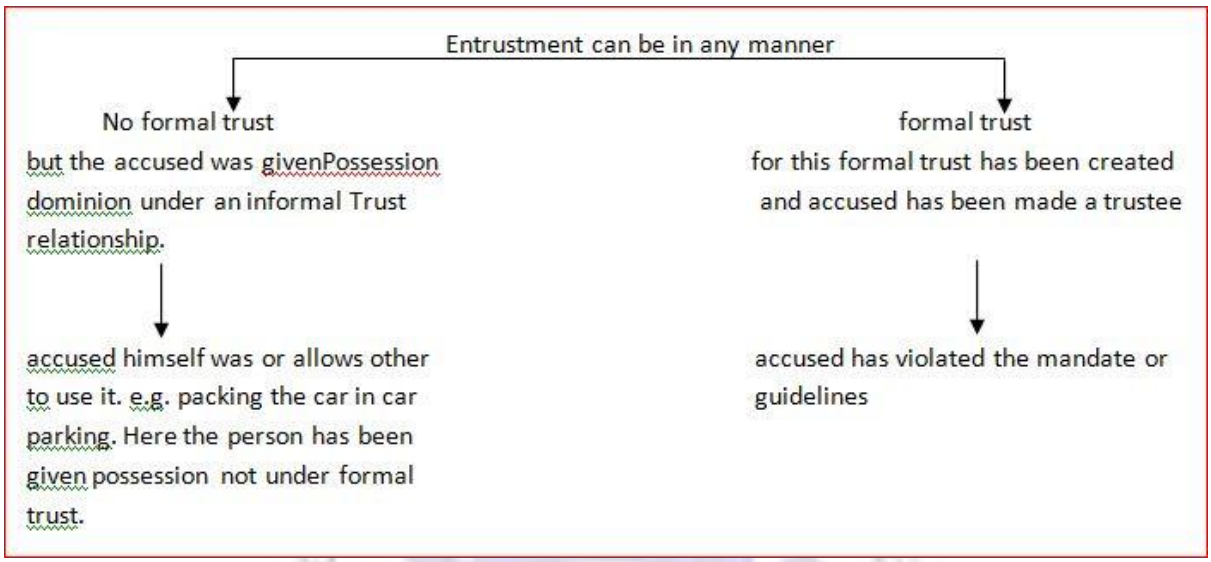
.no.	Criminal Misappropriation	Criminal breach of Trust
1	**Definition :** Section 403 of the Indian Penal Code defines Criminal misappropriation and prescribes the punishment for the offence - "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".	**Definition :** Section 405 of the Indian Penal Code defines Criminal breach of trust - "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".
2	**Ingredients :**To constitute the offence of misappropriation the following ingredients must be present – 1) The accused misappropriated that property and converted the same to his own use dishonestly 2) The movable property belonged to that complainant.	**Ingredients:** To constitute criminal breach of trust following ingredients must be present. 1) The accused must be entrusted with property or with dominion over property; 2) The person who entrusted must – i) dishonestly misappropriate or convert to his use that property or ii) dishonestly use or dispose of that property or willfully suffer any other person to do so a) in violation of any directions of law prescribing the mode in which such property is to be discharged \. b) any legal contract made touching discharge of such trust.

3	The property comes into the possession of the accused in some natural manner.	The property comes into possession of the accused either by an express entrustment or by some process. There is conversion of property held by a person in fiduciary capacity.
4	It can be only movable property	It can be of any movable as well as immovable property.
5	There is no contractual relationship	There is contractual relationship
6	Non-cognizable, bailable, compoundable with permission of Court and triable by any Magistrate.	Non-cognizable, bailable, non-compoundable and triable by the Magistrate of the First Class

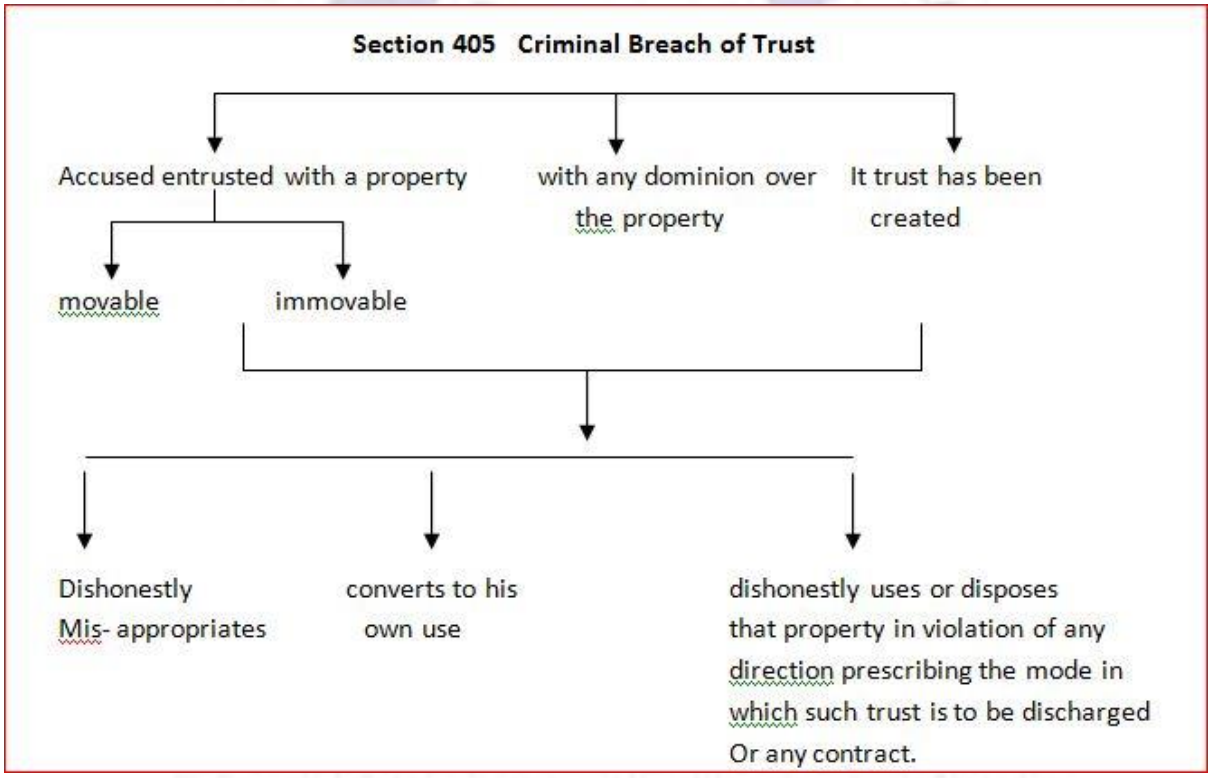
Question 20. What do you mean by criminal breach of trust? Discuss with relevant case laws.

Answer: *Criminal breach of trust is defined under* ***Section 405 of the Indian Penal Code, 1860****. The section, in a nutshell, reads as 'dishonest misappropriation' or 'conversion to own use' another person's property. Criminal breach of trust and criminal misappropriation (under* ***Section 403****) is distinguished from each other in terms of the fact that in criminal breach of trust, the accused is entrusted with property or with dominion or control over the property.*

The language of this section has been structured in a manner that it has a wide ambit, however 'entrustment' of the property is an essential element for an offense to be penalized under S.405 of IPC.



The essential ingredients of the offense of criminal breach of trust are;



(1) The accused must be entrusted with the property or with dominion over it,

(2) The person so entrusted must use that property, or;

(3) The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,-

(a) of any direction of law prescribing the mode in which such trust is to be discharged, or;

(b) of any legal contract made touching the discharge of such trust.

The provision for Criminal Breach of Trust is mentioned in Chapter XVII under Section 405 of Indian Penal Code. Section 405, of Indian Penal Code, states:

'Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust.'

Criminal Breach of Trust mean section 405 of IPC, is similar to the offense of 'embezzlement' under the English law. A reading of the section suggests that the gist of the offense of criminal breach of trust is 'dishonest misappropriation' or 'conversion to own use' another's property, which is nothing but the offense of criminal misappropriation defined u/s 403.

The only difference between the two is that in respect of criminal breach of trust, the accused is entrusted with property or with dominion or control over the property. As the title to the offense itself suggests, entrustment or property is an essential requirement before any offense under this section takes place. The language of the section is very wide. The words used are 'in any manner entrusted with property'. So, it extends to entrustments of all kinds-whether to clerks, servants, business partners or other persons, provided they are holding a position of trust. "The term "entrusted" found in Section 405, IPC governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property."

Entrustment: As the title to the offense itself suggests, entrustment of a property is an essential requirement before any offense in this section takes place. The language of this section is very wide. The words used are, 'in any manner entrusted with property'. So it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of 'trust'.

The word entrust is not a term of art. In common parlance, it embraces all cases in which a thing handed over by one person to another for a specific purpose. The term 'entrusted' is

wide enough to include in its ambit all cases in which property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to terms on which possession has been handed over.[vii] Entrustment need not be expressed, it can be implied.

The definition in the section does not restrict the property to movables or immoveable alone. In ***R K Dalmia vs Delhi Administration***, the Supreme Court held that the word 'property' is used in the Code in a much wider sense than the expression 'moveable property'. There is no good reason to restrict the meaning of the word 'property' to moveable property only when it is used without any qualification in Section 405.

Whether the offense defined in a particular section of IPC can be committed in respect of any particular kind of property, will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section.

The word 'dominion' connotes control over the property. In ***Shivnatrayan vs State of Maharashtra***, it was held that a director of a company was in the position of a trustee and being a trustee of the assets, which has come into his hand, he had dominion and control over the same. However, in respect of partnership firms, it has been held[xii] that though every partner has dominion over property by virtue of being a partner, it is not a dominion which satisfies the requirement of s 405, as there is no 'entrustment of dominion, unless there is a special agreement between partners making such entrustment.

Explanations (1) and (2) to the section provide that an employer of an establishment who deducts employee's contribution from the wages payable to the employee to the credit of a provident fund or family pension fund or employees state insurance fund, shall be deemed to be entrusted with the amount of the contribution deducted and default in payment will amount of the contribution deducted and default in payment will amount to dishonest use of the amount and hence, will constitute an offense of criminal breach of trust.

In ***Employees State Insurance Corporation vs S K Aggarwal,*** the Supreme Court held that the definition of principal employer under the Employees State Insurance Act means the owner or occupier. Under the circumstances, in respect of a company, it is the company itself which owns the factory and the directors of the company will not come under the definition of 'employer.' Consequently, the order of the High Court quashing the criminal proceedings initiated u/ss 405 and 406, IPC was upheld by the Supreme Court.

Misappropriation: Dishonest misappropriation is the essence of this section. Dishonesty is as defined in **Sec.24, IPC,** causing wrongful gain or wrongful loss to a person. The meaning of wrongful gain and wrongful loss is defined in **Sec. 23, IPC**. In order to constitute an

offense, it is not enough to establish that the money has not been accounted for or mismanaged. It has to be established that the accused has dishonestly put the property to his own use or to some unauthorized use. Dishonest intention to misappropriate is a crucial fact to be proved to bring home the charge of criminal breach of trust.

Proof of intention, which is always a question of the guilty mind of the person, is difficult to establish by way of direct evidence. In ***Krishan Kumar V Union of India***, the accused was employed as an assistant storekeeper in the Central Tractor Organization (CTO) at Delhi. Amongst other duties, his duty was the taking of delivery of consignment of goods received by rail for CTO. The accused had taken delivery of a particular wagonload of iron and steel from Tata Iron and Steel Co, Tatanagar, and the goods were removed from the railway depot but did not reach the CTO. When questioned, the accused gave a false explanation that the goods had been cleared, but later stated that he had removed the goods to another railway siding, but the goods were not there.

Similarly, in ***Jaikrishnadas Manohardas Desai vs State of Bombay***, it was held that dishonest misappropriation or conversion may not ordinarily be a matter of direct proof, but when it is established that property, is entrusted to a person or he had dominion over it and he has rendered a false explanation for his failure to account for it, then an inference of misappropriation with dishonest intent may readily be made.

In ***Surendra Prasad Verma vs State of Bihar,*** the accused was in possession of the keys to a safe. It was held that the accused was liable because he alone had the keys and nobody could have access to the safe, unless he could establish that he parted with the keys to the safe. As seen in the case of criminal misappropriation, even a temporary misappropriation could be sufficient to warrant conviction under this section.

In ***Superintendent and Remembrancer of Legal Affairs v SK Roy,*** the accused, a public servant in his capacity in Pakistan unit of Hindustan Co-operative Insurance Society in Calcutta which was a unit of LIC, although not authorized to do so directly realized premiums in cash of some Pakistani policyholders and misappropriated the amounts after making false entries in the relevant registers.

To constitute an offense of Criminal Breach of trust by a public servant punishable under Section 409 IPC, the acquisition of dominion or control over the property must also be in the capacity of a public servant. The question before the court was whether the taking of money directly from policyholders, which was admittedly unauthorized, would amount to acting in his capacity as a public servant.

In order to sustain the conviction under Section 409, it is required to prove:

1. Entrustment of a property of which accused is duty bound to account for;
2. Commission of Criminal Breach of Trust.

The prosecution dealing with cases of criminal breach of trust by a public servant is required to prove not only that the accused was a public servant but also was in a capacity entrusted with property or with domination over the same and he committed breach of trust in respect of that property.

It is not necessary that the property entrusted to a public servant should be of government. But what is important is that the property should have been entrusted to a person in his capacity as a public servant.

In ***State of Gujarat vs Jaswantlal Nathalal[,*** the government sold cement to the accused only on the condition that it will be used for construction work. However, a portion of the cement purchased was diverted to a godown. The accused was sought to be prosecuted for criminal breach of trust. The Supreme Court held that the expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner.

In ***Jaswant Rai Manilal Akhaney vs State of Bombay,*** it was held that when securities are pledged with a bank for specific purpose on specified conditions, it would amount to entrustment. Similarly, properties entrusted to directors of a company would amount to entrustment, because directors are to some extent in a position of trustee. However, when money was paid as illegal gratification, there was no question of entrustment.

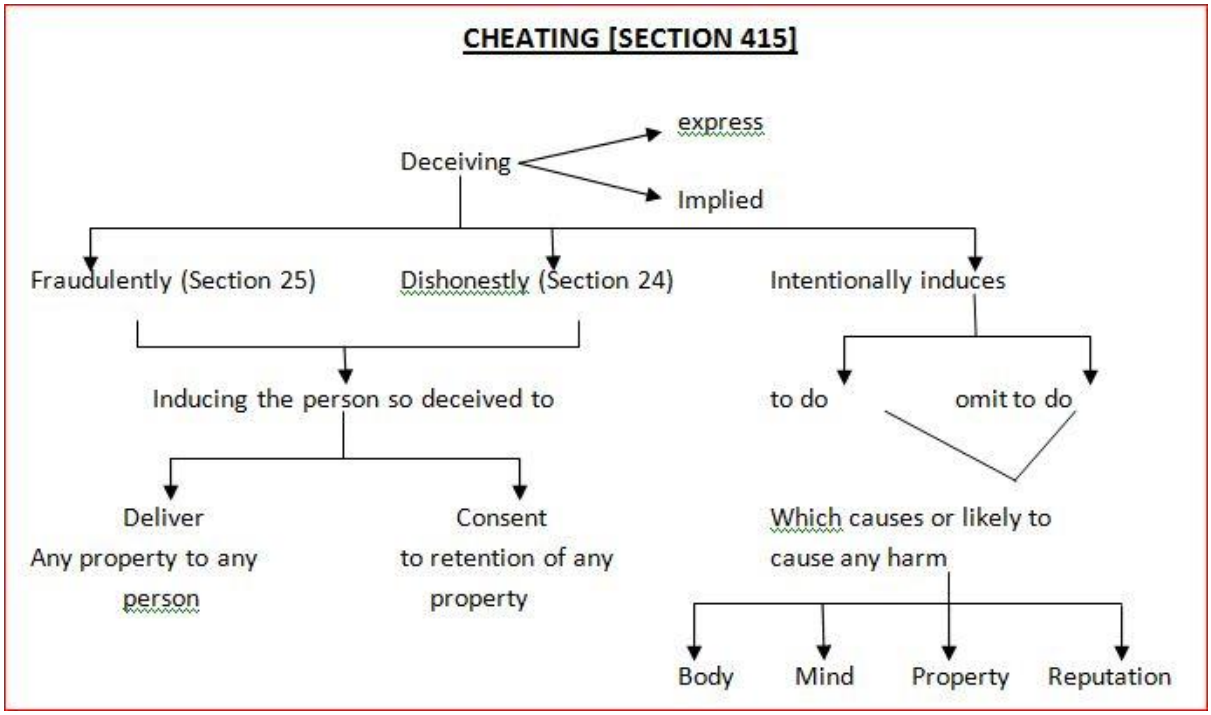
In State of UP vs Babu Ram, the accused, a sub-inspector (SI) of police, had gone to investigate a theft case in a village. In the evening, he saw one person named Tika Ram coming from the side of the canal and hurriedly going towards a field. He appeared to be carrying something in his dhoti folds. The accused searched him and found a bundle containing currency notes. The accused took the bundle and later returned it.

In ***Rashmi Kumar vs Mahesh Kumar Bhada***, the Supreme Court held that when the wife entrusts her stridhana property with the dominion over that property to her husband or any other member of the family and the husband or such other member of the family dishonestly misappropriates or converts to his own use that property, or willfully suffers any other person to do so, he commits criminal breach of trust.

Question 20. What essentials constitute 'Cheating'. Illustrate

Answer: Section 415 Cheating: Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.



Ingredients for Cheating

1. Deception of any person
2. Fraudulently or dishonestly inducing that person; and
3. Delivery of any property to any person

This section covers only simple cases of cheating when there is a delivery of any property or destruction of any valuable security section 420 IPC is attracted.

In **K. Krishnamurthy vs State of Andhra Pradesh, AIR 1965 SC 333**, the Supreme Court held that the offence of cheating by personation under section 416 and 419 IPC was committed when the accused making the false representation as to his name and qualification for a post in an application made to the public service commission and the government-appointed into the post on the Recommendation of the commission.

Deception of the statutory body Public Service Commission and the government which is the appointing authority is completed when he got an appointment and the payment of a salary to the appellant for the post. It amounted to the delivery of property within the meaning of section 415 IPC.

II. Section 416 in The Indian Penal Code – Cheating by personation

A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offense is committed whether the individual personated is a real or imaginary person.

The offense under this section consists of cheating by personation. The offense of cheating by false representation is an aggravated form of cheating. False personation consists of personating another or by knowingly substituting another person and pretending to be that other person and representing that other person.

Personation by itself is no offense but when a person fraudulently and dishonestly does a fraudulent act and represents as if he is himself that other person, section 416 IPC will be attracted

In **Baboo Khan vs State of Uttar Pradesh,** the accused, who pretended to be a certain well-known eye specialist and induced the complainant to allow him to perform an operation on the eye of his 12-year-old son was found guilty under the section.

III. Section 417, IPC – Punishment for cheating.

Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

IV. Section 418, IPC – Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.

Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

This section prescribes the punishment for cheating by a person standing in a fiduciary capacity to the person cheated such a relationship exists between a Banker and customer, the principal and an agent, Guardian and Ward, director of a company and the shareholder, etc.

Ingredients

1. The accused cheated a person whose interests he was under a legal obligation to protect;
2. The accused knew that he was likely to cause wrongful loss to such a person.

The offense is non-cognizable, bailable and compoundable with the permission of the court.

V. Section 419 , IPC – Punishment for cheating by personation: Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

VI. Section 420 , IPC – Cheating and dishonestly inducing delivery of property: Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

This section is an aggravated form of cheating and provides enhanced punishment which may extend to 7 years of imprisonment (simple or rigorous) and fine. The section applies to those cases of cheating which involves the delivery of property or destruction of valuable security.

VII. The offence of cheating is established when the following ingredients are proved, namely**,**

1. That the representation made by the accused was false;
2. That the accused knew the representation was false at the very time when he made it;
3. That the accused made the false representation with the dishonest intention of deceiving the person to whom it was made; and
4. That the accused thereby induced that person to deliver any property or to do or to omit to do something which he would otherwise not have done or omitted.

Section 420 requires the delivery of property in addition to deception and inducement as required under section 415 The deception must be with a dishonest and fraudulent intent without which no offense under section 420 can be said to be committed.

A person can be said to have done a thing dishonestly if he does so with the intention of causing wrongful gain to one person and wrongful loss to another. Therefore, a dishonest act is necessary to establish for the purpose of Section 420.

Difference between section 415 and section 420

The difference between section 415 and section 420 is that wherein pursuance of deception knows property passes but inducement generated in the mind the fence comes under section 415 that is (simple cheating). But where in pursuance of the deception property is delivered the offenses punishable under section 420.

Section 415 deals with cheating but section 420 deals with the species of cheating which involves the delivery of property or destruction of valuable security. Punishment for the

offense under section 415 is one year (section 417), while under section 420 up to 7 years imprisonment.

CASES: ON CHEATING**:** 1. Ramnath V state: A, the accused told B that he would double currency notes, which B doubted. But, B gave currency notes for the purpose. Held, there 'was no cheating as B knew that doubling was false. A was convicted of attempt to cheat.

2. Arab Mihan V. state: A, accused, advertised for "gupta mantra" which would solve all problems if certain instructions are followed. B took the instruction by paying. One condition was gazing at the moon for 15 minutes .with- out winking. Held, this was almost an impossible condition. & hence there was cheating .

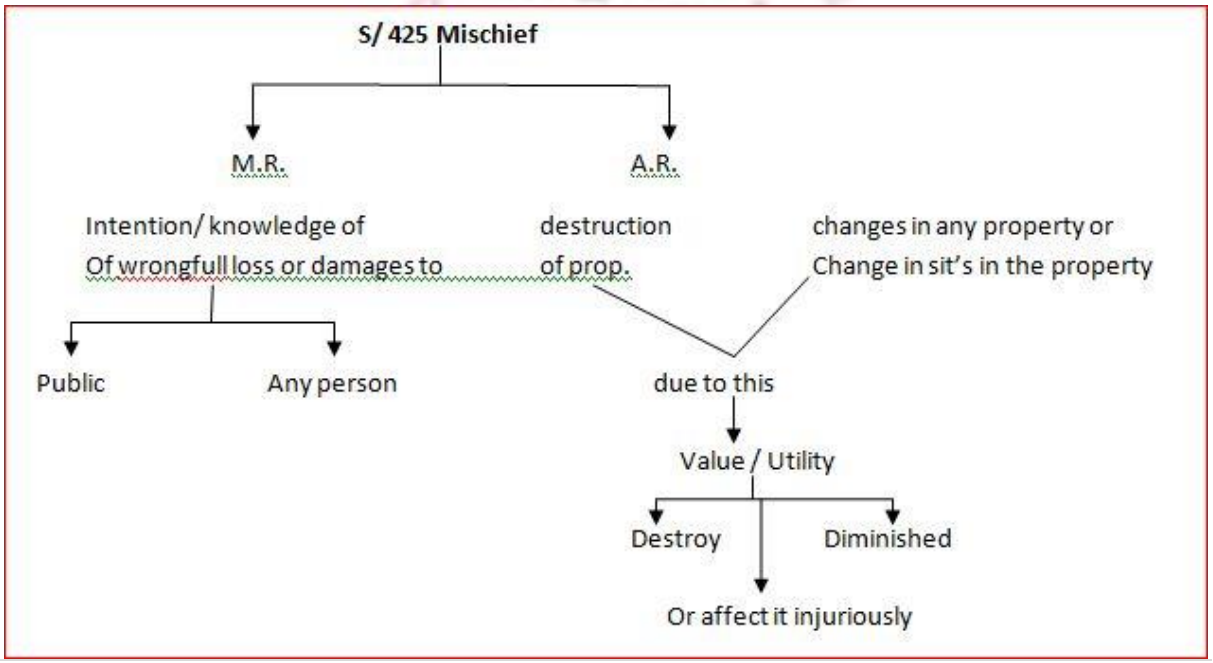
3.A, a doctor certified that the life of B to be insured was first class. The company believing the certificate insured B. B had a bad health record & died within a few days A cheats.

Leading cases:

i. Tulsi Ram V. St. of U..P
ii. Mahadev Prasad V. St. of W. B

Question 20. What do you mean by Mischief? Discuss the legal provision related toMischief.

Answer: Mischief is an offence under Sn. 425 I.P.C. If a person with an intention to cause wrongful loss or damage to public or to any person, causes the destruction of the property or causes any change or situation as will destroy or diminish its value or utility, he is guilty of mischief



. The punishment is imprisonment for three months or fine or both. It is not essential that the offender should intend to cause los> or damage to the property. Suffice if he has the intention to cause wrongful loss or damage. A person commits mischief of his own property where, as joint owner, he causes damage to the property.

i) A throws a wrist watch of B voluntarily into a river intending to cause wrongful loss. A is guilty of mischief

ii) A burns a valuable security (pronote) belonging to B voluntarily with the intention to cause wrongful loss to him. A is guilty of mischief.

iii) A and B are joint owners of a horse. A shoots down the horse and kills it, with a view to cause wrongful loss to B. A is guilty under Sn. 425.

The mens-rea (bad intention) in mischief is to cause wrongful loss. The act done is the destruction of property.

Sukha Singh's case : S received a registered parcel. He took the parcel but tore up the acknowledgement form. Held, S is guilty of mischief

iv) A having insured a ship, voluntarily causes it to be cast away with a view to causing loss to insurance company. A is guilty.

v) A leds in a herd of cattle to the field of B where there was standing crop, intending to cause damage to B. A is guilty. Sns 426 to 440 provide for punishment for mischief of various descriptions. Maiming or killing of animal (428 & 429), injury to works of irrigation, water course (430), injury to public road, bridge, river or channel (431) destruction of house (436) vessel etc..

Question 21. Define Forgery. Discuss the law relating to forgery with relevant case laws.

Answer: There are two sections defining forgery. Sn 463 defines forgery. Section 464 defines "making a false document', which is one of the-essentials of forgery. Forgery: A person who makes a false document or part of it with an intention

i) to cause damage or injury to the public or to any person ,

ii) to support any claim or title

iii) to cause any person to part with property or enter into contract

iv) to commit fraud or that fraud may be committed - is guilty of forgery;

False Document: A person is said to make a false document in the following circumstances:

i) He must dishonestly or fraudulently, make, sign, seal or execute a document, with knowledge or an intention to make others believe that it was genuinely done by the concerned authority.

ii) The person, without lawful authority, dishonestly or fraudulently cancels, or alters the document made by himself or by any other (living or not).

iii) The person may cause any other person who is insane, or intoxicated or deceived, to sign or seal or execute or alter a document.

E.g. : 1) A without authority affixes the signature and seal of the controller of examinations to a marks-card and secures a seat in a Medical college. A is guilty of forgery.

2) A picks up a blank cheque duly signed by B. A without authority but dishonestly fills up and takes Rs. 8000/- from the Bank. A is guilty.

3) Z has written a will giving "the remaining property to A and B'. A dishonestly scratches B's name. This is forgery. A person may commit forgery of his own signature,

i) A money-order is received in the name of B, A person with the same name takes it dishonestly. He is guilty of forgery.

ii) "A picks up a bill of exchange payable to another person of the same name. A endorses the bill, intending to make others believe that it was done duly by A. A has committed forgery. Making of a false document in the name of a fictitious person or by a dead man may amount to forgery. A draws a bill of exchange in the name of a fictitious person He fraudulently accepts it, in that name with a view to negotiate it. A commits forgery.

Recent Supreme Court Decisions:

i) Rarn Narain V. State of Punjab. Accused had forged the signature of the drawer of cheque and encased dishonestly. Held: Guilty.

ii) Jagannath Prasad V. State of U.P. Producing a forged document before a tribunal to support a claim was held forgery under Sn. 463.

iii) Budhu Ram V. State of Rajasthan. Production of a Photostat copy of a forged document was held sufficient to commit forgery.

iv) Dr Vimal V Delhi: Dr Vimalpure J bought a car in her daughter's name: She claimed accident insurance by signing daughter's name. In the circumstance there was no fraud. Hence, not guilty of forgery.

v) Bansal V Delhi: Grandson of had signed the name of deceased Grandfather and claimed amounts of Govt. Securities. Guilty of forgery-

Administrative law

Code- 208

Q.1. Define administrative law? Explain the nature and scope and development of administrative law.

Meaning of Administrative Law

Administrative law deals with the powers and functions of the administrative authorities, the manner in which the powers are to be exercised and remedies which are available to the aggrieved persons when those powers are abused by these authorities

Definition by Ivor Jennings

According to Ivor Jennings "administrative law is the law relating to the administrative authorities".

This is the most widely accepted definition, but there are two difficulties in this definition.

(1) It is very wide definition, for the law which determines the power and functions of administrative authorities may also deal with the substantive aspects of such powers.

For example: - Legislation relation to public health services, houses, town and country planning etc.. But these are not included within the scope and ambit of administrative law, and

(2) It does not distinguish administrative law from constitution law.

It is impossible to attempt any precise definition of administrative law which can cover the entire range of administrative process. The American approach to administrative law is denoted by the definition by the definition of administrative law as propounded by Davis.

Definition by K. C. Davis

According to K. C. Davis, "Administrative law as the law concerns the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action".

Definition by Prof. Wade

According to Professor Wade any attempt to define administrative law will create a number of difficulties. But if the powers and authorities of the state are classified as legislative, administrative and judicial, then administrative law might be said "the law which concerns administrative authorities as opposed to the others".

There are some difficulties with this definition also. It fails to distinguish administrative law from constitutional law Like Jennings definition mentioned above; this is also very wide definition. It includes the entire legal field except the legislature and the Judiciary. It also includes the law of local government. It is also said that it is not possible to divide completely and definitely the functions of legislative, executive and judiciary.

