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Reference Material for Five Years

Bachelor of Law (Hons.)

Code: 035

Semester–III

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Semester – III

FAMILY LAW-I (201)

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Unit-I: Hindu Marriage and Dissolution

a. Institution of Marriage under Hindu Law

i. Evolution and Concept of the Institution of Marriage

Marriage, also called matrimony or wedlock, is a socially or ritually recognized union or legal contract between spouses that establishes rights and obligations between them, between them and their children, and between them and their in-laws, as well as society in general. The definition of marriage varies according to different cultures, but it is principally an institution in which interpersonal relationships, usually sexual, are acknowledged. In some cultures, marriage is recommended or considered to be compulsory before pursuing any sexual activity. When defined broadly, marriage is considered a cultural universal.

Individuals may marry for several reasons, including legal, social, libidinal, emotional, financial, spiritual, and religious purposes. Whom they marry may be influenced by socially determined rules of incest, prescriptive marriage rules, parental choice and individual desire. In some areas of the world, arranged marriage, child marriage, polygamy, and sometimes forced marriage, may be practiced as a cultural tradition. Conversely, such practices may be outlawed and penalized in parts of the world out of concerns for women's rights and because of international law. In developed parts of the world, there has been a general trend towards ensuring equal rights within marriage for women and legally recognizing the marriages of interfaith or interracial, and same-sex couples. These trends coincide with the broader human rights movement.

Marriage can be recognized by a state, an organization, a religious authority, a tribal group, a local community or peers. It is often viewed as a contract. Civil marriage, which does not exist in some countries, is marriage without religious content carried out by a government institution in accordance with the marriage laws of the jurisdiction, and recognised as creating the rights and obligations intrinsic to matrimony. Marriages can be performed in a secular civil ceremony or in a religious setting via a wedding ceremony. The act of marriage usually creates normative or legal obligations between the individuals involved, and any offspring they may produce. In terms of legal recognition, most sovereign states and other jurisdictions limit marriage to opposite-sex couples and a diminishing number of these permit polygyny, child marriage, and forced marriages. Over the twentieth century, a growing number of countries and other jurisdictions have lifted bans on and have established legal recognition for interracial marriage, interfaith marriage, and most recently, same-sex marriage. Some cultures allow the dissolution of marriage through divorce or annulment. In some areas, child marriages and polygamy may occur in spite of national laws against the practice.

Since the late twentieth century, major social changes in Western countries have led to changes in the demographics of marriage, with the age of first marriage increasing, fewer people marrying, and more couples choosing to cohabit rather than marry. For example, the number of marriages in Europe decreased by 30% from 1975 to 2005.

Historically, in most cultures, married women had very few rights of their own, being considered, along with the family's children, the property of the husband; as such, they could not own or inherit property, or represent themselves legally (see for example covertures). In Europe,

the United States, and other places in the developed world, beginning in the late 19th century and lasting through the 21st century, marriage has undergone gradual legal changes, aimed at improving the rights of the wife. These changes included giving wives legal identities of their own, abolishing the right of husbands to physically discipline their wives, giving wives property rights, liberalizing divorce laws, providing wives with reproductive rights of their own, and requiring a wife's consent when sexual relations occur. These changes have occurred primarily in Western countries. In the 21st century, there continue to be controversies regarding the legal status of married women, legal acceptance of or leniency towards violence within marriage (especially sexual violence), traditional marriage customs such as dowry and bride price, forced marriage, marriageable age, and criminalization of consensual behaviours such as premarital and extramarital sex.

ii. Forms, Validity and Voidability of Marriage

Forms of marriage

The ancient Hindu law recognised three forms of Shastric marriages as regular and valid. These were Brahma (bride given gift by father), Gandharva (mutual agreement of bride and bridegroom) and Asura (bride virtually sold by the father). The first and the third are arranged marriage whereas the second one is love marriage.

Forms of marriages in modern Hindu law: The Hindu marriage Act, 1955, does not specially provide for any forms of marriage. The Act calls marriage solemnized under the Act as Hindu marriage which may be performed in accordance with shastric rites and ceremonies or in accordance with the customary ceremonies prevalent in the community to which bride or bridegroom belongs. However, it does not mean that a marriage cannot take any of the aforesaid forms now. Marriage can still be entered into in anyone of the three forms.

Looking at from another aspect in Hindu society there are mainly two forms of marriages: arranged marriages and love marriages. Most Hindu marriages are still arranged marriages. An arranged marriage may be either in the form of Brahma marriage or in the form of Asura marriage. Among the Sudras, the Asura form of marriage is very common. Among the high-class Hindus, the Brahma form of marriage is common. The Gandharva form of marriage is fast becoming popular among the younger generation.

Ceremonies

Marriage among Hindus being a religious and sacred tie, performance of certain ceremonies is still necessary for a valid marriage. There were three important stages wherein certain ceremonies were to be performed. They were:

1. Betrothal or Sagai: it is a formal promise to give the girl in marriage.
2. Kanyadan: It is actual giving away of the girl in marriage by her father.
3. Saptapadi: it consisted in performing a ceremony of taking seven steps before the sacred fire by the bride and the groom. The performance of Saptapadi marked the completion of a marriage. It made the marriage irrevocable.

As per Section 7, a marriage is a ceremonial affair. Saptapadi is an essential part of the ceremonies of marriage, its non performance will invalidate the marriage. The performance of

vedic rights is not enough to solemnise the marriage.

Customary ceremonies may not include any one of the Shastric ceremonies including Saptapadi. It may be totally non-religious ceremony or it may be very simple ceremony. For instance, among santhals smearing of vermilion by bridegroom on the forehead of the bride is the only essential ceremony.

Necessary ceremonies, shastric or customary, whichever are prevalent on the side of the bride or bridegroom, must be performed otherwise marriage will not be valid. No one can innovate new ceremonies and a marriage performed with the innovated ceremonies and rites is invalid. Hindu Marriage Act allows inter-caste marriages. But marriage between a Hindu and a non Hindu is not permissible under Hindu Marriage Act and such a marriage if performed in India, will be invalid. But foreign country such marriage is valid. Such marriage is also valid in India, if performed under the Special Marriage Act, 1954.

Conditions for the validity of marriage (Section 3 and 5)
A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely :–
(i) Neither party has a spouse living at the time of the marriage;
(ii) At the time of the marriage, neither party.

(a) Is incapable of giving a valid consent to in consequences of unsoundness of mind; or

(b) Though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) Has been subject to recurrent attacks of insanity or epilepsy.

(iii) The bridegroom has completed the age of twenty one (21) years and the bride the age of eighteen years at the time of marriage.
(iv) The parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;
(v) The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

Ingredients of Section 5
Parties must be Hindus under Section 2(3) of Hindu Marriage Act. According to this section both the parties to the marriage under the Act must be Hindus. If one of them is a Hindu and the other a non Hindu or both are non Hindus, the marriage will not be a subject matter of this Act but will relate to some other law i.e. Special Marriage Act etc.

Clause (i) – Condition of monogamy
This condition implies monogamy and prohibits bigamy or polygamy. The expression “neither party has a spouse living” depicts that the spouse must not be alive at the time of marriage. If the spouse is alive at the time of marriage that could bar the remarriage of a person. However one must note that the first marriage of a person should be a legally valid marriage. In spite of one’s

valid marriage if the person remarries in violation of Section 5(i), the second marriage will be null and void and he will be subjected to penal consequences. The Scheduled Tribes are exempted from the application of the Act. But there must be a proved custom to this effect.

Bigamy – Section 5(i)
Section 5(i) prohibits bigamy or polygamy. Section 11 makes a bigamous marriage void and Section 17 makes it a penal offence for both Hindu males and females under Section 494 and 495 of IPC. The offence of bigamy is committed only if the required ceremonies of marriage are performed. The second marriage cannot be taken to be proved by the mere admission of the parties; essential ceremonies and rites must be proved to have taken place. In the case of a bigamous marriage, the "second wife" has no status of wife.

Clause (ii) – Condition regarding mental health or capacity
Sub clause (a) requires that at the time of marriage neither party is incapable of giving a valid consent to marriage due to unsoundness of mind.

Sub clause (b) – Mental disorder: According to sub-clause (b) at the time of marriage neither party to marriage should be suffering from a mental disorder of such nature and to such a degree as to be unfit for two purposes (i) marriage and (ii) procreation of child. In Tarlochan Singh v. Jit Kaur, the court held the marriage void on the ground that wife was suffering from schizophrenia within short period after marriage and the disease was not disclosed to the husband before marriage.

Sub clause (c) – Recurrent attacks of insanity: If a person has been subject to recurrent attacks of insanity he is also not qualified for marriage under Hindu Marriage Act. He cannot marry even during a lucid period.

Post marriage mental illness: If a party to a marriage is not suffering from any mental defect described under section 5(ii) but fails ill mentally after the marriage, there is no violation of this condition.

Clause (iii) – Condition of marriageable age
According to this clause, at the time of marriage the bride must have completed the age of 18 years and the bridegroom of 21 years. Thus a child marriage is prohibited under Hindu Marriage Act. However, violation of this condition does not make the marriage void or voidable. It means that it is valid though it may attract penalties. But it can become a valid ground for repudiation of the marriage. The Hindu Marriage Act and the Child Marriage Restraint Act provide for punishment for such marriage.

According to Section 18 of Hindu Marriage Act, anyone who procures a marriage for himself or herself in contravention of Section 5(iii) may be punished with upto 15 days imprisonment or with a fine upto Rs. 1000 or with both. Under the Child Marriage Restraint Act, 1929, a male above the age of 25 years marrying a girl below 15 years is punishable with upto 3 months imprisonment and is also liable to fine. The Child Marriage Restraint (Amendment) Act 1978 has also raised the age of marriage of girl to eighteen.

Clause (iv) – Avoidance of degrees of prohibited relationship
The parties to marriage must not fall within the degree of prohibited relationship. This relationship is defined under Section 3(g) of the Act.

According to Section 3(g) "degree of prohibited relationship" means when two persons are related to each other in any of the following manners:

(i) By lineal ascent: If one is a lineal ascendant of the other. This relationship covers the Sapinda relationship which extends upto fifth degree in the line of father and third degree in the line of the mother. The distinction of this category is that it extends even beyond the Sapinda ascendants.

(ii) By affinity: If one is the husband or wife of the lineal ascendants or descendants of the other. For example, father-in-law and daughter-in-law, mother-in-law and son-in-law, step mother and step son or step father and step daughter are thus within the degrees of prohibited relationship.

(iii) Wives of certain brother relations if one was the wife of:

(1) The brother, or
(2) The father's brother, or
(3) The mother's brother, or
(4) The father's father's brother, or
(5) The mother's father's brother, or
(6) The father's mother's brother, or
(7) The mother's mother's brother.
(iv) Certain close relations if both are:
(1) Brother and sister, or
(2) Niece and uncle (paternal or maternal), or
(3) Nephew and aunt (paternal or maternal), o
(4) Children of a brother and a sister, or
(5) Children of two brothers, or
(6) Children of two sisters.

According to Section 11 of Hindu Marriage Act, a marriage in contravention of this condition is void. It is also punishable under section 18(b) of the Act.

(i) 'A' marries his adopted sister. This is not a valid marriage, as it falls within the degrees of Prohibited relationship. (ii) 'A' marries with the wife of Pre-deceased brother. It is not a valid marriage as it falls within the degree of Prohibited relationship. (iii) 'A' marries his stepmother's sister. It is not a valid marriage, 'A' is related to his step-mother by half blood relationship.

Clause (v) – Avoidance of sapinda relationship
According to the Dharmashastra the Sapinda relationship is very important in the matter of marriage. According to Mitakshara Law of Marriage 'Pinda' means body and therefore those who are related by body or blood or consanguinity are sapindas among themselves. The Hindu Marriage Act has adopted Mitakshara definition but has limited the extent of Sapinda

relationship to 5 degrees in line of ascent through the father and 3 degrees in the line of ascent through the mother.

According to Section 3(f)(ii) two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapindas relationship, or if they have a common lineal ascendant to each of them.

Whereas Section 3(f)(i) states that "sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upwards in each case from the person concerned, who is to be counted as the first generation.

Rules for determining sapinda relations:
1. The relationship extends as far as the third generation in the line of ascent through the mother in case of both the parties.

2. The relationship extends as far as the fifth generation in the line of ascent through the father in case of both the parties.

3. Sapinda relationship may submit in case of both the parties through the father or in case of both through the mother; or it may subsist in case of one of them through the father and on case of the other through the mother.

4. The line is traced upwards in case of both the parties counting each of them as the first generation; the generations in the line of ascent whether three or five are to be counted inclusive of the persons concerned and the common ancestor or ancestress.

Sapinda relationship includes relationship by half or uterine blood as well as by full blood and by adoption. It also includes both, legitimate and illegitimate blood relationship.

Solemnisation of marriage (Section 7)
In connection with marriage the word 'Solemnise' means to celebrate marriage with proper ceremonies and in due form. Unless the marriage is celebrated or performed with proper ceremonies and in the due form, it cannot be said to be solemnised.

Section 7 provides that (i) A Hindu marriage may be solemnised in accordance with the customary rites and ceremonies of either party thereto. (ii) where such rites and ceremonies include the saptapadi, the marriage becomes complete and binding when the seventh step is taken.

Section 7 provides two kinds of ceremonies (i) Customary Ceremonies and (ii) Shastric Ceremonies.

As the rites and ceremonies to be observed are customary, they should possess all the qualities which are necessary for the validity of a custom defined under section 3(a) of the Act.

According to Section 3(a) the expression 'custom' and 'usage' signify any rule which having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family: provided that the rule is certain and not unreasonable or opposed to the public policy; and in the case of a rule applicable only to a family it has not been discontinued by the family.

It is not necessary that the customary rites or ceremonies must be very very old. What section 3(a) of Hindu Marriage Act requires is that for maturing into a custom a rule should have been observed for a long time, continuously and uniformly.

When essential ceremonies consulting a Hindu marriage are not proved, the mere issuance of certificate under Special Marriage Act cannot validate the marriage if the marriage has not been solemnised as per the requirements of this Act.

The Act does not, however prescribe the ceremonies requisite for solemnisation of the marriage but leaves it to the parties to choose a form of ceremonial marriage which is in accordance with any custom or usage applicable to either party; and where the form adopted includes the Saptapadi–that is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire–marriage becomes complete when the seventh step is taken.

The essential rites which may, however, be said to be the requirement common in all ceremonial marriages are: (i) invocation before the sacred fire; and (ii) saptapadi.

Registration of Marriage (Section 8)
Section 8(1) of Hindu Marriage Act provides that for the purpose of facilitating the proof of Hindu marriages, the state government may make rules providing that the parties to any such marriage may have the particulars relating to their marriage entered on such manner and subject to such conditions, as may be prescribed in a Hindi Marriage Register kept for the purpose.

Registration when necessary
Section 8(2) of the Act provides that the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to above, shall be compulsory in the state or in any part thereof, whether in all cases, or in such cases as may be specified.

There was no requirement for the registration of Hindu marriages before the Hindu marriage Act, 1955. Generally, Hindus do not get their marriages registered unlike Adoption, Will Transfer of Property and Partition. The Act does not contain the rules of registration and the State Government have been authorised to frame them.

The purpose of registration is only to furnish a convenient evidence of marriage Clause (4) provides that Hindu Marriage Registers will be admitted as evidence. The certificate is however not a conclusive proof of marriage.

Besides the evidentiary value, the national commission for women has pointed that registration

of marriage has critical importance to various women related issues, such as :–

(a) Prevention of child marriage.
(b) Prevention of marriage without the consent of the parties.
(c) Prevention of illegal bigamy or polygamy.
(d) Enabling married women to claim their right to live in the matrimonial home, maintenance, etc.
(e) Enabling the widows to claim various rights after the death of their husbands.
(f) Deterring men from deserting their wives after marriage.
(g) Deterring the sale of girl under the garb of marriage.

It is explicitly laid down in this Act that non registration does not affect the validity of marriage. Thus marriage can be valid without registration.

In Seema v. Ashwini Kumar, the Supreme Court has dwelt at length on the topic of registration of marriages. It suggested for the compulsory registration of marriages in all the states.

Void and Voidable marriages (Sections 11 and 12)
There are three types of marriages under this Act: (i) valid, (ii) void, and (iii) voidable. Section 11 deals with void marriages and Section 12 deals with the voidable marriage. All other marriages which are not covered by these two sections are valid.

Void marriages
Section 11 states that any marriage solemnized at the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party be so declared by a decree of nullity if it contravenes any of the conditions specified in clauses (i), (iv) and (v) of Section 5.

Thus a marriage will be void ab initio:

(1) If any party to marriage has a spouse living at the time of the marriage [Section 5(i)].

(2) If the parties are within the degree of prohibited relationship unless the custom or usage governing each of them permits such a marriage [Section 5(iv)].

(3) If the parties are sapindas of each other, unless the custom or usage governing each of them permits such a marriage [Section 5(v)].

Section 11 of this Act is prospective in nature. It is only applicable to marriages solemnised after the commencement of the Hindu Marriage Act, 1955.

Effect of Void marriages
A void marriage is no marriage. It is void since its inception. No legal rights and duties flow from it. Therefore, the relationship of husband and wife does not come into existence from a void marriage. No declaration of the court is necessary to this effect. The issues from a void marriage are illegitimate unless legitimatised by law in some way. If one withdraws from the society of

the other, the other party has no right to the restitution of conjugal rights. If one of them marries again, he or she is not guilty of bigamy and the validity of later marriage is not affected because of the first so called marriage.

Voidable marriages
A marriage which can be annulled or avoided at the option of one or both the parties is known as a voidable marriage. Section 12 of Hindu Marriage Act contains relevant provisions of Voidable Marriage.

This section lays down four grounds on which a Hindu marriage becomes voidable. These are:

(1) Inability of the respondent to consummate the marriage on account of his or her impotency.
(2) Respondents incapacity to consent or suffering from a mental disorder.
(3) Consent of the petitioner being obtained by fraud or force.
(4) Concealment of Pre-marriage pregnancy by the respondent.

Impotency [Section 12(1)(a)]
Section 12(1)(a) can be dissected as under:

(1) That the marriage has not been consummated; and

(2) That the non consummation is due to the impotence of the respondent.

Consummation of marriages means full and normal sexual intercourse between married person. A marriage is consummated by sexual intercourse. It consists in the penetration by the male genital organ into the female genital organ. Full and complete penetration is an essential ingredient of ordinary and complete intercourse. Partial, imperfect or transient intercourse of not Consummation. The degree of sexual satisfaction obtained by the parties is irrelevant. Consummation may be proved by medical evidence.

Impotency is the inability to have complete and normal sexual intercourse. It may arise from a physical defect in either partner or from a psychological barrier amounting to invisible repugnance on the part of one to sexual relations with that partner. Sterility is irrelevant and does not imply impotency. Absence of uterus in the body of the one's female partner does not amount to impotency but the absence of a proper vagina would mean impotency. Similarly organic malformation making a woman sexless would means impotency. If a husband fails to satisfy his wife's abnormal appetite for sex that cannot be regarded as impotency. Thus impotency means practical impossibility of consummation of marriage. Sexual intercourse which is incomplete occasionally does not amount to impotency. It includes discharge of healthy Semen containing living sperms in the case of men and discharge of menses in the case of women.

Regarding impotency, the various principles laid down by the courts could be summarised as follows:

(1) Full and complete penetration is an essential ingredient of ordinary and complete intercourse, though degree of sexual satisfaction obtained by the parties is irrelevant. If one spouse is

oversexed and the other is not, it does not amount to impotency.

(2) Impotency is usually either (a) physical, or (b) mental. Physical impotency includes malformation of, or structural defects in the organs, such as unduly large male organ or abnormally small vagina.

(3) Mental or psychological impotency includes emotional, psychological or moral repugnance or aversion to the sexual act. In Shantabai v. Tara Chand, the wife was alleged to have an absolute repugnance towards sexual intercourse although she had normal sexual organs. Held that it amounts to impotency. Where immediately after marriage the husband lived for three nights and days in the same room with his wife and failed to consummate the marriage, it was a fair inference that non-consummation was due to husband's knowing refusal arising out of incapacity, nervousness or hysteria. In Nijhawan v. Nijhawan, a liberal interpretation of the word 'impotence' was made by the court. In that case, the wife felt depressed and frustrated owing to the failure of husband to perform full and complete sexual intercourse. Held that vigorous and harmonious sexual activity is the foundation of marriage and a marriage without sex is anathema. The court considered the husband's impotency to be a cause of mental and physical cruelty to the wife.

(4) If impotency can be cured by medical treatment or surgery, it would not amount to impotency, unless the respondent refuses to undergo treatment. In Rajendra v. Shanti, where the size of wife's vagina was after surgical operation one and half inch, but was fit for intercourse, the court said that wife was not impotent.

(5) Mere barrenness or incapacity to conceive a child or sterility does not amount to impotency. In Shewanti v. Bhaura, the wife was sterile but was capable of having sexual intercourse held that she was not impotent.

Burden of Proof: The Burden of Proof lies on petitioner but when once the impotency is proved there is a rebuttable presumption in favour of its continuance.

Consent obtained by force or fraud [Section 12(1)(c)]
For marriage the consent of the parties concerned must be free. This is not because marriage is a contract but because the sweetness and success of a married life depends upon harmony between both the parties. If the consent to marriage is not free, this harmony is a remote possibility. That is why it is quite just and reasonable that a party whose consent is not free should be permitted to come out of the wedlock. Section 12(1)(c) allows this. It makes the marriage voidable where consent to it was obtained by force or fraud.

Section 12(1)(c) provides that a marriage is voidable on the ground that the consent of the petitioner or of the guardian has been obtained by force or fraud. After the Child Marriage Restraint Act the consent of guardian has became irrelevant as the minimum marriageable age was set 21 years and 18 years for bridegrooms and bride.

Provided no petition for annulling a marriage:

(1) If the petition presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered [Section 12(2)(a)(i)]; or

(2) The petitioners has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or as the case may be the fraud had been discovered [Section 12(2)(a)(ii)].

Force: The word Force is not defined by the Act. But it may include all cases of compulsion, coercion or duress. Abduction, terror, coercion and threat to commit suicide will definitely be covered by the term force. Whenever owing to some natural weakness of mind or on account of some fear, whether entertained reasonably or unreasonably, but nonetheless really entertained or when a party is in such a mental state that he finds it almost impossible to resist the pressure, it will amount to force.

However, mere pressure or strong advice, persuasion etc., will not amount to force.