Nature and scope

The Administrative law deals with the structure, functions and powers of the Administrative organs. It also lays down the methods and procedures which are to be followed by them during the course of remedies which are available to the persons whose rights and other privileges are damaged by their operations.

Administrative law specifies the rights and liabilities of private individuals in their dealings with public officials and also specifies the procedures by which those rights and liabilities can be enforced by those private individuals. It provides accountability and responsibility in the administrative functioning. Also there are specified laws and rules and regulations that guide and direct the internal administration relations.

Pervasive Legal Discipline: No one can master this subject. Whenever and wherever any person becomes a victim of arbitrary exercise of power, the administrative law emerges and develops.

Law in Realist Sense: It is not codified like the Indian Penal Code or the Law of Contracts. It is law in realist sense and not in lawyer's sense. It is based on the construction and includes statute law, precedents etc.

Functions of Administration: It deals with the organization and powers of administrative and powers of quasi-administrative agencies.

Meaning of Administration: Administrative law is the body of law that governs the activities of administrative agencies of the government which comprise of rule making or legislation (when delegated to them by the Legislature as and when the need be), adjudication(to pronounce decisions while giving judgements on certain matters),implementation/enforcement of public policy.Some may explain it negatively as after excluding legislature and judiciary whatever is left is administration.

Ever Widening Scope: It is an ever widening subject in developing society. Apart from administrative functions it also legislates and adjudicates. The legislative function includes rule making or legislation (when delegated to them by the Legislature as and when the need be). The adjudication function (to pronounce decisions while giving judgements on certain matters). There is plethora of Administrative Tribunals.

It is essentially judge made law. It is a branch of public law as compared to private law relations inter-se. Administrative law includes the control mechanism (judicial review) by which administrative authorities are kept within bounds and made effective.

The administrative agencies derive their authority from constitutional law and statutory law. The laws made by such agencies in the exercise of powers conferred on them also regulate their action

Principles of good governance. It is concerned with individual rights as well as public needs and ensures transparent, open and honest governance. Principles of good governance are equity, fairness and conscience.

Development of Administrative Law

Administrative law existed in India even in ancient times. Under the Mauryas and Guptas, several centuries before christ, there was well organised and centralised Administration in India.

The rule of "Dharma" was observed by kings and Administrators and nobody claimed any exemption from it. The basic principle of natural justice and fair play were followed by the kings and officers as the administration could be run only on those principles accepted by Dharma, which was even a wider word than "Rule of Law" or "Due process of Law", Yet, there was no Administrative law is existence in the sense in which we study it today.

With the establishment of East India company and event of the British Rule in India. The powers of the government had increased. Many Acts, statutes and Legislation were passed by the British government regulating public safety, health, morality transport and labour relations. Practice of granting Administrative licence began with the State Carriage Act 1861. The first public corporation was established under the Bombay Port Trust Act 1879.

Delegated legislation was accepted by the Northern India Canal and Drainage Act, 1873 and Opium Act 1878 proper and effective steps were taken to regulate the trade and traffic in explosives by the Indian Explosives by the Indian Explosives Act 1884.

In many statutes, provisions were made with regard to holding of permits and licences and for the settlement of disputes by the Administrative authorities and Tribunals.

During the Second World War, the executive powers tremendously increased Defence of India Act, 1939 and the rules made there under conferred ample powers on the property of an individual with little or no judicial control over them, In addition to this, the government issued many orders and ordinances, covering several matters by way of Administrative instructions.

Since independence, the activities and the functions of the government have further increased. Under the Industrial Disputes Act 1947, the Minimum Wages Act 1948 important social security measures have been taken for those employed in Industries.

The philosophy of a welfare state has been specifically embodied in the constitution of India. In the constitution itself, the provisions are made to secure to all citizens social, economic and political justice, equality of status and opportunity. The ownership and control of material resources of the society should be so distributed as best to sub serve the common good. The operation of the economic system should not result in the concentration of all these objects.

The State is given power to impose reasonable restrictions even on the Fundamental Rights guaranteed by the constitution. In Fact, to secure those objects, several steps have been taken by the parliament by passing many Acts, for example. The Industrial (Development and Regulation) Act 1951, the Requisitioning and Acquisition of Immovable Property Act 1952, the Essential Commodities Act, 1955. The Companies Act 1956, the Banking Companies (Acquisition and Transfer of undertakings) Act, 1969. The Maternity Benefits Act, 1961, The Payment of Bonus Act 1965, The Equal Remuneration Act 1976, The Urban Land (ceiling and Regulation) Act 1976, The Beedi Worker's Welfare Fund Act, 1976 etc.

Even the judiciary has started taking into consideration the objects and ideals social welfare while interpreting all these Acts and the provisions of the Constitution. Hence, on the one hand, the activities and powers of the government and administrative authorities have increased and on the other hand, there is great need for the enforcement of the rule of law and judicial review over these powers, so that the citizens should be free to enjoy the liberty guaranteed to them by the constitution. For that purpose, provisions are made in the statutes giving right of appeal, revision etc. and at the same time extra-ordinary remedies are available to them under Article 32, 226 and 227 of the constitution of India. The Principle of judicial review is also accepted in our constitution, and the order passed by the administrative authorities can be quashed and set aside if they are malafied or ultravires the Act or the provisions of the constitution.

And if the rules, regulations or orders passed by these authorities are not within their powers, they can be declared ultravires, unconstitutional.

Q.2. Discuss Dicey's concept of Rule of law in detail.

Rule of law

The most famous exposition of the concept of rule of law has been laid down by A.V. Dicey (Law of the Constitution) who identifies three principles which together establish the rule of law: A. The supremacy of Law (Principle of Legality): For Dicey, supremacy of the ordinary laws of the land over the actions of public officials and administrative agencies. He writes: It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even wide discretionary authority on the part of the government.

An administrative agency or public official is required to justify its action by clearly establishing that it is expressly or impliedly empowered or authorized by act of the parliament (i.e. proclamation issued by the House of People's Representatives). This means also that in the absence of any authority, the affected party whose rights and liberties have been violated as a result of the action of government, should be able to take the case to court and have it invalidated.

However, acting according to law does not satisfy the meaning of rule of law in the presence of wide discretionary powers. Parliament may confer on the specific administrative agency, wide discretionary powers that enables the agency to take unpredictable and in some cases of the arbitrary actions. Hence, the government should be conducted within the framework of the recognized rules and principles that restrict discretionary power.

B. Equality before Law: The Second meaning of the Rule of Law is that no man is above law. Every man whatever is his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.
Prof. Dicey states that, there must be equality before the law or equal subjection of all classes to the ordinary law of the land. He criticized the French legal system of droit Administrative in which there were separate administrative tribunals for deciding the cases of State Officials and citizens separately. He criticizes such system as negation of law
C. Predominance of Legal Spirit: It means the constitution is the result of the ordinary law as developed by the courts through the common law tradition and provides for the legal

protection of the individual not via a bill of rights, but through the development of the common law

The rule of law lastly means that the general principles of the constitution are the result of judicial decisions of the courts in England. In many countries rights such as right to personal liberty, freedom from arrest, freedom to hold public meetings are guaranteed by a written constitution. However this is not so in England. These rights are the result of judicial decisions in concrete cases that have actually arisen between the parties. The constitution is not the source but the consequence of the rights of the individuals. Thus, Dicey emphasized the role of the courts as ultimate guarantors of liberty.

Application of the Doctrine in England: Though, there is no written constitution, the rule of law is applied in concrete cases. In England, the Courts are the guarantors of the individual rights. Rule of law establishes an effective control over the executive and administrative power.

However, Dicey's rule of law was not accepted in full in England. In those days, many statutes allowed priority of administrative power in many cases, and the same was not challenged better c the Courts. Further sovereign immunity existed on the ground of King can do no wrong'. The sovereign immunity was abolished by the 'Crown Proceedings Act, 1947. Prof. Dicey could not distinguish arbitrary power from discretionary power, and failed to understand the merits of French legal system.

Rule of Law under the Constitution of India: - The doctrine of Rule of Law has been adopted in Indian Constitution. The ideals of the Constitution, justice, liberty and equality are enshrined (embodied) in the preamble.

Basic Principles of the Rule of Law

- Law is Supreme, above everything and everyone. Nobody is above the law.
- All things should be done according to law and not according to whim.
- No person should be made to suffer except for a distinct breach of law.
- Absence of arbitrary power being the heart and soul of the rule of law.
- Equality before the law and equal protection of the law.
- Discretionary power should be exercised within reasonable limits set by law.
- Adequate safeguard against executive abuse of powers.

- Independent and impartial Judiciary.
- Fair and Just Procedure.
- Speedy Trial

The Constitution of India has been made the supreme law of the country and other laws arc required to be in conformity with the Constitution. Any law which is found in violation of any provision of the Constitution is declared invalid.

Part III of the Constitution of India guarantees the Fundamental Rights. Article 13(l) of the Constitution makes it clear that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provision of Part ill dealing with the Fundamental Rights, shall, to the extent of such inconsistency, be void. Article 13(2) provides that the State should not make any law which takes away or abridges the fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void. The Constitution guarantees equality before law and equal protection of laws. Article 21 guarantees right to life and personal liberty. It provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 19 (1) (a) guarantees the third principle of rule of law (freedom of such and expression).

Article 19 guarantees six Fundamental Freedoms to the citizens of India -- freedom of speech and expression, freedom of assembly, freedom to form associations or unions, freedom to live in any part of the territory of India and freedom of profession, occupation, trade or business. The right to these freedoms is not absolute, but subject to the reasonable restrictions which may be imposed by the State. Article 20(1) provides that no person shall he convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence not be subject to a penalty greater than that which might have been inflicted tinder the law in for cc at the time of the commission of the offence. According to Article 20(2), no person shall be prosecuted and punished for the same offence more than once. Article 20(3) makes it clear that no person accused of the offence shall be compelled to be witness against himself. In India, Constitution is supreme and the three organs of the Government viz. Legislature, Executive and judiciary are subordinate to it. The Constitution

provided for encroachment of one organ (for instance Judiciary) upon another (for example Legislature) if its action is mala fide, as the citizen (individual) can challenge under Article 32 of the Constitution.

In India, the meaning of rule of law has been much expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. It's also regarded as a part of natural justice.

In *Kesavanda Bharti v. State of Kerala,* the Apex Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure. The Supreme Court in *Menaka Gandhi v. Union of India,* observed that Article 14 strikes against arbitrariness. In *Indira Gandhi Nehru v. Raj Narain,* Article 329-A was inserted in the Constitution under 39th amendment, which provided certain immunities to the election of office of Prime Minister from judicial review. The Supreme Court declared Article 329-A as invalid since it abridges the basic structure of the Constitution.

In *A.D.M Jabalpur v. Shivakant Shukla* (popularly known as Habeas Corpus Case), the question before Supreme Court of India was, whether there was any rule of law in India apart front Article 21 of the Constitution. The Supreme Court by majority held that there is no rule of law other than the constitutional rule of law. Article 21 is our rule of law. If it is suspended, there is not rule of law.

Rule of law and Administrative Law

The expression —Rule of law plays an important role in administrative law. It provides protection to the people against the arbitrary action of the administrative authorities. The expression rule of law has been derived from the French phrase _la principle de legalite, meaning a government based on the principles of law. In simple words, the term _rule of law, indicates the state of affairs in a country where, in main, the law rules. Law may be taken to mean mainly a rule or principle which governs the external actions of human beings, and which is recognized and applied by the state in the administration of justice. the rule of law requires that government should operate with in the confines of the law; and that aggrieved citizens whose interest have been adversely affected be entitled to approach an independent

court to adjudicate whether or not a particular action taken by or on behalf of the state is in accordance with the law. In these instances, the courts examine a particular decision made by an official, or an official body to determine whether it falls with in the authority conferred by law on the decision maker. In other words, the courts rule as to whether or not the decision is legally valid. It is in this way that the principle of rule of law serves as the foundation of the administrative law. It has been repeatedly said that the basic purpose of the administrative law is to control excessive and arbitrary governmental power. This purpose is mainly achieved through the ordinary courts by reviewing and checking the legality of any administrative action. Therefore, administrative law as a branch of law, is rooted in the principle of the rule of law. This principle mainly stipulates that every administrative action should be according to law. The different control mechanisms of power in administrative law by preventing government not to go beyond the authority granted to it by law ensure that rule of law is respected.

Hence, the expression ―Rule of Law‖ plays an important role in administrative law. It provides protection to the people against arbitrary action of the administrative law.

To clearly understand the relationship between the rule of law and the administrative law, it is important to examine a related doctrine of the administrative law, which is the doctrine of ultra vires. The doctrine to some extent is a derivation of the principle of the rule of law. The former underlines that power should be exercised according to law. The later, goes one step further and states that an action of any official or agency beyond the scope of power given to it is ultra vires (i.e. beyond power), hence it is considered as null and void. An ultra vires act does not have any binding effect in the eyes of the law.

Most of the modern legal system implements the principles of judicial review and similar principles of proportionality and legitimate expectations. Dicey's views on written and unwritten constitutions are subject to much debate and discussion.

Q.3. Explain the Montesquieu's theory of 'Separation of Powers'? Describe its importance in the context of Administrative Law.

Separation of Powers and Its Relevance

The concept of separation of powers refers to a system of government in which the powers are divided among multiple branches of the government, each branch controlling different facet of government. In most of the democratic countries, it is accepted that the three branches are the legislature, the executive and the judiciary. According to this theory, the powers and the functions of these branches must be distinct and separated in a free democracy. These organs work and perform their functions independently without the interference of one into others in order to avoid any kind of conflict. It means that the executive cannot exercise legislative and judicial powers, the legislature cannot exercise executive and judicial powers and the judiciary cannot exercise legislative and executive powers.

Historical Evolution

The doctrine of separation of powers emerged in the ancient era. Aristotle, in his book 'Politics', discussed the concept of separation of powers stating that every constitution should have a heterogeneous form of government consisting of mainly three branches: the deliberative, public officials and the judiciary. The first modern formulation of the doctrine was that of the French writer Montesquieu in De l'esprit des lois (The Spirit of Laws, 1748), although the English philosopher John Locke had earlier argued that legislative power should be divided between king and Parliament. Montesquieu in his book De l'esprit des lois (The Spirit of Laws, 1748), propounded that:

- The Executive should not exercise the legislative or judicial powers because this may threaten the freedom and liberty of individuals.
- The Legislative should never exercise the executive or judicial powers as this may lead to arbitrariness and hence, end the liberty.
- The Judiciary should not exercise the executive or legislative powers because then a judge would behave like a dictator.

Effects of Montesquieu's Theory

The doctrine of separation of powers as propounded by Montesquieu had a tremendous impact on the development of administrative law and functioning of Governments. It was

appreciated by English and American jurists and accepted by politicians. In his book 'Commentaries on the Laws of England', published in 1765, Blackstone observed that if legislative, executive and judicial functions were given to one man, there was an end of personal liberty. Madison also proclaimed: "The accumulation of all powers, legislative and executive and judicial, in the same hands, whether of one, a few or many and whether hereditary, self-appointed or elective may justly be pronounced the very definition of tyranny." The Constituent Assembly of France declared in 1789 that there would be nothing like a Constitution in the country where the doctrine of separation of powers was not accepted.

Defects

Though theoretically, the doctrine of separation of powers was very sound, many defects surfaced when it was sought to be applied in real life situations. Mainly, the following defects were found in this doctrine:

a) Historically speaking, the theory was incorrect. There was no separation of powers under the British Constitution. At no point in time, this doctrine was adopted in England.
b) This doctrine is based on the assumption that the three functions of the Government viz legislative, executive and judicial are independent of distinguishable from one another. But in fact, it is not so. There are no watertight compartments. It is not easy to draw a demarcating line between one power and another with mathematical precision.
c) It is impossible to take certain actions if this doctrine is accepted in this entirety. Thus, if the legislature can only legislate, then it cannot punish anyone, committing a breach of its privilege; nor can it delegate any legislative function even though it does not know the details of the subject-matter of the legislation and the executive authority has expertise over it; nor could the courts frame frame rules of procedure to be adopted by them for the disposal of cases. Separation of Powers thus can only be relative and not absolute. Modern State is a welfare State and it has to solve complex socio-economic problems and in this state of affairs also, it is not possible to stick to

this doctrine. Justice Frankfurter said; "Enforcement of a rigid conception of separation of powers would make modern Government impossible." Strict separation of powers is a theoretical absurdity and practical impossibility.

d) The modern interpretation of the doctrine of Separation of Powers means that discretion must be drawn between 'essential' and 'incidental' powers and one organ of the Government cannot usurp or encroach upon the essential functions belonging to another organ but may exercise some incidental functions thereof.

e) The Fundamental object behind Montesquieu's doctrine was liberty and freedom of an individual, but that cannot be achieved by mechanical division of functions and powers. In England, the theory of Separation of Powers is not accepted and yet it is known for the protection of individual liberty. For freedom and liberty, it is necessary that there should be Rule of Law and impartial and independent judiciary and eternal vigilance on the part of subjects.

Importance of the Doctrine

The doctrine of separation of power in its true sense is very rigid and this is one of the reasons why it is not accepted by a large number of countries in the world. The main object as per Montesquieu in the Doctrine of separation of power is that there should be government of law rather than having will and whims of the official. Also, another most important feature of the above-said doctrine is that there should be the independence of judiciary i.e. it should be free from the other organs of the state and if it is so then justice would be delivered properly.

The judiciary is the scale through which one can measure the actual development of the state if the judiciary is not independent then it is the first step towards a tyrannical form of government i.e. power is concentrated in a single hand and if it is so then there is a cent percent chance of misuse of power. Hence the Doctrine of separation of power does play a vital role in the creation of a fair government and also fair and proper justice is dispensed by the judiciary as there is the independence of the judiciary.

Doctrine of Separation of Power in Practice

U.K. Constitution

The United Kingdom practices the unitary parliamentary constitutional monarchy. The concept of separation of powers is applied in the UK but not in its rigid sense because the UK has an unwritten constitution. The Crown is the head of the state whereas the Prime Minister is recognised as the head of the government. The executive and the legislature are somehow interconnected to one another.

The executive powers are exercised by the Crown through his government. Thus, the Crown is the nominal head and the real executive powers vest in the Prime Minister and the other Cabinet Ministers. The UK parliament is bicameral and divided into two houses – The House of Commons and House of Lords. The Parliament is the sovereign rule-making body in the UK. The Prime Minister and the other cabinet ministers are also a part of The House of Commons. The government is answerable to the Parliament. Practically, the executive is controlled by the House of Commons. The Judiciary, however, is independent of executive control. But the judges of the Supreme Court can be removed on the address of both the houses if found with any charge of corruption.

Thus, we can conclude that the UK constitution has incorporated the separation of powers just to keep checks and balances among the three organs of the government but there exist some kind of interference of one organ in the other.

U.S. Constitution

The US has a written constitution and governed by the Presidential form of government. The cornerstone of the Constitution of the United States is the doctrine of separation of powers. This concept is well-defined and clear under the American Constitution.

Article I – Section 1 of the American Constitution states that –"All the legislative powers are vested in Congress."

Article II – Section 1 of the American Constitution states that –"All the executive powers are vested in the President."

Article III – Section 1 of the American Constitution states that – "All the judicial powers are vested in the federal courts and the Supreme Court."

The President and his ministers are the executive authority and they are not members of the Congress. The ministers are accountable to the President only and not to the Congress. The tenure of the President is fixed and independent of the majority in Congress. Thus, it appears as if the powers of the three organs exist in a watertight compartment but actually it is not so.

- President interferes in the functioning of Congress by exercising his veto power. He also makes the appointment of the Judges thus, interfering in judicial powers.
- Similarly, Congress interferes in the powers of the Courts by passing procedural laws, making special courts and by approving the appointment of the judges.
- The judiciary, by exercising the power of judicial review interferes in the powers of Congress and the President.

In Panama Refining Company v. Ryan, 293 U. S. 388 (1935), Justice Cardozo observed that:

"The doctrine of separation of power is not a dogmatic concept. It cannot be imposed with strictness. There must be elasticity in its application with respect to the needs of the government. Therefore, a practical approach to this theory is required."

Indian Constitution and Separation of Power

Like the United Kingdom, India also practices the parliamentary form of government in which executive and legislature are linked to each other. So, the doctrine of separation of powers is not implemented in its strict sense. However, the composition of our constitution creates no doubt that the Indian Constitution is bound by the separation of powers. There are various provisions under the Indian Constitution that clearly demonstrate the existence of the doctrine of separation of powers. This principle is followed both at the centre and the state level.

Provisions that Substantiate Separation of Power

- Article 53(1) and Article 154 of the Indian Constitution clearly say that the Executive powers of the Union and the States are vest in the President and Governor respectively and shall only be exercised directly by him or through his subordinate officers.
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- Article 122 and Article 212 of the Indian Constitution state that the courts cannot inquire in the proceedings of Parliament and the State Legislature. This ensures that there will be no interference of the judiciary in the legislature.
- Article 105 and Article 194 of the Indian Constitution specify that the MPs and MLAs cannot be called by the court for whatever they speak in the session.
- Article 50 of the Indian Constitution encourages the separation of judiciary from the executive in the states.
- Article 245 of the Indian Constitution gives authority to Parliament and State Legislature for making laws for the whole country and the states respectively.
- Article 121 and Article 211 of the Indian Constitution state that the judicial conduct of any judge of the Supreme Court or High Court shall not be discussed in Parliament or State Legislature.
- Article 361 of the Indian Constitution specifies that the President and the Governor are not accountable to any court for exercising their powers and performance of duties in his office.

Overlapping Provisions

- Article 123 of the Indian Constitution allows the President to issue ordinance when both the houses are not in session.
- Article 213 of the Indian Constitution gives power to the Governor to issue ordinance when state legislative assembly is not in session.
- Article 356 of the Indian Constitution lays the provision of Presidential Rule in case of state emergency.
- Article 73 of the Indian Constitution specifies that the powers of the executive shall be co-extensive with that of the legislature.

- Article 74 of the Indian Constitution states that the council of ministers shall aid the President in the exercise of his executive functions.
- Article 75(3) of the Indian Constitution makes the Council of Ministers collectively responsible to the House of the People.
- Article 61 of the Indian Constitution lays the provision of Impeachment of the President by passing a resolution from both the houses in order to remove the President.
- Article 66 of the Indian Constitution states that the election of Vice-President is done by the electoral members of both the houses.
- Article 145 of the Indian Constitution allows the Supreme Court to make laws with approval of the President for the court proceedings and the practices.
- Article 146 of the Indian Constitution lays the provisions for the appointment of the servants and officers of the Supreme Court by the Chief Justice of India with consultation from President and the Union Public Service Commission.
- Article 229 of the Indian Constitution lays the provision for the appointment of the servants and officers of the High Courts with the consultation of the Governor and the State Public Service Commission.
- Article 124 of the Indian Constitution gives the President the power to appoint the judges of the Supreme Court.
- Article 72 of the Indian Constitution empowers President to grant a pardon or suspend the sentence of any person who is convicted by the Supreme Court of India.
- Article 32, Article 226 and Article 136 of the Indian Constitution provide the power of judicial review to the Supreme Court to strike down any law made by the Parliament or any administrative action which is found to be unconstitutional.

Judicial Approach

In I.C. Golak Nath v State of Punjab, Subha Rao, C.J opined that

"The constitution brings into existence different constitutional entitles, namely the union, the state and the union territories. It creates three major instruments of power, namely the Legislature, the Executive and the Judiciary. It demarcates their jurisdiction minutely and

expects them to exercise their respective powers without overstepping there limits. They should function with the spheres allotted to them"

The above opinion of the court clearly states the change in the court's views pertaining to the opinion in the case of Ram Jawaya v State of Punjab related to the doctrine of separation of power. The came one of the most landmark judgments delivered by the Supreme Court in Keshvananda Bharti v Union of India, the court was of the view that amending power was now subject to the basic features of the constitution. And hence, any amendment tampering these essential features will be struck down as unconstitutional. Beg, J. added that separation of powers is a part of the basic structure of the constitution. None of the three separate organs of the republic can take over the functions assigned to the other.

The relevance of Separation of Powers in the Modern Era

Although, the doctrine of separation of powers does not have the rigid applicability that does not imply that it has no relevance in the current scenario. The core objective of the doctrine of separation of powers is to keep checks and balances among the three organs of the government which is an essential factor to run a government dynamically. The logic behind this doctrine is not the strict classification rather it is the avoidance of concentration of powers to a specific person or a body. This theory is not operative in its absolute sense but yes, it is very advantageous if applied correlatively. Thus, not impenetrable barriers and unalterable frontiers but mutual curtailment in the exercise of powers by the three organs of the state is the spirit of the doctrine of separation of powers.

Q.4. Explain the Relationship between Constitutional Law and Administrative Law.
Relationship between Constitutional law and Administrative Law

Administrative law is categorized as public law since it governs the relationship between the government and the individual. The same can be said of constitutional law. Hence, it is undeniable that these two areas of law, subject to their differences, also share some common features. With the exception of the English experience, it has never been difficult to make a clear distinction between administrative law and constitutional law. Administrative law cannot be fully comprehended without a basic knowledge of constitutional law. As Justice

Gummov has made it clear "The subject of administrative law cannot be understood or taught without attention to its constitutional foundation"

No difference between the administrative law and constitutional law according to early English writers

To the early English writers there was no difference between administrative and constitutional law. Therefore, Keith observed that it is 'logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial."

Difference between the administrative law and constitutional law

According to Holland, constitutional law describes the various organs of the government at rest, while administrative law describes them in motion. Holland contends that the structure of the executive and the legislature comes within the purview of constitutional law whereas their functioning is governed by administrative law.

Jennings puts forward another view, which says that administrative law deals with the organization, functions, powers and duties of administrative authorities while constitutional law deals with the general principles relating to the organization and powers of the various organs of the State and their mutual relationships and relationship of these organs with the individual. Simply put, constitutional law lays down the fundamentals of the workings of government organs while administrative law deals with the details.

Difference between the two is not blurred in countries with written constitution

In such countries the source of constitutional law is constitution while the source of administrative law may be statutes, statutory instruments, precedents and customs. India has a written constitution while the constitutional law deals with the general principles relating to the organization and power of the legislature, executive and the judiciary.

According to Maitland, constitutional law deals with structure and the broader rules which regulate the function while administrative law deals with the details of those functions. The dividing line between the constitutional law and administrative law is a matter of

convenience because every researcher of administrative law has to study some constitutional law.

The importance of administrative law has not been adequately appreciated by governments, both centre as well as the states. Indian administrative law has grown rather sporadically and unsystematically. In Constitution is supreme.

Thus in India the administrative action can be tested on the following points:

- The action must have been taken in accordance with the rules and regulations.
- The rules and regulations should be in accordance with the relevant statute.
- The action, the rules, regulations must in accordance with the provisions of the constitution.
- If the constitution is amended, the amendment of the constitution should be in accordance or conformity with the basic structure of the constitution.

The separate existence of administrative law is at no point of time disputed; however, if one draws two circles of the two branches of law, at a certain place they will overlap depicting their relationship and this area may be termed as watershed in administrative law. In India, in the watershed one can include the whole control mechanism provided in the Constitution for the control of administrative authorities i.e. Articles 32, 136, 226, 227, 300 and 311.

It may include the directives to the State under Part IV. It may also include the study of those administrative agencies which are provided for by the Constitution itself under Articles 261, 263, 280, 315, 323-A and 324. It may further include the study of constitutional limitations on delegation of powers to the administrative authorities and also those provisions of the Constitution which place fetters on administrative action i.e. fundamental rights.

Today administrative law is recognized as a separate, independent branch of the legal discipline. The correct position seems to be that if one draws two circles of administrative law and constitutional law at a certain place they may overlap and this area may be termed as the watershed in administrative law.

Q.5. Explain the various kinds of classification of Administrative Action in detail.

Classification of administrative law

Under the philosophy of Welfare State the Functions of Government have increased tremendously. In the 21st century various functions are performed by administrative entities so much so that the administrative process cuts across the traditional bounds of classification and combines into one the powers exercised by all the organs, i.e. legislature, executive, judiciary. It's evident that a wide variety of activities fall within the sphere of 'administrative action' and that even administrative authority doesn't restrict to courts and legislative bodies of the country. Residuary functions of administrative bodies may themselves partake themselves of the legislative or judicial quality. The consideration that arises is whether the function performed by executive authorities is purely administrative, quasi-judicial or quasi-legislative in nature, since there's no precise or scientific test to distinguish one from another.

Need For Classification

- A question arises as to whether the functions performed by the executive authorities are purely administrative, quasi-judicial or quasi-legislative in character. The answer is very difficult as there is no precise, scientific and perfect test to distinguish these functions from one another.
- A further difficulty arises in a case in which a single proceeding may at times combine various aspects of the three functions. The courts have not been able to formulate any definite test for the purpose of making such classification. Yet such classification is essential and inevitable as many consequences flow from it, e.g., if the executive authority exercises a judicial or quasi-judicial function, it must follow the principles of natural justice and is amenable to the writ of certiorari or prohibition, but if it is an administrative, legislative or quasi-legislative function, this is not so.
- If the action of the executive authority is legislative in character, the requirement of publication, laying on the table etc. should be complied with, but it is not necessary in the case of a pure administrative action.
- Again, if the function is administrative, delegation is permissible, but if it is judicial, it cannot be delegated. An exercise of legislative power may not be held invalid on the ground of unreasonableness, but an administrative decision can be challenged as

being unreasonable. It is therefore necessary to determine what type of function administrative authority performs.

Broadly speaking, an administrative action, can be classified into three categories:

1. Quasi-legislative action or rule-making action;

2. Quasi-judicial action or Rule-decision action; and

3. Purely Administrative action or Rule application action.

Quasi-legislative action:

Legislature is the law-making branch of the State. Unlike constitutions like the Australian Constitution and American Constitutions[v], wherein this power has been explicitly demarcated, the Indian Constitution doesn't have express provisions for the same. Though the intention of the Constitution makers remains that legislative powers should be exercised by those in whom it's vested, the same cannot be fructified in lieu of the efficient working of the intensive form of the modern government.

Therefore delegation of powers to administrative bodies is a necessity. When any administrative body exercises the law-making power delegated to it, it's known as rule-making action or quasi-legislative action. When an instrument of a legislative nature is made by way of delegated powers, it's called subordinate legislation, being subordinate in the sense that the powers of the authority are limited by the statute which conferred these powers.

Quasi-legislative action is the function of subordinate legislation – making rules, regulations and other statutory instruments to fill in the details of legislative enactments in order to make the execution of laws possible. For Instance: Extension of the limits of a Town Area Committee, Declaration of a place to be a Market yard.

Legislative & Administrative Functions: Distinction

Legislative Act is the creation & promulgation of a general rule of conduct without reference to particular conduct while administrative act is the application of a general rule to a particular case.

Quasi-Judicial function

"Quasi" means "not exactly". Generally an authority is described as quasi-Judicial when it has some attributes or trappings of judicial functions but not all.

Donoughmore Committee on Minister's Powers (1932) was of the view that a true judicial decision presupposes a lis between two or more parties and then involves:

1. Presentation of the case

2. Ascertainment of evidence

3. Submission of legal arguments

4. Decision which disposes of the whole matter by applying law and analysing evidence of the case

A quasi-judicial action involves the first two elements, may involve the third but never the fourth. Decisions which are administrative stand on a wholly different footing from quasi-judicial and judicial decisions since in case of administrative actions there is no legal obligation to consider and weigh submission or collect evidence or pass judgement. The entire discretion is left to the administrative authority. However this approach of the committee seems problematic because judges can't be regarded merely as norm-producing machines. Also in certain areas of administrative adjudication, such as tax, administration applies facts and laws similar to a judge.

The distinguishing feature of a quasi-judicial proceeding is that the authority concerned is required by law to act judicially. In A.K. Kraipak v. Union of India, (1969)2 SCC 262, the Supreme Court held that though the action of making selection for government service is administrative, yet the selection committee is under a duty to act judicially. They are not bound to follow the rules of Evidence and not bound by precedents.

Administrative decision making may be defined as a power to perform acts administrative in nature but requiring some judicial characteristics. On the basis of this various administrative functions have been held to be quasi-judicial by various courts:

1. Disciplinary actions against students.

2. Disciplinary proceedings against an employee for misconduct.

3. Confiscation under the Sea Customs Act, 1878.

4. Cancellation, suspension, revocation or refusal to renew licence or permit.

5. Determination of citizenship.

6. Deciding statutory disputes.

7. Power to continue detention of seized goods beyond a certain period.

8. Refusal to grant NOC under Bombay Cinemas (Regulations) Act, 1953.

9. Forfeiture of pensions and gratuity.

10. Granting or refusing permission for retrenchment.

11. Grant of permit by regional transport committee.

Purely administrative action

The expression administrative act is a comprehensive expression, comprising of three categories namely, quasi-legislative, quasi-judicial and purely administrative. In Ram Jawaya v State of Punjab, AIR 1955 SC 549, Mukherjee, CJ. observed that an exhaustive definition of executive function can't be devised. Ordinarily, executive power refers to the residue of governmental functions that remain after legislative and judicial functions are taken away. Thus administrative functions are those which are neither legislative nor judicial. A quasi-legislative act consists of making rules, regulations and the like, while a purely administrative act is concerned with the treatment of a particular situation. Therefore a legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases;

an administrative act includes the adoption of a policy, the making and issue of specific directions, and the application of a general rule to a particular case in accordance with the requirements of policy of expediency or administrative practice.

For Instance:

1. Issuing directions to subordinate officers not having the force of law.

2. Making a reference to a tribunal for adjudication under the Industrial Disputes act.

3. Interment and deportation.

4. Granting or withholding sanction by the Advocate General under Section 92 of the Civil Procedure Code.

5. Fact-finding action.

6. Entering names in the surveillance register of the police.

7. Functions of a selection Committee.

Classification of Pure Administrative Function

Pure administrative function can be divided into three categories:

(a) Administrative discretion

(b) Ministerial action

(c) Administrative instruction

Administrative discretion:

In Layman's language, discretion means choosing from amongst the various available alternatives without reference to nay predetermined criterion, no matter how fanciful that choice may be.

CJ. Coke says– Discretion is a science or understanding to discern between falsity and truth, between right and wrong and not to do according to will and private affection.

Ministerial action:

Ministerial function is that function of agency which is taken as a matter of duty imposed upon it by the law devoid of any discretion or judgment. Therefore, a ministerial action involves the performance of a definite duty I respect of which there is no choice, no wish and no freedom. Here, the high authority dictates and lower authority carries out. Collection of revenue may be one such ministerial action.

When an administrative agency is acting ministerially it has no power to consult its own wishes but when it is acting administratively its standards are subjective and it follows its own wishes.

Administrative instruction:

Administrative instruction means power to issue instruction flow from the general executive power of the administration. 'Administrative instruction' is a most efficacious technique for achieving some kind of uniformity in administrative discretion and to manipulate in an area which is new and dynamic. These instructions also give a desired flexibility to the administration devoid of technicalities of the rule-making process.

The instructions which are generally issued not under any statutory authority but under the general power of administration are considered as directory and hence are unenforceable not having the force of law.

Unit 2

Q6. What do you understand by the term ' delegated legislation'? Discuss.

Meaning and Concept of Delegated Legislation

The Doctrine of separation of powers states that governmental power should be vested in three different organs, the legislature, the executive and the judiciary. Each organ should be

independent of the other and no one organ should perform functions that belong to the other. In all democratic countries, an important segment of administrative process is delegated legislation.. Though law making is the primary function of the legislature, yet in no country does the legislature monopolise the entire legislative power; it shares the same with the executive. A large bulk of legislation is made by the Administration under the powers conferred on it by the legislature. No statute is passed today by a legislature which does not confer some legislative power on the Administration. The Act conferring legislative power is known as the "Parent Act"; the subordinate legislation goes under various appellations, such as, rules, regulations, schemes, by-laws, statutory rules, orders etc.

Meaning of delegated legislation

Definitions

'Delegation' has been defined by Black's Law Dictionary as an act of entrusting a person with the power or empowering him to act on behalf of that person who has given him that power or to act as his agent or representative.

Delegated legislation has been defined by: Salmond as – 'that which proceeds from any authority other than the sovereign power and is therefore dependent for its continued existence and validity on some superior or supreme authority'.

According to Sir John Salmond, "Subordinate legislation is that which proceeds from any authority other than the sovereign power."

Justice P.B Mukherjee also observed about delegated legislation that it was an expression which covered a multitude of confusion. He viewed it as an excuse for the Legislature, a shield for Executors and a provocation to the Constitutional Jurist.

According to M.P Jain, this term can be used in two senses:

- Exercise by subordinate agency or agency that is lower in rank to legislature delegated to it by the Legislature.

- The Subsidiary rules made by the Subordinate Authority in the execution of the power bestowed on it by the Legislature.

Delegated legislation is, referred to as Subordinate, Ancillary, Administrative legislation, and Quasi-Legislation.

'Delegated legislation' means exercising of legislative power by an agent who is lower in rank to the Legislature, or who is subordinate to the Legislature. Delegated legislation, additionally alluded to as an auxiliary legislation, is an enactment made by an individual or body other than Parliament. Parliament, through an Act of Parliament, can allow someone else or some body to make enactment. An Act of Parliament makes the system of a specific or particular law and tends to contain an outline of the purpose for the Act. By delegating the legislation by Parliament to the Executive or any subordinate, it empowers different people or bodies to integrate more details to an Act of Parliament. Parliament along these lines, through essential enactment (for example an Act of Parliament), licenses others to make laws and guidelines through delegated legislation. The enactment made by authorize person must be made as per the reason set down in the Act of Parliament.

Need for delegation legislation or reasons for the growth of delegated legislation

The causes for the growth of delegated legislation are discussed below:

(a) Pressure upon Parliamentary Time: The legislative activity of the State has increased in response to the increase in its functions and responsibilities. The legislature is preoccupied with more important policy matters and rarely finds time to discuss matters of detail. It therefore formulates the legislative policy and gives power to the executive to make subordinate legislation for the purpose of implementing the policy.

(b) Filling in Details of Legislation: The legislature has to make a variety of laws and the details required to be provided in each of these laws require knowledge of matters of technical or local or specialized nature. The executive in consultation with the experts or with its own experience of local conditions can better improve these. There is no point in the

legislature spending its time over such details and therefore the power to fill them in is often delegated to the executive or local authorities or expert bodies.

(c) The Need for Flexibility: A statutory provision cannot be amended except by an amendment passed in accordance with the legislative procedure. This process takes time. It may however be necessary to make changes in the application of a provision in the light of experience. It is therefore convenient if the matter is left to be provided through subordinate legislation. Delegated legislation requires less formal procedure and therefore changes can be made in it more easily.

(d) Administration through Administrative Agencies: Modern government is plurastic and functions through a number of administrative agencies and independent regulatory authorities, which have to regulate and monitor activities in public interest. These agencies such as the Election Commission or the Reserve Bank of India or the Board for Industrial and Financial Reconstruction(BIFR) or the Electricity Commission or the Telecom Regulatory Authority of India(TRAI) etc. have to perform ongoing regulation and control of various activities. Each of these agencies is required to make rules or regulations in pursuance of its regulatory function.

(e) Meeting Emergency Situations: In times of emergency, the government may have to take quick action. All its future actions cannot be anticipated in advance and hence provisions cannot be made by the legislature to meet all unforeseeable contingencies. It is safer to empower the executive to lay down rules in accordance with which it would use its emergency power.

(f) Complexity of Modern Administration: The Government has to perform a variety of functions under the concept of Welfare State, so it is necessary to delegate power to the Executive to make rules and regulations.

(g) Scope for experimentation: A rule made by the executive under delegated legislation can be easily amended as compared to the law made by Legislature. So if a rule is proved to be fruitful then it will be carried out else it can be easily amended. So there is scope for experimentation.

(h) Technicality: With the progress of the society, things have become more complicated and technical. All the legislators may not know them fully and, hence, they cannot make any useful discussion on it. Therefore, after framing of the general policy by the Parliament the government departments or other bodies who know its technicalities are given the power to lay down the details.

(i) Confidentiality: Some situations call for the fact that nobody should know the law until it is operational. Some of those matters include rationing schemes, import duty impositions or exchange control.

Classication of delegated legislation The term ‘statutory rules and orders’ is what expresses delegated legislation or rather, administrative rulemaking. The classification is not to the latter as it appears in other forms, however. Forms like regulation, bye-laws, notifications, directions, and scheme. Delegated legislation may adopt several forms. The forms may be normal or exceptional, positive or negative and so forth. Delegated legislation is classified based of the principles that follow:

1.Title-based

The forms that delegated legislation may take are rules, regulations, bye-laws, notifications etc.

2. Discretion-based The executive may receive a conferred discretion in order to make the Act operational upon meeting particular conditions. Such a legislation is termed as ‘conditional’ or ‘contingent’ legislation.

Purpose-based classication

The purpose has its basis on nature and the level of power granted and the purposes to which those powers can be practiced. That way, the executive has the chance to be empowered to have a specific day to enforce the Act, supply the details, extend what the Act provides to other sectors, include or exclude the workings of the Act to particular territories, individuals, industries, commodities to briefly halt etc. This administrative rule making classification

makes use of the consideration of delegated legislation according to the various purposes it is supposed to serve.

Authority-based classication (sub-delegation) The basis of this classification is the place of authority that makes the rules. The authority that makes rules may either delegate to itself or to a subordinate authority which is more power to give rules. The practice of rulemaking power is called subdelegated legislation. No power can be delegated by the rulemaking authority since it does not have the power to do so with the exception that the power of delegation is present in an enabling Act.

Nature-based classication (exceptional delegation.) Parliamentary delegation was categorized into two by the Committee on Ministers' Powers.

Normal delegation Positive: Where the boundaries of the delegation are clearly elaborated in the enabling act. Negative: Where power delegated does not incorporate the authority to undertake some actions such as legislate on issues of policy.

Exceptional delegation.

- The authority to legislate on issue of principle.
- The authority to amend the Acts of parliament.
- The authority to give a broad discretion that is nearly impossible to establish the limits. The authority to make rules without being opposed in a court of law.

Q.7. Discuss the constitutionality of the delegated legislation.

Constitutionality of Delegated Legislation

It basically means the limits that are permissible within a Constitution of a country through which Legislature with all his right can delegate its power of rule making to other agencies of administration. The aim of extending the power of the government is to handle socio-economic problem.

Position in USA

Delegated legislation in U.S.A Under the constitution of United States of America, the delegated legislation is not accepted in theory because of two doctrines: (a) Separation of powers This doctrine is recognised by the constitution of U.S.A. Article I expressly confer on the congress all legislative powers. Article II states that the executive power shall be vested in a president and under article III; the judiciary has power to interpret the constitution and declare any statute unconstitutional if it does not conform to the provisions of the constitution. In the case of field v. Clarke, (1892) 143 US 649, the US Supreme court observed: "That congress cannot delegate legislative power to the president is a principle universally recognised as vital to the integrity and maintenance of the system of government ordained by the constitution." (b) Delegates non potest delegare (a delegate cannot further delegate) According to this doctrine, a delegate cannot further delegate his powers. As the congress gets power from people, therefore it cannot delegate its legislative power to the executive or to any other agency in this aspect. Hence, it is a cardinal principle of representative government, that the legislature cannot delegate the power to make laws to anybody or authority. Though, in practice, it was not possible for the congress to delegate its legislative power to the executive. Governmental functions were increased and it was impossible for the congress to enact all the statutes with al particulars. In this case, Supreme Court could not shut its eyes and tries to create a balance between these conflicting issues. In Panama refining co. v. Ryan, (1934) 293 US 388, popularly known as hot oil case, under Section 9(c) of the National Industrial Recovery Act (NIRA), 1933, the president was authorised by the congress to prohibit transportation of oil in interstate commerce in excess of the quota fixed by the state concerned. The policy of the act was to 'encourage national industrial recovery' and 'to foster fair competition'. The supermen court by majority held that the delegation was invalid. According to the curt the congress has not declared any legislative policy or standard. In case of National Broadcasting Co. v. U.S., (1943) 319 US 190, vast powers were conferred upon the federal communication committee (FCC) to license broadcasting stations under the Communications Act, 1934. The criterion was 'public interest, convenience of necessity'. Though it was vague or ambiguous, the Supreme Court held it to be a valid standard.

Position in England

The doctrine of parliamentary sovereignty is the core element of the UK Constitution. In England the Parliament is supreme and there is no limitation by the Constitution on the Parliament. Also, Parliament in England has wide powers of delegating its legislative power to the Executive or other subordinate bodies. Committee on Ministers' Powers also refers to as Donoughmore Committee released a report in which a famous lawyer of England, Sir Cecil Carr has quoted about three parts of legislation. These are as follows:

The first and the very smallest part is made by the Crown under her prerogative powers.

The second and the weightiest part is made by the King in the Parliament and it consists of Acts of Parliament.

The third and the bulkiest part is made by such body whom the King entrust the power of legislation in the Parliament.

Sir Cecil Carr has also observed that the truth is that if the parliament is not willing to delegate the law-making power, the Parliament is unable to provide quality and kind of legislation the modern public wants.

Position in India: The position and Constitutionality of delegated legislation in India can be seen in various cases. It is divided into two phases i.e., before independence or we can say it as pre-independence and post-independence.

Pre Independence: In Queen v. Burah, only Conditional Legislation has been validated by the Privy Council and therefore delegated legislation is not permitted as per its reasoning. The administration of civil and criminal justice of a territory can be vested in the hands of those officers who were appointed by the Lieutenant-Governor from time to time.

The Privy Council has stated that it is better to take help from the subordinate agency in framing the rules and regulations that are going to be the part of the law and giving another body the essential legislative features that has only given to the Legislature through the Constitution. He also stated about the essential legislative function that included in determining the legislation policy.

In King v. Benori Lal Sharma, Condition legislative was again applied by the Privy Council, the same as in the case of Queen v. Burah. In this case the validity of the Emergency Ordinance given by Governor-General of India was challenged inter alia. It was challenged on the ground that he is taking the power of the Provincial Government. He was setting up special criminal courts for particular kind of offences but for the settling of any court, power has been given only to the Provincial Government. The judicial committee held that this is not delegated legislation. Privy Council also held that it is an example of an uncommon legislative power by which the local application of the provision of State determined by the local administrative body when it is necessary.

Post Independence: The Constitution of India does not provide the same position as the prominent British Parliament provide to the delegation of legislative powers and also how far delegation is permissible has got to be confirmed in India as a matter of construction from the express provisions of the Indian Constitution. It cannot be said that an exhaustible right of delegation is inherited in the legislative power itself.

In the case of Raj Narain Singh v. Chairman, Patna Administration Committee Air, 1954 AIR 569, the Supreme Court of India upheld the delegation of power given to the executive by the legislature. In Re Delhi Laws Act, the Apex Court held that delegation of power to the executive can be done. But Essential Legislative functions will not be delegated and only the Ancillary functions can be delegated.

Extent of Delegated Legislation

In Re Delhi Laws Act the Apex Court held:

- Parliament completely cannot abdicate itself by creating a parallel authority
- Only ancillary functions can be delegated
- There is a limitation on delegation of power. Legislature cannot delegate its essential functions. Essential function involving laying down the policy of the law and enacting that policy into binding rule of conduct.

Q. 8. Elaborately discuss the various methods of Legislative and Judicial control over

Delegated Legislation with the help of case law.

Parliamentary Control of Delegated Legislation

One of the most significant developments of the present century is the growth in the legislative powers of the executive. The development of the legislative powers of the administrative authorities in the form of the delegated legislation occupies very important place in the study of the administrative law. We know that there is no such general power granted to the executive to make law; it only supplements the law under the authority of legislature. Such type of power is known as delegated legislation.

The underlying object of parliamentary control is to keep watch over the rule-making authorities and also to provide an opportunity to criticize them if there is abuse of power on their part. Parliament has control in that the enabling or parent Act passed by Parliament sets out the framework or parameters within which delegated legislation is made. In India, the question of control on rule-making power engaged the attention of the Parliament. Every delegate is subject to the authority and control of the principal and the exercise of delegated power can always be directed, corrected or cancelled by the principal. Hence parliamentary control over delegated legislation should be a living continuity as a constitutional remedy. The fact is that due to the broad delegation of legislative powers and the generalised standard of control also being broad, judicial control has shrunk, raising the desirability and the necessity of parliamentary control.

In U.S.A., the control of the Congress over delegated legislation is highly limited because neither is the technique of "laying" extensively used nor is there any Congressional Committee to scrutinise it. This is due to the constitutional structurization in that country in which it is considered only the duty of courts to review the legality of administrative rule-making.

In England, due to the concept of Parliamentary sovereignty, the control exercised by Parliament over administrative rule-making is very broad and effective. Parliamentary control mechanism operates through "laying" techniques because under the provisions of the Statutory Instruments Act, 1946, all administrative rule-making is subject to the control of Parliament through the Select Committee on Statutory Instruments . Parliamentary control in

England is most effective because it is done in a non-political atmosphere and the three-line whip does not come into operation.

India

In India parliamentary control of administrative rule-making is implicit as a normal constitutional function because the executive is responsible to the Parliament. There are three types of control exercised:

Direct General Control

Direct but general control over delegated legislation is exercised:

(a) Through the debate on the act which contains delegation. Members may discuss anything about delegation including necessity, extent, type of delegation and the authority to whom power is delegated.

(b) Through questions and notices. Any member can ask questions on any aspect of delegation of legislative powers and if dissatisfied can give notice for discussion under Rule 59 of the Procedure and Conduct of Business in Lok Sabha Rules.

(c) Through moving resolutions and notices in the house. Any member may move a resolution on motion, if the matter regarding delegation of power is urgent and immediate, and reply of the government is unsatisfactory.

Direct special control

This control mechanism is exercised through the technique of "laying" on the table of the House rules and regulations framed by the administrative authority. The notable use of this technique was made in the Reorganization Acts of 1939 to 1969, which authorised the President to reorganise the executive government by administrative rule-making. In England the technique of laying is very extensively used because all the administrative rule-making is subject to the supervision of Parliament under the Statutory Instruments Act, 1946 which prescribes timetable. The most common form of provision provides that the delegated legislation comes into immediate effect but is subject to annulment by an adverse resolution of either house.

By Section 4 of the Statutory Instruments Act, 1946, where subordinate legislation is required to be laid before Parliament after being made, a copy shall be laid before each House before the legislation comes into operation . However, if it is essential that it should come into operation before the copies are laid, it may so operate but notification shall be sent to the Lord Chancellor and the Speaker of the House of Commons explaining why the copies were not laid beforehand. Under Section 6 of the Statutory Instruments Act, 1946, the draft of any statutory instrument should be laid before the parliament.

Laying on Table

In almost all the Commonwealth countries, the procedure of 'Laying on the Table' of the Legislature is followed. It serves two purposes: firstly, it helps in informing the legislature as to what all rules have been made by the executive authorities in exercise of delegated legislation, secondly, it provides a forum to the legislators to question or challenge the rules made or proposed to be made.

Types of 'Laying'

The Select Committee on delegated Legislation summarised the laying procedure under following heads :

Laying without further provision for control

In this type of laying the rules and regulations come into effect as soon as they are laid. It is simply to inform the House about the rules and regulations.

Laying with immediate effect but subject to annulment

Here the rules and regulations come into operation as soon as they are laid before the Parliament. However, they cease to operate when disapproved by the Parliament.

Laying subject to negative resolution

In this process the rules come into effect as soon as they are laid before the Parliament, but shall cease to have effect if annulled by a resolution of the House.

Laying subject to affirmative resolution

This technique takes two forms: firstly, that the rules shall have no effect or force unless approved by a resolution of each House of Parliament, secondly, that the rules shall cease to have effect unless approved by an affirmative resolution.

Laying in draft subject to negative resolution

Such a provision provides that when any Act contains provision for this type of laying the draft rules shall be placed on the table of the House and shall come into force after forty days from the date of laying unless disapproved before that period.

Laying in draft subject to affirmative resolution

In this type of laying the instruments or draft rules shall have no effect unless approved by the House.

In India, there is no statutory provision requiring 'laying of' of all delegated legislation . In the absence of any general law in India regulating laying procedure, the Scrutiny Committee made the following suggestions:

(i) All Acts of Parliament should uniformly require that rules be laid on the table of the House 'as soon as possible'.

(ii) The laying period should uniformly be thirty days from the date of final publication of rules; and

(iii) The rule will be subject to such modifications as the House may like to make.

Legal consequences of non-compliance with the laying provisions

In England the provisions of Section 4(2) of the Statutory Instruments Act, 1946 makes the laying provision mandatory for the validation of statutory instruments . In India, however, the consequences of non-compliance with the laying provisions depend on whether the provisions in the enabling Act are mandatory or directory.

In **Narendra Kumar v. Union of India**, the Supreme Court held that the provisions of

Section 3(5) of the Essential Commodities Act, 1955, which provided that the rules framed under the Act must be laid before both Houses of Parliament, are mandatory, and therefore Clause 4 of the Non-Ferrous Control Order, 1958 has no effect unless laid before Parliament.

However, in **Jan Mohammad v. State of Gujarat**, the court deviated from its previous stand. Section 26(5) of the Bombay Agricultural Produce Markets Act, 1939 contained a laying provision but the rules framed under the Act could not be laid before the Provincial legislature in its first session as there was then no functioning legislature because of World War II emergency. The rules were placed during the second session. Court held that the rules remained valid because the legislature did not provide that the non-laying at its first session would make the rules invalid.

Even if the requirement of laying is only directory and not mandatory, the rules framed by the administrative authority without conforming to the requirement of laying would not be permissible if the mode of rule-making has been violated.

Indirect control

Indirect control is exercised by Parliament through its Committees. With a view to strengthen Parliamentary control over delegated legislation, Scrutiny Committees were established . In UK and India, there are Standing Committees of Parliament to scrutinise delegated legislation. In the USA, on the other hand, there is no equivalent to such committees, the responsibility being diffused. The responsibility is shared but a host of committees – standing committees in each House of Congress, committees on government operation in each house, and some other joint bodies like the committee on atomic energy . In England, the Select Committee on Statutory Instruments was established by the House of Commons in 1944 . In 1950, the Law Minister made a suggestion for the establishment of a Committee of the House on the pattern of the Select Committee on Statutory Instruments, 1944, to examine delegated legislation and bring to the notice of the House whether administrative rule-making has exceeded the intention of the Parliament or has departed from it or has affected any fundamental principle.

Such a committee known as the Committee on Subordinate Legislation of Lok Sabha was appointed on December 1, 1953 . The main functions of the Committee are to examine: (i) whether the rules are in accordance with the general object of the Act, (ii) whether the rules contain any matter which could more properly be dealt with in the Act, (iii) whether it is retrospective, (iv) whether it directly or indirectly bars the jurisdiction of the court, and questions alike. The Committee has between 1953 and 1961, scrutinized about 5300 orders and rules has submitted 19 reports .

There is also a similar Committee of the Rajya Sabha which was constituted in 1964. It discharges functions similar to the Lok Sabha Committee.

Recommendations by the committee on subordinated legislation

The Committee on Subordinate Legislation has made the following recommendation in order to streamline the process of delegated legislation in India .

(i) Power of judicial review should not be taken away or curtailed by rules.

(ii) A financial levy or tax should not be imposed by rules.

(iii) Language of the rules should be simple and clear and not complicated or ambiguous.

(iv) Legislative policy must be formulated by the legislature and laid down in the statute and power to supply details may be left to the executive, and can be worked out through the rules made by the administration.

(v) Sub-delegation in very wide language is improper and some safeguards must be provided before a delegate is allowed to sub-delegate his authority to another functionary.

(vi) Discriminatory rules should not be framed by the administration.

(vii) Rules should not travel beyond the rule-making power conferred by the parent Act.

(viii) There should not be inordinate delay in making of rules by the administration.

(ix) The final authority of interpretation of rules should not be with the administration.

(x) Sufficient publicity must be given to the statutory rules and orders.

The working of the Committee is on the whole satisfactory and it has proved to be a fairly effective body in properly examining and effectively improving upon delegated legislation in

India. Sir Cecil Carr aptly remarks: “It is evidently a vigorous and independent body .”

Therefore, legislature exercises its control over the delegated legislation or the rule-making power by these two methods: namely, ‘laying’ procedure and via Scrutiny committees. However, to what extent these two methods are effective in posing a check and control over delegated legislation, is the question which needs to be taken into consideration. The effectiveness of parliamentary control over delegated legislation has been discussed in the next chapter.

Judicial Control of Delegated Legislation

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

1. That it is ultra-vires the Enabling Act, i.e. Substantive Ultra –Vires.
2. That it is not made in accordance with the procedure prescribed by Enabling– Act, i.e. Procedural Ultra- Vires.

Substantive Ultra –Vires:

Whenever any person, or body of persons exercising statutory authority, acts beyond the power conferred upon him or them by statute, such acts become ultra vires and accordingly void. Substantive ultra vires means the delegated legislation goes beyond the scope of authority conferred on it by Parent Statute.If the subordinate legislative authority keeps within the powers delegated, the delegated legislation is valid, but if it is not, the courts can strike down such Act.

Procedural Ultra- Vires:

When a subordinate legislation fails to comply with certain procedural reqirements prescribed by the Parent Act or by the General Law, it is known as Procedural Ultra- Vires. While framing rules, regulations, bye-laws, et., the Parent Act or Enabling Act may require the delegate to observe a prescribed procedure, such as holding of consultations with particular

bodies or interests, publication of draft rules or bye-laws, laying them before Parliament etc. It is necessary on the part of the delegate to comply with these procedural requirements and to exercise the power in the manner indicated by the legislature. Failure to comply with the same may invalidate the rules so framed. But at the same time it is also to be noted that failure to observe the procedural requirements does not necessarily and always invalidate the rules. It depends on the procedure whether it is mandatory or discretionary one. Non-obervance of a mandatory procedural norm would make the rules so made ultra vires and is known as procedural ultra- vires.

Doctrine of Ultra Vires means beyond the scope, power or authority of any company, corporation or statutory body. The term 'Ultra Vires' implies absence of capacity or power of the person to do any act. It is not necessary that an act to be ultra vires must be illegal; it may or may not be. An act is said to be 'Ultra Vires' when it is enacted in excess of the legislative power. A rule is Ultra Vires when it is beyond the rule-making power of the authority. It is the basic doctrine in Administrative law and the foundation of judicial power to control actions of the administration. When the power is conferred on the administrative body, the instrument conferring the power may itself provide for restriction on the exercise of the power. If administrative body goes beyond such restrictions imposed on it, in the exercise of power, it is treated Ultra Vires.

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

- Constitutionality of Parent Act: Constitutionality of parent act plays a dominant role for delegated legislation under which it is made. If the parent act, which empowers the administration to form necessary rule, bye laws, regulations or any form of delegated legislation, itself unconstitutional or Ultra vires the constitution, delegated legislation made under it is necessarily bad and will be ipso facto invalid. The parent act may be unconstitutional on the ground breach of fundamental rights, other constitutional provisions and on the ground of excessive delegation.
- Delegated legislation ultra vires the constitution: Like the parent act delegated legislation can also be challenged on the ground of its constitutionality. Sometimes,

parent act may not be formed unconstitutional but delegated legislation made under it may conflict with the constitution. The courts may be asked to consider the question of constitutionality of delegated legislation itself. In Reena Bajracharya and others Vs HMG,The court declared that Rule 16.1.3 of RNAC Personnel Service Rules, 1974 null and void abinitio on the ground of ultra vires with the constitutional right to equality.