Fraud: This section does not speak of fraud 'in any general way or every misrepresentation or concealment which may be fraudulent' but 'fraud as to the nature of the ceremony' or 'as to any material fact or circumstance concerning the respondent'.

The clause prior to its amendment by the Amending Act of 1976, did not contain the words 'or' is to any material fact or circumstance concerning the respondent. The operation of the clause was considerably extended so as to include within its ambit any material fact or circumstance concerning the respondent. Whether a misrepresentation or false statement or concealment is as to any such material fact, must to a large extent depend on the facts and circumstance of the case.

However, it must be something vital, touching or affecting the respondent and such as had definitely induced or influenced consent. The petitioner must show that; but for such false representation or statement or concealment he or she would not have married the respondent.

Some important grounds of fraud: (1) Nature of ceremony, (2) Identity of the party, (3) Concealment of disease, (4) Concealment of religion or caste, (5) Concealment of previous marriage, (6) Concealment of unchastity, (7) Concealment of illegitimacy, (8) Concealment of age, (9) Petitioner's father's fraud, (10) Concealment of financial status and nature of employment.

A petition for nullity must be filed within one year of the discovery of fraud or cessation of force. This condition is mandatory.

Thus the operation of Section 12(1)(c) has been considerably winded by the 1976 Amendment.

Pre-marriage Pregnancy [Section 12(1)(d)]
Section 12(1)(d) provides that a marriage is voidable on the ground that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

Section 12(1)(d) is to be read with Section 12(2)(b) which lays down three further conditions

which are to be satisfied in order to avail of the remedy under Section 12(1)(d). These are:

(1) That at the time of the marriage the petitioner was ignorant of the facts alleged;

(2) That the petitioner has started proceedings under Section 12 within one year of the marriage; and

(3) That the petitioner did not have, with his consent, marital intercourse with his wife ever since he discovered that the wife was pregnant by some other person.

Thus the requirements of this ground are:

(1) The respondent was pregnant at the time of marriage.
(2) The respondent was pregnant from a person other than the petitioner.
(3) The petitioner was ignorant of this fact at the time of marriage.
(4) The proceeding is started within one year of the marriage.
(5) Absence of marital intercourse by the petitioner husband with his wife since such discovery.

If the girl becomes pregnant by some person before her marriage and subsequently the same fellow marries her the section has no application. If the bride becomes pregnant by some other person than her husband after marriage the section has no relevance.

Onus of proof lies on the petitioner husband to prove this wife's admission of pre-marriage pregnancy plus the fact that husband had no access to her before marriage is sufficient to establish her pre marriage pregnancy.

In Nishit v. Anjali, where a bride gave birth to a mature child within 167 days from the date of marriage, it was held that it was for the wife to raise a reasonable doubt that she was pregnant by the person who became her husband.

A blood test for the ascertainment of the child's paternity is also possible. If the wife volunteers for the same then it is well and good, but it cannot be forced upon her.

b. Matrimonial Remedies

Restitution of Conjugal Rights - (Right to stay together)
If either the husband or the wife, without reasonable excuses, withdraws from the society of the other, the aggrieved party may approach the Court for restitution of conjugal rights.

The decree of restitution of conjugal rights cannot be executed by forcing the party who has withdrawn from the society from the other to stay with the person who institutes Petition for restitution. The decree can be executed only by attachment of the properties of the judgment debtor. The practice has shown that the decree of restitution is a paper decree.

However, if the decree of restitution of conjugal right is not honored for a period of more than one year, subsequent to the date of the decree, it becomes a ground for divorce.

Judicial Separation: Legal Separation without divorce

Either party to the marriage may present a petition on any of the grounds stated in the provisions for divorce, praying for a decree of judicial separation. A judicial separation is a legal way to stay separate from the spouse, without obtaining a decree of divorce. It also helps in cases to defend a petition for restitution of conjugal rights. A judicially separated spouse cannot be given a meaning to include a spouse merely living separately, and who has not obtained a decree for judicial separation.

In case, there has been no resumption of cohabitation between the parties to the marriage for a period of one year or upwards, after the passing of the decree for judicial separation, it shall be a ground for a divorce.

Dissolution of marriage

Earlier divorce was unknown to general Hindu law as marriage was regarded as an indissoluble union of the husband and wife. Manu declared that a wife cannot be released by her husband either by sale or by abandonment, implying that the marital tie cannot be severed in anyway. Although Hindu law does not contemplate divorce yet it has been held that where it is recognized as an established custom it would have the force of law.

According to Kautilya's Arthashatra, marriage might be dissolved by mutual consent in the case of the unapproved form of marriage. But, Manu does not believe in discontinuance of marriage. He declares" let mutual fidelity continue till death; this in brief may be understood to be the highest dharma of the husband and wife."

However, this changed when divorce was introduced in the Hindu Marriage Act, 1955.

Theories of Divorce

There are basically three theories for divorce-fault theory, mutual consent theory & irretrievable breakdown of marriage theory.

Under the Fault theory or the offences theory or the guilt theory, marriage can be dissolved only when either party to the marriage has committed a matrimonial offence. It is necessary to have a guilty and an innocent party, and only innocent party can seek the remedy of divorce. However the most striking feature and drawback is that if both parties have been at fault, there is no remedy available.

Another theory of divorce is that of mutual consent. The underlying rationale is that since two persons can marry by their free will, they should also be allowed to move out of their relationship of their own free will. However critics of this theory say that this approach will promote immorality as it will lead to hasty divorces and parties would dissolve their marriage even if there were slight incompatibility of temperament.

The third theory relates to the irretrievable breakdown of marriage. The breakdown of marriage is defined as "such failure in the matrimonial relationships or such circumstances adverse to that relation that no reasonable probability remains for the spouses again living together as husband & wife." Such marriage should be dissolved with maximum fairness & minimum bitterness, distress & humiliation.

Some of the grounds available under Hindu Marriage Act can be said to be under the theory of frustration by reason of specified circumstances. These include civil death, renouncement of the world etc.

Grounds for Divorce Under Hindu Marriage Act

It is conceded in all jurisdictions that public policy, good morals & the interests of society require that marital relation should be surrounded with every safeguard and its severance be allowed only in the manner and for the cause specified by law. Divorce is not favored or

encouraged, and is permitted only for grave reasons.

In the modern Hindu law, all the three theories of divorce are recognized & divorce can be obtained on the basis of any one of them. The Hindu Marriage Act, 1955 originally, based divorce on the fault theory, and enshrined nine fault grounds in Section 13(1) on which either the husband or wife could sue for divorce, and two fault grounds in section 13(2) on which wife alone could seek divorce. In 1964, by an amendment, certain clauses of Section 13(1) were amended in the form of Section 13(1A), thus recognizing two grounds of breakdown of marriage. The 1976 amendment Act inserted two additional fault grounds of divorce for wife & a new section 13B for divorce by mutual consent.

The various grounds on which a decree of divorce can be obtained are as follows-

Adultery

While adultery may not have been recognized as a criminal offence in all countries, the matrimonial offence of adultery or the fault ground of adultery is recognized in most. Even under the Shastric Hindu law, where divorce had not been recognized, adultery was condemned in the most unequivocal terms. There is no clear definition of the matrimonial offence of adultery. In adultery there must be voluntary or consensual sexual intercourse between a married person and another, whether married or unmarried, of the opposite sex, not being the other's spouse, during the subsistence of marriage. Thus, intercourse with the former or latter wife of a polygamous marriage is not adultery. But if the second marriage is void, then sexual intercourse with the second wife will amount to adultery.

Though initially a divorce could be granted only if such spouse was living in adultery, by the Marriage Laws Amendment Act, 1976, the present position under the Hindu Marriage Act is that it considers even the single act of adultery enough for the decree of divorce

Since adultery is an offence against marriage, it is necessary to establish that at the time of the act of adultery the marriage was subsisting. Also, it follows that unless one willingly consents to the act, there can be no adultery. If the wife can establish that the co-respondent raped her, then the husband would not be entitled to divorce.

In Swapna Ghose v. Sadanand Ghose the wife found her husband and the adulteress to be lying in the same bed at night and further evidence of the neighbors that the husband was living with the adulteress as husband and wife is sufficient evidence of adultery. The fact of the matter is that direct proof of adultery is very rare.

The offence of adultery may be proved by:

Circumstantial evidence

Contracting venereal disease

Cruelty

The concept of cruelty is a changing concept. The modern concept of cruelty includes both mental and physical cruelty. Acts of cruelty are behavioral manifestations stimulated by different factors in the life of spouses, and their surroundings and therefore; each case has to be decided on the basis of its own set of facts. While physical cruelty is easy to determine, it is difficult to say what mental cruelty consists of. Perhaps, mental cruelty is lack of such conjugal kindness, which inflicts pain of such a degree and duration that it adversely affects the health, mental or bodily, of the spouse on whom it is inflicted. In Pravin Mehta v. Inderjeet Mehta, the court has defined mental cruelty as 'the state of mind.'

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Desertion

Desertion means the rejection by one party of all the obligations of marriage- the permanent

forsaking or abandonment of one spouse by the other without any reasonable cause and without the consent of the other. It means a total repudiation of marital obligation.
The following 5 conditions must be present to constitute a desertion; they must co-exist to present a ground for divorce:
The factum of separation
Animus deserdendi (intention to desert)
Desertion without any reasonable cause
Desertion without consent of other party
Statutory period of two years must have run out before a petition is presented.

In Bipinchandra v. Prabhavati the Supreme Court held that where the respondent leaves the matrimonial home with an intention to desert, he will not be guilty of desertion if subsequently he shows an inclination to return & is prevented from doing so by the petitioner.
Conversion
When the other party has ceased to be Hindu by conversion to any other religion for e.g. Islam, Christianity, Judaism, Zorostrianism, a divorce can be granted.
Insanity
Insanity as a ground of divorce has the following two requirements-
i) The respondent has been incurably of unsound mind
ii) The respondent has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.
Leprosy
Contagiousness of leprosy and repulsive outward manifestations are responsible for creating a psychology where man not only shuns the company of lepers but looks at them scornfully. Thus, it is provided as a ground for divorce. The onus of proving this is on the petitioner.

Venereal Disease
At present, it is a ground for divorce if it is communicable by nature irrespective of the period for which the respondent has suffered from it. The ground is made out if it is shown that the disease is in communicable form & it is not necessary that it should have been communicated to the petitioner (even if done innocently).
Renunciation
"Renunciation of the world" is a ground for divorce only under Hindu law, as renunciation of the world is a typical Hindu notion. Modern codified Hindu law lays down that a spouse may seek divorce if the other party has renounced the world and has entered a holy order. A person who does this is considered as civilly dead. Such renunciation by entering into a religious order must be unequivocal & absolute.
Presumption Of Death
Under the Act, a person is presumed to be dead, if he/she has not been heard of as being alive for a period of at least seven years. The burden of proof that the whereabouts of the respondent are not known for the requisite period is on the petitioner under all the matrimonial laws. This is a presumption of universal acceptance as it aids proof in cases where it would be extremely difficult if not impossible to prove that fact. A decree of divorce granted under this clause is valid & effective even if it subsequently transpires that the respondent was in fact alive at the time when the decree was passed.

Wife's Special Grounds For Divorce

Besides the grounds enumerated above, a wife has been provided four additional grounds of divorce under Section 13(2) of the Hindu Marriage Act, 1955. These are as follows-

Pre-Act Polygamous Marriage

This clause states the ground for divorce as, "That the husband has another wife from before the commencement of the Act, alive at the time of the solemnization of the marriage of the petitioner. For example, the case of Venkatame v. Patil where a man had two wives, one of whom sued for divorce, and while the petition was pending, he divorced the second wife. He then averred that since he was left only with one wife, and the petition should be dismissed. The Court rejected the plea.

Such a ground is available if both the marriages are valid marriages & the other wife (2nd wife) should be present at the time of filing of the petition. However, today this ground is no more of practical importance.

Rape, Sodomy Or Bestiality

Under this clause, a divorce petition can be presented if the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

Non-Resumption Of Cohabitation After A Decree/Order Of Maintenance

If a wife has obtained an order of maintenance in proceedings under Section 125, Cr.P.C., 1973 or a decree under Section 18, Hindu Adoption & Maintenance Act, 1956 & cohabitation has not been resumed between parties after one year or upwards, then this is a valid ground for suing for divorce.

Repudiation Of Marriage

This provision provides a ground for divorce to the wife when the marriage was solemnized before she attained the age of fifteen years, and she has repudiated the marriage, but before the age of eighteen. Such repudiation may be express (written or spoken words) or may be implied from the conduct of the wife (left husband & refused to come back). Moreover, this right (added by the 1976 amendment) has only a retrospective effect i.e. it can be invoked irrespective of the fact that the marriage was solemnized before or after such amendment.

Irretrievable Breakdown Of Marriage

Irrespective of the three remedies available to parties that is: restitution of conjugal rights, judicial separation and divorce, the judiciary in India is demanding irretrievable breakdown of marriage as a special ground for divorce, as sometimes courts face some difficulties in granting the decree of divorce due to some of the technical loopholes in the existing theories of divorce. Both the Supreme Court and Law Committee consider the implementation of such a theory as a boon to parties who for one or the other reasons are unable to seek the decree of divorce. Therefore in the opinion of the Supreme Court and Law Commission of India, it is very essential to make it a special and separate ground mission that introduction of irretrievable breakdown of marriage, as a special ground will do any public good.

Under Hindu Marriage Act, 1955 primarily there are three theories under which divorce is granted:

(i) Guilt theory or Fault theory,

(ii) Consent theory,

(iii) Supervening circumstances theory.

The Irretrievable breakdown theory of divorce is the fourth and the most controversial theory in legal jurisprudence, based on the principle that marriage is a union of two persons based on love affection and respect for each other. If any of these is hampered due to any reason and if the matrimonial relation between the spouses reaches to such an extent from where it becomes completely irreparable, that is a point where neither of the spouse can live peacefully with each other and acquire the benefits of a matrimonial relations, than it is better to dissolve the marriage as now there is no point of stretching such a dead relationship, which exist only in name and not in reality

The breakdown of relationship is presumed de facto. The fact that parties to marriage are living separately for reasonably longer period of time (say two or three years), with any reasonable cause (like cruelty, adultery, desertion) or even without any reasonable cause (which shows the unwillingness of the parties or even of one of the party to live together) and all their attempts to reunite failed, it will be presumed by law that relationship is dead now.

Recently the Supreme Court Naveen Kohli v. Neelu Kohli has recommended an amendment to the Hindu Marriage Act, whereby either spouse can cite irretrievable breakdown of marriage as a reason to seek divorce. Expressing the concern that divorce could not be granted in number of cases where marriages were virtually dead due to the absence of the provision of irretrievable breakdown, the court strongly advocated incorporating this concept in the law in view of the change of circumstances.

The Court observed that public interest demands that the married status should, as far as possible, as long as possible and whenever possible, be maintained. However, where a marriage has been wrecked beyond any hope of being repaired, public interest requires the recognition of the fact. The judgment notes that there is no acceptable way in which a spouse can be compelled to resume life with the consort and that situations causing misery should not be allowed to continue indefinitely as law has a responsibility to adequately respond to the needs of the society. The profound reasoning is that in situations when there is absolutely no chance to live again jointly or when it is beyond repair, in such a case it would be futile to keep the marital tie alive. Here the ground of irretrievable breakdown is really needed. But it should not be oblivious that the ground, when introduced, needs to provide safeguards to ensure that no party is exploited.

Merits

The only merit of the theory as has been propounded by the jurists is that a marriage, which in practice is considered to be sacramental institution, should be based on grounds on which a sound marriage is built- that is tolerance, adjustment and respecting each other. If any of the party to marriage is not ready to live with the other party the relationship will not be a happy relationship. Stretching such a relationship will do no good, rather will develop hatred and frustration among the parties for each other. Therefore to protect the sanctity of marriage, to reduce the number of unhappy marriages and to prevent from getting wasted the precious years of life of the spouses, it is necessary to dissolve such a marriage.

Demerits

The Law Commission Of India in Chapter 4 of the 71st report has dealt in detail the demerits of the irretrievable breakdown theory. The two main oppositions discussed in the report are as follows:

(i) It will make divorce easy. It will allow the spouses or even to any one of the spouses to dissolve the marriage out of their own pleasure.

(ii) It will allow the guilty spouse to take the advantage of his own fault by getting separated and dissolving the marriage.

Conclusion

Hindus consider marriage to be a sacred bond. Prior to the Hindu Marriage Act of 1955, there was no provision for divorce. The concept of getting divorced was too radical for the Indian society then. The wives were the silent victims of such a rigid system. However, time has changed; situations have changed; social ladder has turned. Now the law provides for a way to get out of an unpleasant marriage by seeking divorce in a court of law. The actual benefactors of such a provision are women who no longer have to silently endure the harassment or injustice caused to them by their husbands. But the manner in which the judiciary is dealing with the subject of irretrievable break down of marriage, it is feared that it will completely pause the system of marriages. Every theory has its negative and positive traits. There applicability differs from situation to situation. Therefore it is very essential that the lawmakers of our country should deal with the subject in a very cautious manner after considering in detail its future implications.

Unit-II: Muslim Marriage and Dissolution of Marriage

Nikah (Muslim Marriage)

In the pre-Islam Arabia, the laws were favourable towards males and discriminatory against the women. Polygamy had to be accounted for in a very few blood relationships like in marriage with one's real mother or sister. Marriages were of different kinds and divorce was simple and easy for the man. With absolute rights vested in men and no checks led to men denying the women their basic rights.

Islam brought with it a due status for women and regarded them as dignified members of the society. 'Nikah' literally means 'to tie up together' and referred to the Islamic marriage. It is a matrimonial contract as well as an institution that gives the women a particular and high status in the society. Nikah was to ensure stability in a married life as it bound both the partners together for an indefinite period and also required the woman to be honoured with the mahr.

Islam allows limited polygamy, i.e. four wives at a time. This was allowed as during the numerous wars during the Prophet's time in Arabia, many Muslim men lost their lives. Thus, the women outnumbered the men. The war-widows and orphans became destitute as they had no standing in the society and lead miserable lives. In order to prevent injustice, Quran allows limited polygamy through the following Ayat: "marry of the women, who seem good to you, two or three or four, if you fear that you cannot do justice to so many, then one."

Justice refers to equal love and affection as well as boarding and lodging. The Quran has another Ayat that "you will not be able to deal equally between your wives however much you wish to do so". Thus, it can be safely inferred that though Islam permits four wives at a time it is actually in favour of monogamy. The Motazila Muslims follow monogamy strictly. But Muslims all over the globe follow the traditions of the Prophet and practise polygamy.

As per the statistics, Indian Muslims seem to prefer monogamy. Though they are allowed to have four wives as per the law, the Muslim government servants require the government's permission before contracting the second marriage. Muslim countries like Turkey and Tunisia have laws for monogamy. Pakistan has discouraged polygamy by implementing laws that makes it difficult to marry two or more times.

DEFINITION

Hedaya says that "Marriage implies a particular contract used for the purpose of legalising children.

Justice Mahmood has defined the Muslim marriage as "a purely civil contract".

NATURE AND CONCEPT OF MARRIAGE

The object of a Muslim marriage is to legalise children and to a large extent to regulate and validate the sexual relations. Apart from being a civil contract, it is also a social and religious institution.

LEGAL ASPECT

Legally speaking a Muslim marriage is a contract for it has a few elements of a contract. The parties have to be competent and offer, acceptance and free consent form an important part. Within a limit, the parties can decide the terms of the marriage and in case of breach; there are provisions for the rights and obligations of the parties. It can be safely said that marriage is very similar to a contract.

SOCIAL ASPECT

Marriage is a social institution and a social method to give an equal status to women. The dower, which is essential for a Muslim marriage, provides a security net for the woman in case of need. Limited polygamy helps raise the woman's standing and dignity in the society. By placing prohibitions on the marriage, the relationships of families can be regulated and the ill effects of in breeding are avoided.

RELIGIOUS ASPECT

Marriage is the tradition of the prophet as well as present in the words of Quran. Thus, a person who marries gets religious benefits and the abstainer would have committed a sin. In ANIS BEGAM v MOHD. ISTAFA (1933)55 All, 743, it has been held to be a religious sacrament.

ESSENTIAL OF A VALID MARRIAGE

A marriage is a valid marriage or Sahih only if it is recognised by the courts to be lawful.

I) COMPETENCE OF THE PARTIES

a) Age of Puberty

For marriage, dower and divorce, the age of majority under the Muslim law is the age of puberty and not 18 years of age. Though Hedaya says the minimum age of puberty for a boy is 12 years and for a girl it is 9 years; it has been fixed at 15 years of age by the Privy Council in the year 1916. Thus, a boy or a girl of 15 years of age will be presumed to have attained the age of puberty unless the contrary is proved.

Minor's Marriage

Under Muslim law, a person under 15 years of age is presumed to be a minor and has no capacity to give consent for marriage. Unless and until the guardian's consent is not obtained the marriage will be void. Guardians for marriage are different from guardians appointed by the court. The order of the priority is as follows:

Father;

Paternal Grandfather, however high;

Brother or other male members of the father's family;

Mother; and

Maternal uncle, aunt or other maternal relatives.

A remoter guardian for marriage cannot get the minor married off without actually following the prescribed order and such a marriage will be void.

Shia Law says that only the father or the paternal grand-father however high can be the guardians for marriage.

The Child Marriage Restraint Act, 1929 provides that a child marriage exists and will be valid but the guardians and others who conduct it can be punished. A child marriage can be prevented by an injunction.

Option of Puberty (Khyar-ul-Bulugh)

Under Muslim marriage, a minor on attaining the age of puberty can exercise the option of puberty wherein the minor can approve or disapprove the marriage contracted by the guardian who is not the father or the grandfather. If he disapproves, the marriage will dissolve with immediate effect. If the minor says nothing, it will be presumed that he has approved the marriage. As per the Shia law, a minor has to approve his marriage upon attaining the age of puberty.

If the father or the grandfather has contracted marriage fraudulently or negligently, the minor can repudiate the marriage on attaining the age of puberty. A wife can exercise the right even if the marriage was contracted by her father or her grandfather. There can be no unreasonable delay in the exercise of the option of puberty. The husband will lose his right to the option of puberty if the marriage has been consummated. The wife will also lose her right unless the consummation has taken place when the wife was still a minor and against her consent.

b) Soundness of Mind

Lunatics can get married during the lucid intervals for they can understand the consequences. Idiots on the other hand cannot do so. Idiocy refers to an abnormal state of the mind wherein the person cannot understand the consequences of their actions.