- Delegated legislation is ultra vires the Parent Act: The validity of delegated legislation can be questioned on the ground that it is ultra vires the parent act. It has become an accepted principle of law that the delegated exercise of legislative power must be exercised in conformity with the principal power or authority. If delegated legislation does not conform exactly to the power granted or if it is in direct conflict with any provision of Act, under which it is made, it can be held invalid. Rules whether made under the constitution or a statute, must be intra vires the parent law under which power has been delegated. Thus, delegated legislation, repugnant to or in excess of or overriding the provision of parent act is ultra vires.
- In Advocate Bal Krishna Neupane Vs HMG, secretariat of the council of Ministers the court declared sub-rule 4(a),(b) and (c) of Rule 3 of citizenship Rules, 1992 void abinitio as it had fixed some additional grounds except the grounds determined under the constitution and citizenship act for the acquisition of citizenship without the delegation of legislative power. The court observed that a rule making body is not competent to frame rules without the authority of law. If the rules which are made to fulfill the objective of the Act, fix some additional grounds or criteria of acquisition citizenship without the delegation of legislative power, such rules or the criteria underlying therein are ultra vires the Act and therefore void.
- Delegated legislation Ultra Vires the General rule: The validity of delegated legislation can be challenged on the ground that it is ultra vires the general law. It takes place, when the delegated legislation makes a law in force unlawful and unlawful act lawful. In A.V Nachane Vs union of India, in this case the rules framed by union government under delegated authority by L.I.C with regard to bonus to class

iv employees was held ultra vires since it supersedes the terms of Bonus settlement 1974.

- Unreasonableness: Generally statute cannot be challenged on the ground of unreasonableness. But, in exceptional cases, it can be challenged on the ground of unreasonableness. Unreasonableness is an implied restriction on delegated legislation. It is presumed that legislature does not intend to confer power to make unreasonable rules. Therefore, such rules, which are not reasonable, may be declared ultra vires by the court. But unless a rule is manifestly unjust, capricious, inequitable or partial in operation it cannot be invalidated on the ground of unreasonableness.
- Mala fide: Mala fide means 'bad faith' or ulterior motive. Delegated legislation can be challenged on the ground of mala fide, if it has no relation to the purpose for which the law making power was delegated.

Effect of Ultra- Vires: Null and Void

Q.9. Explain the procedural control over Delegated Legislation.

Procedural control of Delegated Legislation

Procedural control means certain procedures which are laid down in the parent Act which have to be followed by the authorities while making the rules. Delegated legislation may be challenged on the ground that it has been in accordance with the procedure prescribed by the enabling Act. However, rules become invalid on the ground of noncompliance with prescribed procedure only if such procedure is mandatory. Non-compliance with the directory provisions does not render them invalid. It becomes a case of procedural alternatives. One has to see whether the procedure is mandatory or directory. Procedural control mechanism operates in three components:

(i) Antecedent Publicity
(ii) Publication of delegated legislation
(iii) Consultation of Interests

This procedural control mechanism may be either mandatory or directory. For the purpose of mandatory or directory control mechanisms few important parameters should be taken into account viz (a) Scheme of Act (b) Intention of legislature i.e. whether treated mandatory or directory (c) language in which the provision is drafted (d) Serious inconvenience being caused to the public at large, these were four parameters laid down in case of Raza Buland Sugar Co. v.Rampur Municipal Council (AIR 1965 Sc 895).

Antecedent Publicity

The "modus-operandi" is regarded as a valuable safeguard against the misuse of legislative power by the executive authorities. The effect of the term previous publication according to S.23 of General Clause Act, 1897 is that:

1) The rules should be published in draft form in Gazette.
2) Objections and suggestions be invited by a specific date mentioned there in, and
3) Those objection and suggestions be considered by rule-making authority.

In India, a provision of prior consultation, if contained in the enabling Act is considered sometimes as mandatory and sometime as directory. In issues like environment, this requirement is considered as mandatory in nature.

Publication of delegated legislation

It is a fundamental principal of law "ignorantia jris non excusat" (ignorance of law is no excuse) but there is also another equally established principle of law that the public must have the access to the law and they should be given an opportunity to know the law. All laws ought either to be known or at least laid open offend against them under pretence of ignorance. It is essential that adequate means are adopted to publicize the rules so that people are not caught on the wrong foot, in ignorance of the rules applicable to them in a given situation."

Thus, in Harla v. State of Rajasthan (Air 1951 SC 467) the council by resolution enacted the Jaipur opium Act which made rule that if a person carried opinion beyond a certain limit then it was an offence committed and penalty had to be imposed on the accused & act was never

published. One Harla was prosecuted for the contravention of this law because he was in possession of opium in more quantity than permitted. He contended that it was a case of procedural ultravires. Holding that the law was not enforceable the Supreme Court observed. "promulgation or publication of some sort is essential other wise it would be against principles of natural justice to punish the subject under a law of which they had no knowledge and of which they could not even with the exercise f reasonable diligence be said to have acquired any knowledge."

In Narendra Kumar v.s U.O.I. (AIR 1960 Sc 430) Sec.3 of Essential commodities Act, 1955 required all the rules to be made under the Act to be notified in official gazette. The principles applied by licensing authority for issuing permits for the acquisition of non-ferrous metals were not notified. The S.C. held the rules ineffective because the mode of publication i.e. in Official Gazette was held to be mandatory.

Necessity of Publication

Whether the requirement as to be mode of publication of rules is mandatory or directory? Will the rules be valid if to published in official gazette but circulated in any other mode? Form the point of view of the individual it is infair to publish the rule is obscure publication. First publication in required mode creates certainty in the mind of the individual that rules have been duly made. Secondly it enables him to have say access ability to the rules. In Raza Buland Sugar Co. v. Rampur Municipality (AIR 1965 SC 896) for the S.C. Wanchoo, J. observed. 'The question whether a particular provision of statute which on the face of a appears mandatory or is merely directory cannot be laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The language of the provision have all to be taken into account in arriving at the conclusion whether particular provision is mandatory or directory." Further, the medium of publication has been held to be a mandatory requirement.

Consultation of Interests

The provisions for prior consultation may take various forms:

(a) Official consultation: The central govt. is required to make rules U/s 52 of the Banking Companies Act, after consulting the Reserve Bank of India.

(b) Consolation with statutory bodies: Incharge of a particular subject.

(c) Consultation with Administrative boards.

(d) Consultation with affected persons: Municipalities, before tax imposition have to publish draft rules in a Hindi daily and consult the inhabitants of the area. Under the industries development and regulations act, representations from the industry and public are invited.

(e) Draft Rules and Affected interest: Under Indian Mines Act, Sec.61 empowers owner of a time to frame or to draft rules themselves for safety etc. n mines and submit them to inspector of mines. Such rule becomes operative on being approved by the government.

In Ibrahim vs. Regional Transport Authority (Air 1953 SC 79), consultation with the Municipality was required to be made the Transport Authority before certain routes for buses were fixed. The S.C. held it to be merely directory.

Q.10. Explain the term 'Sub-Delegation' in detail.

Sub-Delegation

When a statute confers legislative powers on an administrative authority and that authority further delegates those powers to another subordinate authority or agency, it is called sub-delegation. Thus, what happens in sub-delegation is that a delegate further delegates. This process of sub-delegation may go through one stage to another stage. If the enabling Act is called the ‘Parent’ then the delegated and the sub-delegated act is called the Children.

Illustration

A good illustration of the process of sub-delegation is provided by the Essential Commodities Act, 1955. Section 3 of the Act confers rule-making power on the Central Government. This can be called as the first stage of Delegation. Under Section 5, the Central Government is empowered to delegate powers to its officers, the State Governments and their officers.

Frequently under this provision, the powers are delegated to State Governments. This may be regarded as the second stage of Delegation. When the power is further sub-delegated by the State Government to their officers, it may be characterised as the third stage of Delegation.

The working of the process can be seen in the context of the Cotton Control Order, 1955, The order is made by the Central Government under Section 3 of the Act (this can be called the first stage of delegation). Under the Order, the functions and powers are conferred on the Textile Commissioner (this can be called the second stage of delegation). Under clause 10, the Textile Commissioner is empowered to authorise any officer to exercise on his behalf all or any of his functions and powers under the Order (third stage of Delegation).

However, as sub-delegation dilutes both accountability and oversight of the original administrative authority, safeguards are necessary for their functioning. The sub-delegate should not act beyond the scope of the power delegated over it. At the same time it's important that, the sub-delegation should not be vague and must be free from any irregularities.

Object of Sub-Delegation: The necessity of sub-delegation is sought to be supported, inter alia, on the following grounds:

- Power of delegation necessarily carries with it power of further delegation; and
- Sub-delegation is ancillary to delegated legislation; and any objection to the said process is likely to subvert the authority which the legislature delegates to the executive.

Delegatus Non-Potest Delegare

The legal maxim 'Delegatus Non-Potest Delegare' does not lay down a rule of law. It merely states a rule of construction of a statute. Generally, sub-delegation of legislative power is impermissible, yet it can be permitted either when such power is expressly conferred under the statute or can be inferred by necessary implication. This is so because there is a well-established principle that a sub-delegate cannot act beyond the scope of power delegated to him.

Sub-delegation of legislative power can be permitted either when such power is expressly conferred by the statute or may be inferred by necessary implication.

Express Power

There is no difficulty as regards the validity of sub-delegation where the statute itself authorises the administrative agency to sub-delegate its powers because such a sub-delegation is within the terms of the statute itself.

Thus in Central Talkies v. Dwarka Prasad, under the U.P. Control of Rent and Eviction Act, 1947, it was provided that no suit shall be filed for the eviction of a tenant without the permission of either a District Magistrate or any Officer authorised by him to perform any of his functions under the Act. The Additional Magistrate to whom the powers were delegated made an order granting permission. The Supreme Court held the order valid.

But in Allingham v. Minister of Agriculture, under the Defence Regulations, 1939, the Committee was authorised by the Minister of Agriculture "to give such directions with respect to the cultivation, management or use of land for agricultural purposes as he thinks necessary." The committee sub-delegated its power to its Subordinate Officer, who issued a direction, which was challenged. Holding the direction ultra vires, the Court ruled that the sub-delegation of power by the committee was not permissible.

In Ganpati Singhji v. State of Ajmer, the parent Act empowered the Chief Commissioner to make rules for the establishment of proper system of conservancy and sanitation at fairs. The rules made by the Chief Commissioner, however, empowered the District Magistrate to devise his own system and see that it was observed. The Supreme Court declared the rules ultra vires as the Parent Act conferred the power on the Chief Commissioner and not on the District Magistrate and, therefore, the action of the Chief Commissioner sub-delegating that power to the District Magistrate was invalid. Sometimes, a statute permits sub-delegation to authorities or officers not below a particular rank or in a particular manner only.

Implied Power

The point is not clear as to what would be the position if there is no specific or express provision in the statute for sub-delegation of power. In Jackson v. Butterworth, it was held that the method of sub-delegating power to issue circulars to local authorities was convenient and desirable but the power to sub-delegate was absent. However, the other view is that although there is no provision enabling Act authorising sub-delegation of power by the delegate, the same may be inferred by necessary implication.

According to Griffith, "If the statute is so wisely phrased that two or more 'tiers' of sub-delegation are necessary to reduce it to specialised rules on which action can be based, then it may be that the Courts will imply the power to make the necessary sub-delegated legislation."

In States v. Bareno, the enabling Act empowered the President to make regulations concerning exports and provided that unless otherwise directed the functions of President should be performed by the Board of Economic Welfare. The Board sub-delegated the power to its Executive Director who further sub-delegated to his assistant, who in turn delegated it to some officials. All the sub-delegations were held valid by the Court. On the other hand, in State v. Amir Chand, the Punjab High Court held that the power of sub-delegation cannot be inferred.

Principle Underlying Sub-Delegation

The basic principle in this respect is that the sub-delegate should not be given uncanalised and unguided legislative power. Like delegation, sub-delegation is also subject to the doctrine of excessive delegation. Where a statute itself authorizes an administrative authority to sub-delegate its powers, no difficulty arises as to its validity since such sub delegation is within the terms of the statute itself.

Control on Sub-Delegation

Sub Delegation is subject to the same controls as the delegated Legislation. The doctrine of Ultra Vires applies to sub – delegation as well.

Publication of sub-delegated legislation

There arises the question of the publication of sub-delegated legislation. It may, however, be pointed out that by the decision of the Supreme Court in Narendra Kumar v. Union of India, the publication of sub-delegated legislation has been declared to be necessary to give it legal force when the Parent statute contains the formula i.e requiring the notification of rules in Gazzette.

In the case of District Collector Chittoor v. Chittor District Groundnut Traders Association, AIR 1989 2 SCC 58 at 63; AIR 1989 SC 989, the Essential Commodities Act confers rule-making power on the Central Government. The Central Government sub-delegated this power to the State governments subject to the condition that before making any rules, the State Government would obtain the prior concurrence of the Central Government. The Supreme Court ruled in the instant case that any rule made by a State Government without the concurrence of the Central Government would be ultra vires.

The Hon'ble Apex Court stated that,"A delegate is not entitled to exercise powers in excess or in contravention of the delegated powers. If any order is issued or framed in excess of the powers delegated to the authorities, such order would be illegal and void."

In, Bombay Municipal Corporation v. Thondu, AIR 1965 SC 1480 (1488): (1965) 2 SCR 929 (932), the words of Hidayatullah, J. have become a guiding star to deal with the similar intricacies of the delegated legislation and the judicial powers, as follows- "It goes without saying that judicial power can not ordinarily be delegated unless the law expressly or by clear implication permits it"

Unit 3

Q.11. Explain the need for Devolution of Adjudicatory Authority on Administration.

Need for Devolution of Adjudicatory Authority on Administration

- Administrative adjudication is a dynamic system of administration, which serves, the varied and complex needs of the modern society.
- Administrative adjudication has brought about flexibility and adaptability in the judicial as well as administrative tribunals.

- Administrative justice ensures cheap and quick justice. As against this, procedure in the law courts is long and cumbersome and litigation is costly.
- The system also gives the much-needed relief to ordinary courts of law, which are already overburdened with numerous suits.
- Nowadays, there is growing emphasis on preventive justice rather than punitive. this can be done only by administrative authorities/agencies exercising adjudicatory powers.
- It explores new public law standards based on moral and social principles away from highly individualistic norms developed by courts.
- It also represents a functional approach to law. In certain situations, justice lies not in disposal of cases according to law but in fair disposition.

Q. 12. What are the problems of Administrative Decision Making?

Problems of Administrative Decision Making

- Number and Complexity: Every statutory scheme contains its own machinery for decision-making. A large number of parallel bodies adjudicating on the same kind of dispute and giving divergent decisions is no exception. This complicates the task of administrative law in drawing uniform principles for uniform application.
- Bewildering variety of procedures: As the number of administrative agencies are formidable, so is their procedure. Sometimes the procedure is laid down in the Act under which the agency is constituted. Sometimes the agency is left to develop its own procedure. But in a great number of cases, the agency is required to follow only the minimum procedure of the principles of natural justice.
- Unsystematic system of appeal: No uniform system of appeal has been followed in administrative adjudications. Sometimes administrative decisions are made appealable before an independent tribunal and sometimes appeal is provided for before a higher administrative agency. The period for allowing appeals also differs from agency to agency. Some Acts do not

provide for any appeal and make the decision of the administrative agency final.

- Invisibility of the decisions: Unlike courts, not all administrative agencies exercising judicial powers publish their decisions; their decisions, go beyond the pale of public criticism
- Unpredictability of decisions: Administrative agencies exercising adjudicatory powers do not follow the doctrine of precedent, hence they are not bound to follow their own decisions. This not only makes the development of law incoherent but also violates the principles of the rule of law. Therefore, the Supreme Court's advice to such agencies is that they must be slow in overruling their own decisions.
- Anonymity of decisions: In administrative adjudication, no one knows from where the decision comes. The divided responsibility where one hears and another decides is against the concept of fair hearing.
- Combination of functions: In India, except in the cases of civil servants, in all disciplinary proceedings the functions of a prosecutor and the judge are either combined in one or in the same department. Whether it is accepted or not, in such a situation bias is inevitable.
- No evidence rule: In India, the technical rules of the Evidence Act,1872 do not apply to administrative adjudications.
- Official perspective: In administrative justice, official perspective is inherent. In any disciplinary proceeding, the presumption is of guilt rather than innocence. This projection of official perspective does more damage where the administrative agency is not required to follow the standard rules of evidence and procedure.
- Plea bargaining: Plea bargaining means the bargaining of "plea of guilt" with lesser charges and punishment. Plea bargaining, besides being immoral, violates the accepted canons of justice. It does the most damage where people are

poor and illiterate. It is considered unethical that any person after committing a crime, if he admits it, can get away with small punishment.

- Political interference: Instrumentalities of administrative justice are, by their very nature, subject to some manner of political interference.
- Off-the-record consultation: In India, there is no law to eliminate the dangers inherent in off-the-record consultation by an administrative authority. The principles of natural justice only demand that the authority must not base its decision on any evidence which is not brought to the notice of the other party.
- Reasoned decisions: In India apart from the requirement, if any, of the statute establishing the administrative agency, there is no requirement for the administrative authority to give reasons apart from the principles of natural justice. However, non speaking order is insisted upon except in exceptional situations.
- Legal representation and cross-examination: Apart from the requirement of a specific statute, there is no general requirement of the principles of natural justice that the administrative agency should always allow legal representation and cross-examination in every case.

Q. 13. Discuss the nature, Constitution, Powers, Procedures and Rules of Evidence followed by Administrative Tribunals.

Nature of Administrative Tribunals: Constitution, Powers, Procedures, Rules of Evidence

Meaning

Tribunal is an administrative body that practices the power to adjudicate. They are not termed as ordinary courts. The word tribunal cannot be scientifically and precisely defined. In the dictionary, the word 'tribunal' is the seat or bench that a judge or judges sit in a court of justice. This definition is vast since it covers ordinary courts of law and when it comes to administrative law, the meaning is bound to adjudicating authorities besides ordinary courts of law.

The 42nd Amendment Act of Indian Constitution titled as 'Tribunals' provided for the establishment of 'Administrative Tribunals' under Article 323A and 323B.

Article 323A empowered the Parliament to establish administrative tribunals to adjudicate upon disputes and complaints "with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

Article 323B empowers Parliament or a state legislature, as the case may be, to set up tribunals to adjudicate upon 'disputes, complaints and offences' pertaining to tax, foreign exchange, import, export, industrial and labour disputes, land reforms, ceiling on urban property, elections to Parliament or state legislatures (except the matters dealt under articles 329 and 329A), production, procurement, supply and distribution of foodstuffs and offences relating thereto.

Constitution, Powers, Procedures, Rules of Evidence

- Each Tribunal shall consist of a Chairman and such number of Judicial and Administrative Members as the appropriate Government may deem fit and, subject to the other provisions of this Act, the jurisdiction, powers and authority of the Tribunal may be exercised by Benches thereof.
- A Bench shall consist of one Judicial Member and one Administrative Member.
- A person shall not be qualified for appointment as the Chairman unless he is, or has been, a Judge of a High Court
- A person shall not be qualified for appointment,— (a) as an Administrative Member, unless he has held for at least two years the post of Secretary to the Government of India or any other post under the Central or State Government and carrying the scale of pay which is not less than that of a Secretary to the Government of India for at least two years or held a post of Additional Secretary to the Government of India for at least five years or any other post under the Central or State Government carrying the

scale of pay which is not less than that of Additional Secretary to the Government of India at least for a period of five years

- (b) as a Judicial Member, unless he is or qualified to be a Judge of a High Court or he has for at least two years held the post of a Secretary to the Government of India in the Department of Legal Affairs or the Legislative Department including Member-Secretary, Law Commission of India or held a post of Additional Secretary to the Government of India in the Department of Legal Affairs and Legislative Department at least for a period of five years.
- The Chairman and every other Member of the Central Administrative Tribunal shall be appointed after consultation with the Chief Justice of India by the President. The Chairman and every other Member of an Administrative Tribunal for a State shall be appointed by the President after consultation with the Governor of the concerned State.
- The Chairman shall hold office as such for a term of five years from the date on which he enters upon his office: Provided that no Chairman shall hold office as such after he has attained the age of sixty-eight years. A Member shall hold office as such for a term of five years from the date on which he enters upon his office extendable by one more term of five years: Provided that no Member shall hold office as such after he has attained the age of sixty-five years.

A Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has. A Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 , while trying a suit, in the following matters:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 , requisitioning any public record or document or copy of such record or document from any office;

(e) issuing commissions for the examination of witness or documents;

(f) reviewing its decisions;

(g) dismissing a representation for default or deciding it ex parte;

(h) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(i) any other matter which may be prescribed by the Central Government.

A Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and subject to the other provisions of this Act and of

any rules made by the Central Government, the Tribunal shall have power to regulate its own procedure including the fixing of places and times of its inquiry and deciding whether to sit in public or in private.

A person making an application to a Tribunal under this Act may either appear in person or take the assistance of a legal practitioner of his choice to present his case before the Tribunal.

Q. 14. Discuss the Principles of Natural Justice in detail. Refer to case laws.

Principles of Natural Justice

Natural justice is an expression of English common law, and involves a procedural requirement of fairness. The principles of natural justice have great significance in the study of Administrative law. It is also known has substantial justice or fundamental justice or Universal justice or fair play in action. The principles of natural justice are not embodied rules and are not codified. They are judge made rules and are regarded has counterpart of the American procedural due process. Natural justice implies fairness, equity and equality. In a

welfare state like India, the role and jurisdiction of administrative agencies is increasing at a rapid pace. The concept of Rule of Law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging these functions in a fair and just manner.

Definition:

There is no precise and scientific definition of natural justice. However, the principles of natural justice are being acceptable and enforced. Different judges, lawyers and Scholars define it in various ways. In Vionet v. Barrett, (1885) 55 LJ RB 39, Lord Esher M.R has defined it as the natural sense of what is right and wrong. Later, he had chosen to define natural justice as fundamental justice**.** In a subsequent case of Hopkins v. Smethwick Local Board Of health, (1890) 24 QB 713, Lord Parker has defined it as duty act fairly. Mr. Justice Bhagwati has taken it as fair play in action. Article 14 and 21 of the Indian Constitution has strengthened the concept of natural justice.

Basis of the application of the principle of natural justice:

The principles of natural justice, originated from common law in England are based on two Latin maxims, (which were drawn from jus natural).

In simple words, English law recognizes two principles of natural justice as stated below-

1. *Nemo Judex in causa sua* or *Nemo debet esse judex in propria causa* or Rule against bias (No man shall be a judge in his own cause).

2. *Audi Alteram partem* or the rule of fair hearing (hear the other side).

Bias means an operative prejudice, whether conscious or unconscious in relation to a party or issue. The rule against bias flows from following two principles: -

i. No one should be a judge in his own cause
ii. Justice should not only be done but manifestly and undoubtedly be seen to be done.

Types of Bias:

- Personal Bias

- Pecuniary Bias
- Subject-matter bias
- Departmental bias
- Policy Bias

Personal bias

Personal bias arises from a relation between the party and deciding authority. Which lead the deciding authority in a doubtful situation to make an unfair activity and give judgement in favour of his person. Such equations arise due to various forms of personal and professional relations. In order to challenge the administrative action successfully on the ground of personal bias, it is necessary to give a reasonable reason for bias. Supreme Court held that one of the members of the panel of selection committee his brother was a candidate in the competition but due to this, the whole procedure of selection cannot be quashed.

Here, to avoid the act of biases at the turn of his brother respective panel member connected with the candidate can be requested to go out from the panel of the selection committee. So, a fair and reasonable decision can be made, (Ramanand Prasad Singh vs. UOI).

Pecuniary bias

If any of the judicial body has any kind of financial benefit, how so ever small it may be will lead to administrative authority to biases.

Subject matter bias

When directly or indirectly the deciding authority is involved in the subject matter of a particular case.

Muralidhar vs. Kadam Singh The court refused to quash the decision of Election tribunal on the ground that the chairman's wife was a member of Congress party whom the petitioner defeated.

Departmental bias

The problem or issue of departmental bias is very common in every administrative process and it is not checked effectively and on every small interval period it will lead to negative concept of fairness will get vanished in the proceeding.

Policy bias

Issues arising out of preconceived policy notion is a very dedicated issue. The audience sitting over there does not expect judges to sit with a blank sheet of paper and give a fair trial and decision over the matter.

Audi Alteram Partem

It simply includes 3 Latin word which basically means that no person can be condemned or punished by the court without having a fair opportunity of being heard. The literal meaning of this rule is that both parties should be given a fair chance to present themselves with their relevant points and a fair trial should be conducted. The principle of *audi alteram partem* is the basic concept of principle of natural justice. The expression *audi alteram partem* implies that a person must be given opportunity to defend himself. This principle is *sine qua non* of every civilized society. This rule covers various stages through which administrative adjudication pass starting from notice to final determination.

This is an important rule of natural justice and its pure form is not to penalize anyone without any valid and reasonable ground. Prior notice should be given to a person so he can prepare to know what all charges are framed against him.

Right to fair hearing thus includes:-

A. Right to notice
B. Right of Fair Hearing

Right to notice : A notice must be adequate and contain:

1) Time, place and nature of hearing,

2) Legal authority under which hearing is to be held,

3) Statement of specific charges (or grounds) and proposed action (or grounds) which the person has to meet**.**

Right of Fair Hearing:In the case of Mohinder Singh Gill v. Chief Election Commissioner, AIR 1978 SC 851, the court held that the concept of fairness should be in every action whether it is judicial, quasi-judicial, administrative and or quasi-administrative work. It includes:

- Adjudicating authority receives all the relevant material produced by the individual
- The adjudicating authority discloses the individual concerned evidence or material which it wishes to use against him
- The adjudicating authority providing the person concerned an opportunity to rebut the evidence or material which they said authority wants to use against him

Exclusion of natural justice (exceptions to the rule of natural justice)

- Exclusion by statutory provisions.
- Exclusion by the constitutional provisions.
- Exclusion in case of legislative act.
- Exclusion in public interest.
- Exclusion in case of the need of prompt action or in emergency or necessity.
- Exclusion on the ground of the impracticability.
- Exclusion in case of confidentiality.
- Exclusion in cases of academic adjudication.
- Exclusion in the cases of interim prevention action.
- Exclusion in case of Mere Formality Theory

Effect of Breach of Natural Justice

When the authority is required to observe the principle of natural justice in passing an order but fails to do so, the general judicial opinion is that the order is void.

In England, in the case of Ridge v. Baldwin, (1964) A.C. 40, the court held the decision of the authority void on the ground of the breach of the rule of fair hearing. In India, the position is well settled that the order passed in violation of the principles of natural justice is void.

Q. 15. Explain Reasoned Decision as a component of natural justice.

Reasoned Decision

A Reasoned Decision is a decision which contains reason in its support. When the adjudicating bodies give reasons in support of their decisions, the decisions are treated as reasoned decision. It is also called speaking order. A 'speaking order' means an order speaking for itself by giving reasons. The expression (Speaking order) was first coined by Lord Chancellor Earl Cairns in a rather strange context. Therefore in the absence of a speaking order courts would not be able to understand the applications of mind to the facts and issues raised in the case, The habit of mind of an executive officers that is formed cannot be expected to change from function to function or from an act to another. Speaking orders are necessary if the judicial review is to be effective. The party affected must know why and on what grounds an order has been passed against him.

Value and Significance of the Reasoned Decisions

The value of the reasoned decisions as a check upon the arbitrary use of administrative power is very clear. A party has a right to know the result of inquiry and the reasons in support of the decision. But the requirement that reasons be given does more than merely vindicate the right of the individual to know why a decision detrimental to him has been given. This is so because the obligation to give a reasoned decision is a substantial check upon the abuse of power. A decision supported by reasons is much less likely to rest on caprice or careless considerations. The giving of reasoned serves both to convince those subject to the decision that they are not arbitrary and to ensure that they are not, indeed, arbitrary.

The duty to give reason may be statutory or no statutory. Where the duty is required by the statute, the authority is bound to give reasoned decisions in all cases to which that provisions applies. But in the absence of statutory requirement, the courts have been emphatic to advice

judicial or quasi- judicial bodies to assign reasons in such a form as to justify the order being called what are described as speaking order.

Express provisions:

If the statute requires recording of reasoned, then it is the statutory requirement and, therefore, there is no scope for further inquiry. Reasons are the link between the materials on which certain conclusion are based and the actual conclusions. They disclose how the mind applied the subject-matter for decisions; whither it is purely administrative or quasi- judicial. They should reveal a rational nexus between the fact considered and the conclusion reached. Only in this way can decisions recorded shown to be manifestly just and reasonable.

Implied Requirement:

The obligation to give reason for judicial or quasi-judicial decision has been particularly implied where the statute provide for appeal, review or revision against those orders. If a quasi- judicial decision is subject to appeal, the law necessarily implies the requirement of reasons; otherwise the right of appeal shall become an "empty formality". Even where the statute does not provide for an appeal or revision, the administrative authority are required to give reason, if they are discharging quasi judicial functions (Mahabir Prasad v. State of M.P. AIR 1970 SC 1320.).

The Supreme Court observed in Siemens Engg. vs. Union of India,(AIR 1976 SC 1785) “The rule requiring reasons to be given in support of an order is like the principle of ‘audi alteram partem’, a basic principle of natural justice, which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.”

Unit 4

Q. 16. What do you mean by Administrative Discretion? Explain its need and relationship with Rule of Law.

Need and its Relationship with Rule of Law

Meaning of Discretion

Discretion in layman's language means choosing from amongst the various available alternatives without reference to any predetermined criterion, no matter how fanciful that choice may be. A person writing his will has such discretion to dispose of his property in any manner, no matter how arbitrary or fanciful it may be. But the term "discretion" when qualified by the word "administrative" has somewhat different overtones. 'Discretion' in this sense means choosing from amongst the various available alternatives, but with reference to the rules of reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful but legal and regular.

Quite often, the legislature bestows more or less an unqualified or uncontrolled discretion on the executive. Administrative discretion may be denoted by such words or phrases as "public interest", "public purpose", "prejudicial to public safety or security", "satisfaction," "belief, "efficient", 'adequate', 'advisable,' 'appropriate', 'beneficial', 'competent', 'conversant', 'detrimental', 'expedient', 'equitable', 'fair', 'fit', 'necessary', 'practicable', 'proper', 'reasonable', 'reputable', 'safe', 'sufficient', 'wholesome', or their opposite. Thus, there is no set pattern of conferring discretion on an administrative officers.

Definitions

In black law's dictionary: , administrative discretion would be a public official's or agency's power to exercise judgment in the discharge of its duties.

According to a, Coke, discretion would be "…a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colorable glosses and pretences, and not to do according to their will and private affection."

Need --

- Under the impact of the contemporary philosophy of welfare State, Government is required to perform a variety of functions.

- The present day problems are of complex and varying nature and it is difficult to comprehend them all within the scope of general rules.
- It is not always possible to foresee each and every problem.
- Circumstances differ from case to case so that applying one rule mechanically to all cases may itself result in injustice.

There is conferment of large discretionary powers on the administration, to be exercised according to its subjective satisfaction. Administration is always asked to solve a problem, whenever it arises, for the Legislature is not sure how it can be solved. The power should be exercised independently by the authority concerned according to his own assessment. It imposes a duty to do so, subject, of course, to the limitation provided by law and of being within the ambit of the power. The administrative authorities vested with such powers should, therefore, act on their own record, they should not be guided by the direction or instruction their superiors in the discharge of the power. In short, the purpose of the discretion is to serve the country's citizens' in the best possible way.

Q.17. What is Judicial Review of Administrative Action. Explain the various grounds of judicial review.

Judicial Review of Administrative Action and Grounds of Judicial Review

Judicial review

Judicial Review means the power of the courts to examine the actions of the legislative, executive, and administrative arms of the government and to determine whether such actions are consistent with the constitution. Actions judged inconsistent are declared unconstitutional and, therefore, null and void.

Remedies of Judicial Review/ Public Interest Litigation

Here five types of writs are available for judicial review of administrative actions under Article of 32, and Article of 226 of Constitution of India.

Habeas Corpus: The writ literally means "Have the body". This writ is issued to secure the release of person from illegal detention or without legal justification, its deals with person's right of freedom. In simple words Court direct the person and even authority who has detained the individual to bring such person before Court so that Court may decide the validity, justification, jurisdiction of such detention. It is to be filed by any person.

Mandamus writ: It means that "To command the public authority" to perform its public duty. For the issue of mandamus against an administrative authority the affected individual must demand justice and only on refusal he has right to approach the Court

Quo Warranto: It is ancient common law remedy. It is used against an intruder or usurper of public office. Literally means "What is your authority". Court directs the concerned person that by what authority he holds the office. The Court may oust a person from the office if he finds that he is not entitled to obtain such office.

Prohibition: It is an extraordinary prerogative writ of prevention; it seeks to prevent Courts, Tribunals, Quasi-judicial authorities and officers from exceeding their jurisdiction. Main object of this writ is to prevent the encroachment of jurisdiction. It is based upon "Prevention is better than cure".

Certiorari: It deals with a method to bring the record of subordinate Court before the superior Court for correction of jurisdiction or error of law committed by them. In simple word if any inferior Court decided the case beyond its powers than Apex Court and High Courts correct the error by issuing this writ. Earlier it was used for criminal matters but later on it was started to use in civil cases too. Grounds for this writ are (a) excess or failure to exercise the jurisdiction (b) violation of natural justice rules such as right of notice and hearing (c) violation of fundamental rights or statutory provisions of laws. (c) Finding of facts which no person would have reached to the conclusion.

Judicial control mechanism of administrative discretion is exercised at two stages: At the stage of delegation of discretion: At the stage of the exercise of discretion

At the stage of delegation of discretion.

The court exercises control over delegation of discretionary powers to the administration by adjudicating upon the constitutionality of the law under which such powers are delegated with reference to the fundamental rights enunciated in Part III of the Indian constitution. Therefore, if the law confers vague and wide discretionary power on any admin authority, it may be declared ulta vires Art. 14, art.19 and other provisions of the constitution.

Art 14

State of West Bengal V. Anwar Ali: In order to speed up the trial for certain offences, Sec 5(1) of the west Bengal Special Courts Act, 1950 conferred discretion on the Statew Govt. to refer any offence for trial by special court. Since the procedure before the special court was stringent in comparison with that of normal trials, the respondents assested its unconstitutionality on the ground that it violates Art 14. The court held the law invalid on the ground the use of vague expressions like speedier trial confers a wide discretion on the govt. and can be a basis of unreasonable classification.

Art 19

Himat lal K. Shah v. Police Commissioner, Rule 7 under section 44 of the Bombay Police Act, 1951 gave unguided discretionary power to the police commissioner to grant or refuse permission for any public meeting to be held on a public street. The S.C. Struck down rule 7 as being unreasonable restriction on the exercise of fundamental right.

At the stage of the exercise of discretion

Grounds of Judicial Review of Administrative Discretion

Failure to Exercise Discretion

- Acting Mechanically: when the authority becomes lazy and rely on its subordinates, the authority passes an order mechanically.(Merugu Satya Narayana v. State of A.P., AIR 1982 SC 1543)
- Abdication of Function: when the authority leaves the discretion to be exercised by the subordinate without acting itself.

- Imposing Fetters on the exercise of Discretion: The authority imposes fetters on the discretion by adopting fixed rules of policy to be applied in all cases coming before it and not considering individual cases.

- Acting under Dictation: When the authority entrusted with the discretion does not exercise the discretion but acts under a dictation by a superior authority.(State of Punjab v. Hari Kishan, AIR 1966 SC 1081)

- Non- Application of Mind: The authority to whom discretion is conferred must exercise the same after applying its mind to the facts and circumstances of the case in hand. There will be non- application of mind if the authority acts mechanically, without due care and caution or without a sense of responsibility in exercise of its discretion.

Abuse of Discretion

- **Exceeding Jurisdiction**: A Decision going beyond what is authorised by law is *ultra vires*. For eg. If the administrative authority is authorised to control the price of bread it will be in excess of its jurisdiction to control the price of butter.

- **Irrelevant Considerations**: The power must be exercised on considerations relevant to the purpose for which it is conferred. If the authority takes into account wholly irrelevant or extraneous considerations, the exercise of power by the authority will be *ultra vires* (Sant Raj v. O.P. Singh, AIR 1985 SC 617).

- **Leaving out relevant considerations**. It can be inferred from detailed reasons given in the impugned order. Sometimes, the relevant considerations are prescribed by the statute itself. For e.g., "regard shall be had to", "must have regard to".

- **Mala fide**: It means dishonest intention or corrupt motive. A power is exercised maliciously if it motivated by personal animosity towards those who are directly affected by its exercise.

- **Improper purpose**; If statutory power is conferred for one purpose but it is exercised for a different purpose, that is abuse of power and action may be quashed.(Nalini v. District Magistrate, AIR 1951 Cal. 346.)

- **Colourable exercise of Power**: Where the authority resorts to exercise power ostensibly for the authorised end, but in reality for some other purpose.

- **Unreasonable exercise of power**: The term 'unreasonable' means more than one thing. It may include many things, e.g., irrelevant considerations, improper purpose etc.(Indian Express News Papers v. Union of India, AIR 1985 SC 515)(Govt. imposed import duty on newspaper, the petitioner contended violation of Art 19, court held power was exercised unreasonably.

Illegality: The decision maker must correctly understand the law and its limits and apply the law that provides and regulates his decision making power. Therefore it may be illegality:

- If The Authority Lacks Jurisdiction, or
- Exceeds It,
- Fails to exercise Jurisdiction or
- Abuses Jurisdiction

Irrationality: A decision is irrational if it is "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it. A decision of admin authority will be irrational if:

- it is without authority of law;
- is based on no evidence;
- based on irrelevant considerations;
- defiance to logic;
- so unreasonable that can be described in bad faith.

Procedural Impropriety: Failure to comply with procedures laid down by statute may invalidate a decision. Procedural Impropriety is to encompass two areas:

- failure to observe rules laid down in statute;
- a failure to observe the basic common law rule of natural justice

Requirement of fair procedure may arise in-

As a constitutional mandate: Where constitutional provisions and fundamental rights of people are violated.

As a statutory mandate: If statute lays down procedure which is not followed the decision is not valid.

As an implied requirement: Where statute is silent, the administrative authority is required to follow the principles of natural justice.

Q. 18. What do you understand by the term 'Legitimate Expectation'? Explain.

Doctrine of Legitimate Expectation

A Legitimate Expectation amounts to an expectation of receiving some benefit or privilege to which the individual has no right. Legitimate Expectation means expectation having some reasonable basis. A legitimate expectation will arise in the mind of the complainant wherever he or she has been led to understand by the words or actions of the decision maker that certain procedures will be followed in reaching a decision. The doctrine of Legitimate Expectation has evolved to give relief to the people when they are not able to justify their claims on the basis of law in the strict sense of the term they had suffered civil consequences because their legitimate expectation has been violated. Two considerations apply to legitimate expectations. The first is where an individual or group has been led to believe that a certain procedure will apply. The second is where an individual or group relies upon a policy or guidelines which have previously governed an area of executive action.

Origin

The evolvement of the doctrine of Legitimate Expectation in the Common law jurisdiction can been traced to an obiter dictum of Lord Denning M. R in *Sehmidt v. Secretary of Home Affairs* , [1969] 2 Ch 149; (1969) 1.AllE.R. 904. Lord Denning observed in *Sehmidt:*

"The speeches in *Ridge v Baldwin* show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, *some legitimate expectation*, of which it would not be fair to deprive him without hearing what he has to say ...."

In this case certain non national students at Hubbard College of Scientology had been given leave to enter the United Kingdom before July, 1968, initially for a period of a month. The periods had been extended to the end of August and September 1968, respectively. Applications were made on behalf of the plaintiffs to the Home Office on June 11 and July 15, 1968 for extensions of their stay until November and December 1968, to complete their studies. By letters of July 29 and 30 the Home Secretary, the defendant, rejected the applications. The plaintiff's stay was, however, extended to September 30 to let them make arrangements to leave.

The Plaintiffs, on behalf of themselves and 50 other alien students of the college, claimed declarations against the defendant that his decision not to consider further similar applications for extension of stay was unlawful, void, and of no effect and the defendant was bound to consider such applications on their merit and in accordance with the principles of natural justice. The court of appeal held that they had no legitimate expectation of extension and therefore no right to hearing, though revocation of their permits within the earlier granted period of permit would have been contrary to legitimate expectation.

The legitimate expectation referred to in, this case did not give the alien students an enforceable right to stay for the time originally permitted but an enforceable right to be heard before the decision to revoke his permit was taken: a procedural protection only.

Evolution in India

As already stated that the Doctrine of "Legitimate Expectation" is not a legal right in itself embedded in some statute of Code readily available for its inference and applicability. However it is a right to be treated fairly and the same has been fashioned by judicial precedents of various courts over a period time

In **National Buildings Construction Corporation Vs. S. Raghunathan & Ors.**, a three-Judge Bench of this Court observed as under:

"The doctrine of "legitimate expectation" has its genesis in the field of administrative law. The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice. It was in this context that the doctrine of "legitimate expectation" was evolved which today has become a source of substantive as well as procedural rights. But claims based on "legitimate expectation" have been held to require reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel."

In ***Food Corporation of India v. Kamdhenu Cattle Feed Industries Ltd***, the Supreme Court has observed that the doctrine of legitimate expectation falls within the purview of the principle of non-arbitrariness as incorporated under **Article 14 of the Constitution.**

Legitimate Expectation arises when an administrative body by reason of a representation or by past practice or conduct aroused an expectation which it would be within its powers to fulfill unless some overriding public interest comes in the way. However, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. It is well settled that the concept of legitimate expectation has no role to play where the State action is as a public policy or in the public interest unless the action taken amounts to an abuse of power.

Q. 19. What do you understand by Ombudsman? Discuss its evolution.

Evolution of Concept of Ombudsmen

'Ombudsman' is an old Swedish word that has been used for centuries to describe a person who represents or protects the interests of another. An ombudsman is an official, usually appointed by the government or by parliament, who is charged with representing the interests of the public by investigating and addressing complaints reported by citizens. The concept of Ombudsman at first originated in Sweden, a Scandinavian state, in 1809. Finland created the institution of Ombudsman in 1919, Denmark in 1955 and Norway in 1961. The institution of Ombudsman drew the attention of several European states, and they did borrow the term. Some countries used the term Parliamentary commission and New Zealand is one of them.

Professor Larry B Hill has enumerated the following characteristics of the pure ombudsman –

1. Established as separate entity that is functionally autonomous.
2. Operationally independent of both the legislature and the executive.
3. Ombudsman is a legally established governmental official.
4. A monitoring specialist.
5. Administrative expert and professional.
6. Non-partisan.
7. Normatively universalistic.
8. Client-centered, but not anti-administration.
9. Popularly accessible and visible.
10. High status institutions
11. Have extensive resources to perform his mission.

Functions of Ombudsman

The core business of public sector ombudsman remains receiving, investigation and redressal of citizen's complaints related to mal-administration of government agencies or their functionaries. The primary function of the Ombudsman is generally to examine:

- A decision, process, recommendation, act of omission or commission which is contrary to law, rules or regulations, or is a departure from established practice or procedure, unless it is bona fide and has valid reason; is perverse, arbitrary or unreasonable, unjust, biased, oppressive or discriminatory; based on irrelevant grounds; or, involves the exercise of powers or the failure or refusal to do so for reasons of corrupt or improper motives such as bribery, jobbery, favouritism, nepotism, and administrative excesses; and,
- neglect, inattention, delay, incompetence, inefficiency and ineptitude in the administration or discharge of duties and responsibilities.

A Lokpal is a proposed ombudsman in India.

Q. 20. Discuss Lokpal and Lokayukta Act and other Anti corruption Bodies and their Administrative Procedures.

The Lokpal and Lokayukta Act, 2013

The Act provided for the establishment of Lokpal for the Union and Lokayukta for States. They perform the function of an "ombudsman" and inquire into allegations of corruption against certain public functionaries and for related matters. In 1966, the First Administrative Reforms Commission recommended the setting up of two independent authorities- at the central and state level, to look into complaints against public functionaries, including MPs. In 1968, Lokpal bill was passed in Lok Sabha but lapsed with the dissolution of Lok Sabha and since then it has lapsed in the Lok Sabha many times.

"India Against Corruption movement" led by Anna Hazare put pressure on the United Progressive Alliance (UPA) government at the Centre and resulted in the passing of the Lokpal and Lokayuktas Bill, 2013, in both the Houses of Parliament. It received assent from President on 1 January 2014 and came into force on 16 January 2014. Retired Supreme Court judge Pinaki Chandra Ghose was appointed as the first Lokpal of India by a committee

consisting of Prime Minister Narendra Modi and Chief Justice of India Ranjan Gogoi and Loksabha speaker Sumitra Mahajan and Eminent Jurist Mukul Rohatgi.

Structure of Lokpal

Lokpal is a multi-member body that consists of one chairperson and a maximum of 8 members. Chairperson of the Lokpal should be either the former Chief Justice of India or the former Judge of Supreme Court or an eminent person with impeccable integrity and outstanding ability, having special knowledge and expertise of minimum 25 years in the matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law and management.

Out of the maximum eight members, half will be judicial members and minimum 50% of the Members will be from SC/ ST/ OBC/ Minorities and women.

The judicial member of the Lokpal either a former Judge of the Supreme Court or a former Chief Justice of a High Court. The non-judicial member should be an eminent person with impeccable integrity and outstanding ability, having special knowledge and expertise of minimum 25 years in the matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law and management.

The term of office for Lokpal Chairman and Members is 5 years or till the age of 70 years. The selection committee is composed of the Prime Minister who is the Chairperson; Speaker of Lok Sabha, Leader of Opposition in Lok Sabha, Chief Justice of India or a Judge nominated by him/her and One eminent jurist. The 2013 Act also provides that all states should set up the office of the Lokayukta within one year from the commencement of the Act.

Lokpal: Jurisdiction and Powers

Jurisdiction of Lokpal includes Prime Minister, Ministers, members of Parliament, Groups A, B, C and D officers under Prevention of Corruption Act, 1988 and officials of Central Government.

Jurisdiction of the Lokpal included the Prime Minister except on allegations of corruption relating to international relations, security, the public order, atomic energy and space. The Lokpal does not have jurisdiction over Ministers and MPs in the matter of anything said in Parliament or a vote given there. Its jurisdiction also includes any person who is or has been in charge of any body/ society set up by central act or any other body financed/ controlled by central government and any other person involved in act of abetting, bribe giving or bribe taking.

The Lokpal Act mandates that all public officials should furnish the assets and liabilities of themselves as well as their respective dependents. It has the powers to superintendence over, and to give direction to CBI.

If Lokpal has referred a case to CBI, the investigating officer in such case cannot be transferred without the approval of Lokpal. The Inquiry Wing of the Lokpal has been vested with the powers of a civil court. Lokpal has powers of confiscation of assets, proceeds, receipts and benefits arisen or procured by means of corruption in special circumstances. Lokpal has the power to recommend transfer or suspension of public servant connected with allegation of corruption. Lokpal has the power to give directions to prevent the destruction of records during the preliminary inquiry.

Other Anti-Corruption Bodies

Central Bureau of Investigation: The CBI investigates major crimes in the country having interstate and international ramifications. It is also involved in collection of criminal intelligence pertaining to three of its main areas of operation, viz., Anti-Corruption, Economic Crimes and Special Crimes.

The Anti-Corruption Division is responsible for collection of intelligence with regard to corruption, maintaining liaison with various Departments through their Vigilance Officers, enquiries into complaints about bribery and corruption, investigation and prosecution of offences pertaining to bribery and corruption and tasks relating to preventive aspects of corruption. The Anti-Corruption Division investigates cases against public servants under the control of the Central Government, public servants in Public Sector Undertakings under the

control of Central Government and cases against the public servants working under State Govt. entrusted to the CBI by the State Governments and serious departmental irregularities committed by the above mentioned public servants.

Central Vigilance Commission (CVC) : It is an apex Indian governmental body created in 1964 to address governmental corruption.

It Exercise superintendence over the functioning CBI insofar as it relates to the investigation of offences under the Prevention of Corruption Act, 1988; or an offence under the Cr.PC for certain categories of public servants. It gives directions to the CBI for superintendence insofar as it relates to the investigation of offences under the Prevention of Corruption Act, 1988. It inquires or causes an inquiry or investigation to be made on a reference by the Central Government.

Subject: Economics II -210

Ques 1 What do you mean by business cycles? Also explain its different features and phases

Ans 1 The business cycle, also known as the economic cycle or trade cycle, is the downward and upward movement of gross domestic product (GDP) around its long-term growth trend.

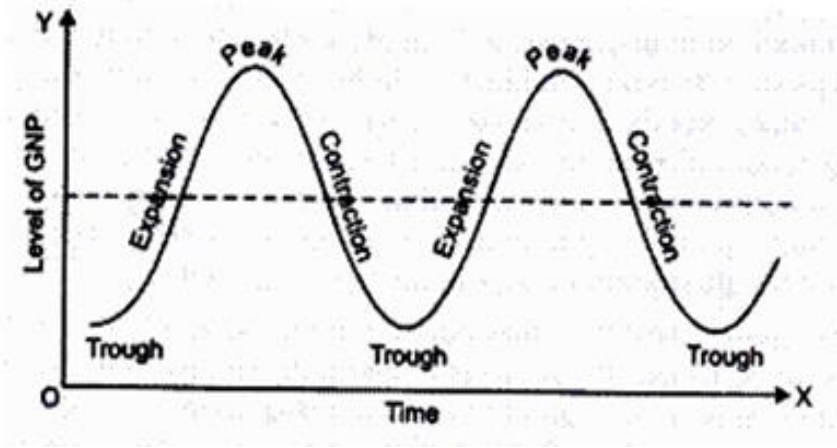
Phases of Business Cycles:

Business cycles have shown distinct phases the study of which is useful to understand their underlying causes. These phases have been called by different names by different economists. Generally, the following phases of business cycles have been distinguished:

1. Expansion (Boom, Upswing or Prosperity)
2. Peak (upper turning point)
3. Contraction (Downswing, Recession or Depression)
4. Trough (lower turning point)

The four phases of business cycles have been shown in Fig. 1.1 where we start from trough or depression when the level of economic activity i.e., level of production and employment is at the lowest level.

With the revival of economic activity the economy moves into the expansion phase, but due to the causes explained below, the expansion cannot continue indefinitely, and after reaching peak, contraction or downswing starts. When the contraction gathers momentum, we have a depression. The downswing continues till the lowest turning point which is also called trough is reached.



In this way cycle is complete. However, after remaining at the trough for some time the economy revives and again the new cycle starts.

Haberler in his important work on business cycles has named the four phases of business cycles as:

(1) Upswing,

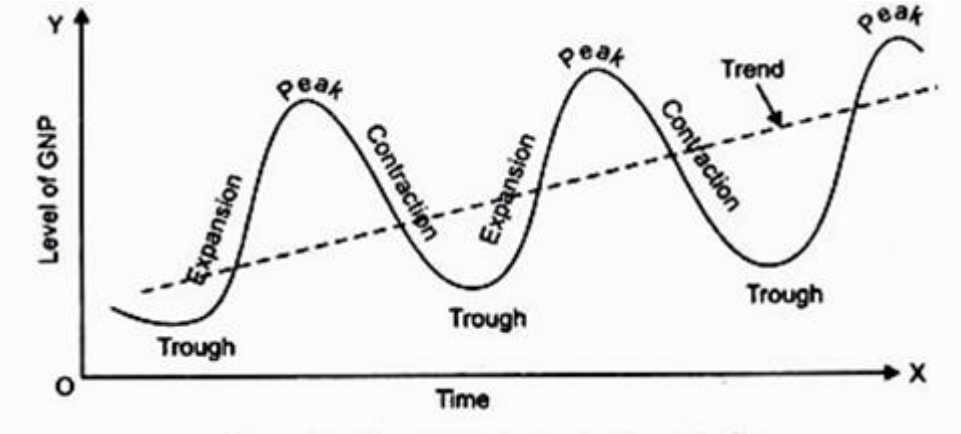
(2) Upper turning point,

(3) Downswing, and

(4) Lower turning point.

There are two types of patterns of cyclic changes. One pattern is shown in Fig. 1.1 where fluctuations occur around a stable equilibrium position as shown by the horizontal line. It is a case of dynamic stability which depicts change but without growth or trend.

The second pattern of cyclical fluctuations is shown in Fig. 1.2 where cyclical changes in economic activity take place around a growth path (i.e., rising trend). J.R. Hicks in his model of business cycles explains such a pattern of fluctuations with long-run rising trend in economic activity by imposing factors such as autonomous investment due to population growth and technological progress causing economic growth on the otherwise stationary state.



Expansion and Prosperity:

In its expansion phase, both output and employment increase till we have full employment of resources and production is at the highest possible level with the given productive resources. There is no involuntary unemployment and whatever unemployment prevails is only of frictional and structural types.

Thus, when expansion gathers momentum and we have prosperity, the gap between potential GNP and actual GNP is zero, that is, the level of production is at the maximum production level. A good amount of net investment is occurring and demand for durable consumer goods is also high. Prices also generally rise during the expansion phase but due to high level of economic activity people enjoy a high standard of living.

Then something may occur, whether banks start reducing credit or profit expectations change adversely and businessmen become pessimistic about future state of the economy that brings an end to the expansion or prosperity phase. Economists differ regarding the possible causes of the end of prosperity and start of downswing in economic activity.

Monetarists have argued that contraction in bank credit may cause downswing. Keynes has argued that sudden collapse of expected rate of profit (which he calls marginal efficiency of capital, MEC) caused by adverse changes in expectations of entrepreneurs lowers investment in the economy. This fall in investment, according to him, causes downswing in economic activity.

Contraction and Depression:

Expansion or prosperity is followed by contraction or depression. During contraction, not only there is a fall in GNP but also level of employment is reduced. As a result, involuntary

unemployment appears on a large scale. Investment also decreases causing further fall in consumption of goods and services.

At times of contraction or depression prices also generally fall due to fall in aggregate demand. A significant feature of depression phase is the fall in rate of interest. With lower rate of interest people's demand for money holdings increases. There is a lot of excess capacity as industries producing capital goods and consumer goods work much below their capacity due to lack of demand.

Capital goods and durable consumer goods industries are especially hit hard during depression. Depression, it may be noted, occurs when there is a severe contraction or recession of economic activities. The depression of 1929-33 is still remembered because of its great intensity which caused a lot of human suffering.

Trough and Revival:

There is a limit to which level of economic activity can fall. The lowest level of economic activity, generally called trough, lasts for some time. Capital stock is allowed to depreciate without replacement. The progress in technology makes the existing capital stock obsolete. If the banking system starts expanding credit or there is a spurt in investment activity due to the emergence of scarcity of capital as a result of non-replacement of depreciated capital and also because of new technology coming into existence requiring new types of machines and other capital goods.

The stimulation of investment brings about the revival or recovery of the economy. The recovery is the turning point from depression into expansion. As investment rises, this causes induced increase in consumption. As a result industries start producing more and excess capacity is now put into full use due to the revival of aggregate demand. Employment of labour increases and rate of unemployment falls. With this the cycle is complete.

Features of Business Cycles:

Though different business cycles differ in duration and intensity, they have some common features

1. Business cycles occur periodically. Though they do not show same regularity, they have some distinct phases such as expansion, peak, contraction or depression and trough. Further

the duration of cycles varies a good deal from minimum of two years to a maximum of ten to twelve years.

2. Secondly, business cycles are synchronic. That is, they do not cause changes in any single industry or sector but are of all-embracing character. For example, depression or contraction occur simultaneously in all industries or sectors of the economy.

Recession passes from one industry to another and chain reaction continues till the whole economy is in the grip of recession. Similar process is at work in the expansion phase, prosperity spreads through various linkages of input-output relations or demand relations between various industries, and sectors.

3. Thirdly, the fluctuations occur not only in level of production but also simultaneously in other variables such as employment, investment, consumption, rate of interest and price level.

4. Another important feature of business cycles is that investment and consumption of durable consumer goods such as cars, houses, refrigerators are affected most by the cyclical fluctuations. As stressed by J.M. Keynes, investment is greatly volatile and unstable as it depends on profit expectations of private entrepreneurs.

These expectations of entrepreneurs change quite often making investment quite unstable. Since consumption of durable consumer goods can be deferred, it also fluctuates greatly during the course of business cycles.

5. An important feature of business cycles is that consumption of non-durable goods and services does not vary much during different phases of business cycles. Past data of business cycles reveal that households maintain a great stability in consumption of non-durable goods.

6. The immediate impact of depression and expansion is on the inventories of goods. When depression sets in, the inventories start accumulating beyond the desired level. This leads to cut in production of goods. On the contrary, when recovery starts, the inventories go below the desired level. This encourages businessmen to place more orders for goods whose production picks up and stimulates investment in capital goods.

7. Another important feature of business cycles is that profits fluctuate more than any other type of income. The occurrence of business cycles causes a lot of uncertainty for businessmen and makes it difficult to forecast the economic conditions.

During the depression period profits may even become negative and many businesses go bankrupt. In a free market economy profits are justified on the ground that they are necessary payments if the entrepreneurs are to be induced to bear uncertainty.

8. Lastly, business cycles are international in character. That is, once started in one country they spread to other countries through trade relations between them. For example, if there is a recession in the USA, which is a large importer of goods from other countries, it will cause a fall in demand for imports from other countries whose exports would be adversely affected causing recession in them too. Depression of 1930s in USA and Great Britain engulfed the entire capital world.

Ques2 Explain different goals of Macroeconomic policy

Ans As macroeconomics looks at the whole, its objectives are aggregative in character.

1. Macroeconomic Policy goals:

(i) Full employment,

(ii) Price stability,

(iii) Economic growth,

(iv) Balance of payments equilibrium and exchange rate stability, and

(v) Social objectives.

(i) Full employment:

Performance of any government is judged in terms of goals of achieving full employment and price stability. These two may be called the key indicators of health of an economy. In other words, modern governments aim at reducing both unemployment and inflation rates.

Unemployment refers to involuntary idleness of mainly labour force and other productive resources. Unemployment (of labour) is closely related to the economy's aggregate output. Higher the unemployment rate, greater the divergence between actual aggregate output (or GNP/CDP) and potential output. So, one of the objectives of macroeconomic policy is to ensure full employment.

The objective of full employment became uppermost amongst the policymakers in the era of Great Depression when unemployment rate in all the countries except the then socialist

country, the USSR, rose to a great height. It may be noted here that a free enterprise capitalist economy always exhibits full employment.

But, Keynes said that the goal of full employment may be a desirable one but impossible to achieve. Full employment, thus, does not mean that nobody is unemployed. Even if 4 or 5% of the total population remain unemployed, the country is said to be fully employed. Full employment, though theoretically conceivable, is difficult to attain in a market-driven economy. In view of this, full employment objective is often translated into 'high employment' objective. This goal is desirable indeed, but 'how high' should it be. One author has given an answer in the following way; "The goal for high employment should therefore be not to seek an unemployment level of zero, but rather a level of above zero consistent with full employment at which the demand for labour equals the supply of labour. This level is called the natural rate of unemployment."

(ii) Price stability:

No longer is the attainment of full employment considered as a macroeconomic goal. The emphasis has shifted to price stability. By price stability we must not mean an unchanging price level over time. Not necessarily, price increase is unwelcome, particularly if it is restricted within a reasonable limit. In other words, price fluctuations of a larger degree are always unwelcome.

However, it is difficult again to define the permissible or reasonable rate of inflation. But sustained increase in price level as well as a falling price level produce destabilizing effects on the economy. Therefore, one of the objectives of macroeconomic policy is to ensure (relative) price level stability. This goal prevents not only economic fluctuations but also helps in the attainment of a steady growth of an economy.