Marriage of insane persons

A person can contract a lawful marriage through a guardian. On recovering reason the said person can repudiate the marriage.

c) Religion of the parties

The parties can marry any Muslim irrespective of sects or sub sects.

Inter-Religion Marriage

Under Sunni law, a male can marry a Muslim girl of any sect/ sub sect or even a Kitabia girl. A Kitabia female is one who belongs to a community that originated in a book revealed by the heavens. Thus, the Jews and the Christians can be wed to a Sunni male. A marriage with a non-Muslim or non-Kitabia female, the marriage is merely irregular. Under Shia law, a marriage with a non-Muslim or a Kitabia woman is not permitted. However, a Muta marriage may be contracted with a Kitabia or Parsi female.

Marriage of a Muslim Female with a non-Muslim male

A Muslim female has no right to contract a marriage with a non-Muslim even if he is a Kitabia or Parsi. Such a marriage will be void.

The Special Marriage Act, 1954 allows any man or woman to get married to each other whether a Muslim or a non-Muslim. The succession will be governed under the Indian Succession Act, 1925.

II) FREE CONSENT OF THE PARTIES

If the parties are sane and adults, they can give consent on their own and the marriage will be a valid one. If the parties or one of them is either a minor or insane, the consent has to be obtained by the guardian. The consent will be deemed free when it is made at will and given voluntarily and not under any coercion or fraud.

Coercion is when the party is made to consent under the threat of harm to self or a loved one. All sects and schools render a marriage under coercion to be void. The Hanafi School is the only

exception. It is believed in the school that three things cannot be undone ever even if committed as a joke. The three things are marriage, divorce and taking back.
Fraud refers to a dishonest concealment of facts or presentation of false facts or statements to obtain consent. The moment the party whose consent was obtained by fraud comes to know of such fraud, he or she may accept the marriage as a legal one or altogether reject it.
Mistake of Fact is when the parties agree but not on the same thing. Consent refers to the meeting of the minds on the same issue. Where the identity of the bride to be, for example, is mistaken, the marriage will be void.

III) FORMALITIES IN THE MARRIAGE
Under Muslim law, religious ceremonies are not essential for validating a marriage. The only essential formalities are that of offer and acceptance.
Offer and Acceptance
Offer or Ijab signifies the willingness of a party to contract marriage with another. The offer comes in form of a declaration from the boy or his guardian. This offer has to be accepted by the girl or her guardian. This is referred to as acceptance or Qubool. Though no specific form exists, the words must show the unequivocal intention of the parties orthe guardians to marry the parties. It may be oral or written. When written down, it is referred to ass the Kabinnamah.
It is essential that the offer and acceptance occur at the same sitting. Thus, simultaneous actions must become a joint whole. For example, the groom to be has to send the offer through another. The bride must accept it in presence of others and then the marriage will be a valid one.
Reciprocity is another important aspect. The acceptance has to be for the proposal word to word, as it is and without any variations.
Conditional or Contingent Marriage is void even if the event that they are made dependent upon does in fact occur.
Presence of Witnesses is not essential under the Shia law. Under the Sunni law, the offer and acceptance needs to two competent witnesses. A Muslim male who is of sound mind and has attained the age of puberty is a competent single witness. Two sane Muslim females who have reached the age of puberty can also be treated as competent witnesses. Thus, two Muslim women along with a competent Muslim male witness will be regarded as competent witnesses for the marriage. Four females will not be regarded as competent witness. The term ‘witnesses’ does not refer to any one specifically asked or invited for this purpose only.
Registration under Muslim law is not essential for the validity of the marriage. But certain enactments provide for registration in the matters of marriage as well as divorces. The acts do so because then there exists a proof of the marriage. But even then the registration is optional only and not mandatory. It has also been held in a few cases that if the community custom requires registration, even if it is in a different format, the marriage has to be registered then. Under the Indian Christian Marriages Act, 1872, the registration of marriage will be essential if the marriage is between a Muslim and a Christian.

IV) ABSENCE OF PROHIBITION
Prohibition refers to the impediments or restrictions placed on a person with respect to another person or an action. The Muslim law provides that the marriage should not be a marriage against Islam or have any other impediments to it. Absence of prohibition refers to the freedom to marry a person for they do not stand in a particular relationship to each other. For example, a father cannot marry his own daughter.

Absolute Prohibitions

They are mandatory and have to be followed or else the marriage will be void. If a person is within the prohibited relationship of the other party, the marriage cannot take place.

Whether a person is within the prohibited relationship or not can be decided on the following basis:

a) Consanguinity is relationship by Blood.A Muslim cannot marry one's own descendant, however high or descendents of one' father or mother no matter how low. Similarly brothers and sisters of one's ascendants howsoever high can not be married to. However, there is no prohibition in the marriage of cousin brothers or sisters.

b) Affinity refers to relation by marriage. A Muslim can not marry the ascendant or descendant of one's spouse or the spouse of one's ascendant or descendant.

c) Fosterage refers to the relationship of nurture and feeding. A child is breast fed during its infancy. If the person providing the feeds is someone other than the biological mother, the infant or child will still stand in a prohibited relationship with her.

Relative Prohibitions

Where the compliance is not mandatory but non-compliance will be frowned upon. Any marriage in violation will be only irregular and not void. As per Shia law, the marriage will be either perfectly valid or void and not irregular.

a) Unlawful Conjunctions

A Muslim can not have two wives at the same time if the wives are related to each other in a way that would have made their marriage void if they had been of opposite sex. As per the Sunni law, a marriage against this condition is irregular. The Shia law will treat violation as a void marriage. The only exception will be if the marriage is with the wife's consent.

b) Marriage with the fifth wife

If a Muslim man has more than five wives, it is merely irregular with respect to the fifth wife. If he divorces a wife or a wife dies, the irregularity will be removed with respect to the fifth wife.

c) Marriage with a non-Muslim has been discussed early on in the chapter.

d) Marriage without witnesses is irregular as per Sunni law.

e) Marriage during Iddat is irregular as per the Sunni law and void as per the Shia law.

Iddat refers to the period that a woman undergoes after divorce or the death of her husband. It literally means counting. This period is essential to ascertain whether the wife/widow is pregnant or not. During this time, the woman leads a simple and chaste life. The circumstances where she has to observe Iddat and how are as follows.

1) Dissolution of Marriage by divorce

If the marriage was a valid one and consummated, the duration of Iddat is three monthly courses. The marriage could have been dissolved through Talaq, Ila, Zihar or under the Dissolution of Muslim Marriage Act, 1939. If the woman is pregnant, the period of Iddat extends till the delivery or abortion of the foetus. If the marriage has not been consummated, the woman is not required to observe Iddat.

2) Divorce of marriage by the death of the husband

If the marriage was a valid one, the period of Iddat extends up to 4 months and 10 days irrespective of the fact whether the marriage was consummated or not. If the woman was pregnant at the time, the period of Iddat is on till the delivery or the abortion or the earlier specified period, which ever is longer.

3) Death if husband during divorce Iddat

If the husband dies during the divorce Iddat, the wife has to start a fresh Iddat of 4 months and 10 days from the date of death of the husband.

4) Commencement of Iddat

The period of Iddat starts from the date of divorce or death and not from the date of the wife receiving a notice of the same. Thus, if the wife gets the notice of such an even after the specified period of Iddat has expired, she does not have to observe Iddat.

Under Shia law, Iddat need not be observed if the wife is past the childbearing age or if she has not even attained puberty.

Valid Retirement refers to when a couple spends time together in private and there is no moral, social or legal restriction in their intercourse. As per Sunni law, a valid retirement raises the presumption of consummation of the marriage. Thus, Iddat will have to be observed even if there was no actual consummation but a valid retirement has been proved. Shia law does not recognise the concept of valid retirement.

Husband is prohibited from remarrying during iddat if and only if he already has four wives. Thus, he can not marry another woman till the iddat period is over. In case, such a marriage does take place, it will be merely irregular and not void.

Miscellaneous Prohibitions

a) Marriage during pilgrimage is void as per Shia law only.

b) Rule of Equality refers to the society's prohibition on marriage wherein the husband and wife must be of the same standing and equal therefore. The marriage in violation of this rule can be invalidated by the Qazi. The Shia law does not recognise this rule.

c) Re-marriage between the divorced couple is allowed provided a procedure if followed. The divorced wife has to marry another man fulfilling all the requisites of a valid marriage. The marriage has to be consummated. Then the present husband has to divorce her voluntarily and the wife has to observe Iddat. Then she may marry her first or former husband. If the procedure is not followed, the marriage will be merely irregular.

d) Polyandry is not permitted and the second marriage will be void under Shia and Sunni law.

KINDS OF MARRIAGE

Valid Marriage or the Sahih Marriage

Under all schools of Muslim law, the basic requirements have to be fulfilled, i.e. the parties are competent, the consent of the parties is free consent and the offer and acceptance has been duly made.

Legal Effect of a Valid Marriage

i) The co habitation of the parties becomes lawful and not immoral;

ii) The children born to a lawfully wedded couple are legitimate and can inherit accordingly;

iii) For the couple itself, mutual rights of inheritance arise;

iv) The wife can claim dower and has a right to maintenance and simultaneously the obligation to observe Iddat is bestowed upon her;

v) Prohibited relations are created due to the marriage;

vi) The legal identity or status of a Muslim woman does not blend in with her husband's identity after marriage; and

vii) The parties have rights to regulate the movements of each other but they can not refrain each other from maintaining a relationship with their respective families or visits to then.

Void Marriage or the Batil Marriage

It is an illegal union that exists not in law. Thus, a marriage in violation of absolute prohibitions or polyandry is a void marriage. Shia law provides a few additional grounds like marriage during a pilgrimage or marriage with a non-Muslim or a woman observing Iddat.

Legal Effects of a Void Marriage

No mutual rights or obligations are created for the parties in this union. The children born to such a couple are deemed illegitimate and the wife has no rights to dower or maintenance. The parties can actually marry any one they wish for this marriage does not exist in law or in fact.

Irregular Marriage or Fasid Marriage

An incomplete marriage where the deviation from procedure or a flaw can be removed, it is called an irregular marriage. For example, the marriage with the fifth wife or with a woman observing Iddat will be treated as an irregular marriage.

Legal Effects of an irregular Marriage

The cohabitation is lawful and the children are legitimate and can inherit the properties of their parents. Mutual rights of inheritance do not arise. After consummation only, can the wife claim dower. The wife does not have to observe Iddat if the marriage is not consummated.

Temporary marriage or Muta Marriage

It is a unique form of marriage recognised only under the Ithna Asharia School. It is a union for a particular time only with consideration as a pre-requisite. The roots can be
traced back to the early Arabia, where men had to travel long and far. To confer legitimacy on the offspring produced during the travels, the Prophet allowed this Muta or enjoyment marriage for some time. Later, he prohibited it absolutely.

It is essential that the parties must be competent to contract marriage because the guardians cannot contract for a Muta marriage. The Muslim male can contract Muta marriage with a Muslim,
Kitabia or Parsi woman but the Muslim woman can contract the same only with Muslim men. Any number of Muta wives can be contracted with.

The formalities of free consent, offer and acceptance as well as absence of prohibition have to be followed. The dower must be specified at the time of marriage otherwise the marriage will be deemed void. The duration of the Muta marriage must be specified or else it will be deemed as a permanent marriage.

Legal Effects of Temporary Marriage

The cohabitation between parties becomes lawful and consequently even the children are legitimate children. There will be no mutual rights of inheritance between the husband and wife.

The husband has to pay the whole dower amount if he leaves without finishing the duration of the marriage. If the wife were to leave before the expiry of the specified time, the husband can deduct a proportionate amount from her dower.

Maintenance is not available to the wife as a right. There is no divorce in Muta marriages. It ends on the prescribed time or departure of one of the parties. Iddat has to be observed for two months if the marriage has been consummated, else it is not needed. If the marriage dissolved due to death, 4 months and 10 days is the iddat period.

Marriage Agreements are allowed under Muslim law. Even subsequent to the marriage, a couple can enter into an agreement for regulation of their relationship. If the guardians have made such agreements when the parties are not competent to do so, the agreement will be binding on them. Any agreement working against Islam is void. For example a marriage agreement wherein the wife is not allowed to claim her dower or the couple can stay separately without any reasonable cause would be illegal.

Marriage agreements are binding on the parties as long as they are legal. For example an agreement wherein the husband cannot contract another marriage during the subsistence of the first is a valid agreement. Similarly, an agreement stating that the husband shall not stop the wife from receiving her relatives at his house at any time is also valid.
Breach of a Marriage Agreement if the agreement was a valid one gives rise to rights of refusal for restitution, dower related rights and in extreme scenarios, dissolution of the marriage.

RESTITUTION OF CONJUGAL RIGHTS

Restitution of conjugal rights refers to giving back the right to one party to stay with the spouse. As a couple is entitled to stay together and enjoy each other's company, if one spouse stays away without reason, the other can file a suit to move back with the aggrieved party. The courts have to look into the circumstances of each case and then decide. A wife can claim defences against her husband's claim as given below:

a) He falsely accused her of adultery;
b) Her prompt dower was not paid on demand;
c) The husband has been expelled from the caste;
d) Cruelty, physical or emotional, by the husband; and
e) Husband converted from Islam to another religion or used objectionable words against the Prophet, etc.

Dissolution of marriage

Firm union of the husband and wife is a necessary condition for a happy family life. Islam therefore, insists upon the subsistence of a marriage and prescribes that breach of marriage contract should be avoided. Initially no marriage is contracted to be dissolved but in unfortunate circumstances the matrimonial contract is broken. One of the ways of such dissolution is by way of divorce . Under Muslim law the divorce may take place by the act of the parties themselves or by a decree of the court of law. However in whatever manner the divorce is effected it has not been regarded as a rule of life. In Islam, divorce is considered as an exception to the status of marriage.

The Prophet declared that among the things which have been permitted by law, divorce is the worst . Divorce being an evil, it must be avoided as far as possible.But in some occasions this evil becomes a necessity, because when it is impossible for the parties to the marriage to carry on their union with mutual affection and love then it is better to allow them to get separated than compel them to live together in an atmosphere of hatred and disaffection. The basis of divorce in Islamic law is the inability of the spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. A divorce may be either by the act of the husband or by the act of the wife. There are several modes of divorce under the Muslim law, which will be discussed hereafter.

Modes of Divorce:

A husband may divorce his wife by repudiating the marriage without giving any reason. Pronouncement of such words which signify his intention to disown the wife is sufficient. Generally this done by talaaq. But he may also divorce by Ila, and Zihar which differ from talaaq only in form, not in substance. A wife cannot divorce her husband of her own accord. She can divorce the husband only when the husband has delegated such a right to her or under an agreement. Under an agreement the wife may divorce her husband either by Khula or Mubarat.

Before 1939, a Muslim wife had no right to seek divorce except on the ground of false charges of adultery, insanity or impotency of the husband. But the Dissolution of Muslim Marriages Act 1939 lays down several other grounds on the basis of which a Muslim wife may get her divorce decree passed by the order of the court.

There are two categories of divorce under the Muslim law:
1.) Extra judicial divorce, and
2.) Judicial divorce

The category of extra judicial divorce can be further subdivided into three types, namely,
- By husband- talaaq, ila, and zihar.
- By wife- talaaq-i-tafweez, lian.
- By mutual agreement- khula and mubarat.

The second category is the right of the wife to give divorce under the Dissolution of Muslim Marriages Act 1939.

Talaaq: Talaaq in its primitive sense means dismission. In its literal meaning, it means "setting free", "letting loose", or taking off any "ties or restraint". In Muslim Law it means freedom from the bondage of marriage and not from any other bondage. In legal sense it means dissolution of marriage by husband using appropriate words. In other words talaaq is repudiation of marriage by the husband in accordance with the procedure laid down by the law.

The following verse is in support of the husband's authority to pronounce unilateral divorce is often cited:
Men are maintainers of women, because Allah has made some of them to excel others and because they spend out of their property (on their maintenance and dower) . When the husband exercises his right to pronounce divorce, technically this is known as talaaq. The most remarkable feature of Muslim law of talaaq is that all the schools of the Sunnis and the Shias recognize it differing only in some details. In Muslim world, so widespread has been the talaaq that even the Imams practiced it . The absolute power of a Muslim husband of divorcing his wife unilaterally, without assigning any reason, literally at his whim, even in a jest or in a state of intoxication, and without recourse to the court, and even in the absence of the wife, is recognized in modern India. All that is necessary is that the husband should pronounce talaaq; how he does it, when he does it, or in what he does it is not very essential.
In Hannefa v. Pathummal, Khalid, J., termed this as "monstrosity" . Among the Sunnis, talaaq may be express, implied, contingent constructive or even delegated. The Shias recognize only the express and the delegated forms of talaaq.

Conditions for a valid talaaq:
1) Capacity: Every Muslim husband of sound mind, who has attained the age of puberty, is competent to pronounce talaaq. It is not necessary for him to give any reason for his pronouncement. A husband who is minor or of unsound mind cannot pronounce it. Talaaq by a minor or of a person of unsound mind is void and ineffective. However, if a husband is lunatic

then talaaq pronounced by him during "lucid interval" is valid. The guardian cannot pronounce talaaq on behalf of a minor husband. When insane husband has no guardian, the Qazi or a judge has the right to dissolve the marriage in the interest of such a husband.

2) Free Consent: Except under Hanafi law, the consent of the husband in pronouncing talaaq must be a free consent. Under Hanafi law, a talaaq, pronounced under compulsion, coercion, undue influence, fraud and voluntary intoxication etc., is valid and dissolves the marriage.

Involuntary intoxication: Talaaq pronounced under forced or involuntary intoxication is void even under the Hanafi law.

Shia law:
Under the Shia law (and also under other schools of Sunnis) a talaaq pronounced under compulsion, coercion, undue influence, fraud, or voluntary intoxication is void and ineffective.

3) Formalities: According to Sunni law, a talaaq, may be oral or in writing. It may be simply uttered by the husband or he may write a Talaaqnama. No specific formula or use of any particular word is required to constitute a valid talaaq. Any expression which clearly indicates the husband's desire to break the marriage is sufficient. It need not be made in the presence of the witnesses.

According to Shias, talaaq, must be pronounced orally, except where the husband is unable to speak. If the husband can speak but gives it in writing, the talaaq, is void under Shia law. Here talaaq must be pronounced in the presence of two witnesses.

4) Express words: The words of talaaq must clearly indicate the husband's intention to dissolve the marriage. If the pronouncement is not express and is ambiguous then it is absolutely necessary to prove that the husband clearly intends to dissolve the marriage.

Express Talaaq (by husband):
When clear and unequivocal words, such as "I have divorced thee" are uttered, the divorce is express. The express talaaq, falls into two categories:

- Talaaq-i-sunnat,
- Talaaq-i-biddat.

Talaaq-i-sunnat has two forms:

- Talaaq-i-ahasan (Most approved)
- Talaaq-i-hasan (Less approved).

Talaaq-i-sunnat is considered to be in accordance with the dictats of Prophet Mohammad.

The ahasan talaaq: consists of a single pronouncement of divorce made in the period of tuhr (purity, between two menstruations), or at any time, if the wife is free from menstruation, followed by abstinence from sexual intercourse during the period if iddat. The requirement that

the pronouncement be made during a period of tuhr applies only to oral divorce and does not apply to talaaq in writing. Similarly, this requirement is not applicable when the wife has passed the age of menstruation or the parties have been away from each other for a long time, or when the marriage has not been consummated. The advantage of this form is that divorce can revoked at any time before the completion of the period of iddat, thus hasty, thoughtless divorce can be prevented. The revocation may effected expressly or impliedly.

Thus, if before the completion of iddat, the husband resumes cohabitation with his wife or says I have retained thee" the divorce is revoked. Resumption of sexual intercourse before the completion of period of iddat also results in the revocation of divorce.

The Raad-ul-Muhtar puts it thus: "It is proper and right to observe this form, for human nature is apt to be mislead and to lead astray the mind far to perceive faults which may not exist and to commit mistakes of which one is certain to feel ashamed afterwards"

The hasan talaaq:
In this the husband is required to pronounce the formula of talaaq three time during three successive tuhrs. If the wife has crossed the age of menstruation, the pronouncement of it may be made after the interval of a month or thirty days between the successive pronouncements. When the last pronouncement is made, the talaaq, becomes final and irrevocable. It is necessary that each of the three pronouncements should be made at a time when no intercourse has taken place during the period of tuhr. Example: W, a wife, is having her period of purity and no sexual intercourse has taken place. At this time, her husband, H, pronounces talaaq, on her. This is the first pronouncement by express words. Then again, when she enters the next period of purity, and before he indulges in sexual intercourse, he makes the second pronouncement. He again revokes it. Again when the wife enters her third period of purity and before any intercourse takes place H pronounces the third pronouncement. The moment H makes this third pronouncement, the marriage stands dissolved irrevocably, irrespective of iddat.

Talaaq-i-Biddat:
It came into vogue during the second century of Islam. It has two forms: (i) the triple declaration of talaaq made in a period of purity, either in one sentence or in three, (ii) the other form constitutes a single irrevocable pronouncement of divorce made in a period of tuhr or even otherwise. This type of talaaq is not recognized by the Shias. This form of divorce is condemned. It is considered heretical, because of its irrevocability.

Ila:
Besides talaaq, a Muslim husband can repudiate his marriage by two other modes, that are, Ila and Zihar. They are called constructive divorce. In Ila, the husband takes an oath not to have sexual intercourse with his wife. Followed by this oath, there is no consummation for a period of four months. After the expiry of the fourth month, the marriage dissolves irrevocably. But if the husband resumes cohabitation within four months, Ila is cancelled and the marriage does not dissolve. Under Ithna Asharia (Shia) School, Ila, does not operate as divorce without order of the

court of law. After the expiry of the fourth month, the wife is simply entitled for a judicial divorce. If there is no cohabitation, even after expiry of four months, the wife may file a suit for restitution of conjugal rights against the husband.

Zihar:
In this mode the husband compares his wife with a woman within his prohibited relationship e.g., mother or sister etc. The husband would say that from today the wife is like his mother or sister. After such a comparison the husband does not cohabit with his wife for a period of four months. Upon the expiry of the said period Zihar is complete.

After the expiry of fourth month the wife has following rights:
(i) She may go to the court to get a decree of judicial divorce
(ii) She may ask the court to grant the decree of restitution of conjugal rights.
Where the husband wants to revoke Zihar by resuming cohabitation within the said period, the wife cannot seek judicial divorce. It can be revoked if:
(i) The husband observes fast for a period of two months, or,
(ii) He provides food at least sixty people, or,
(iii) He frees a slave.

According to Shia law Zihar must be performed in the presence of two witnesses.