(iii) Economic growth:

Economic growth in a market economy is never steady. These economies experience ups and downs in their performance. This objective became uppermost in the period following the World War II (1939-45). Economists call such ups and downs in the economic performance as trade cycle/business cycle. In the short run such fluctuations may exhibit depressions or prosperity (boom).

One of the important benchmarks to measure the performance of an economy is the rate of increase in output over a period of time. There are three major' sources of economic growth, viz. (i) the growth of the labour force, (ii) capital formation, and (iii) technological progress. A country seeks to achieve higher economic growth over a long period so that the standards of living or the quality of life of people, on an average, improve. It may be noted here that while talking about higher economic growth, we take into account general, social and environmental factors so that the needs of people of both present generations and future generations can be met.

However, promotion of higher economic growth is often hampered by short run fluctuations in aggregate output. In other words, one finds a conflict between the objectives of economic growth and economic stability (in prices). In view of this conflict, it is said that macroeconomic policy should promote economic growth with reasonable price stability.

(iv) Balance of payments equilibrium and exchange rate stability:

From a macro- economic point of view, one can show that an international transaction differs from domestic transaction in terms of (foreign) currency exchange. Over a period of time, all countries aim at balanced flow of goods, services and assets into and out of the country. Whenever this happens, total international monetary reserves are viewed as stable.

If a country's exports exceed imports, it then experiences a balance of payments surplus or accumulation of reserves, like gold and foreign currency. When the country loses reserves, it experiences balance of payments deficit (or imports exceed exports). However, depletion of reserves reflects the unhealthy performance of an economy and thus creates various problems. That is why every country aims at building substantial volume of foreign exchange reserves.

Anyway, the accumulation of foreign exchange reserves is largely conditioned by the exchange rate the rate at which one currency is exchanged for another currency to carry out international transactions. The foreign exchange rate should be stable as far as possible. This is what one may call it external stability in price.

External instability in prices hampers the smooth flow of goods and services between nations. It also erodes the confidence of currency. However, maintenance of external stability is no

longer considered as the macroeconomic policy objective as well as macroeconomic policy instrument.

It is, however, because of growing inter- connectedness and interdependence between different nations in the globalized world, the task of fulfilling this macroeconomic policy objective has become more problematic.

(v) Social objectives:

Macroeconomic policy is also used to attain some social ends or social welfare. This means that income distribution needs to be more fair and equitable. In a capitalist market-based society some people get more than others. In order to ensure social justice, policymakers use macroeconomic policy instruments.

2. Macroeconomic Policy Instruments:

As our macroeconomic goals are not typically confined to "full employment", "price stability", "rapid growth", "BOP equilibrium and stability in foreign exchange rate", so our macroeconomic policy instruments include monetary policy, fiscal policy, income policy in a narrow sense. But, in a broader sense, these instruments should include policies relating to labour, tariff, agriculture, anti-monopoly and other relevant ones that influence the macroeconomic goals of a country. Confining our attention in a restricted way we intend to consider two types of policy instruments the two "giants of the industry" monetary (credit) policy and fiscal (budgetary) policy. These two policies are employed toward altering aggregate demand so as to bring about a change in aggregate output (GNP/GDP) and prices, wages and interest rates, etc., throughout the economy.

Monetary policy attempts to stabilise aggregate demand in the economy by influencing the availability or price of money, i.e., the rate of interest, in an economy. Monetary policy may be defined as a policy employing the central bank's control of the supply of money as an instrument for achieving the macroeconomic goals.

Fiscal policy, on the other hand, aims at influencing aggregate demand by altering tax-expenditure-debt programme of the government. The credit for using this kind of fiscal policy in the 1930s goes to J.M. Keynes who discredited the monetary policy as a means of attaining some of the macro- economic goals—such as the goal of full employment. As fiscal policy

has come into scrutiny in terms of its effectiveness in achieving the desired macroeconomic objectives, the same is true about the monetary policy. One can see several rounds of ups and downs in the effectiveness of both these policy instruments consequent upon criticisms and counter- criticisms in their theoretical foundations.

So as there are conflicts among different macroeconomic goals, policymakers are in a dilemma in the sense that neither of the policies can achieve desired goals. Hence the need for additional policy measures like income policy, price control, etc.

Ques 3 What are the different methods of measuring National income

Ans 3 There are three methods of measuring national income of a country. They yield the same result. These methods are:

(1) The Product Method.

(2) The Income Method.

(3) The Expenditure Method.

(1) Product Method or Value Added Method:

Goods and services are counted in gross domestic product (GDP) at their market values. The product approach defines a nation's gross product as that market value of goods and services currently produced within a nation during a one year period of time.

The product approach measuring national income involves adding up the value of all the final goods and services produced in the country during the year. Here we focus on various sectors of the economy and add up all their production during the year. The main sectors whose production value is added up are:

(i) agriculture (ii) manufacturing (iii) construction (iv) transport and communication (v) banking (vi) administration and defense and (vii) distribution of income.

Precautions for Product Method or Value Added Method:

There are certain precautions which are to be taken to avoid miscalculation of national income using this method. These in brief are:

(i) Problem of double counting: When we add up the value of output of various sectors, we should be careful to avoid double counting. This pitfall can be avoided by either counting (he final value of the output or by including the extra value that each firm adds to an item.

(ii) Value addition in particular year: While calculating national income, the values of goods added in the particular year in question are added up. The values which had previously been added to the stocks of raw material and goods have to be ignored. GDP thus includes only those goods, and services that are newly produced within the current period.

(iii) Stock appreciation: Stock appreciation, if any, must be deducted from value added. This is necessary as there is no real increase in output.

{iv) Production for self-consumption: The production of goods for self-consumption should be counted while measuring national income. In this method, the production of goods for self-consumption should be valued at the prevailing market prices.

(2) Expenditure Method:

The expenditure approach measures national income as total spending on final goods and services produced within nation during an year. The expenditure approach to measuring national income is to add up all expenditures made for final goods and services at current

market prices by households, firms and government during a year. Total aggregate final expenditure on final output thus is the sum of four broad categories of expenditures:

(i) Consumption (ii) investment (iii) government and (iv) Net export.

(i) Consumption expenditure (C): Consumption expenditure is the largest component of national income. It includes expenditure on all goods and services produced and sold to the final consumer during the year.

(ii) Investment expenditure (I): Investment is the use of today's resources to expand tomorrow's production or consumption. Investment expenditure is expenditure incurred on by business firms on (a) new plants, (b) adding to the stock of inventories and (c) on newly constructed houses.

(iii) Government expenditure (G): It is the second largest component of national income. It includes all government expenditure on currently produced goods and services but excludes transfer payments while computing national income.

(iv) Net exports (X - M): Net exports are defined as total exports minus total imports.
National income calculated from the expenditure side is the sum of final consumption expenditure, expenditure by business on plants, government spending and net exports.

NI = C + I +G + (X - M)

Precautions for Expenditure Method:

While estimating national income through expenditure method, the following precautions should be taken:

(i) The expenditure on second hand goods should not be included as they do not contribute to the current year's production of goods.

(ii) Similarly, expenditure on purchase of old shares and bonds is not included as these also do not represent expenditure on currently produced goods and services.

(iii) Expenditure on transfer payments by government such as unemployment benefit, old age pensions, interest on public debt should also not be included because no productive service is rendered in exchange by recipients of these payments.

(3) Income Approach:

Income approach is another alternative way of computing national income, this method seeks to measure national income at the phase of distribution. In the production process of an economy, the factors of production are engaged by the enterprises. They are paid money incomes for their participation in the production. The payments received by the factors and paid by the enterprises are wages, rent, interest and profit. National income thus may be defined as the sum of wages, rent, interest and profit received or occurred to the factors of production in lieu of their services in the production of goods. So national income is the sum of all income, wages, rents, interest and profit paid to the four factors of production. The four categories of payments are

(i) Wages: It is the largest component of national income. It consists of wages and salaries along with fringe benefits and unemployment insurance.

(ii) Rents: Rents are the income from properly received by households.

(iii) Interest: Interest is the income private businesses pay to households who have lent the business money.

(iv) Profits: Profits are normally divided into two categories (a) profits of incorporated businesses and (b) profits of unincorporated businesses (sole proprietorship, partnerships and producers cooperatives).

Precautions for Income Approach:

While estimating national income through income method, the following precautions should be undertaken.

(i) Transfer payments such as gifts, donations, scholarships, indirect taxes should not be included in the estimation of national income.

(ii) Illegal money earned through smuggling and gambling should not be included.

{iii) Windfall gains such as prizes won, lotteries etc. is not be included in the estimation of national income.

(iv) Receipts from the sale of financial assets such as shares, bonds should not be included in measuring national income as they are not related to generation of income in the current year production of goods.

Reason why Three Methods of Computing/Measuring National Income are Equal:

The three approaches used for measuring national income give the same result. The reason is the market value of goods and services produced in a given period by definition is equal to the amount that buyers must spend to purchase them. So the product approach which

measures market value of goods and services produced and the expenditure approach which measures spending should give the same measure of economic activity.

In the income approach, the sellers receipts must equal what the buyers spend. The sellers receipts in turn equal the total income generated by the economic activity. Thus, total expenditure must equal total income generated implying that the expenditure and income approach must also produce the same result.

Ques 4 Difference between

a. Stock and flow
b. MEC and MEI

Ans Stock and flow

Basis	Stock	Flow
1. Measurement	Stock of a commodity is measured at a point of time.	Flow of a commodity is measured over a period of time.
2. Nature	Stock is static.	Flow is a dynamic concept.
3. Time Angle	Stock has no time dimension.	Flow has time dimensions like per day, per month, per year etc.
4. Example	Examples of stock —On a particular date,(i) Water in a tank. (ii) National Wealth. (iii) Bank balance etc.	Examples of flow during a quarter, (i) Water flow in a stream. (ii) National Income. (iii) Loan instalments paid

B MEC and MEI

Marginal Efficency of Capital(MEC)	Marginal Efficiency of Investment(MEI)
1)MEC is based on a given supply price for capital.	1)MEI is based on the induced change in the price due to change in the demand for capital.
2)MEC represents the rate of return on all successive units of capital without regard to existing capital.	2)MEI shows the rate of return on just those units of capital over and above the existing capital stock.
3)In MEC the capital stock is taken on the horizontal axis of diagram.	3)In MEI the amount of investment is taken on the horizontal axis of diagram.
4)The MEC is a "stock" concept.	4)The MEI is a "flow" concept.
5)The MEC determines the optimum capital stock in an economy at each level of interest rate .	5)The MEI determines the net investment of the economy at each interest rate given the capital stock .

Ques 5 What do you mean by Equilibrium and Disequilibrium of Balance of Payment? How Disequilibrium of Balance of Payment can be rectified?

Ans **Equilibrium of Balance of Payments:**

"The equilibrium of balance of international payment is a statement that takes into account the debits and credits of a country on international account during a calendar year".

When a country has unfavorable or adverse balance of payments, it is regarded as herald of disaster because the country by having deficit in her balance of payments either decreases her balances abroad or increases her foreign debits. When it has favorable credit balance, it is considered that the country is heading towards prosperity because by having surpluses, it either increases her foreign credits or reduces her foreign debits.

There is no doubt that a study of country's balance of payment reveals much information about its economic position and development of the country. But when we are to see that a country is heading towards financial bankruptcy or higher standard of living, we are to examine the balance of payments of many years of that country.

A persistent deficit in the balance of payments on current account certainly leads to economic and financial bankruptcy. A continued favorable balance on current account is also disadvantageous because it creates difficulties for other countries. The credit country may utilize her surplus in advancing short or long term loans to the debtor country. But if it gives

no opportunity to the debtor country to repay the loan by exporting more, then how can the loans he realized?

The hard earned surplus of the credit country will then one day be turned into gifts and this may create political difficulties for the creditor country. So a country should neither have unfavorable nor favorable balance of payment on current account in perpetuity. It must obtain equilibrium in her balance of payments over a reasonable period of time. From this it may not be concluded that a country should balance her account every year with every country with which it has trade relations.

A country may have favorable balance of payment with one country and unfavorable with another but in the long run it must balance her account. The total liabilities and total assets of all nations related to one currency block must balance over a reasonable period of time.

Causes of Disequilibrium in the Balance of Payment:

Balance of international payment is a summary account of total debits and credits of a country during a year. It includes both visible and invisible trading terms, i.e., merchandize imported and exported, interest on dividend received and paid, payments and receipts of transport services, commission, insurance, brokerage, etc., received and paid money lent abroad or borrowed, movement of gold, etc., etc.

Disequilibrium in the balance of payments can arise due to persistently one sided movement of one or more than one trading terms. If, for instance, the total value of goods exported exceeds the total value of the goods imported over a given period and this surplus is not offset by the debit balance on invisible item, the country will have favorable balance of payments. Disequilibrium in the balance arises when exports of a country fall short of imports because of decrease in production at home, due to stiffer competition abroad or of an appreciation in the currency or fall of purchasing power of the buyers in the foreign market.

When the imports remain unaffected or increase, then the country will also face deficit in her balance on invisible items, the country will have disequilibrium in her balance of payments. Disequilibrium in her balance of payments can also arise over a given period due to excessive imports not equalized by exports of invisible items and if it is not offset by credit balance on visible items, the country will face disequilibrium in her balance of payments.

The main methods adopted to cover a deficit in balance of payments of a country are as follows:

(i) Rectifying the Balance of Trade: One of the major items which can adversely affect the balance of payments of a country is the excess of imports over exports. In case of a deficit in the balance of payments, a country must try to stimulate exports or discourage imports or do both. The exports can be encouraged by bringing down the level of costs in the country, of by granting bounties or by giving concessions to industrialists and exporters. Imports can be restricted either by adopting quota system or by imposing duties or by reducing people's disposable income or by higher taxation or by a reduced government expenditure or by total prohibitions, etc.

(ii) Deflation: Deflation is another important weapon which is used to correct the unfavorable balance of payments. The currency authority may try to lower the prices by reducing the quantity of money in circulation. If the country succeeds in bringing down the prices, it then becomes a good market to buy from and a bad market to sell in. Exports are encouraged, and imports fall and thus the deficit gap is greatly reduced. This method when adopted is full of dangers. If by contracting supply of money, the prices are lowered, the rigid costs may not be brought down. Labor may oppose tire reduction in the wages. This can lead to depression and unemployment in the country which may prove very dangerous.

(iii) Devaluation: Devaluation is a remedy which is applied only in times of extreme crisis to correct the adverse balance of payments. Devaluation means the lowering of the exchange rate. This method like devaluation is adopted to cheapen exports and make imports dearer.

Devaluation, thus, raises exports and lowers imports. England devalued the value of pound from 4.03 dollars to 2.80 dollars, i.e. by 30% in September, 1949 to correct disequilibrium in her balance of payments. Pakistan first devalued its currency in 1955. The advantage with this method is that there is no need to reduce the money wages and the object is achieved. The disadvantage is that it shakes the people's confidence in home currency.

(iv) Exchange Control: Exchange control is a very effective and useful method for correcting adverse balance of payments. Under this system, the government enforces a complete monopoly of buying and selling of foreign exchange in the foreign exchange market. The exporters are required to surrender their foreign exchange at fixed rates to the central bank. The central bank then rations out this foreign exchange among the licensed importers of essential commodities only. When imports are restricted to the available foreign exchange, the problem of adverse balance of payments is then greatly solved.

(v) International Monetary Fund: Deficit in the balance of payments can also be covered by obtaining assistance from International Monetary Fund. The IMF, which began its operation in March, 1941, helps member countries in maintaining equilibrium in the balance of payments. The International Monetary Fund has proved very helpful in promoting exchange stability and facilitating the settlement of international transactions.

UNIT 2

Ques 1.What are the different causes of Poverty in India

Ans The different causes of Poverty in India are-.

i**. Colonial Exploitation:**

Colonial rule in India is the main reason of poverty and backwardness in India. The Mughal era ended about 1800. The Indian economy was purposely and severely de-industrialized

through colonial privatizations. British rule replaced the wasteful warlord aristocracy by a bureaucratic-military establishment. However, colonial exploitation caused backwardness in India. In 1830, India accounted for 17.6 per cent of global industrial production against Britain's 9.5 per cent, but, by 1900, India's share was down to 1.7 per cent against Britain's 18.5 per cent. This view claims that British policies in India, exacerbated by the weather conditions led to mass famines, roughly 30 to 60 million deaths from starvation in the Indian colonies. Community grain banks were forcibly disabled, land was converted from food crops for local consumption to cotton, opium, tea, and grain for export, largely for animal feed.

ii. Lack of Investment for the Poor:

There is lack of investment for the development of poorer section of the society. Over the past 60 years, India decided to focus on creating world class educational institutions for the elite,whilst neglecting basic literacy for the majority. This has denied the illiterate population - 33 per cent of India - of even the possibility of escaping poverty. There is no focus on creating permanent income-generating assets for the poor Studies on China (2004) also indicated that since universal and free healthcare was discontinued in 198 1, approximately 45 million (5 per cent of its 900 million rural population) took on healthcare-related debts that they could not repay in their lifetimes. Since then, the government has reintroduced universal health care for the population. Given India's greater reliance on private healthcare spending, healthcare costs are a significant contributor to poverty in India.

iii. Social System in India :

The social system is another cause of poverty in India. The social subsystems are so strongly interlocked that the poor are incapable of overcoming the obstacles. A disproportionally large number of poor people are lower caste Hindus. According to S. M. Michael, Dalits constitute the bulk of poor and unemployed. Many see Hinduism and its structure, called the caste system, as a system of exploitation of poor, low ranking groups by more prosperous, high ranking groups.

iv. India's Economic Policies:

In 1947, the average annual income in India was US$439, compared with US619 for China, US$770 for South Korea. But South Korea became a developed country by the 2000s. At the same time, India was left as one of the world's poorest countries. India had the Hindu rate of growth which stagnated at around 3.5 per cent from the 1950s to the 1980s, while per capita income averaged 1.3 per cent License Raj prevailed with elaborate licenses, regulations and accompanying red tape. Corruption flourished under this system. The bureaucracy often led to absurd restrictions. India had started out in the 1950s with: high growth rates, openness to trade and investment, a promotional state, social expenditure awareness, and macro stability but we ended the 1980s with: low growth rates (the Hindu rate of growth), closure to trade and investment, a license-obsessed, restrictive state (License Raj), inability to sustain social expenditures and macro instability, indeed crisis. Poverty has decreased significantly since reforms were started in the 1980s. India currently adds 40 million people to its middle class every year. An estimated 300 million Indians now belong to the middle class; one-third of them have emerged from poverty in the last ten years. At the current rate of growth, a majority of Indians will be middle class by 2025. Literacy rates have risen from 52 per cent to 65 per cent in the same period.

v. Over-reliance on Agriculture:

In India there is high level of dependence on primitive methods of agriculture. There is a surplus of labour in agriculture. Farmers are a large vote bank and use their votes to resist reallocation of land for higher-income industrial projects. While services and industry have grown at double digit figures, the agriculture growth rate has dropped from 4.8 per cent to 2 per cent. About 60 per cent of the population depends on agriculture, whereas the contribution of agriculture to the GDP is about 18 per cent. The agricultural sector has remained very unproductive. There is no modernization of agriculture despite some mechanization in some regions of India.

vi. Heavy population pressures: Although demographers generally agree that high population growth rate is a symptom rather than cause of poverty and add to poverty. Mohmood Mamdani aptly remarked "people are not poor because they have large families.

Quite the contrary, they have large families because they are poor". However this is a general argument in developing country that population growth is a major obstacle to development and cause ofpoverty.

vii. High Illiteracy:

Indian literacy rate rose almost tenfold during the British era. In 1947, India's literacy rate matched China's. However, in 2007, China reported at 9 1 per cent literacy rate versus 66 per cent for India. Now India suffers from about 35 per cent illiteracy among the adult population.

viii. High Unemployment:

There is high degree of underutilization of resources. The whole country suffers from a high degree of unemployment. India is marching with jobless economic growth. Employment is not growing, neither in the private sector, nor in the public sector. The IT sector has become elitist, which does not improve the poverty situation in the country. Disguised unemployment and seasonal unemployment is very high in the agricultural sector of India. It is the main cause of rural poverty in India.

ix. Lack of Entrepreneurship:

The industrial base of India has remained very slender. The industrial sickness is very widespread. The whole industrial sector suffers from capital deficiency and lack of entrepreneurial spirit.

Ques2 How Poverty can be eradicated? Describe different schemes introduced by the Govt of India in this regard

Ans There are different measures for tackling poverty is discussed below.

i. Increase in Saving :

In order to get rid of the supply side vicious circle in these countries, efforts should be made to increase savings so that investment in productive channels may be encouraged. To increase saving, expenditure on marriages, social ceremonies, etc., should be curtailed. In under developed countries, the possibility of voluntary savings is slim. Thus, in this regard, government interference is necessm. The government can increase saving, by altering its fiscal policy. The government can impose heavy taxes on luxury goods. Moreover, it can increase the role of direct taxes. Thus, the government can curtail consumption by altering the tax system.

ii. Increase in Investment :

The vicious circle of poverty, apart from increasing savings, investment of saving in productive channels is also of immense use. The policies of short run and long run investment should be coordinated. By short period investment, people can get the necessary goods at fair rates, which will have a favourable impact on their skill. Moreover, along with short period investment, investment in the establishment of multipurpose projects, like iron and chemical fertilizers should be properly encouraged. In UDCs, proper monetary and banking policies should be adopted which may provide facilities and encouragement to small savings.

iii. Balanced Growth :

To resolve the demand side vicious circle in under developed countries, the extent of the market should be widened so that people may get inducement to invest. In this regard, Prof. Nurkse advocated the doctrine of balanced growth. According to the principle of balanced growth, investment should be made in every sphere of an economy so that demand of one sector can be fulfilled by another sector. Thus, an increase in demand will lead to wider extent of the market, and so, the inducement to invest. On the other hand, economists like Hirschman, Singer, and Fleming do not consider the policy of balanced growth effective. According to them, the policy of unbalanced growth would be more useful. In UDCs, there is every possibility of increase in demand and there is the need of increase in monetary income.

The majority of UDCs have adopted the policy of planned development. Accordingly, due to more investment in the public sector, the supply of money increases. Due to increase in monetary income, sizes of the market widen. These countries endeavour to widen the size of foreign market by increasing their exports.

iv. Human Capital Formation :

In underdeveloped countries, the main obstacle to economic growth is the backwardness of human capital. Human capital should no longer be neglected. Many suggestions can be made to increase skill of manpower. For instance, in these countries, education, technical knowledge, and vocational training should be enlarged. Health facilities should be enhanced, which may increase the efficiency of the workers. Transportation and communication should be developed.

v. Industrialisation :

Poverty can be eradicated by a self-sustaining process of industrialization. All industries should have llnkage to build a powerful process of ancilary industries and occupations. The percolation effect of industries can be linked to agricultural growth. Agro-based industries should grow to provide employment to village people as they are very much labour intensive. Industrialisation can contribute to the growth process and bring improvement in the standard of living of people.

Other Measures for Poverty Reduction

i More employment opportunities : poverty can be eliminated by creating more employment opportunities, so that people may be able to meet their basis needs

ii Minimum needs programmes: providing minimum needs to the poor people can help to reduce the problem of poverty.

Iii Social security programmes: various social security schemes, like worker's compensation, maternity benefit. provident fund, etc., can make a frontal attack on poverty

iv. Small scale industries: encouraging and establishing small scale industries can create jobs in rural areas, which can reduce poverty

v. Spread of education: education can create awareness and build confidence among people to find methods to overcome poverty

vi Empowerment of poor: poor people are voiceless due to the ruthless system of development. So, empowerment of poor people will reduce poverty

vii. Land reforms: land belongs to the absentee landlords in India. Therefore, land reform is needed for giving rights to the actual tiller of the soil

viii Asset creation: productive assets must be created which will ensure regular income for the poor people

ix. Political will: political will and thrust is needed to face the challenge of poverty.Government policy should be designed with determination for having apovertyfiee country

PLANNED EFFORTS FOR ALLEVIATION OF POVERTY IN INDIA -

Since the early 1950s, the government of India has initiated, sustained, and refmed various planning schemes to help the poor attain self sufficiency in acquisition of food and overcome hunger and poverty. Probably the most important initiative has been the supply ofbasic commodities, particularly food at controlled prices, available throughout the country as the poor spend about 80 per cent of their income on food.

During different Five Year Plans, the Government of India has adopted several strategies and devised several schemes to remove poverty in India. The following are some steps.

IRDP: the Integrated Rural Development Programme was initiated in 1 976 in 20 selected districts of India. Then, it was extended to all blocks in 1980.The objective of this program

was to enable the selected families to cross the poverty line by creating productive assets for the poor people.

NREP: the National Rural Employment Programme was launched in 1980 in order to generate gainful employment in rural areas.

RLEGP: the Rural Landless Employment Guarantee Programme was launched in August 1983 to generate additional employment opportunities for the landless people in the villages.

JRY: Jawahar Rojgar Yojana was introduced in 1989 to create 837 million man-days in the country.

TRYSEM: Training of Rural Youth for Self Employment was launched in 1979 with the aim of generating self employment opportunities for unemployed educated rural youth.

DWC: Development of Women and Children was launched during the Sixth Plan on a pilot basis in 50 districts, and continued in 71h plan.

DPAP: the Drought Prone Area Programme was started in 1970 for drought areas with a view to create jobs through labour intensive schemes.

DDP: the Desert Development Programme was started in 1977 to control the expansion of deserts and raise local productivity of desert areas.

MNP: the MinimumNeeds Programme was introduced in the Fifth Plan, in order to achieve growth with justice.

PMRY the Prime Ministers Rozgar Yojana was implemented in 1993 to give employment to more than 10 lakh people by setting up 7 lakh micro enterprises.

SGSY Swarna Jayanti Gram Swarozgar Yojana, created in 1999, is a combination of many previous poverty eradication programmes, like IRDP, **TRY SEM,** Minimum Wells Programme, and D WCRA.

PMIUPEP: the Prime Ministers Integrated Urban Poverty Eradication Programme was implemented in 1995 to reduce urban poverty.

EGS: the Employment Guarantee Scheme was launched in many states to provide employment for poor people.

SJRY: Swama .Tyanti Rozgar Yojana was launched in 1997 for the urban poor.

JGSY Jawahar Gram Samridhi Yojana is the new name of Jawahar Rozgar Yojana with effect fi-om 1999.

PMGY Pradhan Mantri Grarnodaya Yojana.

PMGSY Pradhan Mantri Grama Sadak Yojana.

AAY Antyodaya Anna Yoj ma.

JPRGY: Jai Prakash Rozgar Guarantee Yojana.

DWCRA: Development of Women and Children in Rural Areas.

MGNREGA: This was implemented since 2002 for providing 100 days employment in a calendar year to a family member interested for doing unskilled manual work.

Ques 3 Define Unemployment. Also explain its types

Ans Unemployment is defined as the condition of being unemployed, or, it refers to the number or proportion of people in the working population who are unemployed (have no jobs). An unemployed person is one who is an active member of the labour force and is able to and seeks work, but is unable to find work during a specified reference period (a week or a month or a year).

Broadly, unemployment can be divided into two types: voluntary, and involuntary, unemployment. Voluntary unemployment arises due to reasons that are specific to an individual, while involuntary unemployment is caused by a large number of socio-economic factors such as structure of the market, level and composition of aggregate demand, government intervention, and so on. Thus, there Unemployment are different kinds of unemployment depending on the nature, causes, and duration of unemployment.

1. Structural unemployment:

This kind of unemployment occurs when there is any change in consumer demand and technology in the economy. For instance, when computers were introduced, many workers were dislodged because of a mismatch between the existing skills of the workers and the requirement of the job. Although jobs were available, there was a demand for a new kind of skill and qualification. So, persons with old skills did not get employment in the changed economic regime, and remain unemployed. This is called structural unemployment.

2. Cyclical unemployment:

When there is an economy-wide decline in aggregate demand for goods and services, employment declines and unemployment correspondingly increases. Therefore, it is sometime referred to as 'demand deficient unemployment'. For instance, during the recent global slowdown, in late 2008, many workers around the globe lost their jobs.

3. Frictional unemployment:

This type of unemployment refers to a transition period of looking for a new job, for different reasons, such as seeking a better job, being fired from a current job, or having voluntarily quit a current job. The period of time between the current to a new job is referred to as frictional, or temporary unemployment.

4.Seasonal unemployment, a type of frictional unemployment, occurs in specific activities or occupations which are characterized by seasonal work. An example of seasonal unemployment is the joblessness during non-cultivation in rural areas.

5. Open unemployment:

Open unemployment arises when a person, voluntarily or involuntarily, keeps himself or herself out of consideration for certain jobs.

The type and nature of unemployment differs significantly in developing and developed countries. Unemployment in developed countries arises due to the lack of effective demand and/or economic slowdown, recession, or depression. In developing countries, unemployment occurs largely due to a lower demand for labour and/or inadequate employment opportunities in the economy. Such a situation occurs due to the subsistence nature of agriculture, a low industrial base and the small size of the tertiary sector. Let us now discuss the various concepts of unemployment applicable to developing nations, including India.

All developing countries, including India suffer from structural unemployment, which exists both in open and disguised forms. The problem in developing countries can better be summarized as underemployment - a partial lack of work, low employment income, and underutilization of skills or low productivity. rather than unemployment as discussed above. Thus, underemployment describes the condition of those who work part time because fill time jobs are unavailable or employed on a full time basis but the services they render may actually be much less than full time (disguised underemployment) or who are employed in occupations requiring lower levels of skills than they are qualified for (hidden underemployment). Arelated concept is that ofworking poor - those who actually work long hours but earn only a low income below the poverty line. In other words, working poor is defined as a situation when individuals or households, in spite ofbeing employed, remain in relative poverty due to low levels of wages and earnings.