Divorce by mutual agreement:
Khula and Mubarat: They are two forms of divorce by mutual consent but in either of them, the wife has to part with her dower or a part of some other property. A verse in the Holy Quran runs as: "And it not lawful for you that ye take from women out of that which ye have given them: except (in the case) when both fear that they may not be able to keep within the limits (imposed by Allah), in that case it is no sin for either of them if the woman ransom herself." The word khula, in its original sense means "to draw" or "dig up" or "to take off" such as taking off one's clothes or garments. It is said that the spouses are like clothes to each other and when they take khula each takes off his or her clothes, i.e., they get rid of each other.

In law it is said is said to signify an agreement between the spouses for dissolving a connubial union in lieu of compensation paid by the wife to her husband out of her property. Although consideration for Khula is essential, the actual release of the dower or delivery of property constituting the consideration is not a condition precedent for the validity of the khula. Once the husband gives his consent, it results in an irrevocable divorce. The husband has no power of cancelling the 'khul' on the ground that the consideration has not been paid. The consideration can be anything, usually it is mahr, the whole or part of it. But it may be any property though not illusory. In mubarat, the outstanding feature is that both the parties desire divorce. Thus, the proposal may emanate from either side. In mubarat both, the husband and the wife, are happy to get rid of each other . Among the Sunnis when the parties to marriage enter into a mubarat all mutual rights and obligations come to an end.

The Shia law is stringent though. It requires that both the parties must bona fide find the marital relationship to be irksome and cumbersome. Among the Sunnis no specific form is laid down, but the Shias insist on a proper form. The Shias insist that the word mubarat should be followed by the word talaaq, otherwise no divorce would result. They also insist that the pronouncement must be in Arabic unless the parties are incapable of pronouncing the Arabic words. Intention to dissolve the marriage should be clearly expressed. Among both, Shias and Sunnis, mubarat is irrevocable. Other requirements are the same as in khula and the wife must undergo the period of iddat and in both the divorce is essentially an act of the parties, and no intervention by the court is required.

Divorce by wife:
The divorce by wife can be categorized under three categories:
(i) Talaaq-i-tafweez
(ii) Lian
(iii) By Dissolution of Muslim Marriages Act 1939.

Talaaq-i-tafweez or delegated divorce is recognized among both, the Shias and the Sunnis. The Muslim husband is free to delegate his power of pronouncing divorce to his wife or any other person. He may delegate the power absolutely or conditionally, temporarily or permanently . A permanent delegation of power is revocable but a temporary delegation of power is not. This delegation must be made distinctly in favour of the person to whom the power is delegated, and the purpose of delegation must be clearly stated. The power of talaaq may be delegated to his wife and as Faizee observes, "this form of delegated divorce is perhaps the most potent weapon in the hands of a Muslim wife to obtain freedom without the intervention of any court and is now beginning to be fairly common in India".

This form of delegated divorce is usually stipulated in prenuptial agreements. In Md. Khan v. Shahmai, under a prenuptial agreement, a husband, who was a Khana Damad, undertook to pay certain amount of marriage expenses incurred by the father-in-law in the event of his leaving the house and conferred a power to pronounce divorce on his wife. The husband left his father-in-law's house without paying the amount. The wife exercised the right and divorced herself. It was held that it was a valid divorce in the exercise of the power delegated to her. Delegation of power may be made even in the post marriage agreements. Thus where under an agreement it is stipulated that in the event of the husband failing to pay her maintenance or taking a second wife, the will have a right of pronouncing divorce on herself, such an agreement is valid, and such conditions are reasonable and not against public policy . It should be noted that even in the event of contingency, whether or not the power is to be exercised, depend upon the wife she may choose to exercise it or she may not. The happening of the event of contingency does not result in automatic divorce.

Lian:
If the husband levels false charges of unchastity or adultery against his wife then this amounts to character assassination and the wife has got the right to ask for divorce on these grounds. Such a mode of divorce is called Lian. However, it is only a voluntary and aggressive charge of adultery

made by the husband which, if false, would entitle the wife to get the wife to get the decree of divorce on the ground of Lian. Where a wife hurts the feelings of her husband with her behaviour and the husband hits back an allegation of infidelity against her, then what the husband says in response to the bad behaviour of the wife, cannot be used by the wife as a false charge of adultery and no divorce is to be granted under Lian. This was held in the case of Nurjahan v. Kazim Ali by the Calcutta High Court.

Dissolution of Muslim Marriages Act 1939:
Qazi Mohammad Ahmad Kazmi had introduced a bill in the Legislature regarding the issue on 17th April 1936. It however became law on 17th March 1939 and thus stood the Dissolution of Muslim Marriages Act 1939.

Section 2 of the Act runs thereunder:
A woman married under Muslim law shall be entitled to obtain a decree for divorce for the dissolution of her marriage on any one or more of the following grounds, namely:-
• That the whereabouts of the husband have not been known for a period of four years: if the husband is missing for a period of four years the wife may file a petition for the dissolution of her marriage. The husband is deemed to be missing if the wife or any such person, who is expected to have knowledge of the husband, is unable to locate the husband. Section 3 provides that where a wife files petition for divorce under this ground, she is required to give the names and addresses of all such persons who would have been the legal heirs of the husband upon his death. The court issues notices to all such persons appear before it and to state if they have any knowledge about the missing husband. If nobody knows then the court passes a decree to this effect which becomes effective only after the expiry of six months. If before the expiry, the husband reappears, the court shall set aside the decree and the marriage is not dissolved.

• That the husband has neglected or has failed to provide for her maintenance for a period of two years: it is a legal obligation of every husband to maintain his wife, and if he fails to do so, the wife may seek divorce on this ground. A husband may not maintain his wife either because he neglects her or because he has no means to provide her maintenance. In both the cases the result would be the same. The husband's obligation to maintain his wife is subject to wife's own performance of matrimonial obligations. Therefore, if the wife lives separately without any reasonable excuse, she is not entitled to get a judicial divorce on the ground of husband's failure to maintain her because her own conduct disentitles her from maintenance under Muslim law.

• That the husband has been sentenced to imprisonment for a period of seven years or upwards: the wife's right of judicial divorce on this ground begins from the date on which the sentence becomes final. Therefore, the decree can be passed in her favour only after the expiry of the date for appeal by the husband or after the appeal by the husband has been dismissed by the final court.

• That the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years: the Act does define 'marital obligations of the husband'. There are several marital obligations of the husband under Muslim law. But for the purpose of this clause husband's failure to perform only those conjugal obligations may be taken into account which

are not included in any of the clauses of Section 2 of this Act.

• That the husband was impotent at the time of the marriage and continues to be so: for getting a decree of divorce on this ground, the wife has to prove that the husband was impotent at the time of the marriage and continues to be impotent till the filing of the suit. Before passing a decree of divorce of divorce on this ground, the court is bound to give to the husband one year to improve his potency provided he makes an application for it. If the husband does not give such application, the court shall pass the decree without delay. In Gul Mohd. Khan v. Hasina the wife filed a suit for dissolution of marriage on the ground of impotency. The husband made an application before the court seeking an order for proving his potency. The court allowed him to prove his potency.

• If the husband has been insane for a period of two years or is suffering from leprosy or a virulent veneral disease: the husband's insanity must be for two or more years immediately preceding the presentation of the suit. But this act does not specify that the unsoundness of mind must be curable or incurable. Leprosy may be white or black or cause the skin to wither away. It may be curable or incurable. Veneral disease is a disease of the sex organs. The Act provides that this disease must be of incurable nature. It may be of any duration. Moreover even if this disease has been infected to the husband by the wife herself, she is entitled to get divorce on this ground.

• That she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated;

• That the husband treats her with cruelty, that is to say-
(a) Habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical illtreatment, or
(b) Associates with women of ill-repute or leads an infamous life, or
(c) Attempts to force her to lead an immoral life, or
(d) Disposes of her property or prevents her exercising her legal rights over it, or
(e) Obstructs her in the observance of her religious profession or practice, or
(f) If he has more than one wives, does not treat her equitably in accordance with the injunctions of the Holy Quran.

In Syed Ziauddin v. Parvez Sultana, Parvez Sultana was a science graduate and she wanted to take admission in a college for medical studies. She needed money for her studies. Syed Ziaudddin promised to give her money provided she married him. She did. Later she filed for divorce for non-fulfillment of promise on the part of the husband. The court granted her divorce on the ground of cruelty. Thus we see the court's attitude of attributing a wider meaning to the expression cruelty. In Zubaida Begum v. Sardar Shah, a case from Lahore High Court, the husband sold the ornaments of the wife with her consent. It was submitted that the husband's conduct does not amount to cruelty.

In Aboobacker v. Mamu koya, the husband used to compel his wife to put on a sari and see pictures in cinema. The wife refused to do so because according to her beliefs this was against the Islamic way of life. She sought divorce on the ground of mental cruelty. The Kerela High

Court held that the conduct of the husband cannot be regarded as cruelty because mere departure from the standards of suffocating orthodoxy does not constitute un-Islamic behaviour.

In Itwari v. Asghari, the Allahabad High Court observed that Indian Law does not recognize various types of cruelty such as 'Muslim cruelty', 'Hindu cruelty' and so on, and that the test of cruelty is based on universal and humanitarian standards; that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife's safety or health.

Irretrievable Breakdown:

Divorce on the basis of irretrievable breakdown of marriage has come into existence in Muslim Law through the judicial interpretation of certain provisions of Muslim law. In 1945 in Umar Bibi v. Md. Din , it was argued that the wife hated her husband so much that she could not possibly live with him and there was total incompatibility of temperaments. On these grounds the court refused to grant a decree of divorce. But twenty five years later in Neorbibi v. Pir Bux, again an attempt was made to grant divorce on the ground of irretrievable breakdown of marriage. This time the court granted the divorce. Thus in Muslim law of modern India, there are two breakdown grounds for divorce: (a) non-payment of maintenance by the husband even if the failure has resulted due to the conduct of the wife, (b) where there is total irreconcilability between the spouses.

Conclusion:

In contrast to the Western world where divorce was relatively uncommon until modern times, and in contrast to the low rates of divorce in the modern Middle East, divorce was a common occurrence in the pre-modern Muslim world. In the medieval Islamic world and the Ottoman Empire, the rate of divorce was higher than it is today in the modern Middle East. In 15th century Egypt, Al-Sakhawi recorded the marital history of 500 women, the largest sample on marriage in the Middle Ages, and found that at least a third of all women in the Mamluk Sultanate of Egypt and Syria married more than once, with many marrying three or more times. According to Al-Sakhawi, as many as three out of ten marriages in 15th century Cairo ended in divorce. In the early 20th century, some villages in western Java and the Malay peninsula had divorce rates as high as 70%.In practice in most of the Muslim world today divorce can be quite involved as there may be separate secular procedures to follow as well.

Usually, assuming her husband demands a divorce, the divorced wife keeps her mahr, both the original gift and any supplementary property specified in the marriage contract. She is also given child support until the age of weaning, at which point the child's custody will be settled by the couple or by the courts. Women's right to divorce is often extremely limited compared with that of men in the Middle East. While men can divorce their spouses easily, women face a lot of legal and financial obstacles. For example, in Yemen, women usually can ask for divorce only when husband's inability to support her life is admitted while men can divorce at will. However, this contentious area of religious practice and tradition is being increasingly challenged by those promoting more liberal interpretations of Islam.

Unit-III: Adoption, Maintenance of Guardianship

Adoption:

The Hindu Adoptions and Maintenance Act were enacted in India in 1956 as part of the Hindu Code Bills. The
other legislations enacted during this time include the Hindu Marriage Act (1955), the Hindu Succession Act (1956), and the Hindu Minority and Guardianship Act (1956). All of these acts were put forth under the leadership of Jawaharlal Nehru, and were meant to codify and standardize the current Hindu legal tradition. The Adoptions and Maintenance Act of 1956 dealt specifically with the legal process of adopting children by a Hindu adult, as well as the legal obligations of a Hindu to provide "maintenance" to various family members including, but not limited to, their wife or wives, parents, and in-laws.
Application

This Act applies to Hindus and all those considered under the umbrella term of Hindus, which includes:
• a Hindu by religion in any of its forms or development;
• a Buddhist, Jain or Sikh;
• a child legitimate or illegitimate whose parents are Hindus, Buddhists, Jains or Sikhs;
• a child legitimate or illegitimate one of whose parents are Hindus, Buddhists, Jains or Sikhs and has been so brought up;
• an abandoned child, legitimate or illegitimate of unknown parentage brought up as a Hindu, Buddhist, etc.;
and
• a convert to the Hindu, Buddhist, Jain or Sikh religion.
Persons who are Muslims, Christians, Parsis or Jews are excluded from this definition.
The Act does not also apply to adoptions that took place prior to the date of enactment. However, it does apply
to any marriage that has taken place before or after the Act had come into force. Moreover, if the wife is not a Hindu then the husband is not bound to provide maintenance for her under this Act under modern Hindu Law.
Who can adopt?

Under this Act only Hindus may adopt subject to their fulfillment of certain criteria. The first of these asserts
that the adopter has the legal right to (under this Act that would mean they are a Hindu). Next, they have to have the capacity to be able to provide for the adopted child. Thirdly the child must be capable of being adopted. Lastly, compliance with all other specifications (as outlined below) must be met to make the adoption valid.

Men can adopt if they have the consent(s) of their wife or of all of their wives. The only way of getting around
obtaining the permission of the wife or of the wives is if she or if they are unsound, if they have died, if they have completely and finally renounced the world, and if they have ceased to be a Hindu. Men who are unmarried can adopt as well as long as they are not a minor. However, if a

man were to adopt a daughter, the man must be twenty four years of age or older.

Women can adopt if they have the consent of their husband. Again, the only way of getting around obtaining
the permission of the husband is if he is unsound, has died, has completely and finally renounced the world, and has ceased to be a Hindu. Women who are unmarried can adopt as well as long as they are not a minor. However, if a woman were to adopt a son, the woman must be twenty four years of age or older. If the child is adopted and there are more than one wife living in the household, then the senior wife is classified as the legal mother of the adopted child.

Who can be adopted?

The adopted child can be either male or female. The adopted child must be fall under the Hindu category. The
adoptee needs also to be unmarried; however, if the particular custom or usage is applicable to the involved parties then the adoptee can be married. The child cannot be the age of sixteen or older, unless again it is custom or the usage is applicable to the involved parties. An adoption can only occur if there is not a child of the same sex of the adopted child still residing in the home. In particular, if a son were to be adopted then the adoptive father or mother must not have a legitimate or adopted son still live in the house.

Legal Implications for an Adopted Child

From the date of the adoption, the child is under the legal guardianship of the new adopted parent(s) and thus
should enjoy all the benefits from those family ties. This also means that this child, therefore, is cut off from all legal benefits (property, inheritance, etc.) from the family who had given him or her up for adoption.
Adoption is recognized by the Hindus and is not recognized by Muslims, Christian and Parsis. Adoption in the
Hindus is covered by The Hindu Adoptions Act and after the coming of this Act all adoptions can be made in accordance with this Act. It came into effect from 21st December, 1956. Prior to this Act only a male could be adopted, but the Act makes a provision that a female may also be adopted. This Act extends to the whole of India except the state of Jammu and Kashmir. It applies to Hindus, Buddhists, Jainas and Sikhs and to any other person who is not a Muslim, Christian, Parsi by religion.
(c)Maintenance
Maintenance of a Wife
A Hindu wife is entitled to be provided for by her husband throughout the duration of her lifetime. Regardless
of whether the marriage was formed before this Act was instated or after, the Act is still applicable. The only way the wife can null her maintenance is if she renounces being a Hindu and converts to a different religion, or if she commits adultery.
The wife is allowed to live separately from her husband and still be provided for by him. This separation can be

justified through a number of different reasons, including if he has another wife living, if he has converted to a different religion other than Hinduism, if he has treated her cruelly, or even has a violent case of leprosy. If the wife is widowed by her late husband, then it is the duty of the father-in-law to provide for her. This legal obligation only comes into effect if the widowed wife has no other means of providing for herself. If she has land of her own, or means of an income and can maintain herself then the father-in-law is free from obligation to her. Additionally, if the widow remarries then her late husband's father-in-law does is not legally bound by this Act anymore as well.

Maintenance of a Child or of Aged Parent(s)

Under this Act, a child is guaranteed maintenance from his or her parents until the child ceases to be a minor.

This is in effect for both legitimate and illegitimate children who are claimed by the parent or parents. Parents or infirmed daughters, on the other hand, must be maintained so long as they are unable to maintain for themselves

Amount of Maintenance Provided

The amount of maintenance awarded, if any, is dependent on the discretion of the courts. Particular factors

included in the decision process include the position or status of the parties, the number of persons entitled to maintenance, the reasonable wants of the claimants, if the claimant is living separately and if the claimant is justified in doing so, and the value of the claimant's estate and income. If any debts are owed by the deceased, then those are to be paid before the amount of maintenance is awarded or even considered.

(d)Maintenance of a divorced Muslim wife

Maintenance of a divorced Muslim wife has always been a highly controversial and debatable social issue. The

issue of maintenance of Muslim wife has been a very difficult path as compared to Hindu wife. This issue has been subject matter of big fight by both Muslim fundamentalist and Hindu right wing.

Now coming to the legal technicalities of the issue, I would like to highlight the loop holes of statutes and the helplessness of the Legislature. The legal shortcoming of the maintenance law for Muslim Wife was used as a weapon by husbands to protect themselves from the liability of maintaining their wives. Prior to amendment, as per section 125 Cr.P.C.(Criminal Procedure Code), maintenance is granted only to the 'Wife' and therefore the husband started taking defense that the divorced women is no more his wife and henceforth not entitled for any maintenance. Then the legislature amended the section and inserted an explanation which clarifies that 'wife' includes divorced wives. However, husbands used another shield to protect themselves from the liability of maintaining their wife which was available under section 127(3) Cr.P.C. (Criminal Procedure Code), which

says that if women get any customary payment after divorce then husband will not be responsible for her maintenance. In numerous cases, it was held that 'Maher' or 'Dower' is the sum mentioned under sec 127 (3). Then the next stage came in, when the court recognized Dower as the sum mentioned under the aforesaid clause

but emphasized that such amount should be fair & reasonable as observed in Bai Fatima vs. Ali Hussain 1979 which find further approval of the Supreme Court in Fazlunbi vs. Khaderwali 1980 (SC) so as to protect Muslim women from destitution.

Then another stage came when the court held that no matter whether the dower is paid or not,

husband is liable to maintain his wife and held that Dower is not included in clause 3 of sec 127 and the court also mentioned verses of the HOLY Quran from chapter 2 verse 241 and 242 to signify that it's a religious duty of a Muslim husband to provide reasonable maintenance to his divorced wife. This all happened in the infamous case of Shahbano Begum v/s Mohd Ahmed Khan (AIR 1986: 945 sc)

However, this led to wide spread demonstrations and controversy which pressurized then Rajiv Gandhi government to pass Muslim Women Protection of Rights on Divorce Act (1986). Once again, this legislation failed to address the real issue. This law created new confusion and contradiction because of loose drafting amongst the views of different High Courts. The most important section relating to controversy was sec 3 which used the word "within the iddat period ".The controversy was on its peak between Gujarat and Andhra High Courts in the cases of Arab Bail and Fathimunnissa Begum.

The constitutionality of this act was challenged in 2000 in the case of: Though there is no fixed formula to arrive at the calculation of maintenance. Yet, the figure hovers around 30% to 40% of the salary/income. Danial Latifi Vs Union Of India Air 2000 (Sc) It was held that sec 3 of Muslim Women Protection of Rights on Divorce Act entitles a Muslim women for maintenance even beyond IDDAT period and the controversy was set aside once and for all.

Conclusion:

By virtue of judicial pronouncements and other steps, rights of Muslim women has been restored but it will become fruitful only when under lying thinking are changed, the Muslim women should emancipate themselves educationally, economically and socially for their well being only and then they can understand their rights and worth and thereafter the social upliftment of the whole community is possible. We should always remember that mother is the first teacher and mentor of his child. It is a historical fact that no society ever lived in peace until their women folk are at peace.

(e)Maintenance under the Code of Criminal Procedure, 1973

Introduction:

The advent of the nuclear family, due to globalization and consumerism, ensured the disintegration of the Joint Family system which was prevalent for several Yugas. The dismantling of the Joint family resulted in withdrawal of the support system which acted as a buffer to weather difficult periods during the early phase of marital life. Consequently, a couple had to find both the psychological and financial support within and by dint of hard work respectively which invariably culminated in a stressful life. The Consequence is the breakdown of family bonding resulting in divorce. This arises due to incompatibility between spouses. The children also have to endure the psychological conflict due to differences between parents. The wife and the children required sustenance and the law stepped into ensure they are not subjected to distress.

Genesis

According to Black's legal Dictionary the origin of the expression "Alimony" lies in the Latin Word "Alimonia" which means sustenance. It has not been defined in any of the statutes in India. Sustenance stems from the common Law right of the Divorced wife to support by her husband. "Alimony in Gross" or "in lumpsum" is in the nature of final property settlement. However, Alimony in strict sense contemplates payment of money at regular intervals. It also includes permanent and pendatelite spousal support. Generally it is restricted to money, unless otherwise authorized by statute.

It is a term used to describe the allowance made to married women when she is under necessity

to live apart from her spouse. The object of the provision is the prevention of vagrancy and to provide the neglected wife and children sustenance in their distress. It is consistent with Article 15(3) and 39 of the Constitution of India. Bala Nair vs. Bhavani Ammal (1987 Cr.L.J.399).

Statutory Provision:

The Power of the Court to order maintenance, when proceedings are pending for matrimonial relief has been provided under different statutes. Section 24 of the Hindu Marriage Act; Section 36 of the Special Marriage Act and the Divorce Act and Section 39 of the Parsi Marriage Act speak about alimony pendatelite. Section 25 of the Hindu Marriage Act, section 40 of the Parsi Marriage Act and Section 37 of the Special Marriage Act and Divorce Act, provides for permanent alimony and maintenance. Section 85 of the Mohamedan Law states that the wife may get maintenance in accordance with the provisions of Section 125 of the Code of Criminal Procedure. This is to ensure that a derelict Muslim husband cannot take umbrage under his personal law in order to defeat these statutory obligations under the code of Criminal procedure. Ameer Amanullah Vs. P.Maniam Beevi(1985 (1) MLJ (Cri) 164 Code of Criminal Procedure:

Section 125 of the Code of Criminal Procedure reads as follows:

(1) If any person having sufficient means neglects or refuses to maintain-

(a) his wife, unable to maintain herself, or

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d) his father or mother, unable to maintain himself or herself,

A Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct:

This Section was introduced, to safeguard the wife, legitimate and illegitimate child (not being a married daughter) who has attained majority, where such child by reason of any physical or mental abnormality or injury unable to maintain itself or a person's father or mother unable to maintain himself or herself.

From the reading of the section it is clear that a person is bound to maintain his wife, children and aged parents, who are unable to maintain themselves. While ordering maintenance the Court has to consider the income and the status of the person who is liable to pay maintenance and also the income and status of the person claiming maintenance. Though a wife can file a suit for maintenance in a Civil Court, this Section is provided to get maintenance as early as possible. For a person, food, clothing and shelter is essential. While ordering maintenance, Court has to consider whether the wife is living separately on reasonable grounds. The wife can refuse to live with her husband if he lives with a mistress. No wife shall be entitled to receive maintenance from her husband under this Section if she is living in adultery, or husband and wife are living separately by mutual consent. The petitioner can file any number of petitions under Section 125 Cr.P.C for enhancement of Maintenance when the circumstances change. The Court after considering the change of circumstances can enhance the maintenance accordingly. Originally a magistrate can order Rupees 500 per month as maximum maintenance. After the recent amendment maintenance exceeding Rs.500 can be ordered according to the circumstances of each case

Wives right to maintenance is not absolute under 125 of the Code. It is circumscribed by the fact

that she is unable to maintain herself and further the husband having sufficient means neglected or refused to maintain her. No doubt, there is a clear distinction between the locus standi or competence to file a petition for maintenance under Section 125 of The Code by any of the persons illustrated in the Section and their being entitled on merits to particular amounts of maintenance there under. However, the premises for both is essentially the existence or otherwise of their separate income or means of support besides other factors stipulated in the Section. K.M.Nagammalappa vs. B.J.Lalitha, 1985 Cr.L.J 1706 (KANT) See also Hyma Krishnadass vs. M.Krishnadass, 1985 (2) CRIMES 661 (KER), Habeebulla vs. Shakella, 1984 Cr.L.J 1062.

Quantum of Maintenance Right of Maintenance under Hindu Law is a substantive right and a continuing right and it is variable from time to time. The Family Court or the District Court may in satisfaction of change of circumstances modify, recind or enhance the maintenance allowance. On proof of change and circumstance, the family Court has jurisdiction under Section 127 Cr.P.C. to revise the earlier order passed under Section 125 of the Code. Uma vs. Lalit Kumar Sharma (1999 (1) DMC 83). In Ekradeshwari Vs. Homeswar (AIR 1929 PC 128), the privy council held, that fixation of maintenance depends upon a number of factors and the same must be determined on the facts of a particular case. The said ruling was rendered prior to the enactment of Hindu Adoption and Maintenance Act 1956.

The Apex Court in Kulbhusan vs. Rajkumari (AIR 1971 SC 234) approved the said observation by the Privy Council under Section 23(2) of the said Act. See also K.Sivakumar vs. K.Sambasiva Rao (2001 (1) DMC 75) and G.C.Gosh Vs.Sushmita Gosh (2001 (1) DMC 469). The wife is entitled to have the same status as her husband. She must have the necessary medical facility, food, clothing etc. While fixing the amount of maintenance, the Court should also take into account considering the inflation and cost of living and his obligation to support the minor child and his parents. S.Jayanthi Vs.S.Jayaraman (1998(1) DMC 699).

There is no fixed Rule, while arriving at the Quantum, in respect of permanent Alimony. It is only the independent income of the payee which is to be considered. While granting relief of permanent alimony, the court has to keep in view the following considerations:

i) Husband's own income.
ii) Income of the Husband from other property;
iii) Income of the Applicant.
iv) Conduct of parties.

Ramlal vs. Surender Kaur (1995 (1) (iv) L.J 204 (Punjab) In Vanaja Vs. Gopa (1992 (1) DMC 347) the High Court Madras has held that the fact that the wife has already got maintenance under Section 125 Cr.P.C. is no bar to her getting alimony pendante lite under Section 24 of the Hindu Marriage Act.

Enforcement:

After ordering maintenance if the respondent husband fails or refuses to pay the maintenance without sufficient cause the magistrate can issue warrant for levying the amount due in the manner provided for levying fines and may also sentence such person for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made. Provided that no warrant shall be issued for the recovery of any amount due under this Section unless applications made to the Court to levy such amount within a period of one year it became due. Proceedings under Section 125 Cr.P.C are considered to be of a civil nature. Though they are wholly

governed by the procedure of the code of criminal procedure, they are really of civil nature, but are dealt with summarily in a Criminal Court for the purpose of speedy disposal on grounds of convenience and social order. Pandharinadh

Sakharam Thuve vs. Surekha Pandharinadh Thuve, 1999 Cr.L.J 2919 (BOM). It is to be borne in mind that a petition filed under Section 125 Cr.P.C is not a complaint and the person arrayed as the opposite party is not an accused. Following the decision of the Supreme Court in AIR 1963 SC 1521, which held that instant proceedings under 125 Cr.P.C is a proceedings of a civil nature in which the Magistrate can invoke the inherent powers to recall his earlier order finally disposing a proceedings of this nature, provided, sufficient grounds are shown. S K.Alauddin vs. Khadizebb, 1991 Cr.L.J 20.

Hindu Law Text enjoins upon the husband a mandatory duty to maintain his wife. The duty to maintain is dehorns his possession of any property. A decree for maintenance creates a charge on his property. In Raghavan vs. Nagammal (AIR 1979 Mad 200) the High Court of Madras held that an order of maintenance, in term of Section 39 of the Transfer of property Act, creates a charge on the property Act. This principle was extended to an order passed under Section 125 Cr.P.C. in Diwakaran vs. Barghavy Chellamma (1985 (2) DMC 486).
Apart From the above, Section 125 (3) of the Cr. P.C. r/w Section 128 of the Cr.P.C. empowers the Magistrate to enforce the execution in case of default by the person ordered to pay maintenance. Section 51 of the C.P.C. can also be utilized for enforcing the order of maintenance
Validity of Marriage
Validity of the marriage for the purpose of summary proceedings under Section 125 Cr.P.C is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of a marriage in such proceedings is not as strict as is required in a trial of offences under Section 494 IPC. If the claimant in proceedings under Section 125 of The Code succeeds in showing that she and the respondent have lived together as husband and wife the Court can presume that they are legally wedded spouses, and in such a situation the party who denies the marital status can rebut the presumption. Undisputedly marriage procedure followed in the temple, that too, in the presence of the idol of Lord Jaganath, which is worshiped by both the parties is considered to be valid. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe in to whether the said procedure was complete as per the Hindu rites in the proceedings under Section 125 Cr.P.C. Dwarika Prasad Satpathi Vs. Bityut Prava Dixit, (1999) 7 SCC 675 1999 (4) crimes 206 = 2000 Cr.L.J 1, See also Raju Vs. Pushpa Devi, 1999 Cr.L.J 2294.

The High Court of Bombay in K.M. Vyas vs. R.K.Vyas (AIR 1999 Bom 127) held that the second wife is entitled to get maintenance under Section 24 of the Hindu Marriage Act even if the Second Marriage of the husband is void. In Devinder Singh Vs. Jaspal Kaur (1999 (1) MDM (535) the Punjab and Haryana High Court held that the Right to claim maintenance under Section 25 of the Hindu Marriage Act is not defeated even where the marriage is dissolved by a Decree of Nullity. In Malika Vs. P.Kulandai (2001 (1) DMC 354) the court held that when the husband contracted the Second marriage by suppressing the fact of the first marriage, the wife and child are entitled to maintenance under Section 125 of the Cr.P.C.

Guardianship
Guardianship Under Hindu Law
The Dharmashastras did not deal with the law of guardianship. During the British regime the law of guardianship was developed by the courts. It came to be established that the father is the natural guardian of the children and after his death, mother is the natural guardian of the children and none else can be the natural guardian of minor children. Testamentary guardians were also introduced in Hindu law: It was also accepted that the supreme guardianship of the minor children vested in the State as parens patrie and was exercised by the courts. The Hindu law of guardianship of minor children has been codified and reformed by the Hindu Minority and Guardianship Act, 1956. The

subject may be discussed under the following heads : (i) Guardianship of person of minors, (u) Guardianship of the property of minors, and (iii) De facto guardians, and (iv) guardians by affinity.

Guardianship of the person

Minor Children

Under the Hindu Minority and Guardianship Act, 1956, S. 4(b), minor means a person who has not completed the age of eighteen years. A minor is considered to be a person who is physically and intellectually imperfect and immature and hence needs someone's protection. In the modern law of most countries the childhood is accorded protection in multifarious ways. Guardian is "a person having the care of the person of the minor or of his property or both person and property." It may be emphasized that in the modern law guardians exist essentially for the protection and care of the child and to look after its welfare. This is expressed by saying that welfare of the child is paramount consideration. Welfare includes both physical and moral well-being. Guardians may be of the following types : 1. Natural guardians, 2. Testamentary guardians, and 3. Guardians appointed or declared by the court. There are two other types of guardians, existing under Hindu law, de facto guardians, and guardians by affinity.

Natural Guardians

In Hindu law only three persons are recognized as natural guardians father, mother and husband, Father. “Father is the natural guardian of his minor legitimate children, sons and daughters." Section 19 of the Guardians and Wards Act, 1890, lays down that a father cannot be deprived of the natural guardianship of his minor children unless he has been found unfit. Me effect of Lh1s provision has been considerably whittled down by judicial decisions and by Section 13 of the Hindu Minority and Guardianship Act which lays down that welfare of the minor is of paramount consideration and father's right of guardianship is 5;ubordinate to the welfare of the child. The Act does not recognize the principle of joint guardians. The position of adopted children is at par with natural-born children. The mother is the natural guardian of the minor illegitimate children even if the father is alive. However, she is the natural guardian of her minor legitimate children only if the father is dead or otherwise is incapable of acting as guardian. Proviso to clause (a) of Section 6, Hindu Minority and Guardianship Act lays down that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother. Thus, mother is entitled to the custody of the child below five years, unless the welfare of the minor requires otherwise.

In Gita Hariharan v. Reserve Bank of India and Vandana Shiva v. Jayanta Bandhopadhaya, the Supreme Court has held that under certain circumstances, even when the father is alive mother can act as a natural guardian. The term 'after' used in Section 6(a) has been interpreted as 'in absence of' instead 'after the life-time'. -

Rights of guardian of person. -The natural guardian has the following rights in respect of minor children:

(a) Right to custody, .
(b) Right to determine the religion of children,
(c) Right to education,
(d) Right to control movement, and
(e) Right to reasonable chastisement

These rights are conferred on the guardians in the interest of the minor children and therefore of each- of these rights is subject to the welfare of the minor children. The natural guardians have also

the obligation to maintain their minor children.

Testamentary Guardians

When, during the British period, testamentary powers were conferred on Hindus, the testamentary guardians also came into existence. It was father's prerogative to appoint testamentary guardians. By appointing a testamentary guardian the father could exclude the mother from her natural guardianship of the children after his death. Under the Hindu Minority and Guardianship Act, 1956, testamentary power of appointing a guardian has now been conferred on both parents.' The father may appoint a testamentary guardian but if mother survives him, his testamentary appointment will be ineffective and the mother will be the natural guardian. If mother appoints testamentary guardian, her appointee will become the testamentary guardian and father's appointment will continue to be ineffective. If mother does not appoint, father's appointee will become the guardian. It seems that a Hindu father cannot appoint a guardian. of his minor illegitimate children even when he is entitled to act as their natural. guardian, as S. 9(1) confers testamentary power on him in respect of legitimate children. In respect of illegitimate children, Section 9(4) confers such power on the mother alone.

Under Section 9, Hindu Minority and Guardianship Act, testamentary guardian can be appointed only by a will. The guardian of a minor girl will cease to be the guardian of her person on her marriage, and the guardianship cannot revive even if she becomes a widow while a minor. It is necessary for the testamentary guardian to accept 'the guardianship. Acceptance may be express or implied. A testamentary guardian may refuse to accept the appointment or may disclaim it, but once he accepts, he cannot refuse to act or resign except with the permission of the court.

Guardians Appointed by the Court

The courts are empowered to appoint guardians under the Guardians and Wards Act, 1890. The High Court also have inherent jurisdiction to appoint guardians but this power is exercised sparingly. The Hindu Minority and Guardianship Act is supplementary to and not in derogation to Guardians and Wards Act. Under the Guardians and Wards Act, 1890, the jurisdiction is conferred on the District Court: The District Court may appoint or declare any person as the guardian whenever it considers it necessary in the welfare of the child.' In appointing ,,a" guardian, the court takes into consideration various factors, including the age, sex, wishes of the parents and the personal law of the child. The welfare of the children is of paramount consideration.
The District Court has the power to appoint or declare a guardian in respect of the person as well as separate property of the minor. The chartered High Courts have inherent jurisdiction to appoint guardians of the- person as well as the property of minor children. This power extends to the undivided interest of a coparcener.

The guardian appointed by the court is known as certificated guardian. Powers of Certificated guardians. Powers of certificated guardians are controlled by the Guardians and Wards Act, 1890. There are a very few acts which he can perform without the prior permission of the court. In the ultimate analysis his powers are co-extensive with the powers of the sovereign and he may do all those things (though with the permission of the court) which the sovereign has power to do. A certificated guardian from the date of his appointment is under the supervision, guidance and control of the court./

Guardianship by affinity

In pre-1956 Hindu law there existed a guardian called guardian by affinity. The guardian by affinity is the guardian of a minor widow. Mayne said that "the husband's relation, if there exists any, within the degree of sapinda, are the guardians of a minor widow in preference to her father and his relations."' The judicial. pronouncements have also been to the same effect[1]. The guardianship by affinity was taken to its logical end by the High Court in Paras Ram v. State[2] In this case the father-in-law of a minor widow forcibly took away the widow from her mother's house and married her for money to an unsuitable person against her wishes. The question before the court was whether the father-in-law was guilty of removing the girl forcibly. The Allahabad High Court held that he was not, since he was the lawful guardian of the widow.

A question has come before our courts, whether the nearest sapinda of the husband automatically becomes a guardian of the minor widow on the death of her husband or whether he is merely preferentially entitled to guardianship and therefore he cannot act as guardian unless he is appointed as such? Paras Ram seems to subscribe to the former view, and the Madras and the Nagpur high Courts to the latter view. Under Section 13, Hindu Minority and Guardianship Act, in the appointment of 'any person as guardian, the welfare of the child is paramount consideration. The fact that under Hindu law father-in-law has preferential right to be appointed as guardian is only a matter of secondary consideration.

In our submission, it would be a better law if the guardianship of the minor wife, both of her person and property, continues to vest in the parents. We do not have much of textual guidance or case law on the powers of the guardians by affinity. Probably his powers may be taken to be at par with those of the natural guardian.

De Facto Guardian

A de facto guardian is a person who takes continuous interest in the welfare of the minor's person or in the management and administration of his property without any authority of law. Hindu jurisprudence has all along recognized the principle that if liability is incurred by one on behalf of another in a case where it is justified, then the person, on whose behalf the liability is incurred or, at least, his property, is liable, notwithstanding the fact that no authorization was made for incurring the liability.'

The term 'de facto guardian' as such is not mentioned in any of the texts, but his existence has never been denied in Hindu law. In Sriramulu, Kanta[3]. said that Hindu law tried to find a solution out of two difficult situations : one, when a Hindu child has no legal guardian, there would be no one who would handle and manage his estate in law and thus without a guardian the child would not receive any income for his property and secondly, a person having no title could not be permitted to intermeddle with the child's estate so as to cause loss to him. The Hindu law found a solution to this problem by according legal status to de facto guardians.

A mere intermeddler is not a de facto guardian. An isolated or fugitive act of a person in regard to child's property does not make him a de facto guardian. To make a person a de facto guardian some continuous course of conduct is necessary on his part. In other words, a de facto guardian is a person who is not a legal guardian, who has no authority in law to act as such but nonetheless he himself has assumed, the management of the property of the child as though he were a guardian. De facto guardianship is a concept where past acts result in present status. The term literally means 'from that

which has been done.'
The de facto guardian was recognised in Hindu law as early as 1856. The Privy Council in Hanuman Pd.said that 'under Hindu law, the right of a bona fide incumbrancer, who has taken a de facto guardian a charge of land, created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not affected by the want of union of the de facto with the de jure title.

Guardianship Under Muslim Law:
The source of law of guardianship and custody are certain verses in the Koran and a few ahadis. The Koran, the alladis and other authorities on Muslim law emphatically speak of the guardianship of the property of the minor, the guardianship of the person is a mere inference. We would discuss the law of guardianship of custody as under :
(a) Guardianship,
(b) Custody, and
(c) De facto guardian.
Classification of Guardianship
In Muslim law guardians fall under the following three categories : (i) Natural guardians, (ii) Testamentary guardians, and
(iii) Guardians appointed by the court.

Natural Guardians
In all schools of both the Sunnis and the Shias, the father is recognized as guardian which term in the context is equivalent to natural guardian and the mother in all schools of Muslim law is not recognized as a guardian, natural or otherwise, even after the death of the father. The father's right of guardianship exists even when the mother, or any other female, is entitled to the custody of the minor. The father has the right to control the education and religion of minor children, and their upbringing and their movement. So long as the father is alive, he is the sole and supreme guardian of his minor children.

The father's right of guardianship extends only over his minor legitimate children. He is not entitled to guardianship or to custody of his minor illegitimate children.

In Muslim law, the mother is not a natural guardian even of her minor illegitimate children, but she is entitled to their custody.

Among the Sunnis, the father is the only natural guardian of the minor children. After the death of the father, the guardianship passes on to the executor. Among the Shias, after the father, the guardianship belongs to the grandfather, even if the father has appointed an executor, the executor of the father becomes the guardian only in the absence of the grandfather. No other person can be natural guardian, not even the brother. In the absence of the grandfather, the guardianship belongs to the grandfather's executor, if any.'

Testamentary Guardian
Among the Sunnis, the father has full power of making a testamentary appointment of guardian. In the absence of the father and his executor, the grandfather has the power of appointing a testamentary guardian. Among the Shias, the father's appointment of testamentary guardian is valid only if the grandfather is not alive. The grandfather, too, has the power of appointing a -testamentary guardian.

No other person has any such power. Among both the Shias and the Sunnis, the mother has no power of appointing a testamentary guardian of her children. It is only in two cases in which the mother can appoint a testamentary guardian of her property of her minor children :.first, when she has been appointed a general executrix by the will of the child's father, she can appoint an executor by her will; and secondly, she can appoint an executor in respect of her own property. which will devolve after her death on her children.

The mother can be appointed a testamentary., guardian or executrix by the father, or by the grandfather, whenever he can exercise this power. Among the Sunnis, the appointment of a non-Muslim mother as testamentary guardian is valid, but among the Shias such an appointment is not valid, as they hold the view that a non-Muslim cannot be a guardian of the person as well as of. the property of a minor. It seems that the appointment of non'-Muslim fellow-subject (iiinmi) is valid, though it may be set aside by the kazi. According to the Malikis and the Shafii law, a zimmi can be a validly appointed testamentary guardian of the property of the minor, but not of the person of -the minor. The Shias also take the same view. It appears that when two persons are appointed as guardians, and one of them is disqualified, the other can act as guardian. A profligate, i.e., a person who bears in public walk of life a notoriously bad,character, cannot be appointed as guardian: Acceptance of the appointment of ...testamentary guardianship is necessary, though acceptance may be express or implied. But once the guardianship . is accepted, it cannot be renounced save with the permission of the court.

Muslim law does not lay down any specific formalities for the appointment of testamentary guardians. Appointment may be made in writing or orally. In every case the intention to appoint a testamentary guardian must be clear and unequivocal. A testamentary deposition made by a testator may be invalid, but appointment of the executor may be general or particular. The testator must have the capacity to make the will at the time when it was executed. This means that the feslat8r ghould be major and of sound -mind, i.e., at the time of execution of the will, he should be in full possession of his senses.

The executor of the testamentary guardian is designated variously by Muslim lawgivers, indicating his position and powers. He is commonly called, wali or guardian. He is also called amin, i.e., a trustee. He is also termed as kaim-mukam, i.e., personal representative of the testator.

Guardian appointed by the Court.-On the failure of the natural . guardians and testamentary guardians, the kazi was entrusted with the power of appointment of guardian of a Muslim minor. Now the matter is governed by the Guardians and Wards Act, 1890. This Act applies to the appointment of guardians of all minors belonging to any community. The High Court also have inherent powers of appointment of guardians, though the power is exercised very sparingly.

Under the Guardians and Wards Act, 1890, the power of appointing, or declaring any person as guardian is conferred on the District Court. The District Court may appoint or declare any person as guardian of a minor child's person as well as property whenever it considers it necessary- for the welfare of the minor, taking into consideration the age, sex, wishes of the child as well 'as the wishes of the parents and the personal law of the minor.

Unit -IV: Civil Marriage and Emerging trends in Family Law

Provisions of Special Marriage Act, 1954

Hindu Marriages can now be solemnized under two different two different acts passed by the control of the Legislature. The acts are –

The Special Marriage Act 1954
The Hindu Marriage Act 1955

Under the former Act the Hindu Marriage is called a Special Marriage .

The SMA has come into force with effect from 1st January 1955 and extends to the whole of India except the states of Jammu and Kashmir. The Act applies to all citizens of India domiciled in the territories to which this Act extends but who are presently and temporarily in the state of Jammu and Kashmir.

In other words, the Act applies to citizens of India permanently residing in any part of India except those persons permanently residing in the state of Jammu and Kashmir.

The Act provides for a special form of marriage which can be taken advantage of by any person in India as well as by citizens of India resident in foreign countries irrespective of the faith which either party to the marriage may profess. Thus, the said Act has extra-territorial operation so as to permit marriage between the citizens of India solemnized outside the territory of India in any foreign country.

Definition of Degrees of Prohibited Relationship – Section 2(b) :

According to Section 2(b) a man and any other person mentioned in Part I of the First Schedule and a woman and any other person mentioned in Part II of the said Schedule are within the degrees of Prohibited relationship.

According to the Explanation 1 appended to Section 2(b) , relationship includes –

- Relationship by half blood, full blood or uterine blood.
- Illegitimate and legitimate blood relationships
- Relationships by adoption as well as by blood.

Explanation II has defined the terms full and half blood as –

Full blood –

Two persons are said to be related to each other by full blood when they are descendants from a common ancestor by the same wife.

Half blood –

Two persons are said to be related to each other by half blood when they are descendants from a common ancestor but by different wives.