Ques 4 Explain Vicious cycle/circle of Poverty

Ans The vicious circle of poverty refers to the interconnectedness of different factors that reinforce each other for generating poverty. They are poor because they are too many. They are too many because they are poor. According to Nurkse and Kindleberger the reasons for this vicious circle of poverty can be classified into three groups.

1. Supply side factors
2. Demand side factors
3. Market imperfection.

1 Supply Side Factors

The supply side of the vicious circle indicates that in underdeveloped countries, productivity is so low that it is not enough for capital formation. According to Samuelson, "The backward nations cannot get their heads above water because their production is so low that they can spare nothing for capital formation by which their standard of living could be raised." According to Nurkse on the supply side there is small capacity to save, resulting from low level of national income. The low real income is the result of low productivity, which in turn, is largely due to the lack of capital. The lack of capital is a result of the small capacity to save, and so, the circle is vicious.

Low Income
- **Low Saving**
- **Low Investment**
- **Low Production**
- **Low Income**

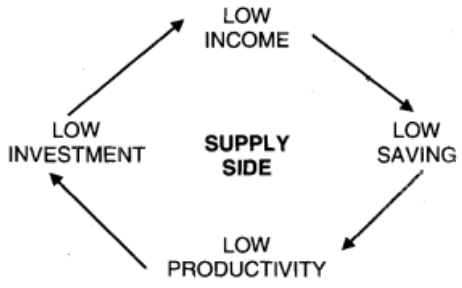


Figure 2.2 : Low Supply

Figure 2.2: Low Supply

Thus, it becomes clear from the above diagram that the main reason of poverty is the low level of saving. Consequently, investment is not possible in production channels. A huge chunk of GDP is used for consumption purposes. People cannot save. So, there is lack of investment and capital formation. Although rich people can save, they spend their surplus in some on luxurious goods instead of saving. They gave preference to high priced items and foreign products. Thus, their demand does not enlarge the size of the market. The developing countries, therefore, lack investment facilities.

2 Demand Side Factors

According to Nurkse, poverty is caused by several factors in the demand side. In underdeveloped countries the inducement to invest is low because of the low purchasing power of the people, which is due to their small real income. It is illustrated in the following diagram.

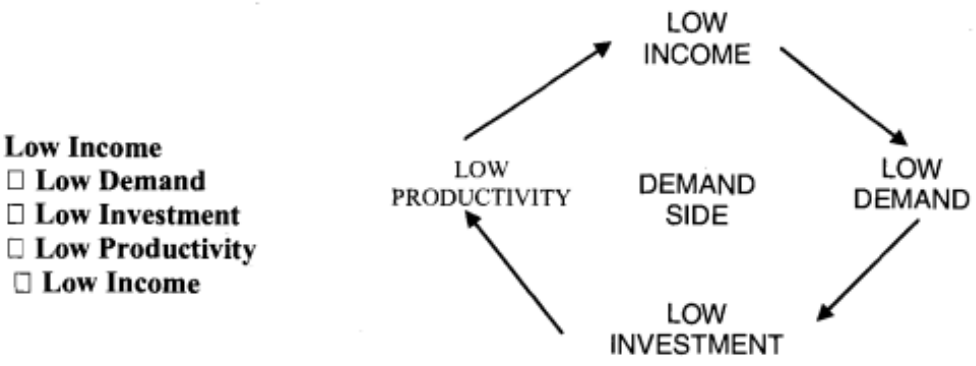


Figure 2.3 : Low Demand

Figure 2.3: Low Demand

The main reason for poverty in these countries is the low level of demand. Consequently, the sizes of markets remain low. The small size of the market becomes a hurdle in the path of inducement to invest.

3 Market Imperfections

According to Meier and Baldwin, the existence of market imperfections prevents optimum allocation and utilization of natural resources, and the result is underdevelopment, and this, in turn, leads to poverty. The development of natural resources depends upon the character of human resources. But due to lack of skill and low level of knowledge, natural resources remain unutilized, underutilised and misused.

Ques 5 Explain Lorenz Curve and GINI-Coefficient (Related to Poverty)

Ans Lorenz Curve

An American statistician Conard Lorenz (1905) used a diagram to show the relationship between the population groups and their respective shares. The same diagram (Lorenz Curve) is used to show the relative inequality in the distribution of income at the world level. Whereas the GINI-Coefficient is a measure of relative poverty, and it is used to measure the distribution of wealth at the world level.

Explanation with Diagram and Example:

Figure 1, on the horizontal axis the numbers of income recipients are plotted, not in absolute terms but in cumulative percentages. For example, at point B we have the lowest (poorest) 20% of the population; at point F there is bottom 60% population; and at the end of the axis there is all 100% of the population which are the recipients of income. The vertical axis, as shown below:

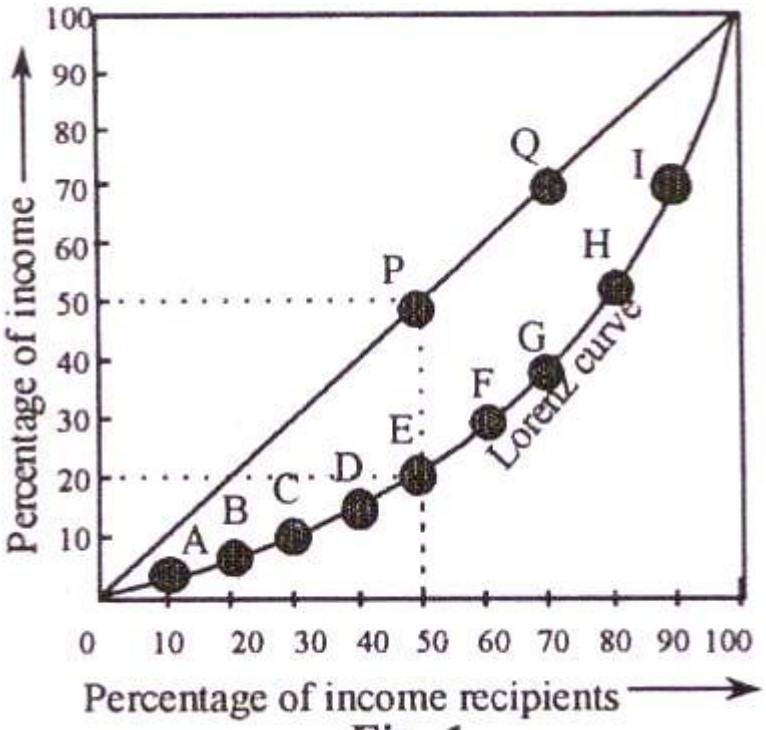


Fig. 1

The share of total income that is earned or received by each % of population. It is also cumulative up to 100% so that both axis are equally long and the entire figure is then enclosed in a square. A diagonal line is drawn from the left hand corner (the origin of the square to the upper right hand corner). At every point on this diagonal the percentage of income received is exactly equal to the percentage of income recipients. For example, the point "P" on this diagonal which is half way along the length of the diagonal, represents 50% of the income being distributed to exactly 50% of the population. While point "Q" (the three quarter point) shows that 75% of the income is going over to the 75% of the population. Thus, this diagonal line is the representative of perfect equality in respect of distribution of income. Each percentage group of income recipients is receiving that same percentage the total income. As the bottom 40% receives 40% of income, while the top 5% receive only 5% of the total income.

Whereas the Lorenz Curve shows the quantitative relationship between the percentage of income recipients and the percentage of the total income which they actually received, say during a year. The horizontal and vertical axis have been divided into ten equal segments

corresponding to each of the 10 deciles groups. Point A (in the Fig. 1) show that 10% of the population receives only 1.8% of total income. Point B shows that the bottom 20% is receiving 5% of income and 80% of the population is receiving 48% of the income.

The more the Lorenz curves away from the diagonal (perfect equality), the greater will be the inequality. The extreme case of perfect inequality is a situation where one person receives all the national income, while everybody else receives nothing.

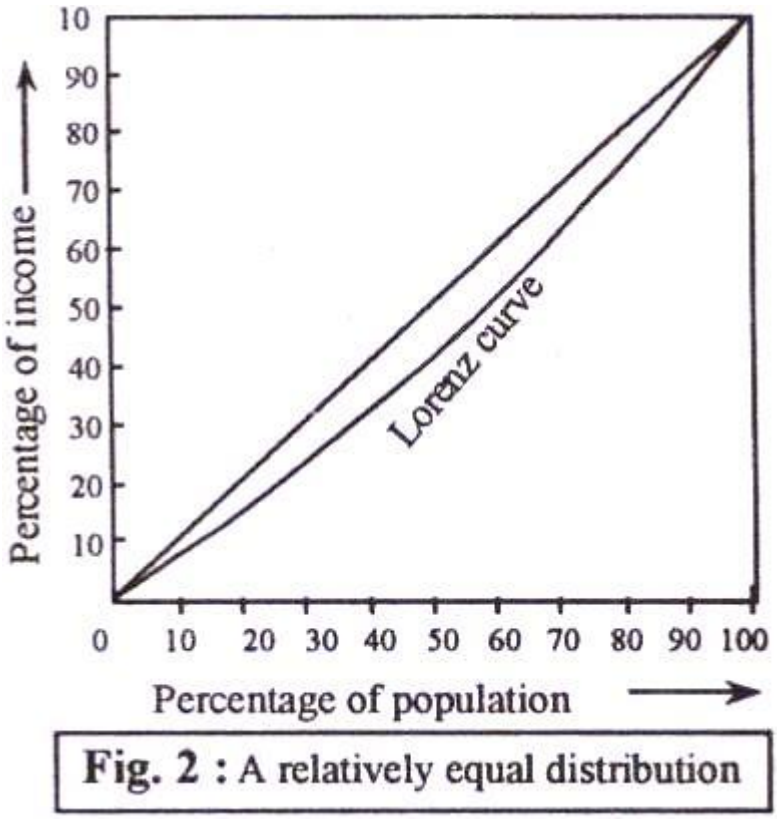


Fig. 2 : A relatively equal distribution

In Fig. 2, we have Lorenz Curve which shows relatively greater equality in the distribution of income. In such case the Lorenz Curve is away from horizontal axis.

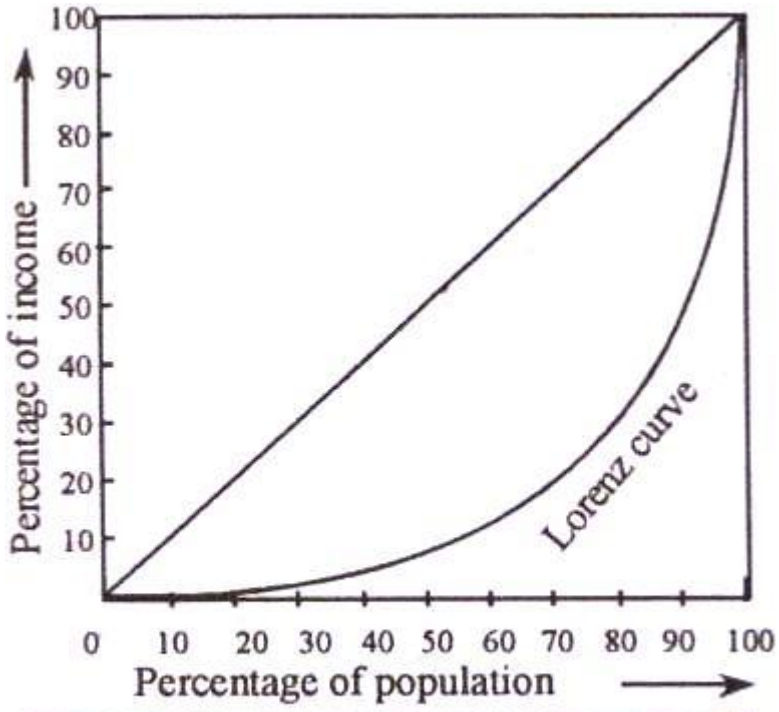


Fig. 3: A relatively unequal distribution

While in Fig. 3, we have Lorenz Curve which has greater curvature and it is closer to the bottom horizontal axis shows greater inequality in the distribution of income. The Gini-Co-efficient is employed to measure the aggregate inequality.

Degree of Inequality in a Country:

The degree of inequality in a country can be obtained by calculating the ratio of the "area between the diagonal and the Lorenz Curve as compared to the total, area of the half square in which the curve lies".

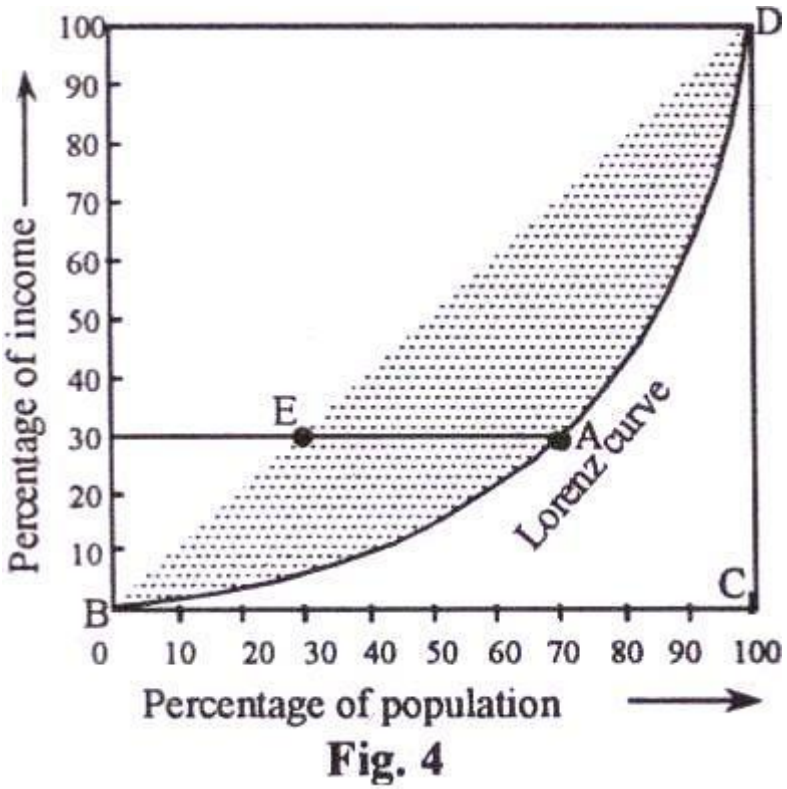


Fig. 4

Thus in Fig. 4:

"The ratio of the shaded area EA to the total area of the triangle BCD".

This ratio is known as, GINI-Concentration Ratio or GINI-Coefficient. This ratio is attributed to Italian statistician C. Gini who formulated it in 1912. The Gini-Coefficients are aggregate inequality measures and they can vary any where from zero to one. When the value of such ratio is zero, it represents perfect equality regarding the distribution of income. On the other extreme, if the value of this ratio is 1 it shows perfect inequality. The countries which are furnished with unequal income distributions the value of such ratio ranges in between 0.5 and 0.7. On the other hand, the countries having relative equality in their distributions of income the value of such coefficient ranges in between 0.2 to 0.35.

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UNIT 3

Ques1 What do you mean by Deficit financing?

Ans Deficit financing refers to means of financing the deliberate excess of expenditure over income through printing of currency notes or through borrowings. The term is also generally used to refer to the financing of a planned deficit whether operated by a government in its domestic affairs or with reference to balance of payment deficit.

Deficit financing is the budgetary situation where expenditure is higher than the revenue. It is a practice adopted for financing the excess expenditure with outside resources. The expenditure revenue gap is financed by either printing of currency or through borrowing.

Advantages

Firstly Deficit financing is inflationary and it destroys its own purpose of aiding economic development. But it is not always so.

Secondly inflation not always harmful for economic development. On the contrary, to a certain extent inflation is conducive to economic development and hence deficit financing is beneficial. During the process of development, increase in national production is bound to give rise to the demand for increased money supply for transactions. This can be met by injecting new money in the economy through deficit financing. If deficit financing is resorted to for productive purposes especially for the production of consumer goods and that too for quick results then deficit financing is not that inflationary.

For example, if any land reclamation activity is to be undertaken which would lead to agricultural production, resort to deficit financing for this activity will not be inflationary. Even if there is a moderate price increase of 4 to 5% per annum, its impact on the economy will not be too severe. Besides, deficit financing will not be inflationary if it is matched by a balance of payment deficit. To the extent to which past savings of foreign balances can be used to pay for such imports, it would be deflationary. But much reliance cannot be put on balance of payments deficit because balance of payments deficit depends on our foreign exchange reserves and our credlt worthiness in the world market. Moreover, a developing country aims at reducing this deficit by increasing exports and reducing imports.

Deficit financing will be non-inflationary if the government is able to mop up the additional money incomes, created by deficit financing, through taxation and saving schemes. Properly controlled and efficiently managed programme of deficit financing may help the process of

economic development. In fact a certain measure of deficit financing is inevitable under planned economic development to activate unutilised or dormant resources especially when one of the objectives of planning is to step up the Inflationary impact of deficit financing is helpful for economic development to a certain extent and under certain circumstances like :

a) Under developed countries, with their low incomes, low or negative savings, inadequate investment and traditional resistance to change and modernisation, it will remain stagnant or develop at an intolerably slow pace unless they are restructured and activised. This can be done with the stimulus of inflation.

b) Inflation stimulates economic activities and rising prices induce more investments. In a developing economy the major goal is rapid economic development through speedy capital formation. The additional income that is earned through inflation can be ploughed back and if the same process is repeated there is every possibility of a rapid rate of capital formation in the country. For this, inflation may be tolerated to a certain extent.

c) Inflation is said to be a useful method of increasing saving in a forced way. There will be redistribution within the private sector of the economy, from the personal sector to corporate sector. Inflation reduces real consumption and provides resources for investment purposes.

Thus, deficit financing is a necessary and positive instrument to accelerate the rate of economic growth in countries suffering from acute shortage of capital. But any deficit financing has to be undertaken in the context of an efficient and well executed plan for economic development.

Controlling

Besides open deficit financing undertaken by the goyernment, there is concealed deficit financing in developing economies. In all government departments, in a developing country most of the expenditure is incurred recklessly in the last few weeks of the financial year so that the amount sanctioned may not lapse. This reckless expenditure is largely a waste and is not accompanied by expected results. This expenditure is fairly large every year. It is not productive and it leads to price rise and operates in the economy in a manner similar to deficit financing. Most of the havoc created in the economy is actually created by this concealed deficit financing. If, by efficient and honest administratithi, this vast wasteful expenditure can be avoided, the officially acknowledged deficit financing will not be so inflationary.

Anti-social acts such as evasion of taxes, black marketing, cash transactions to supplement recorded cheque transactions, under invoicing and over invoicing of export and imports, and a variety of such forms of corruption on the part of the private parties lead to large volume of 'unaccounted money'. This money is to be spent recklessly and it leads to inflationary rise in prices. Government must try to remove reckless expenditure in public and private sectors caused by 'concealed deficit financing' and 'unrecorded gains' instead of stopping the use of deficit financing which is likely to be spent productively and therefore help in the economic development of the country.

In order to minimise the inflationary effects of deficit financing during the process of Resource .Mobilisation development the government will have to keep a vigilant and constant watch on changing economic situations, study the repercussions of measures adopted in several spheres and, above all, take effective action on following lines :

a) Government should try to drain off a larger proportion of funds resulting from deficit financing through saving campaign and higher taxation.

b) The policy of deficit financing should be adopted as a last resort, after exhausting all other possible sources of development finance.

c) Investment should be channelled into those areas where capital output ratio is low so that returns are quick and price rise is not provoked.

d) Along with deficit financing, government should adopt policies of physical controls like price control and rationing etc.

e) Import policy should allow import of necessary capital equipment for economic development and consumer goods required by the masses alone. Import of luxury and semi-luxury goods should be discouraged.

f) Deficit financing and credit creation policies should be integrated in such a way that neither of the two sectors (public or private) is handicapped due to shortage of financial resources and, at the same time, inflation is also kept in check in the economy.

Above all these policies, what is more required is that the government should try to seek full public cooperation and people should have full faith in the policies of the government so that government policies can be successfully implemented.

Deficit financing or no deficit financing, the process of economic development itself is inflationary. Whenever new investment is financed by taxation or borrowing, the result is an increase in monetary incomes, increase in demand for consumption goods, and price rise. With this background the important question, in a developing country, is not whether deficit financing should be resorted to or not for economic development, but, rather, how far inflation can be pushed without upsetting the productive process. Thus deficit financing is a necessary and positive instrument to accelerate the rate of economic growth in countries suffering from acute shortage of the capital, though it is necessary to emphasise here that it must be undertaken with an efficient and well executed plan for economic development.

Ques 2 Explain Fiscal policy and its objectives

Ans Fiscal policy is concerned with raising and spending financial resources and public debt operations to influence the economic activities of the community in desired ways. It is also concerned with the allocation of resources between the public and private sectors and their use in accordance with national objectives and priorities. It aims at using its three major instruments-taxes, public expenditure and public debt-as balancing factors in the development of the economy.

The important objectives of fiscal policy include:

i) To increase the rate of capital formation

In order to promote and sustain economic development, the rate of capital formation has to be much higher than that prevailing in most of the underdeveloped countries. A high rate of economic growth, sustained over a long period is an essential condition for achieving a rising level of living. Since an increase in the rate of growth does not come about automatically, the main objective of fiscal policy is to allocate more resources for investment and to restrain consumption.

ii) Reduction in economic inequalities of income and wealth

A major contribution of fiscal policy consists in minimising the adverse distributional impact of government policies. For instance, in a developing country like India, the need for alleviation of poverty is self-evident. There is, however, yet no evidence that the process of economic development has had any positive economic impact on the impoverished classes.

Mobilisation of resources for financing the anti-poverty programmes, such as Integrated Rural Development Programme, Jawahar Rozgar Yojana, employment guarantee schemes, etc., is an important objective of fiscal policy in India. In any case, in a democratic society political realities would not permit a further widening of the distribution patterns than at present. Either by itself, or in conjunction with other measures of social and economic reforms, the current fiscal policy has considerable potential for reducing inequalities of income. CumuIative inequalities may take time to melt away.

iii) Balanced growth

A primary feature of the economic scenario in developing countries is their excessive dependence on agriculture rather than on industries and other non-agricultural occupations. The process of economic development gives rise to a greater variety of economic occupations, lesser dependence on land, and the need to provide employment to additional labour which results from mounting population pressure. Balanced development not only across income groups, but also across regions in the country can be achieved through appropriate fiscal policy instruments. Another kind of balance is that between the public sector and the private sector. There is no such thing as a pure market economy or a total centrally planned economy. Once the appropriate mix and the economic role of the state have been decided on, fiscal policy instruments are pressed into service to bring about the desired policy changes.

iv) Economic and social overheads

Fiscal policy has to be so formulated that adequate resources are available to the government for funding social expenditure which benefit the poor. Heavy investments have to be made in infrastructure for sustaining growth in agriculture and industry. The development of transport and communication, water management and irrigation projects, large scale investments in health and education, cannot be left to the private sector. Such investments are heavy and generally beyond the capacity of the private sector. Private sector is generally interested in projects with adequate and quick returns. The government, therefore, has to have a fiscal policy which will allow such investments in social overheads. Such investment will allow private capital to come in and by raising the productive capacity and production, the government can generate profits.

v) Control of inflation

There are various causes of inflation. There can be too much money in the hands of people and two few goods and services available for buying. An increase in government expenditure results in an increase in payment of salaries, wages, purchase of goods and services. This puts more income in the hands of the people. An increase in wages of industrial workers also increases money income. Wages also constitute costs of inputs. If costs go up, so do prices. This is cost-push inflation. Thus inflation results either because there is too much demand (because of increased purchasing power) for too few goods or because the costs of inputs having gone up the prices rise. An appropriate fiscal policy can help in controlling inflation. A noninflationary financing of planned development will require a greater reliance on surplus generated by the budget and public sector undertakings and a reduced dependence on borrowed funds.

vi) Progressive tax structure

Taxes and subsidies have direct consequences for the poor to the extent that they bear the burden of taxes or benefits from the subsidies. In a developing country like India, the tax structure relies heavily on indirect taxes. This is not surprising, given the stage of development, low income levels of the majority of the people and the scope for commodity taxes offered by the growth of industry and trade. The government should try to increase the scope of the indirect tax system, both through low tax rates on essential commodities and through subsidised distribution of food grains, edible oils and sugar.

At the same time, an effort has to be made to increase the share of direct taxes in total tax revenue over a period of time, so that the fiscal system as a whole becomes progressive. What matters, however, is not the tax rates on paper, but the actual collections and their incidence. Fiscal policy must, therefore, ensure that taxes, as levied, are fully collected and strong action is taken to curb tax evasion.

Instruments

There are three instruments of fiscal policy.

1.Public Revenue-

Public revenues are the funds of the government to finance it's expenditure. The main sources of revenue are taxes, fees, fines penalties etc. For example, the income tax paid by

our parents, the chalans we pay to traffic police, the house tax, the entertainment tax on our leisure activities are all examples of public revenue.

2.Public Expenditure-

It is expense that the government incurs on the maintenance of the country or for the welfare of the society. For example, expenditure on parks, water works, education and health, defense, law and order, construction work etc are all examples of public expenditure.

3.Public Debt-

Debt means borrowings, therefore, public debt is made by the government when it is unable to meet its expenditure with current revenue.The government can borrow from the public by issuing bonds or take a loan from any international finance institute.This usually happens when public expenditure exceeds public revenue. Debt can be required to pay interest payments on previous loans or to finance new construction projects or to make public welfare schemes etc.

Fiscal policy involves using these three instruments to do the best for the public and still be in a favorable position.

Ques 3 What are the different components of Union Budget

Ans Meaning

"A government budget is an annual financial statement showing item wise estimates of expected revenue and anticipated expenditure during a fiscal year." The government budget is a statement of its income and expenditure. In the beginning of every year, government presents before the Lok Sabha an estimate of its receipts and expenditure for the coming financial year.

The government plans expenditure according to its objectives and then tries to raise resources to meet the proposed expenditure. Government earns money broadly from taxes, fees and fines, interest on loans given to states and dividend by public sector enterprises.

Government spends mainly on

(i) securing and providing goods and services to citizens,

(ii) on law and order and

(iii) internal security, defence, staff salaries, etc.

In India there is constitutional requirement to present budget before Parliament for the ensuing financial year. The financial (fiscal) year starts on April 1 and ends on March 31 of next year. For example, fiscal or budget year 2010-11 is from April 1, 2010 to March 31, 2011. Obviously, the budget is the most important information document of the government because government implements its plans and programmes through the budget.

1. **Revenue Receipts**:

Revenue receipts refer to those receipts which increase usable funds of the government without creating any debt liability. It includes receipts from taxation and other non-tax receipts like registration fees, court fees, fines and penalties surpluses from public enterprises and surpluses from public utilities. Revenue receipts is classified into following types.

a) Tax revenue: It includes proceeds of taxes and other duties imposed by the central government both direct as well as indirect taxes. Income tax, interest tax, wealth tax, corporation tax are the direct taxes which people pay directly to the government. Such taxes are compulsory and cannot be avoided. Customs duties, sale tax, service tax are indirect taxes.

b) Non-Tax revenue:It includes all other receipts. Receipts from registration fees, court fees, fines, penalties, escheat, surplus from public enterprises and public utilities, interest loans, dividends from investment and external grants fall under this category.

2. Capital receipts:

Capital receipts refer to those receipts which increase the usable funds of the government by creating debt obligations or by causing a reduction in the assets of the government. It includes the following items:

a) Borrowing by the government from the public (market borrowings)

b) Borrowing from Reserve Bank of India and other parties through the sale of treasury bills.

c) External borrowing from foreign governments and international organization like world bank, Asian Development Bank etc.

d) Recoveries of loans from states and union territories.

e) Small savings and public provident fund (PPF)

f) Other receipts like proceeds from disinvestments is always included in capital receipts. Because it leads to a reduction in assets of the government.

3. **Revenue Expenditure:**

Revenue expenditure refers to those items of current expenditure which reduce the usable funds of the government without reducing any debt liability. Such expenditure does not result in creation of assets. Revenue expenditure is incurred towards purposes like running of government departments, provision of various services, interest payments on government loans, subsidies etc.

4.Capital expenditure: Capital expenditure refers to expenditure incurred by the central government on acquisition of assets like land, building, machinery and equipment, investment on shares, loans granted to state and union territories, government companies, corporations etc.

5. Development expenditure: It refers to expenditure incurred by the government on programmes related to the growth and development activities of the government. It includes expenditure on education, health, industry, road, channels, rural developments, water works and power generation etc.

6. Plan expenditure: It refers to expenditure incurred by the government towards its planned development programmes. Both consumption and investment expenditure made by the government will be included under plan expenditure. Expenditure on power communication, industry, agriculture and health are the different types of expenditure falling under plan expenditure.

7. Non development expenditure: It refers to expenditure incurred on the non-development activities of the government. It includes activities like maintenance of law and order, defence, tax collections, payment of interest and loan, payment of old age pension etc.

8. Non plan expenditure: It refers to expenditure made beyond the preview of the plan development activities of the government. It includes expenditure on subsidies, defence, law and order, payment of loan and interest etc.s

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Ques 4 What is difference between Public and private financing?

Ans Public finance, according to the traditional definition of the subject, is that branch of Economics which deals with, the income and expenditure of a government. In the words of Adam Smith:

"The investment into the nature and principles of state expenditure and state revenue is called public finance".

The earlier economists were perfectly justified in giving this definition of the science of public finance because the functions of the public authorities in those days were simply to raise revenue by imposing taxes for covering the cost of administration and defense.

The scope of the science of public finance now-a-days has widened too much. It is due to the fact that modern states have to perform multifarious functions to promote the welfare of its citizens. In addition to maintaining law and order within the country and provision of security from external aggression, it has to perform many economic and commercial functions.

Due to the increased activities of the state, there has taken place a vast increase in the expenditure of the public authorities. The sources of revenue have also increased. Taxes are levied not for raising the revenue alone but are used as an important instrument of economic policy.

Public finance now includes the study of financial administration and control as well. We, therefore, agree with Professor Bastable when he defines public finance as that:

"Branch of economics which deals with income and expenditure of public authorities or the state and their mutual relation as also with the financial administration and control the term public authorities includes ail bodies which help in carrying on the administration of the state)".

The study of public finance is split up into four parts; (1) Public Expenditure (2) Public Revenue, (3) Public Debt and (4) Budgeting etc.

Difference Between Public Finance and Private Finance:

Public finance is different from private finance. Findlay Shiraz in his famous book 'Principles of Public Finance' has listed the following points of difference between government finance and private finance.

(i) Adjustment of Income and expenditure. An individual usually adjusts his expenditure to his income. But the public authority generally adjusts its income to its expenditure. In other words, we can say that an individual cuts his coat according to his cloth. While the public authority first decides the size of the coat and then tries to procure cloth according to the size of its coat. The public authority prepares an estimate of the total expenditure to be incurred during a fiscal year and then devises ways and means to raise the required amount. The individual, on the other hand, tries to live within his own means. His expenditure is generally determined by his income.

(ii) Unit of time. The public authority balances its budget during a given period which is generally a year. For an individual, there is no period of time in the course of which the budget must be balanced. The individual generally continues earning and spending without

keeping any record-of his budget by a particular date. The public authority, however, has to keep full records of its income and expenditure and the accounts are to be in balance during the financial year.

(iii) An Individual cannot borrow from himself. If at any time an individual is in need of money, he cannot borrow from himself. He can raise me loan from other individuals or can utilize his past savings, but he cannot borrow internally. The public authority, on the other hand, can borrow internally from its own people and externally from other nations.

(iv) Issue of currency Government has full control over the issue of currency in the country. No other person except the stale can print notes. If an individual floes so, be will be put behind the bars.

(v) Provision for the future. The government has to make a solid provision for the future. It spends large amounts of money on those projects which the future generation is only to benefit. The individuals, on the other hand, are not generally liberal and far sighted. They discount the future at a higher rate and so usually make inadequate provision for the future.

(vi) Big and deliberate changes in public finance. It, is easier for the government to make big and deliberate changes in its income, and expenditure but for an individual it is a very difficult affair. A few individuals may succeed in increasing their incomes but all the persons cannot do so. The public authority can also make deliberate decrease in its income without feeling any difficulty. But for individuals, reduction in income is very painful as they are used to certain standard of living.

(vii) Surplus budgeting. For an individual, excess of income over expenditure or surplus budgeting is considered to be a virtue but for the public authority it is not as such, it is expected from the government that it should raise only as much revenue as it needs

during a calendar year. After all what is the fun of showing persistently surplus budgets. It is not better to give relief to the tax-payer; than to show surplus budgets?

(viii) Mystery shrouds Individual Finance. Individual's finance is usually shrouded in mystery. Everybody likes that his financial position should 1 remain a closely guarded secret but this is not the case with public authorities. The government publishes its budget and gives due publicity to it.

Ques 5 Explain the objectives of Public debt

Ans In India, public debt refers to a part of the total borrowings by the Union Government which includes such items as market loans, special bearer bonds, treasury bills and special loans and securities issued by the Reserve Bank. It also includes the outstanding external debt.

However, it does not include the following items of borrowings:

(i) small savings,

(ii) provident funds,

(iii) other accounts, reserve funds and deposits.

The aggregate borrowings by the Union Government—comprising the public debt and these other borrowings — are generally known as 'net liabilities of the Government'.

Objectives:

In India, most government debt is held in long-term interest bearing securities such as national savings certificates, rural development bonds, capital development bonds, etc. In industrially advanced countries like the U.S.A., the term government or public debt refers to the accumulated amount of what government has borrowed to finance past deficits.

In such countries the government debt has a very simple relationship to the government deficit the increase in debt over a period (say one year) is equal to its current budgetary deficit. But, in India, the term is used in a different sense.

The State generally borrows from the people to meet three kinds of expenditure:

(a) to meet budget deficit,

(b) to meet the expenses of war and other extraordinary situations and

(c) to finance development activity.

(a) Public Debt to Meet Budget Deficit:

It is not always proper to effect a change in the tax system whenever the public expenditure exceeds the public revenue. It is to be seen whether the transaction is casual or regular. If the budget deficit is casual, then it is proper to raise loans to meet the deficit. But if the deficit happens to be a regular feature every year, then the proper course for the State would be to raise further revenue by taxation or reduce its expenditure.

(b) Public Debt to Meet Emergencies like War:

In many countries, the existing public debt is, to a great extent, on account of war expenses. Especially after World War II, this type of public debt had considerably increased. A large portion of public debt in India has been incurred to defray the expenses of the last war.

(c) Public Debt for Development Purposes:

During British rule in India public debt had to be raised to construct railways, irrigation projects and other works. In the post-independence era, the government borrows from the public to meet the costs of development work under the Five Year Plans and other projects. As a result the volume of public debt is increasing day by day.

The Burden of Public Debt:

When a country borrows money from other countries (or foreigners) an external debt is created. It owes its all to others. When a country borrows money from others it has to pay interest on such debt along with the principal. This payment is to be made in foreign exchange (or in gold). If the debtor nation does not have sufficient stock of foreign exchange (accumulated in the past) it will be forced to export its goods to the creditor nation. To be able to export goods a debtor nation has to generate sufficient exportable surplus by curtailing its domestic consumption.

Thus an external debt reduces society's consumption possibilities since it involves a net subtraction from the resources available to people in the debtor nation to meet their current

consumption needs. In the 1990s, many developing countries such as Poland, Brazil, and Mexico faced severe economic hardships after incurring large external debt. They were forced to curtail domestic consumption to be able to generate export surplus (i.e., export more than they imported) in order to service their external debts, i.e., to pay the interest and principal on their past borrowings.

The burden of external debt is measured by the debt-service ratio which returns to a country's repayment obligations of principal and interest for a particular year on its external debt as a percentage of its exports of goods and services (i.e., its current receipt) in that year. In India it was 24% in 1999. An external debt imposes a burden on society because it represents a reduction in the consumption possibilities of a nation. It causes an inward shift of the society's production possibilities curve.

UNIT 4

Ques 1 Explain New Economic Policy (NEP) of India

Ans New Economic Policy refers to economic liberalisation or relaxation in the import tariffs, deregulation of markets or opening the markets for private and foreign players, and reduction of taxes to expand the economic wings of the country. This is also known as the LPG Model of growth. Former Prime Minister Manmohan Singh is considered to be the father of New Economic Policy (NEP) of India. He introduced the NEP on July 24,1991.

Need of New Economic Policy 1991

a. The independence-era Indian economy (from 1947 to 1991) was based on a mixed economy combining features of capitalism and socialism -Resulting in an inward-looking, and import-substituting economy

b.The Indian currency, the rupee, was inconvertible and high tariffs and import licensing prevented foreign goods reaching the market

c. India also operated a system of central planning for the economy, in which firms required licenses to invest and develop.

d.This model contributed to widespread inefficiencies and corruption, and the failings of this system were due largely to its poor implementation.

Some Other Problems Faced Were

- Economic instability/fiscal deficit.
- Gulf war/crisis
- Shortage of foreign exchange reserves.
- Burden of debt/liquidity crisis (From 1980 to 1991 India's domestic public debt increased steadily, from 36 percent to 56 percent of the GDP, while its external debt more than tripled to $70 billion.)
- Inefficient industrial growth.
- Fall in growth rate.
- Inflationary pressure.
- Poor performance of financial sector

The process of economic reforms was need of the hour and thus was started by the government of India in 1991 for taking the country out of economic difficulty and speeding up the development of the country.

Objectives of New Economic Policy – 1991, July 24

1. The main objective was to plunge Indian Economy in to the arena of 'Globalization.

2. The NEP intended to bring down the rate of inflation

3. It intended to move towards higher economic growth rate and to build sufficient foreign exchange reserves.

4. It wanted to achieve economic stabilization and to convert the economy into a market economy by removing all kinds of un-necessary restrictions.

5. It wanted to permit the international flow of goods, services, capital, human resources and technology, without many restrictions.

6. It wanted to increase the participation of private players in the all sectors of the economy.

Beginning with mid-1991, the govt. has made some radical changes in its policies related to foreign trade, Foreign Direct Investment, exchange rate, industry, fiscal discipline etc. The various elements, when put together, constitute an economic policy which marks a big departure from what has gone before.

The main objective of the New Economic Policy has been towards creating a more competitive environment in the economy as a means to improving the productivity and

efficiency of the system. This was to be achieved by removing the barriers to entry and the restrictions on the growth of firms.

The main characteristics of new Economic Policy 1991 are:

1. Delicencing. Only six industries were kept under Licencing scheme.

2. Entry to Private Sector. The role of public sector was limited only to four industries; rest all the industries were opened for private sector also.

3. Disinvestment. Disinvestment was carried out in many public sector enterprises.

4. Liberalisation of Foreign Policy. The limit of foreign equity was raised to 100% in many activities, i.e., NRI and foreign investors were permitted to invest in Indian companies.

5. Liberalisation in Technical Area. Automatic permission was given to Indian companies for signing technology agreements with foreign companies.

6. Setting up of Foreign Investment Promotion Board (FIPB). This board was set up to promote and bring foreign investment in India.

7. Setting up of Small Scale Industries. Various benefits were offered to small scale industries.

Ques 2 What are the three major Components or Elements of New Economic Policy

Ans There are three major components or elements of new economic policy-

Liberalisation, Privatisation, Globalisation.

1.**LIBERALISATION** refers to end of licence, quota and many more restrictions and controls which were put on industries before 1991.

Indian companies got liberalisation in the following way:

a. Abolition of licence except in few. Previously private sector had to obtain license from Govt. for starting a new venture. In this policy private sector has been freed from licensing and other restrictions.

Industries licensing is necessary for following industries:

(i) Liquor

(ii) Cigarette

(iii) Defence equipment

(iv) Industrial explosives

(v) Drugs

vi) Hazardous chemicals

(b) No restriction on expansion or contraction of business activities.

(c) Freedom in fixing prices.

(d) Liberalisation in import and export.

(e) Easy and simplifying the procedure to attract foreign capital in India.

(f) Freedom in movement of goods and services

(g) Freedom in fixing the prices of goods and services.

2. PRIVATISATION:

It means permitting the private sector to set up industries which were previously reserved for the public sector. Under this policy many PSU's were sold to private sector. Literally speaking, privatisation is the process of involving the private sector-in the ownership of Public Sector Units (PSU's).

The main reason for privatisation was in currency of PSU's are running in losses due to political interference. The managers cannot work independently. Production capacity remained under-utilized. To increase competition and efficiency privatisation of PSUs was inevitable.

To execute policy of privatisation government took the following steps:

The following steps are taken for privatisation:

1. Sale of shares of PSUs:

Indian Govt. started selling shares of PSU's to public and financial institution e.g. Govt. sold shares of Maruti Udyog Ltd. Now the private sector will acquire ownership of these PSU's. The share of private sector has increased from 45% to 55%.

GLOBALISATION:

Globalisation means to make Global or worldwide, otherwise taking into consideration the whole world. Broadly speaking, Globalisation means the interaction of the domestic economy with the rest of the world with regard to foreign investment, trade, production and financial matters.

Steps taken for Globalisation:

Following steps are taken for Globalisation:

(i) Reduction in tariffs:

Custom duties and tariffs imposed on imports and exports are reduced gradually just to make India economy attractive to the global investors.

(ii) Long term Trade Policy:

Forcing trade policy was enforced for longer duration.

Main features of the policy are:

(a) Liberal policy

(b) All controls on foreign trade have been removed

(c) Open competition has been encouraged.

(iii) Partial Convertibility of Indian currency:

Partial convertibility can be defined as to convert Indian currency (up to specific extent) in the currency of other countries. This convertibility stood valid for following transaction:

(a) Remittances to meet family expenses

(b) Payment of interest

(c) Import and export of goods and services.

(iv) Increase in Equity Limit of Foreign Investment:

Equity limit of foreign capital investment has been raised from 40% to 100% percent. In 47 high priority industries foreign direct investment (FDI) to the extent of 100% will be allowed without any restriction. In this regard Foreign Exchange Management Act (FEMA) was enforced.

Impact of Changes in Economic Policy on the Business or Effects of Liberalisation and Globalisation:

1. Increasing Competition:

After the new policy, Indian companies had to face all round competition which means competition from the internal market and the competition from the MNCs. The companies which could adopt latest technology and which were having large number of resources could only survive and face the competition. Many companies could not face the competition and had to leave the market.

2. More Demanding Customers:

Prior to new economic policy there were very few industries or production units. As a result there was shortage of product in every sector. Because of this shortage the market was producer-oriented, i.e., producers became key persons in the market. But after new economic policy many more businessmen joined the production line and various foreign companies also established their production units in India.

As a result there was surplus of products in every sector. This shift from shortage to surplus brought another shift in the market, i.e., producer market to buyer market. The market became customer- oriented and many new schemes were made by companies to attract the customer. Nowadays products are produced/manufactured keeping in mind the demands of the customer.

3. Rapidly Changing Technological Environment:

Before or prior to new economic policy there was a small internal competition only. But after the new economic policy the world class competition started and to stand this global competition the companies need to adopt the world class technology.

To adopt and implement the world class technology the investment in R & D department has to increase. Many pharmaceutical companies increased their investment in R and D department from 2% to 12% and companies started spending a large amount for training the employees.

4. Necessity for Change:

Prior to 1991 business enterprises could follow stable policies for a long period of time but after 1991 the business enterprises have to modify their policies and operations from time to time

5. Need for Developing Human Resources:

Before 1991 Indian enterprises were managed by inadequately trained personnel's. New market conditions require people with higher competence skill and training. Hence Indian companies felt the need to develop their human skills.

6. Market Orientation:

Earlier firms were following selling concept, i.e., produce first and then go to market but now companies follow marketing concept, i.e., planning production on the basis of market research, need and want of customer.

7. Loss of Budgetary Support to Public Sector:

Prior to 1991 all the losses of Public sector were used to be made good by government by sanctioning special funds from budgets. But today the public sectors have to survive and grow by utilising their resources efficiently otherwise these enterprises have to face disinvestment. On the whole the policies of Liberalisation, Globalisation and Privatisation have brought positive impacts on Indian business and industry. They have become more customer focus and have started giving importance to customer satisfaction.

8. Export a Matter of Survival:

The Indian businessman was facing global competition and the new trade policy made the external trade very liberal. As a result to earn more foreign exchange many Indian companies joined the export business and got lot of success in that. Many companies increased their turnover more than double by starting export division. For example, the Reliance Company, Videocon, MRF, etc. got a great hold in the export market.

Ques 3 Critically examine the role of IMF

Ans The International Monetary Fund is a global organisation founded in 1944 in the post-war economic settlement which included the Bretton-Woods system of managed exchange rates. J.M.Keynes and Harry Dexter White both played an important role in its development. Its primary aim is to help stabilise exchange rates and provide loans to countries in need. Nearly all members of the United Nations are members of the IMF with a few exceptions such as Cuba, and Andorra.

The IMF is independent of the World Bank although both are United Nations agencies and both are aiming to increase living standards. The World Bank concentrates on long-term loans to developing countries.

Functions of IMF

International monetary cooperation.

Promote exchange rate stability.

To help deal with balance of payments adjustment

Help deal with economic crisis by providing international coordination – loans, plus advice.

What the IMF does in practice

1. Economic surveillance and monitoring. IMF produces reports on member countries economies and suggests areas of weakness / possible danger (e.g. unbalanced economies with large current account deficit/excess debt levels.. The idea is to work on crisis prevention by highlighting areas of economic imbalance

2. Loans to countries with a financial crisis. The IMF has $300 billion of loanable funds. This comes from member countries who deposit a certain amount on joining. In times of financial/economic crisis, the IMF may be willing to make available loans as part of a financial readjustment.

The IMF has arranged more than $180 billion in bailout packages since 1997.

In 1976, the IMF gave a loan to the UK as the Pound Sterling was coming under pressure. The loan came with conditions to reduce the budget deficit and raise interest rates to defend the value of the Pound..

In 2010/11 the IMF played a major role in the bailout to the Greek economy, which involved a total loan of up to $110 billion.

3. Conditional loans/structural adjustment. When giving loans, the IMF usually insist on certain criteria being met. These can include policies to reduce inflation (tightening of monetary policy)

Reduce inflation (tightening of monetary policy)

Deficit-reducing policies (higher tax)

Supply-side policies, such as privatisation, deregulation and improved tax collection.

Removing price controls

Free trade – removing tariff barriers

Devaluation of currency to reduce current account deficit.

4. Technical assistance and economic training.

The IMF produce many reports and publications. They can also offer support for local economies. The IMF is financed by member countries who contribute funds on joining. They

can also increase this throughout their membership. The IMF can also ask its member countries for more money. IMF financial resources have risen from about $50 billion in 1950 to nearly $300 billion last year, sourced from contributions from its 183 members.This initial amount depends on the size of the countries economy. E.g. the US deposited the largest amount with the IMF. The US currently has 16% of voting rights at the IMF, a reflection of its quotas deposited with IMF. The UK has 4% of IMF Voting rights. Loans at discounted rate are also available to developing countries to 'deal with poverty reduction.'

Criticisms of IMF

Over time, the IMF has been subject to a range of criticisms, generally focused on the conditions of its loans. The IMF has also been criticised for its lack of accountability and willingness to lend to countries with bad human rights records.

1. Conditions of loans

On giving loans to countries, the IMF make the loan conditional on the implementation of certain economic policies. These policies tend to involve:

Reducing government borrowing – Higher taxes and lower spending

Higher interest rates to stabilise the currency.

Allow failing firms to go bankrupt.

Structural adjustment. Privatisation, deregulation, reducing corruption and bureaucracy.

The problem is that these policies of structural adjustment and macro economic intervention can make difficult economic situations worse.

2. Exchange rate reforms. When the IMF intervened in Kenya in the 1990s, they made the Central bank remove controls over flows of capital. The consensus was that this decision made it easier for corrupt politicians to transfer money out of the economy (known as the Goldenberg scandal,). Critics argue this is another example of how the IMF failed to understand the dynamics of the country that they were dealing with – insisting on blanket reforms.

The economist Joseph Stiglitz has criticised the more monetarist approach of the IMF in recent years. He argues it is failing to take the best policy to improve the welfare of developing countries saying the IMF "was not participating in a conspiracy, but it was reflecting the interests and ideology of the Western financial community."

3. Devaluations In earlier days, the IMF have been criticised for allowing inflationary devaluations

4. Neo-Liberal Criticisms There is also criticism of neo-liberal policies such as privatisation. Arguably these free-market policies were not always suitable for the situation of the country. For example, privatisation can create lead to the creation of private monopolies who exploit consumers

5. Free market criticisms of IMF

As well as being criticised for implementing 'free market reforms' Others criticise the IMF for being too interventionist. Believers in free markets argue that it is better to let capital markets operate without attempts at intervention. They argue attempts to influence exchange rates only make things worse – it is better to allow currencies to reach their market level.

There is also a criticism that bailing out countries with large debt create moral hazard. Because of the possibility of getting bailed out, it encourages countries to borrow more.

6. Lack of transparency and involvement

The IMF has been criticised for imposing policy with little or no consultation with the affected countries.

7. Supporting military dictatorships

For supporting military dictatorships in Brazil and Argentina, such as Castello Branco in 1960s received IMF funds denied to other countries.

Response to criticism of IMF

1. Crisis always lead to some difficulties

Because the IMF deal with economic crisis, whatever policy they offer, there are likely to be difficulties. It is not possible to deal with a balance of payments without some painful readjustment.

2. IMF have had some successes

The failures of the IMF tend to be widely publicised. But, its successes less so. Also, criticism tends to focus on short-term problems and ignores longer term view. IMF loans have helped many countries avoid liquidity crisis, such as Mexico in 1982 and more recently, Greece and Cyprus have received IMF loans.

3. Confidence

The fact there is a lender of last resort provides an important confidence boost for investors. This is important during the current financial turmoil.

4. Countries are not obliged to take an IMF loan

It is countries who approach the IMF for a loan. The fact so many take loans suggest there must be at least some benefits of the IMF.

5. IMF easy target

Sometimes countries may want to undertake painful short term adjustment but there is a lack of political will. An IMF intervention enables the government to secure a loan and then pass the blame on to the IMF for the difficulties.

6. IMF better than previous alternatives.

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Ques 4 Explain the advantages and disadvantages of Foreign direct investment (FDI)

Ans Foreign direct investment (FDI) is an investment in a business by an investor from another country for which the foreign investor has control over the company purchased.

The Organization of Economic Cooperation and Development (OECD) defines control as owning 10% or more of the business. Businesses that make foreign direct investments are often called multinational corporations (MNCs) or multinational enterprises (MNEs). An MNE may make a direct investment by creating a new foreign enterprise, which is called a greenfield investment, or by the acquisition of a foreign firm, either called an acquisition or brownfield investment.

There are two ways in which a foreign investor can invest in the Indian market- Automatic and Government route.

While the government route requires a prior approval from the centre and its ministries, no such approval is needed under the automatic route.

There are mainly three types of foreign direct investment.

Horizontal FDI– In this type of investment, a business expands its existing operations to a foreign country. For example, Burger King opening restaurants in China.

Vertical FDI– Under this type of investment, a company expands to another country by moving to a different level of the supply chain. The company undertakes different business

activities in the foreign country but these activities are related to the main business. For example, If Burger King buys a farm in China to produce meat, it will be considered as a vertical investment.

Conglomerate FDI- In this type of investment, a company established an unrelated business in another country. However, this type of investment is common because entering a new, previously unexplored market that too in a foreign country is difficult. For example, if a clothing outlet in one country, opens a food chain in another country.

Advantages of Foreign Direct Investment

1. Economic Development Stimulation.

Foreign direct investment can stimulate the target country's economic development, creating a more conducive environment for you as the investor and benefits for the local industry.

2. Easy International Trade.

A country has its own import tariff, and this is one of the reasons why trading with it is quite difficult. Also, there are industries that usually require their presence in the international markets to ensure their sales and goals will be completely met. With FDI, all these will be made easier.

3. Employment and Economic Boost.

Foreign direct investment creates new jobs, as investors build new companies in the target country, create new opportunities. This leads to an increase in income and more buying power to the people, which in turn leads to an economic boost.

4. **Development of Human Capital Resources.**

One big advantage brought about by FDI is the development of human capital resources, which is also often understated as it is not immediately apparent. Human capital is the competence and knowledge of those able to perform labor, more known to us as the workforce. The attributes gained by training and sharing experience would increase the education and overall human capital of a country. Its resource is not a tangible asset that is owned by companies, but instead something that is on loan. With this in mind, a country with FDI can benefit greatly by developing its human resources while maintaining ownership.

5. Tax Incentives.

Parent enterprises would also provide foreign direct investment to get additional expertise, technology and products. As the foreign investor, you can receive tax incentives that will be highly useful in your selected field of business.

6. Resource Transfer.

Foreign direct investment will allow resource transfer and other exchanges of knowledge, where various countries are given access to new technologies and skills.

7. Reduced Disparity Between Revenues and Costs.

Foreign direct investment can reduce the disparity between revenues and costs. With such, countries will be able to make sure that production costs will be the same and can be sold easily.

8. Increased Productivity.

The facilities and equipment provided by foreign investors can increase a workforce's productivity in the target country.

9. Increment in Income.

Another big advantage of foreign direct investment is the increase of the target country's income. With more jobs and higher wages, the national income normally increases. As a result, economic growth is spurred. Take note that larger corporations would usually offer higher salary levels than what you would normally find in the target country, which can lead to increment in income.

Disadvantages of Foreign Direct Investment

1. Hindrance to Domestic Investment.

As it focuses its resources elsewhere other than the investor's home country, foreign direct investment can sometimes hinder domestic investment.

2. Risk from Political Changes.

Because political issues in other countries can instantly change, foreign direct investment is very risky. Plus, most of the risk factors that you are going to experience are extremely high.

3. Negative Influence on Exchange Rates.

Foreign direct investments can occasionally affect exchange rates to the advantage of one country and the detriment of another.

4. Higher Costs.

If you invest in some foreign countries, you might notice that it is more expensive than when you export goods. So, it is very imperative to prepare sufficient money to set up your operations.

5. **Economic Non-Viability.**

Considering that foreign direct investments may be capital-intensive from the point of view of the investor, it can sometimes be very risky or economically non-viable.

6. Expropriation.

The political changes can also lead to expropriation, which is a scenario where the government will have control over your property and assets.

7. Negative Impact on the Country's Investment.

Exchange rates and direct investments might negatively have an impact on the investing country. Investment may be banned in some foreign markets, which means that it is impossible to pursue an inviting opportunity.

8**. Modern-Day Economic Colonialism.**

Many third-world countries, or at least those with history of colonialism, worry that foreign direct investment would result in some kind of modern day economic colonialism, which exposes host countries and leave them vulnerable to foreign companies' exploitations.

The Government of India has already eased rules for FDI or Foreign Direct Investment considerably, and only a handful of sectors exist where government approval is required for an investment over 49%. The Department for Promotion of Industry and Internal Trade (DPIIT) has begun to identify such sectors for which FDI rules can be liberalized.In September, the Cabinet or council of ministers authorized to exercise executive decisions, cleared rules for coal mining, single-brand retail, contract manufacturing and digital media, while the finance ministry changed the norms for segments of the insurance business.

Ques 5 Describe SEZ and its Approval Mechanism

Ans A Special Economic Zone or SEZ is a specially marked territory or enclave within the national borders of a country that has more liberal economic laws than the rest of the country.

Special Economic Zone – Definition

A SEZ is an enclave within a country that is typically duty-free and has different business and commercial laws chiefly to encourage investment and create employment.

SEZ Background

A SEZ Policy was announced for the very first time in 2000 in order to overcome the obstacles businesses faced.

There were multiple controls and many clearances to be obtained before starting a venture.

Infrastructure facilities were shoddy and well below world standards in India.

The fiscal regime was unstable as well.

In order to attract huge foreign investments into the country, the government announced the Policy.

The Parliament passed the **Special Economic Zones Act** in 2005 after many consultations and deliberations.

The Act came into force along with the SEZ Rules in 2006.

However, SEZs were operational in India from 2000 to 2006 (under the Foreign Trade Policy).

Special Economic Zones Act, 2005

"It is defined as an Act to provide for the establishment, development and management of the Special Economic Zones for the promotion of exports and for matters connected therewith or incidental thereto."

The chief objectives of the SEZ Act are:

To create additional economic activity.

To boost the export of goods and services.

To generate employment.

To boost domestic and foreign investments. To develop infrastructure facilities.

SEZ Rules

The Rules provide for:

Simplified procedures to develop, operate and maintain SEZs and also to set up units and conduct businesses in the SEZs.

Single-window clearance to set up a Special Economic Zone, and also to set up a unit in an SEZ.

Single-window clearance for matters connected to the Central and State governments.

Simplified compliance procedures and documentation with a focus on self-certification.

Different minimum land requirements for different classes of Special Economic Zones.

SEZ Approval Mechanism

The SEZ approval mechanism is a single-window process provided by a 19-member inter-ministerial SEZ Board of Approval (BoA).

The developer has to submit the proposal to the state government.

The state government forwards this proposal to the BoA along with its recommendation within forty-five days.

The developer or applicant can also directly submit the proposal to the BoA.

The Board, which has been constituted by the Central Government, and is a 19-member Board takes the decision considering the merits of the proposal. All decisions taken by the Board are by consensus.

The Board is chaired by the Secretary of the Dept. of Commerce, Ministry of Commerce and Industry.

The other members are from various bodies and ministries such as the Central Board of Excise and Customs (CBEC), the Central Board of Direct Taxes (CBDT), Department of Economic Affairs, Dept. of Commerce, Ministry of Science and Technology, Ministry of Home Affairs, Ministry of Law and Justice, Ministry of Urban Development, etc.

Once the BoA gives its approval, and the central government notifies the area of the SEZ, units are allowed to be established inside the SEZ.

Single window clearance for Central and State level approvals.

There is no need for a license for import.

In the manufacturing sector, barring a few segments, 100% FDI is allowed.

Profits earned are permitted to be repatriated freely with no need for any dividend balancing.

There is no need for separate documentation for customs and export-import policy.

Many SEZs offer developed plots and ready-to-use space.

Apart from the firms operating in SEZs, developers of SEZs also receive many benefits and incentives from the government.

SEZs in India

Currently, about 230 are operational in the country. About 64% of the SEZs are located in five states – Tamil Nadu, Telangana, Karnataka, Andhra Pradesh and Maharashtra.

SEZs approved	417
SEZs notified	349
SEZs approved in-principle	33
SEZs operational	238
Units approved in SEZs (as of Sep 2019)	5168

In 2018 – 19, about 20 lakh jobs were created through SEZs. Most of the SEZs being set up are primarily private investment-driven. In the financial year 2017 – 18, the exports from SEZs have grown by about 13% when compared to the previous financial year.

Examples: Special Economic Zone (Mumbai), Kandla SEZ, Cochin SEZ, Madras SEZ, Visakhapatnam SEZ, NOIDA Export Processing Zone, Falta SEZ, etc

Challenges

Since SEZs offer a wide range of incentives and tax benefits, it is believed that many existing domestic firms may just shift base to SEZs.

There is a fear that the promotion of SEZs may be at the cost of fertile agricultural land affecting food security, loss of revenue to the exchequer and cause uneven growth with adverse effects.

Apart from food security, water security is also affected because of the diversion of water use for SEZs.

SEZs also cause pollution, especially with the release of untreated effluents. There has been a huge destruction of mangrove in Gujarat affecting fisheries and dairy sectors.

SEZs have to be promoted but not at the cost of the agricultural sector of the country. It should also not affect the environment adversely.