Explanation III has defined the term uterine blood as –

Uterine blood –

Two persons are said to be related by uterine blood when they are descendants of a common ancestor but by different husbands.

Explanation IV states that in Explanation II and III, the term ancestor refers to the father and ancestress refers to themother.

Section 4 – Conditions relating to Solemnization Of Special Marriage :

Section 4 states that – notwithstanding any thing contained in any other law for the time being in force relating to the solemnization of the marriage – a marriage between any two persons may be solemnized under this Act if – at the time of the marriage the following conditions are fulfilled :

Neither party has a spouse living

Neither party is Incapable of giving a valid consent to the marriage in consequence of unsound mind, or

Although capable of giving a valid consent – has been suffering from mental disorder of such kind or

to such an extent that it would be unfit for marriage and procreation of children, or has been subject to recurring attacks of epilepsy or insanity

The male has completed the age of 21 years and the female the age of 18 years

The parties are not within the degrees of prohibited relationship within the meaning of Section 2 of the Act.

Where the marriage is solemnized in the state of Jammu and Kashmir , both the parties are citizens of India domiciled in the territories to which this Act extends.

Proviso to Section 4, states where the parties must not be within the degrees of prohibited relationship – that where a custom governing at least one of the parties to marry even when they are within the degrees of prohibited relationship, then such a marriage may be solemnized even though they are within such prohibited limits.

A marriage shall be void if all these conditions are not satisfied. Thus when the minimum age of the bridegroom is less than 21 years then the marriage is considered void. Similarly, if a spouse suffers from epilepsy, then the marriage contravenes Section 4 and is to be held void. However, a marriage cannot be considered void if it is held that the marriage has not been consummated.

Note –The term "persons" used in Section 4 may not refer to only those who are citizens of India. It may also refer to –

- 2 citizens of India whether they are residing in India or in foreign countries
- 2 foreigners who are in India
- A citizen of India and a foreigner.

Section 5 : Notice Of Intended Marriage :

Section 5 of the Act expressly states that when a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the prescribed form, specified in Schedule II of the Act – to the marriage officer of the district in which at least one of the parties to the marriage has resided for a period of not less than 30 days immediately preceding the date on which such notice is given.

However, it was held in a certain decided case that the omission to issue notice under Section 5 could not make the marriage void.

A notice of intended marriage under Section 5 may be withdrawn by any party giving such notice under Section 5.

Notice of Intended Marriage When One Party Lives Abroad :

Marian Eva vs. State of H. P.

A permanent resident of Shimla and a female whose permanent resident is in Germany , submitted a notice of intended marriage before the marriage officer of Shimla. As the marriage officer was not aware if any other marriage officer was appointed under this Act in Germany, to whom a copy of notice was required to be sent, the marriage officer refused to solemnize the marriage.

In a writ petition filed challenging such order, the High Court issued necessary orders to the State Government, and the marriage officer to see whether the parties were still willing to marry, so that this marriage could be solemnized by the marriage officer of Shimla under provisions of this Act.

Section 6 : Marriage Notice Book And Publication :

According to Section 6(1) the marriage officer shall keep all notices given under Section 5 along with other records of his office. Further , the marriage officer shall enter a true copy of every such notice, in a book prescribed for that purpose – called the Marriage Notice Book. This book shall be open for inspection at all reasonable times without fee, by any person who desires to inspect the same.

Section 6(2) states that the marriage officer shall publish every such notice by affixing a copy of it to some prominent place in his office.

Section 6(3) finally, lays down that , where either of the parties to an intended marriage is not permanently residing within the local limits of the district of the marriage officer, to whom the notice has been given under Section 5. The marriage officer shall in such a case, send a copy of such notice to the marriage officer of the district within whose limits such party is permanently residing. That marriage officer shall affix a copy of the notice at some prominent place in his office.

Section 7 : Objection To Marriage :

Section 7(1) lays down that any person may before the expiry of 30 days from the date on which any notice has been published by the concerned marriage officer in accordance with Section 6(2) – object to the marriage on the ground that , if this marriage is solemnized , it would contravene with one or more conditions stated under Section 4 of the Act.

According to Section 7(2), after the expiry of 30 days from the date of publication of the notice of the intended marriage under Section 6(2), the marriage may be solemnized – provided there has been no previous objections under Section 7(1).

Section 7(3) makes it obligatory on the marriage officer to record in writing the nature of objection in the marriage notice book. After recording the objection, it shall be read over and explained , if necessary, to the person who has made the objection. He or someone on his behalf shall then sign such records.

Section 8 : Procedure On Receipt Of Objection :

Section 8 (1) provides that if an objection is made under Section 7 to an intended marriage , the marriage officer shall not solemnized the marriage until he has inquired into the matter of the objection and is satisfied that the objection is of such a nature that it should not prevent the solemnization of marriage. The objection may be withdrawn by the person making it.

Section 8(1) further imposes on the marriage officer an obligation that he shall not take more than 30 days from the date of objection for the purpose of inquiring into the matter of the objection and arriving at a decision.

Section 8(2) provides that if the marriage officer upholds the objection and refuses to solemnize the marriage , either party to the intended marriage may within a period of 30 days from the date of such refusal , prefer an appeal to the District Court within the local limits of whose jurisdiction the office of the marriage officer is situated. The decision of thedistrict Court on such appeal shall be final and binding on the marriage officer who must then Act in accordance with the decision of the Court.

Section 9 : Powers Of Marriage Officers In Respect Of Inquiries :

Section 9 of the Act has laid down the powers of the marriage officer in respect of the conduct of inquiries in matters ofobjection to an intended marriage as entrusted to him under Section 8 of the Act.

Section 9 (1) provides that for the purpose of any inquiry under Section 8 , the marriage officer shall have all the powers vested in a civil Court under the Civil Procedure Code 1908 when trying a suit in respect of the following matters :

- Summoning and enforcing the attendance of witnesses and organizing them on oath
- Discovery and inspection of documents
- Receiving of evidence on affidavit
- Issuing orders for the examination of witnesses.

Any proceeding before the marriage officer shall be deemed to be a judicial proceeding within the meaning of Section 193 of the IPC 1860, in as much as, if any witness gives false evidence, he may be punished for giving false evidence under Section 193 of the IPC.

Explanation to Section 9 states that for the purpose of enforcing the attendance of any person to give evidence, the local limits of the jurisdiction of the marriage officer shall be the local limits of his district. According to Section 9(2) , if it appears to the marriage officer that the objection made to an intended marriage is arbitrary, unreasonable and mala fide (not in good faith) he may impose on the

person fine , so objecting costs , not exceeding Rs 1000 and award the whole or any part of such compensation to the parties to the intended marriage . Any order made for costs by way of compensation may be executed in the same manner as if it was a decree passed by the District Court within the local limits of whose jurisdiction the marriage officer has his office.

Section 15 : Registration Of Marriage Celebrated In Other Forms :

This Section deals with the registration of marriages celebrated in other forms.

Accordingly, any marriage celebrated either before or after the commencement of this Act , other the marriage solemnized under this Act or under the Special Marriage Act 1872 – may be registered under Chapter III of the Special Marriage Act 1954 by the marriage officer .

But the following conditions need to be satisfied :-

Clause (a) A ceremony of marriage has been performed between the parties and they have been living together ever since as husband and wife

(b) Neither party at the time of the registration of the marriage – more than one spouse living

(c) Neither party is an idiot or a lunatic at the time of registration of marriage

(d) The parties have completed the age of 21 years at the time of registration

(e) The parties are not within the degrees of prohibited relationship .

A Proviso to clause (e) states that in the case of a marriage celebrated before the commencement of the Special Marriage Act 1954, the condition as to the degrees of prohibited relationship shall be subject to any law , custom or usage having the force of law governing such parties , which permits of a marriage between the two even within the degrees of prohibited relationship.

(f) The parties have been residing within the district of the marriage officer for a period of not less than 30 days immediately preceding the date on which the application is made to the marriage officer for registration.

Section 16 : Procedure For Registration :

According to Section 16 , upon the receipt of the application signed by both the parties to the marriage for the registration of their marriage under Chapter III of the Act , the marriage officer shall give Public Notice thereof in the prescribed manner.

He shall then allow a period of 30 days for objection and if any objection is received , he shall hear them within the said period. Therefore the marriage officer , shall , if satisfied that all the conditions mentioned in Section 15 are fulfilled, he shall enter a Certificate of Marriage in the Marriage Certificate Book in the prescribed form. Such certificate shall besigned by the parties to the marriage and by 3 witnesses.

Section 19 : Effect Of Marriage On Member Of Undivided Family

Section 19 of the Act deals with the effect of marriage solemnized under the Special Marriage Act on a member of undivided family.

The Section states that if a marriage is solemnized under this Act of any member of an undivided family who professes theHindu, the Buddhist, Sikh or Jain religion , then by the very fact that such marriage was solemnized under the Act would severe his tie from the family.

Section 24 : Void Marriage :

According to Section 24(1) any marriage solemnized under this Act shall be null and void if –

i.Any of the conditions mentioned in Section 4(a), (b) (c) and (d) had not been fulfilled.

ii.Or if the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

Such marriage may on a petition presented by either party to the marriage against the other party be declared as null and void by a decree of nullity.

Section 24(2) provides that the provision of Section 24 shall not apply to any marriage deemed to be

solemnized under this Act within the meaning of Section 18.

But the registration of any such marriage under chapter III may be declared to be of no effect if the registration was in contravention of any of the conditions specified in clauses (a) to (c) of Section 15. However no such declaration shall be made where an appeal has been preferred under Section 17 and the decision of the Court has become final.

Section 25 : Voidable Marriage :

Section 25 lays down that any marriage solemnized under the Act shall be voidable and may be annulled by a decree of nullity if –

i.The marriage has not been consummated because of willful refusal of the respondent to consummate the marriage, or

ii.The respondent was at the time of the marriage pregnant by some other person other than the petitioner, or

iii.The consent of either party to the marriage was obtained by coercion or fraud within the meaning of Section 15 and 17 of the ICA

Proviso to Section 25 expressly lays down that in case where the respondent was at the time of the marriage, pregnantby some other person other than the petitioner husband, the Court shall not grant a decree of nullity of marriage unless the Court is satisfied that –

i. The petitioner was at the time of the marriage ignorant of the fact alleged
ii. The proceedings to set aside the marriage were instituted within a year from the date of marriage
iii. The marital intercourse with the consent of the petitioner has not taken place since the discovery of the fact alleged by the petitioner.

The Section further provides that in the case where the consent of either party to the marriage was obtained by coercion or fraud , the Court shall not grant a decree of nullity if –

i. Proceedings have not been instituted within 1 year after the coercion had ceased or after the fraud was discovered, as the case may be.
ii. The petitioner , either the husband or the wife, has with his / her free consent lived with the other party to the marriage as husband / wife , after the coercion had ceased or after the fraud was discovered , as the case may be.

Note –

The principal point in the distinction between the void and voidable marriage is the void marriage is void ab initio under the circumstances specified in Section 24(1) and the marriage would be declared null by a decree of nullity. In the case of voidable marriages, however, marriage is not void ab initio. The marriage may be set aside / avoided at the instance of the petitioner under the circumstances specified in Section 25 of the Act. Unless so avoided by the petition shall continue to be valid and the marriage will not be considered void prima facie.

Impotence means incapacity to consummate the marriage and such impotency may either be of the husband/wife with the other spouse.

The ground for annulling a marriage on the ground of willful refusal to consummate the marriage is not available under the Hindu Marriage Act but is found under this Act,

Case Law – Gitika Bagchi vs. Subhabrota Bagchi

The wife totally concealing the fact that she was 3 years older than the husband during the marriage amounts to fraud contemplated by Section 25.

Section 26 : Legitimacy Of Children Of Void And Voidable Marriages :

According to Section 26(1) notwithstanding that a marriage is null and void under Section 24, any child of such marriage who would have been legitimate had the marriage been legitimate had the marriage been valid shall be legitimate –

Whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act 1976, and

Whether or not a decree of nullity is granted in respect of that marriage under this Act

Whether or not such marriage is held to be void otherwise than on a petition under this Act

Section 26(2) states that where a decree of nullity is granted in respect of a voidable marriage under Section 25 , any child begotten or conceived before the decree is made , who would have been the legitimate child of the parties to the marriage , if at the date of the decree, the marriage has been dissolved instead of being annulled , shall be deemed to be their legitimate child.

Finally Section 26(3) provides that although a child of a null and void marriage , or of a marriage which is annulled by a decree – shall be deemed to be the legitimate child of the parties to such a marriage. But that does not confer upon any child any rights in or to the property of any person other than the parents.

The provision under Section 26 which recognizes the legitimacy of children of void and voidable marriages is both essential and necessary because otherwise, such child would have been incapable of possessing or acquiring any such right by reason of his not being the legitimate child of such parents.

Section 29 : Restrictions On Petitions For Divorce During First 3 Years After Marriage :

According to Section 29 (1) , no petition for divorce shall be presented to the district Court unless at the date of the presentation of the petition one year has passed since the date of entering the certificate of marriage in the Marriage Certificate Book.

Proviso to Section 29 (1) states that the District Court may upon the application being made to it allow a petition to be presented before one year has passed, if the case is one of "exceptional hardship" suffered by the petitioner or exceptional disparity on the part of the respondent.

The Proviso further lays down that if it appears to the District Court at the time of the presentment of the petition that thepetitioner obtained leave to present the petition by any misrepresentation or concealment of fact of the case, the District Court in that case, even if it pronounces a decree of divorce shall do so subject to the condition that the decree shall not have effect until the expiry of one year from the date of the marriage .

The Court may even dismiss the petition which is based on the misrepresentation or concealment of facts.

Section 29 (2) states that in disposing off any application for leave to present a petition for divorce before the expiry of one year from the date of the marriage , the District Court shall have regard to the interests of any children of the marriage , as well as to the probability of a reasonable reconciliation between the parties before the expiry of the said one year.

Section 30: Re-Marriage Of Divorced Persons :

Section 30 of the Act provides for the re-marriage of divorced persons under certain circumstances.

According to Section 30 where a marriage has been dissolved by a decree of divorce and either –

There is no right of appeal against the decree, or

If there is such a right of appeal, the time for appealing has expired without an appeal being preferred, or an appeal was presented but has been dismissed,

Subject to the fulfillment of these conditions – either party to the marriage may marry again.

Section 31 : Court To Which Petition Should Be Made :

According to Section 31 (1) , every petition under this Act shall be presented to the District Court within the local limits of whose original civil jurisdiction –

- The marriage was solemnized, or
- The respondent at the time of the presentation of the petition residing (by the petitioner)
- The parties to the marriage last resided together

In case the wife is the petitioner where she is residing on the date of the presentation of the petition.

The petitioner is residing at the time of presentation of the petition in a case where the respondent at the time residing outside the territories to which this Act extends or
The petitioner has not been heard of as being alive for a period of 7 years by those who would have naturally heard of him had he been alive.
Section 31(2) states that the District Court may by virtue of this subsection entertain a petition by a "wife" domiciled in the territories to which this Act extends for nullity of marriage or for divorce, if she is a resident in the said territories and has been ordinary resident thereon for a period of 3 years immediately preceding the presentment of the petition and the "husband" is not resident in the said territories.
Section 33 : Proceedings To Be In Camera And May Not Be Printed Or Published
Section 33(1) states that every proceeding under this Act shall be conducted in CAMREA that is, in Judge's Private Room not in public/openly. Moreover, it shall not be lawful for any person to print or publish any matter concerning any such proceedings. However, a judgment of the High Court or the Supreme Court may be printed or published with the prior permission of the Court.
Section 33(2) states that any person who contravenes the provision contained in Section 33(1) – shall be punished with fine which may extend up to Rs 1000.

b. Emerging trends:
Surrogacy
A surrogacy agreement is an arrangement to carry a pregnancy for intended parents. Surrogacy can be classified into two main types: gestational and traditional. In case of gestational surrogacy, pregnancy occurs due to the transfer of an embryo created by in vitro fertilization such that the resulting child is genetically unrelated to the surrogate. Traditional surrogacy involves impregnation of the surrogate naturally or artificially, and the resulting child is genetically related to the surrogate.

Surrogacy arrangement is usually sought by intended parents when pregnancy is either medically impossible or it is considered very risky for the mother's health. These agreements may or may not includemonetary compensation. The arrangement is termed commercial surrogacy when the surrogate is given compensation higher than the medical reimbursement and other reasonable expenses; otherwise, it is referred to as altruistic or non-commercial surrogacy. Surrogacy laws and costs can differ significantly across jurisdictions in various nations.
History Of Surrogacy
Babylonian law and custom followed a practice known as antiquity. A couple could arrange for another woman to be impregnated by the male half of the couple. The child thus borne would be raised by the couple.A barren woman could use this practice to prevent a divorce.Several advances in medicine, social customs, and legalities have led to the development of modern commercial surrogacy.

In the 1930s,U.S., pharmaceutical companies Schering-Kahlbaum and Parke-Davis started the mass production of estrogen. For the first time in1944, Harvard Medical School Professor John Rock fertilized the human ova outside the uterus. In 1953, the first cryopreservation of sperm was performed successfully. A commercial sperm bank was first opened in New York in 1971, which turned this into a highly profitable business throughout the world.Louise Brown, the first test-tube baby and product of the IVF procedure, was born in England in 1978. In 1980,Noel Keane, a lawyer from Michigan prepared the first surrogacy contract. The first successful gestational surrogate pregnancy in a woman was carried out in 1985.In 1986,surrogate and biological mother, Mary Beth Whitehead of the United States, refused to give custody of the child (Baby M) to the couple against

the surrogacy agreement. However, the courts of New Jersey awarded custody of the child to the biological father and not the surrogate mother. Similarly, in 1990,the surrogate mother Anna Johnson in California refused to yield custody of the baby to the intended parents. The court upheld the parental rights of the couple. This verdict legally defined the true mother as the woman who intends to create and raise a child. A convention was held in Chile in 1994 by Latin American fertility specialists to discuss assisted reproduction and its ethical and legal status.So, the concept of surrogacy is not new and has existed in the world since ages.

Legal Issues Regarding Surrogacy Across The World

Not all countries encourage surrogacy. Ethical and legal implications have been a deterrent for its worldwide acceptance. In France, Germany,Sweden and Spain, the people have voted against surrogacy.In France, commercial surrogacy is banned;and in 1991 its highest court announced that "the human body is not lent out, is not rented out, and is not sold." In the United Kingdom, South Africa and Argentina, where surrogacy is allowed, surrogacy requests are decided by independent surrogacy committees.In the United States, rules and regulations on surrogacy differ among states. California has legalized commercial surrogacy, while it is illegal in some states and in some others, regulations are introduced.

In such a scenario, couples in these countries where legalities involved in commercial surrogacy are complicated, would rather opt for other countries where the legal procedure in this issue is much simpler. In the United States and few other countries, the embryo implantation attempts, surrogacy contracts and post-birth rights of the surrogate mother are all governed by laws;while such contracts and laws in India are still under developed. Surrogate mothers give up their rights to the children with just a signature, and most often with a thumbprint if they are illiterate. The birth certificate does not carry the name of the surrogate. Thus, taking the baby out of the country becomes easy, but legal and ethical uncertainties over surrogacy remain.

Although laws in Ukraine allow surrogacy, bringing the child into the country can be difficult. Surrogacy is completely banned in France, Germany and Sweden.Further, commercial surrogacy is not encouraged in the United Kingdom where legal hurdles exist.Surrogacy is more acceptable internationally, but there are no international laws on surrogacy or minimum standards. Also, legal parentage of such a child has not been recognized by any international conventions.

In some countries, producing evidence (such as DNA test results) of at least one parent of the child having a genetic relationship with the child is mandatory;whereas in other countries, legal release of the child by the husband of any married surrogate is required. Obtaining citizenship and travel document is tough in most countries for such a child.In Belgium, altruistic surrogacy is legal,while commercial surrogacy is illegal. In France, Article 17/6 of the Civil Code nullifies any agreement with a third party relating to procreation or gestation and disobeying the law may lead to judicial problems.However, the Conseild'Etat, the highest administrative court in Francehas declared that overseas surrogacy agreement is lawful.

In Germany, Article 1 of the Constitution, which states that human dignity is inviolable, disallows surrogacy. German law does not permit a human to be made the subject of a contract; including the use of a third party's body for reproduction. In the United Kingdom, commercial surrogacy is not considered legal. It is prohibited by the Surrogacy Arrangements Act 1985.Paying more than expenses for a surrogacy is considered illegal. The Human Fertilization and Embryology Act 1990 allows intending parents to acquire legal parenthood of their child;the surrogate is excluded by anadoption order. In the United States, citizenship to children born overseas to a U.S. parent is granted by the U.S. Department of State, only ifthe U.S. citizen has a biological connection with the child; this is governed by the Immigration and Nationality Act.

International Surrogacy Arrangement

Traditional surrogacy involves the union of the egg of a surrogate mother and, usually, the sperm of the commissioning father. The commissioning father would be the child's legal father, and the surrogate mother the child's legal mother, in the home country of both the parents. However, at present,conferring parentage on couples who use artificial fertilization techniques is problematic. Generally, the sperm donor is regarded as the father of the child, so legislation had to be enacted such that the husband of the woman who is inseminated by artificial insemination-donor would be the legal father of the child. This legislation does not encourage surrogacy arrangements.

Advances in medical technology such as gestational surrogacy enable an embryo to be created from a donor egg and sperm and then implanted into a surrogate mother. In this case, the "mother" has to be legally defined. Legal rules maydiffer in the home countries of the surrogate and the commissioning parents. There may be a serious conflict of laws which will affect matters such as nationality and immigration. In countries that allow commercial surrogacy arrangements, rules may permit commissioning parents to have parental rights over the child, and not the surrogate mother. This may not be recognized by other countries, which can have their own rules.

Surrogacy In India – Legal Issues

Since many nations do not recognize surrogacy agreements, India has become a popular destination of fertility tourism. Infertile couples from all over the world travel to India where commercial surrogacy is legal. This arrangement may seem to be beneficial for all concerned parties; however,certain important issues have to be addressed through carefully framed laws in order to protect the rights of the surrogate mother and the intended parents.An added attraction is the low cost of the whole procedure in India which is much less compared to other countries.

The Assisted Reproductive Technologies (ART, Regulation) Bill 2010is an act which aims to provide a national framework for the accreditations, regulation and supervision of assisted reproductive technology clinics, for prevention of misuse of assisted reproductive technology, for safe and ethical practice of assisted reproductive technology services and for matters connected therewith or incidental thereto. However, this bill does not address many important issues of surrogacy. There is no limit on the frequency of use of surrogacy by an intending couple. A government body has not been appointedto check the family background or status of the couples. The ART Bill prohibits sex-selective surrogacy in accordance with the Pre-conception and Pre-natal Diagnostic Techniques (Prohibition of Sex Selection) Act. However, there are no means monitor their operation of the clinics.

Commercial surrogacy was made legal in India with the landmark Supreme Court judgment and later, the Indian Council of Medical Research Guidelines 2005 which prescribed conduct and use of ART procedures or treatment by fertility clinics. The ART Bill legalized commercial surrogacy by prescribing monetary compensation to the surrogate mother by the intending couple.Law Commission Report No. 228 (2009) recommends legalization of altruistic or non-commercial surrogacy arrangements in India in order to protect the surrogate mother from exploitation.

The Home Ministry guidelines apply only to foreign couples andlimit the choice of surrogacy to heterosexual couples. However, the ART Bill allows surrogacy by all (including single or unmarried) and there is no restriction on sexual orientation or nationality.In India, many laws have been enforced to regulate surrogacy;but,they lack in clarity. Hence, efforts have to be channelized in this direction.

India only has guidelines and no legislation governing surrogacy. The surrogacy agreement governs the contractual relation between the parties. The surrogate could claim the child as her own or enforce parental visitation or custodial rights, thus creating problems. Also, the surrogate's husband may claim the child under section 112 of the Evidence Act.It is very important for the parents in this arrangement to prepare afoolproof surrogacy agreement and ensure a strong contract.

Concluding Remarks

In India, people are practicing surrogacy when several children are orphans. Childless couples who want to adopt these children are subjected to a complex procedure. A common adoption law for all the citizens across religions or Indians living in other countries is not present. Hence, they are forced to opt for IVF or surrogacy. The Guardian and Wards Act, 1890 allows guardianship and not adoption. The Hindu Adoption and Maintenance Act, 1956 does not allow non-Hindus to adopt a Hindu child, and immigration procedures after adoption pose obstacles. Simple adoption procedures will reduce the rates of surrogacy. However, commercial surrogacy should be encouraged. The rights of women and children should be protected through framing of laws which will cover all the present loopholes.

Live-in Relationship

Status of live in relationships in India

In India marriage has always been considered a sacrament. The husband and wife are considered as one in the eyes of law. The legal consequences of marriage that follow add to the sanctity of this relationship. Marriage legally entitles both the persons to cohabit; the children born out of a legal wedlock are the legitimate children of the couple; the wife is entitled to maintenance during the subsistence of marriage and even after the dissolution of marriage and many more.

The benefits of marriage come with a lot of responsibilities. The marital obligations towards the spouse, towards the family, towards the children and towards the marital house are an inseparable part of the Indian marriage. To avoid the obligations of a traditional marriage and on the other hand to enjoy the benefit of cohabiting together, the concept of live in relation has come into picture. Live in relationships provide for a life free from responsibility and commitment which is an essential element of marriage. The concept of live in relationships is not new to the Indian society, the only difference is that earlier people were hesitant in declaring their status may be due to the fear of the society but now the people are openly in this kind of relationship.

WHAT IS LIVE IN RELATIONSHIP

A living arrangement in which an unmarried couple lives together under the same roof in a long term relationship that resembles a marriage is known as a live- in-relationship. Thus, it is the type of arrangement in which a man and woman live together without getting married. This form of relationship has become an alternate to marriage in metropolitan cities in which individual freedom is the top priority amongst the youth and nobody wants to get entangled into the typical responsibilities of a married life.

This form of living together is not recognized by Hindu Marriage Act, 1955 or any other statutory law. While the institution of marriage promotes adjustment; the foundation of live in relationships is individual freedom. Though the common man is still hesitant in accepting this kind of relationship, the Protection of Women from Domestic Violence Act 2005 provides for the protection and maintenance thereby granting the right of alimony to an aggrieved live-in partner.

LEGAL STATUS OF LIVE IN RELATIONSHIP

The definition of live in relationships is not clear and so is the status of the couples in a live in relationship. There is no specific law on the subject of live in relationships in India. There is no legislation to define the rights and obligations of the parties to a live in relationships, the status of children born to such couples. In the absence of any law to define the status of live in relationships, the Courts have come forward to give clarity to the concept of live in relationships. The Courts have taken the view that where a man and a woman live together as husband and wife for a long term, the law will presume that they were legally married unless proved contrary.

The first case in which the Supreme Court of India first recognized the live in relationship as a valid marriage was that of Badri Prasad vs. Dy. Director of Consolidation, in which the Court gave legal validity to the a 50 year live in relationship of a couple.
The Allahabad High Curt again recognized the concept of live in relationship in the case of Payal Katara vs. Superintendent, Nari Niketan and others, wherein it held that live in relationship is not illegal. The Court said that a man and a woman can live together as per their wish even without getting married. It further said that it may be immoral for the society but is not illegal.
Again in the case of Patel and Others., the Supreme Court has held that live in relationship between two adults without marriage cannot be construed as an offence. It further held that there is no law which postulates that live in relationships are illegal. The concept of live in relationship was again recognized in the case of Tulsa v. Durghatiya.
In the case of S. Khushboo vs. Kanniammal & Anr., the Supreme Court held that living together is a right to life. Live in relationship may be immoral in the eyes of the conservative Indian society but it is not "illegal" in the eyes of law. In this case, all the charges against Kushboo, the south Indian actress who endorsed pre- marital sex and live in relationship were dropped. The Court held that how can it be illegal if two adults live together, in their words "living together cannot be illegal."
However in one of its judgment Alok Kumar vs. State, the Delhi High Court has held that live in relation is walk in and walk out relationship and no strings are attached to it. This kind of relationship does not create any legal bond between the partners. It further held that in case of live in relationships, the partners cannot complain of infidelity or immorality.

Again giving recognition to live in relationships, the Supreme Court in the case of D. Velusamy v. D. Patchaiammal has held that, a 'relationship in the nature of marriage' under the 2005 Act must also fulfill some basic criteria. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'. It also held that if a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'.
The court made it clear that if the man has a live-in arrangement with a woman only for sexual reasons, neither partner can claim benefits of a legal marriage. In order to be eligible for 'palimony', a relationship must comply with certain conditions, the apex court said. The following conditions were laid down by the apex Court:
The couple must hold themselves out to society as being akin to spouses;
They must be of legal age to marry; they must be otherwise qualified to enter into a legal marriage, including being unmarried;
They must have voluntarily cohabited for a significant period of time.
Conscious of the fact that the judgment would exclude many women in live-in relationships from the benefit of the Domestic Violence Act, 2005, the apex court said it is not for this court to legislate or amend the law. The parliament has used the expression 'relationship in the nature of marriage' and not 'live-in relationship'. The court cannot change the language of the statute.

RIGHTS OF A FEMALE IN LIVE IN RELATIONSHIP

In June, 2008, it was recommended by the National Commission for Women to the Ministry of Women and Child Development to include live in female partners for the right of maintenance under Section 125 of Criminal Procedure Code, 1973. The view was also supported by the judgment in Abhijit Bhikaseth Auti v. State Of Maharashtra and Others. In October, 2008, the Maharashtra Government also supported the concept of live in relationships by accepting the proposal made by Malimath Committee and Law Commission of India which suggested that if a woman has been in a live-in relationship for considerably long time, she ought to enjoy the legal status as given to wife.

However, recently it was observed that it is divorced wife who is treated as a wife in context of Section 125 of CrPC and if a person has not even been married i.e. the case of live in partners, they cannot be divorced, and hence cannot claim maintenance under Section 125 of CrPC.
The partner of a live in relationship was first time accorded protection by the Protection of Women from Domestic Violence Act, 2005, which considers females who are not formally married, but are living with a male person in a relationship, which is in the nature of marriage, also akin to wife, though not equivalent to wife. Section 2(f) of the Act defines domestic relationship which means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Thus, the definition of domestic relationship includes not only the relationship of marriage but also a relationship `in the nature of marriage'.

In a case in Delhi, the Delhi High Court awarded Rs. 3000/- per month as maintenance to a maid who was in a live in relationship with her widower employer.
In Varsha Kapoor vs UOI & Ors., the Delhi High Court has held that female living in a relationship in the nature of marriage has right to file complaint not only against husband or male partner, but also against his relatives.
In the case of Koppisetti Subbharao Subramaniam vs. State of Andhra Pradesh, the defendant used to harass his live in partner for dowry. In this case the Supreme Court held that the nomenclature 'dowry' does not have any magical charm written over it. It is just a label given to demand of money in relation to a marital relationship. The Court rejected the contention of the defendant that since he was not married to the complainant, Section 498A did not apply to him. Thus, the Supreme Court took one more step ahead and protected the woman in a live in relationship from harassment for dowry.

STATUS OF CHILDREN OF COUPLES IN LIVE IN RELATIONSHIP
Since there is no specific law that recognizes the status of the couples in live in relationship, hence the law as to the status of children born to couples in live in relationship is also not very clear.

The Hindu marriage Act, 1955 gives grants the status of legitimacy to every child irrespective of his birth out of a void, voidable or a legal marriage. But there is no specific law that raises any presumption of legitimacy in favour of children of live in partners. The future of children of live in partners becomes very insecure in case the partners step out of their relationship. There comes the requirement of a strong provision to safeguard the rights of such children. The must be provision to secure the future of the child and also entitling the children to a share in the property of both the parents.

Again in the absence of a specific legislation, the Supreme Court of India took the initiative to safeguard the interest of children of live in couples. In the case of Bharata Matha & Ors. vs. R. Vijaya Renganathan & Ors., the Supreme Court of India has held that child born out of a live-in relationship may be allowed to succeed inheritance in the property of the parents, if any, but doesn't have any claim as against Hindu ancestral coparcenary property.

CONCLUSION
Live-in relationships in India have still not received the consent of the majority of people. They are still considered a taboo to the Indian society. The majority of the people consider it as an immoral and an improper relationship. At present there is no specific legislation that deals with concept of live

in relationship and the rights of the parties and the children of the live in partners. It was a very unambiguous concept until the Supreme Court of India took the initiative and declared that live in relationship though considered immoral but it is not illegal.
Through its various decisions the judiciary has tried to accord legality to the concept and protect the rights of the parties and the children of live in couples. But at present there is a need to formulate a law that would clarify the concept. There should be clear provisions with regard to the time span required to give status to the relationship, registration and rights of parties and children born out of it. The utmost need of the hour is to secure the future of the children born to live in couples. The steps taken by the judiciary are indeed welcoming and pragmatic in approach. Though the live in relations provide the individuals individual freedom but due to the insecurity it carries it with, there needs to be a law to curtail its disadvantages

IVF

When Robert G Edward and Patrick Steptoe created history by performing the world's first invitro fertilisation (IVF) in July 1978, Dr Subhash Mukhopadhyay, a Kolkata-based doctor was also set to bring glory to India for the same reason. Durga alias Kanupriya Agarwal, India's first test tube baby and the world's second test tube baby was born on October 3, 1978 just two months after Louise Brown-the first test tube baby came into this world. In retrospect, this achievement is considered to be one of the most important medical advances of the last century as basic research conducted by these veterans had translated into practical outcome that was going to benefit so many families. Interestingly, this path-breaking step in control of infertility constituted a base for the development of the IVF segment in India and the world over.

The Growth Trajectory

The last 20 years have seen an exponential growth of infertility clinics across the globe. They offer services such as: artificial insemination by husband or donor sperm, gamete intra fallopian transfer (GIFT), in vitro fertilisation and embryo transfer (IVF-ET), intra cytoplasmic sperm injection (ICSI), donor egg treatment, donor embryo treatment and endoscopic diagnosis as well as the use of a surrogate mother. Presently, the field of reproductive medicine is witnessing a paradigm shift with new techniques being added and the same being educated to the people at large. India, being at the forefront of reproductive medicine, has become a mecca for all the IVF treatments available around the world. The Indian IVF sector accounts to around five billion dollars and has around 500 plus IVF clinics across the country.

Catch 22

The present prosperity witnessed by the segment, is a result of various factors. From hi-tech infrastructure, to effective treatment options to increased awareness to no regulations, all these determinants have influenced growth for this sector in India. Moreover, experts observe a correlation between the growth of the Indian IVF segment and the advancements in the world wide web. Opines Dr Annirudh Malpani, MD, Malpani Infertility Clinic, Mumbai, "The Indian IVF segment has been on the growth path since 1980s, but the major chance came in with the introduction of internet. Indians got a chance to interact with infertile patients using information therapy." With a similar opinion Dr Kedar Ganla, Consultant - Fertility Physician and Coordinator - IVF Department, Dr L H Hiranandani Hospital informs that a lot of information is disseminated to patients using the internet that felicitate patients to understand the available treatments options. He also mentions that apart from information doctors also provide counselling using internet and skype to domestic as well as overseas patients.
While the advances in the IVF field has helped the Indian industry, it is not without a catch. The situation currently is such that anyone can open an infertility or assisted reproductive technology

(ART) clinic; no permission is required to do so and there is no written said law that regulates this practice. The industry only follows the guidelines laid down by the Indian Council of Medical Research(ICMR) that includes when, and by whom IVF can be performed. The guidelines also provides for IVF, ICSI, egg donation, and surrogacy but not for the setting up of the clinics that offer these techniques. Consequently, there is constant mushrooming of such clinics around the country.

Thus, even while we reap the benefits of a budding industry, we also have to look out for the pitfalls.

India and Fertility Tourism

India is fast becoming a favoured destination for medical tourism. It has become the mecca for all treatment options for infertility and thereby opened new avenues for reproductive medical tourism or better known as the fertility tourism. The key drivers for its growth being the increasing number of infertility cases in the country and growing number of people from abroad who flock to India seeking high-end treatments that come at a fraction of the price that they have to pay abroad.

According to the medical tourism website of the Government of India, the combination of the low cost of infertility treatment in India - nearly one-quarter of the cost in developed nations - and the modern ART available here make India a top choice for infertility treatments. Fertility clinics in countries like United Kingdom, Israel, Australia, France, Spain, and Denmark are finding it increasingly difficult to meet the demand for donor eggs and hence turning to India. Further on, benefits associated with fertility tourism are numerous. To name a few, fertility tourism brings in more income, creates jobs, improves lives and contributes to overall economic development. "Fertility tourism has brought in revenue worth 20 to 30 per cent annually. It has also showcased India as a progressive and developed nation erasing the third world image that it had about a decade ago, says, Dr Kaberi Banerjee, IVF Expert, Max Healthcare. Further on he adds, "With the awareness of various infertility treatment options and it being available at a much economical rate in India the international patients have started flocking to the country for IVF services. An average IVF cycle in the US cost $ 10000 whereas in India it is available for about $ 3000. The liberal guidelines of ICMR, allowing egg donation and surrogacy have facilitated this. The easy availability of egg donors and surrogates in India has also encouraged international patients to consider India as one of the suitable countries to persue their treatment. Additionally, India is also equipped with some of the finest international IVF centres and highly qualified IVF doctors."

When we talk about fertility tourism the first thing that comes to mind is people from abroad coming to seek IVF treatment. However, in the real terms, fertility tourism has two aspects—domestic as well as international tourism. Explains Dr Jaydeep Tank, Renowned Fertility Expert and Board Member, Birla IVF, "Fertility tourism and medical tourism in general have two large and distinct components, one is the domestic tourism where Indians from rural or semi-urban areas come to the metros to seek treatment which is simply not available in their locality. The other component is of course the much talked about international tourism which has been in the limelight for perhaps not always the right reasons." While the spotlight still remains on international fertility tourism, is it justified to say that the sector earns its maximum profits from foreign patients?

Replying to this question Dr Tank says, "The benefits of fertility tourism are manifold and accrue not only to the patients seeking treatment but have a cumulative effect on the centre treating such patients. The patients benefit from the typically personalised treatment that can be offered here besides enjoying the tremendous cost advantages offered in our country. They also benefit by availing these treatments at success rates comparable to the best in the world. It would be incorrect to say that international fertility tourism is responsible for the growth of the IVF clinics in India, there is however no denying the fact that it has shaped the perception of IVF in India, domestically and internationally to a large extent. I would actually go so far as to say that the perceptions shaped are actually out of proportion to the amount of international fertility tourism taking place. A very large majority of centres still derive most of their work from the domestic sector."

The Legal and Ethical Dilemma

Despite the fact that the industry enjoys the fruits of increased domestic and foreign income that flows in through fertility tourism, it stumbles onto many legal and ethical obstacles that could be detrimental for its growth. This is because we do not have any formal regulations that can play as a watchdog for this thriving baby-making industry and there is ample scope for legal manipulations and corruption. So the question here is, should the industry celebrate the economic gain that this market brings in or should we be more circumspect about the lack in regulations?

Recalling the social ostracisation faced by Dr Mukhopadhyay despite his ground-breaking achievement and looking at the present situation it wouldn't be wrong to say that the field has always been mired in controversy. The subject seems to be as delicate as sex detection and its legal aspects. Getting to the crux of the subject, brings to light certain glitches that include bureaucratic negligence and social reprimand that are the actual causes for concern. Analysing the legal, moral and ethical concerns, Dr Nikhil Datar, Consultant Gynaecologist, Dr Balabhai Nanavati Hospital and Medico-legal Consultant responds, "Since we do not have a proper law in place different people will have different opinions. Morality and ethics is a grey area. Therefore, questions such as can a grandmother become a mother of the child? or can a close relative donate their eggs or sperms? will definitely draw public attention. Moreover, it is important to note that what could be morally correct for one person could be a vile thing for the another. Basically, this sector is market-and-wish driven because there is no binding law; so technically everyone is free to do what they like. Therefore, a law in place is a must." Getting to the intricacy of the situation, Dr Tank states, "As IVF technology develops, it raises questions in all aspects of life, as the treatments are concerned with the creation and sustenance of life itself. When IVF was introduced and the first IVF baby was born in the UK, there was a maelstrom of debate which surrounded the treatment. Questions regarding the boundaries of procreation were raised and the treatments were derogated as physician's attempts to play God and interfere in the creation of life. As treatment progressed there has been a gradual acceptance in the minds of most. When gamete donation and surrogacy started being widely accessed as treatments a whole new set of questions emerged, not only with regard to the legal issues but even social ones with the welfare of the women/men who donate gametes and undertake to be surrogates. The legal issues can sometimes be very complex and quite clearly there are times when there is a need to revamp laws, as the existing laws are simply not equipped to take such issues under consideration." According to Dr Banerjee, legal issues include accreditation of IVF centre, personnel, and consent of patients. Drawing attention towards medico-legal cases concerning IVF he says, "There are medico-legal cases filed by patients on doctors for negligence when there is a failure of cycle. It is however a known fact that not all IVF cycles can be successful. There are also cases regarding using donor gametes without consent. The ethical issues of IVF would involve known vesus anonymous donation of gametes. The renumeration given to egg donors and surrogates has also been questioned in view of whether one should be paid for human parts and organs or whether it should be completely altruistic."

Critically Looked upon

On one hand the industry is battling with ethical and legal squabbles and on the other hand the growing number of western couples seeking donors and surrogates in India has prompted critics to view the practice of egg donation and surrogacy as exploitation of poor women. Critics express their concern and believe that women may be coerced by their husbands or in-laws or middlemen into becoming surrogates. Notwithstanding these concerns raised by critics, the industry strongly dissents to this allegation. Dr Malpani firmly says, "I do not agree that this practice can be exploitative. Women who opt to become surrogates do it of their own, free will. They normally do it to provide

financial support to their families." Agreeing to this point, Dr Ganla, replies, "It is not an exploitative practice. It gives mutual benefit to both parties if done ethically under proper legal cover. It gives women of lower socio-economic class a chance for self empowerment. These women can contribute for the future plan of their family and for their children's education." On the same lines, Dr Banerjee says, " I disagree on the criticism. Professional egg donors and surrogates come from a low socio-economic status, the renumeration given to them is substantial, some times they cannot earn that in their lifetime. It would be considered exploitative if the process is without consent, non-voluntary, and the renumeration is shared by their spouses, relatives and agents."

Not denying the possibility of exploitation, Dr Tanks presumes, that there is a potential for exploitation but till such time as a law and regulations are in place self regulation on behalf of the centres and physician is paramount to make sure that it does not take place.

The General Guidelines

Since fertility tourism continues to be fraught with questions concerning reproductive autonomy, free-will and coercion, it is vital for all IVF providers and practitioners to follow certain guidelines provided by the ICMR. Nevertheless, there is no record as to how many IVF centres in India follow these guidelines.

Experts opine that keeping in mind the lack of regulations in our country, IVF practitioners and ART providers should check for all the legal implications followed by the home countries from which these prospective parents come. For example, countries such Dubai, Canada and New Zealand have stringent laws for IVF. In such cases, it is a must to consider the legal implications of prospective parents coming from these countries to seek IVF treatments; especially egg donation and surrogacy. "Technically, we must follows the legal process of our country but unfortunately we do not have a law. So, in such cases practitioners should go one step ahead and ask the prospective parents to check for the legal implications in their country, get the required permissions for their embassy and then find out whether the Indian Government allows permission to perform these procedures. This helps in protecting the rights of the child born out of these procedures," asserts Dr Datar.

The ART Bill 2010

In view of all the above and in public interest, the Assisted Reproductive Technology (Regulation) Bill which was first drafted in 2008 and has been altered and re-framed in 2010 provides a national framework for married and unmarried couples as well as single parents seeking surrogacy in India. It also aims to regulate and supervise the ART procedure happening throughout the country.

The bill details procedures for accreditation and supervision of infertility clinics (and related organisations such as semen banks) handling spermatozoa or oocytes outside of the body, or dealing with gamete donors and surrogacy, ensuring that the legitimate rights of all concerned are protected, with maximum benefit to the infertile couples/individuals within a recognised framework of ethics and good medical practice.

The bill also recommends setting up State Boards and a National Advisory Board that will exercise the powers and duties conferred on them by the legislation. The ART bill also provides special guidelines for foreign nationals seeking surrogacy in India.

Looking at all the constraints concerning the field, the ART Bill 2010 seems to be quiet fare and balanced. The positive part of the bill is that it states that ART bank and ART clinics should be separate entities. This is in order to promote more transparency; especially in cases that include egg donation and surrogacy.

The other good side of the bill is its well drafted guidelines for regulating surrogacy in India that covers special provisions for the surrogate and the child as well. Additionally, the bill also mentions the exact age limit for males (21-45 years) and females (21-35 years) to donate semen and oocytes.

Understanding that no law can be perfect, if we critically analysis the provisions of the draft it is

evident that the said draft has certain lacunae that can be improved. According to Dr Abha Majumdar, Director, Center of IVF and Human Reproduction, Sir Ganga Ram Hospital, the bill needs to address areas wherein relatives of the patients would want to donate their eggs. She also points out to the need to encourage egg banking and sperm banking that should be registered under this law. Further on, she appeals that IVF practitioners should not be allowed to get involved in the entire compensation procedures.

Dr Datar suggests for an addition in the already existing chapters. This chapter should clearly specify the responsibilities, liabilities and rights of all the stakeholders involved the process including the doctor, the prospective parents and the donors or surrogates. Pointing out the other loop holes of the bill, experts appeal that the law implying to this practice should be free from bureaucracy.

Government's Take

In view of the fact, that industry is strongly in favour of promoting the IVF sector, the question that comes to mind is how much support does the Government of India provide to this industry? Is the government in favour of fertility tourism? And does the government consider regulating this sector?

The industry opinion here is at variance. Dr Banerjee feels that the very fact that the ICMR has allowed professional surrogates and egg donors proves that the government is encouraging fertility tourism. The government is also encouraging IVF by opening it in government-run institutions and encouraging medical conferences on these subjects. Dr Ganla also agrees that the government encourages corporate hospitals fto take different accreditations which ensure quality control and hence attracts more overseas clients. Dr Tank believes that the government creates a positive environment for fertility tourism. But he also mentions that much more needs to be done.

However, Dr Malpani and Dr Datar are of a different opinion, they believe that government does not support this industry in full. They have a point though. If the government had been so proactive in promoting the IVF sector wouldn't we have a law in place by now?

Need of the Hour

All in all, these legal wranglings and public debate surrounding this sector point out that a binding law which can fulfill the needs of all the parties involved is a must. As things go by, we must understand that when a law comes into existence, so comes in the red tapeism and bureaucracy. Therefore, the industry needs to be more vigilant in terms of their practice.

Reflecting on the absolute need for a law, Dr Malpani says "I think the ART Bill 2010 is a useful starting point. I am sure it will evolve over time, as we get additional inputs from patients and society. Like every bill, it does have certain lacunae, but it's far better than operating in the current vacuum which exists at present". Agreeing on this the same Dr Tank concludes that there cannot be a perfect law and like practice, the law also needs to evolve with time.

Domestic Violence

Domestic Violence in India

India has adopted the Convention on the Elimination of All Forms of Discrimination against Women and the Universal Declaration of Human Rights, both of which ensure that women are given equal rights as men and are not subjected to any kind of discrimination. The Constitution of India also guarantees substantive justice to women. Article 15 of the Constitution provides for prohibition of discrimination against the citizens on grounds of religion, race, caste, sex or place of birth or their subjection to any disability, liability or restriction on such grounds. Article 15 (3) gives power to the legislature to make special provision for women and children. In exercise of this power, the Protection of Women from Domestic Violence Act was passed in 2005.

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 2005

MAIN FEATURES OF THE ACT

DEFINITIONS

Domestic Violence: The term "domestic violence" includes elaborately all forms of actual abuse or threat of abuse of physical, sexual, verbal, emotional and economic nature that can harm, cause injury to, endanger the health, safety, life, limb or well-being, either mental or physical of the aggrieved person. The definition is wide enough to cover child sexual abuse, harassment caused to a woman or her relatives by unlawful dowry demands, and marital rape.

The kinds of abuse covered under the Act are:

Physical Abuse-

- an act or conduct causing bodily pain, harm, or danger to life, limb, or health;
- an act that impairs the health or development of the aggrieved person;
- an act that amounts to assault, criminal intimidation and criminal force.

Sexual Abuse-

any conduct of a sexual nature that abuses, humiliates, degrades, or violates the dignity of a woman.

Verbal and Emotional Abuse-

- any insult, ridicule, humiliation, name-calling;
- insults or ridicule for not having a child or a male child;
- repeated threats to cause physical pain to any person in whom the aggrieved person is interested.

Economic Abuse-

- depriving the aggrieved person of economic or financial resources to which she is entitled under any law or custom or which she acquires out of necessity such as household necessities, stridhan, her jointly or separately owned property, maintenance, and rental payments;
- disposing of household assets or alienation of movable or immovable assets;
- restricting continued access to resources or facilities in which she has an interest or entitlement by virtue of the domestic relationship including access to the shared household.
- Domestic Relationship: A domestic relationship as under the Act includes live-in relationships and other relationships arising out of membership in a family.

Beneficiaries under the Act:

Women: The Act covers women who have been living with the Respondent in a shared household and are related to him by blood, marriage, or adoption and includes women living as sexual partners in a relationship that is in the nature of marriage. Women in fraudulent or bigamous marriages or in marriages deemed invalid in law are also protected.

Children: The Act also covers children who are below the age of 18 years and includes adopted, step or foster children who are the subjects of physical, mental, or economical torture. Any person can file a complaint on behalf of a child.

Respondent: The Act defines the Respondent as any adult male person who is or has been in a domestic relationship with the aggrieved person and includes relatives of the husband or male partner.

Shared Household: A shared household is a household where the aggrieved person lives or has lived in a domestic relationship either singly or along with the Respondent. Such a household should be owned or tenanted, either jointly by both of them or by either of them, where either of them or both of them jointly or singly have any right, title, interest or equity in it. It also includes a household that may belong to the joint family of which the Respondent is a member, irrespective of whether the Respondent or person aggrieved has any right, title or interest in the shared household.

RIGHTS GRANTED TO WOMEN

Right to reside in a shared household:

The Act secures a woman's right to reside in the matrimonial or shared household even if she has no title or rights in the household. A part of the house can be allotted to her for her personal use. A court can pass a residence order to secure her right of residence in the household.

The Supreme Court has ruled in a recent judgment that a wife's claim for alternative accommodation lie only against her husband and not against her in-laws and that her right to 'shared household' would not extend to the self-acquired property of her in-laws.

Right to obtain assistance and protection:

A woman who is victimized by acts of domestic violence will have the right to obtain the services and assistance of Police Officers, Protection Officers, Service Providers, Shelter Homes and medical establishments as well as the right to simultaneously file her own complaint under Section 498 A of the Indian Penal Code for matrimonial cruelty.

Right to issuance of Orders:

She can get the following orders issued in her favour through the courts once the offence of domestic violence is prima facie established:

Protection Orders: The court can pass a protection order to prevent the accused from aiding or committing an act of domestic violence, entering the workplace, school or other places frequented by the aggrieved person, establishing any kind of communication with her, alienating any assets used by both parties, causing violence to her relatives or doing any other act specified in the Protection order.

Residence Orders: This order ensures that the aggrieved person is not dispossessed, her possessions not disturbed, the shared household is not alienated or disposed off, she is provided an alternative accommodation by the Respondent if she so requires, the Respondent is removed from the shared household and he and his relatives are barred from entering the area allotted to her. However, an order to remove oneself from the shared household cannot be passed against any woman.

Monetary Relief: The Respondent can be made accountable for all expenses incurred and losses suffered by the aggrieved person and her child due to the infliction of domestic violence. Such relief may include loss of earnings, medical expenses, loss or damage to property, and payments towards maintenance of the aggrieved person and her children.

Custody Orders: This order grants temporary custody of any child or children to the aggrieved person or any person making an application on her behalf. It may make arrangements for visit of such child or children by the Respondent or may disallow such visit if it is harmful to the interests of the child or children.

Compensation Orders: The Respondent may be directed to pay compensation and damages for injuries caused to the aggrieved person as a result of the acts of domestic violence by the Respondent. Such injuries may also include mental torture and emotional distressed caused to her.

Interim and Ex parte Orders: Such orders may be passed if it is deemed just and proper upon commission of an act of domestic violence or likelihood of such commission by the Respondent. Such orders are passed on the basis of an affidavit of the aggrieved person against the Respondent.

Right to obtain relief granted by other suits and legal proceedings:

The aggrieved person will be entitled to obtain relief granted by other suits and legal proceedings initiated before a civil court, family court or a criminal court.

LIABILITIES AND RESTRICTIONS IMPOSED UPON THE RESPONDENT

He can be subjected to certain restrictions as contained in the Protection and Residence order issued against him.

The Respondent can be made accountable for providing monetary relief to the aggrieved person and her children and pay compensation damages as directed in the Compensation order.

He has to follow the arrangements made by the court regarding the custody of the child or children of

the aggrieved person as specified in the Custody order.

The Act does not permit any female relative of the husband or male partner to file a complaint against the wife or female partner.

AUTHORITIES RESPONSIBLE AND THEIR FUNCTIONS

The Act provides for appointment of Protection Officers and Service Providers by the state governments to assist the aggrieved person with respect to medical examination, legal aid, safe shelter and other assistance for accessing her rights.

Protection Officers: These are officers who are under the jurisdiction and control of the court and have specific duties in situations of domestic violence. They provide assistance to the court in preparing the petition filed in the magistrate's office, also called a Domestic Incident Report. It is their duty to provide necessary information to the aggrieved person on Service Providers and to ensure compliance with the orders for monetary relief.

Service Providers: These refer to organizations and institutions working for women's rights, which are recognized under the Companies Act or the Societies Registration Act. They must be registered with the state government to record the Domestic Incident Report and to help the aggrieved person in medical examination. It is their duty to approach and advise the aggrieved person of her rights under the law and assist her in initiating the required legal proceedings or taking appropriate protective measures to remedy the situation. The law protects them for all actions done in good faith and no legal proceedings can be initiated against them for the proper exercise of their powers under the Act.

Court of first class Judicial Magistrate or Metropolitan Magistrate: This shall be the competent court to deal with cases of domestic violence and within the local limits of this court, either of the parties must reside or carry on business or employment, or the cause of action must have arisen. The Magistrate is allowed to hold proceedings in camera if either party to the proceedings so desires.

General duties of Police Officers, Service Providers and Magistrate: Upon receiving a complaint or report of domestic violence or being present at the place of such an incident, they are under a duty to inform the aggrieved person of:

- her right to apply for obtaining a relief or the various orders granted under the Act;
- the availability of services of Service Providers and Protection Officers;
- her right to obtain free legal services; and
- her right to file a complaint under Section 498 A of the Indian Penal Code.

Counselors: The Magistrate may appoint any member of a Service Provider who possesses the prescribed qualifications and experience in counseling, for assisting the parties during the proceedings.

Welfare experts: The Magistrate can appoint them for assisting him in discharging his functions.

In charge of Shelter Homes: The person in charge of a shelter home shall provide shelter to the aggrieved person in the shelter home upon request made by the aggrieved person, a Protection Officer or a Service Provider on her behalf.

In charge of Medical Facilities: The person in charge of a medical facility shall provide medical aid to the aggrieved person upon request made by the aggrieved person, a Protection Officer or a Service Provider on her behalf.

Central and State Governments: Such governments are under a duty to ensure wide publicity of the provisions of this Act through all forms of public media at regular intervals, to provide awareness and training to all officers of the government, and to coordinate the services provided by all Ministries and various Departments.

PROCEDURE OF FILING COMPLAINT AND THE COURT'S DUTY

The aggrieved person or any other witness of the offence on her behalf can approach a Police Officer, Protection Officer, and Service Provider or can directly file a complaint with a Magistrate for obtaining orders or reliefs under the Act. The informant who in good faith provides information

relating to the offence to the relevant authorities will not have any civil or criminal liability.

The court is required to take cognizance of the complaint by instituting a hearing within three days of the complaint being filed in the court.

The Magistrate shall give a notice of the date of hearing to the Protection Officer to be served on the Respondent and such other persons as directed by the Magistrate, within a maximum period of 2 days or such further reasonable time as allowed by the Magistrate.

The court is required to dispose of the case within 60 days of the first hearing.

The court, to establish the offence by the Respondent can use the sole testimony of the aggrieved person. Upon finding the complaint genuine, the court can pass a Protection Order, which shall remain in force till the aggrieved person applies for discharge. If upon receipt of an application from the aggrieved person, the Magistrate is satisfied that the circumstances so require, he may alter, modify or revoke an order after recording the reasons in writing.

A complaint can also be filed under Section 498 A of the Indian Penal Code, which defines the offence of matrimonial cruelty and prescribes the punishment for the husband of a woman or his relative who subjects her to cruelty.

PENALTY/PUNISHMENT

For Respondent: The breach of Protection Order or interim protection order by the Respondent is a cognizable and non-bailable offence. It is punishable with imprisonment for a term, which may extend to one year or with fine, which may extend to twenty thousand rupees or with both. He can also be tried for offences under the Indian Penal Code and the Dowry Prohibition Act.

For Protection Officer: If he fails or does not discharge his duties as directed by the Magistrate without any sufficient cause, he will be liable for having committed an offence under the Act with similar punishment. However, he cannot be penalized without the prior sanction of the state government. Moreover, the law protects him for all actions taken by him in good faith.

APPEAL

An appeal can be made to the Court of Session against any order passed by the Magistrate within 30 days from the date of the order being served on either of the parties.

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE RULES 2005

The Act empowers the Central government to make rules for carrying out the provisions of the Act. In exercise of this power the Central government has issued the Protection of Women from Domestic Violence Rules 2005 relating to the following matters:

- the qualifications and experience to be possessed by a Protection Officer and the terms and conditions of his service;
- the form and manner in which a domestic incident report may be made;
- the form and the manner in which an application for Protection Order may be made to the Magistrate;
- the form in which an application for legal aid and services shall be made;
- the other duties to be performed by the Protection Officer;
- the rules regulating registration of Service Providers;
- the means of serving notices;
- the rules regarding counseling and procedure to be followed by a Counselor;
- the rules regarding shelter and medical assistance to the aggrieved person;
- the rules regarding breach of Protection Orders.

Same Sex Marriage

History:

Homosexuality has an ancient history in India. Ancient texts like Rig-Veda which dates back around

1500 BC and sculptures and vestiges depict sexual acts between women as revelations of a feminine world where sexuality was based on pleasure and fertility. The description of homosexual acts in the Kamasutra, the Harems of young boys kept by Muslim Nawabs and Hindu Aristocrats, male homosexuality in the Medieval Muslim history, evidences of sodomy in the Tantric rituals are some historical evidences of same-sex relationships.

However, these experiences started losing their significance with the advent of Vedic Brahmanism and, later on, of British Colonialism. Giti claims that Aryan invasion dating to 1500 B.C began to suppress homosexuality through the emerging dominance of patriarchy. In the Manusmriti there are references to punishments like loss of caste, heavy monetary fines and strokes of the whip for gay and lesbian behaviour. In the case of married women, it is mentioned that 'luring of maids' is to be punished by shaving the women bald, cutting of two fingers and then parading her on a donkey. Manu's specifications of more severe punishments for married women can suggest either a wide prevalence of such relationships among married women or a greater acceptance of these practices among unmarried women. In either cases, these references point to the tensions in the norms of compulsory heterosexuality prescribed by Brahmanical0 partite. Both sexual systems coexisted, despite fluctuations in relative repression and freedom, until British Colonialism when the destruction of images of homosexual expression and sexual expression in general became more systematic and blatant.

The homophobic and Victorian puritanical values regarded the display of explicit sexual images as 'pornographic and evil'. The Western view, since the time of Colonial expansion, has been strongly influenced by reproductive assumption about sexuality. These puritanical values and attitudes were in turn mapped into the interpretation of sexual activity among colonial people which is evident from the responses to all forms of 'unnatural' sexual practices. The Indian psyche accepted the Western 'moral and psychological' idea of sexuality being 'pathological' rather than the natural expression of desire, which once used to be part of Indian culture.

The last century witnessed major changes in the conception of homosexuality. Since 1974, homosexuality ceased to be considered an abnormal behaviour and was removed from the classification of mental disorder. It was also de-criminalized in different countries. Since then various states across the globe enacted anti-discriminatory or equal opportunity laws and policies to protect the rights of gays and lesbians. In 1994, South Africa became the first nation to constitutionally safeguard the rights of lesbians and gays. Canada, France, Luxembourg, Holland, Slovenia, Spain, Norway, Denmark, Sweden and New Zealand also have similar laws. In 1996, the US Supreme Court ordered that no state could pass legislation that discriminated against homosexuals. In India, so far no such progressive changes have taken place and the homosexuals remain victims of violence in different forms supported by the state and society.

The issue of homosexual conduct has come to this fore in recent legal and political debates for three main reasons:

(I). Liberalization of the law (in the U.K., by the Sexual Offences Act 1967 as amended in 2000 and some other countries by a similar legislation) has brought with it a change in social attitudes, so that the stigma attached to the homosexuality has to a greater extent disappeared.

(II). Campaigns for lesbian and gay rights especially in the U.S. have taken on an increasingly radical character, arguing for an end to all forms of discrimination against homosexuality, and even for the legalization of same sex marriages.

(III).The outbreak of HIV/AIDS which has been spread in western countries to a great extent by homosexual activity between males, has led to accusations and counter-accusations, often of a bitter

kind. Spain, Belgium and the Netherlands, as well as Canada in allowing same-sex marriages. Same-sex acts are punishable by death in nine countries around the world.

Arguments by those who don't want it to be legalized;
This is more of a religious debate then a political one. Large number of people specially in India are opposing it, as they say it is unnatural, uncouth and immoral. Prime Minister Mr. Manmohan Singh on asking what did he think about the Canadian law of homosexual marriages he replied it is not appreciated. Those people who are opposing it their arguments are based on religious and natural law belief. Some people don't consider them as natural because they do not produce kids. Is it sacred if gay marriage is allowed God created Adam and Eve, we never find statements in Genesis about Adam and Steve. Why break God's law by allowing gay marriage If nature wanted same-sex people to live together, there would only be one sex rather than different sexes. Our society is based on opposite sex marriage. If gay marriage is OK, then why can't I marry my cousin, or my sister, or my cat. Don't I have the same rights as gays or are they now above the rest of us. Don't forget that the law is specific on this. It was created to keep the fabric of society together. It goes against the laws of the land that have been used for hundreds of years and were based on the basis of the commandments.
How Law Deals With It In India:
There is no explicit mention of homosexuality or hemophilia in any of the statute books of India. A person cannot be prosecuted for being a homosexual or hemophilic. But the sexual act of sodomy is a criminal offence. The major provisions of criminalisation of same-sex acts if found in the Section 377 of the Indian Penal Code (IPC) of 1860.

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment of either description for a term which may extend to ten years and should also be liable to fine.

The offence of homosexuality is read under this section as an Unnatural Offence. The term Carnal Intercourse used in this section refers to sexual intercourse between men or in other words, homosexual relationships. Section 377 of the Indian Penal Code, was enacted by the British in 1860.

The Indian law against homosexuality seems to be too harsh. The Constitutional validity of section-377 of IPC was challenged in the Delhi High Court as being violative of fundamental rights guaranteed under the Indian Constitution. Here it may be noted that, in practically all crimes against human body listed under the Indian Penal Code, some sort of physical violence or coercion is an essential element of crime. The only exception is in the favour of section-377, which criminalizes sexual activity that leaves no victims. In the history of the statute from, 1860 in 1992 there was only 30 cases in the High Courts and Supreme Court. "The small number of cases filed under this section shows that this section is redundant and outdated and needs to be repealed.

The Central Government has informed the Delhi High Court that homosexuality cannot be legalized in India as the Indian society is intolerant to the practice of homosexuality/lesbianism. To paraphrase, three things can be said about the government's stance:
[a] the state has not just a function to, but actually a duty to stop unnatural sex, or else the social order would break down, law loose its legitimacy et al;
[b] that our society does not tolerate homosexuality, and notwithstanding the universality of human rights or the universal applicability of our fundamental rights and freedoms, its criminalization is therefore justified; and

[c] that it is really not our thing, its something that happens out there in the west, we do not have to copy that. In other words the three pillars of the classic culture arguments to criminalize the likes of us.

Why Should Be Legalized:

Arguments in favour of Decriminalizing Homosexuality: Gay and lesbian rights activists from various parts of the countries were protesting for their rights and for decriminalizing the homosexual conduct. There is a big debate in our country too- whether it should be legalized or not. I am giving some of the arguments in favour of decriminalizing it, specifically in Indian context- in view of Section-377 of the Indian Penal Code.

(1) It violates right to liberty guaranteed under Article-21 of the Indian Constitution which covers private consensual sexual relations. The fundamental right to liberty (under Article-21) prohibits the state from interfering with the private personal activities of the individual. The concept of privacy is so broad that no comprehensive and all encompassing definition of the term can be given. In the case National Coalition for Gay and Lesbian equality V. Ministry of Justice , the South African court held that, Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. Even at the international level, the right to privacy has been recognized in the favour of lesbians and gay man.

(2) Criminalization of homosexual conduct is unreasonable and arbitrary:

Infringement of, the right to equal protection before law requires the determination of whether there is a rational and objective basis to the classification introduced. There should be a just and reasonable nexus between the classification and the object sought to be achieved by the legislation. Section-377 of IPC, its legislative objective is to criminalize all the sexual activities which are against the order of nature, thus punishing the unnatural sex. Section-377 assumes that natural sexual act is that which is performed for procreation. Hence, it thereby labels all forms of non-procreative sexual act as unnatural. This gives a very narrow view to the distinction between the procreative and non-procreative sexual act. Hence, the legislative intent of creating a public code of sexual morality has no rational nexus with the classification created. Further the very object of the section is vague, unreasonable, arbitrary and based up on the stereotyped notion that sex is only for procreation. Now if this presumption is accepted is correct then, what justifies the policies of family planning and the use of the contraceptive devices

(3) Section-377 discriminates on the basis of sexual orientation: forbidden under Article-15 of the Constitution. Article-15 prohibits discrimination on several grounds, which includes Sex. By prohibiting discrimination on the basis of sex, article-15 establishes that there is no standard behavioral pattern attached to the gender. The prohibition on non-procreative sexual acts imposed by section-377 prescribes traditional sexual relations upon men and women. In so doing the provision discriminates against the homosexuals on the basis of their sexuality and therefore constitutes discrimination on the basis of sexual orientation.

(4). Section-377 violates the enjoyment of civil laws and gay men and lesbians and leads to other adverse effects: Section-292 of IPC punishes Obscenity; the current definition of obscenity can lead it to incriminate the gay and lesbian writings. As male homosexuality is a criminal offence, the presumption is that it is something depraved and can corrupt the minds and bodies of the persons. In the prevailing atmosphere any writing about the lesbians and the gay men can be criminalized, as

homosexuality is treated as something immoral or depraved. The workman's Compensation Act, 1923- provides that in case of death caused by injury at the work place, the dependents of the employee are entitled to receive the compensation from the employer, the dependents will include a widow, minor legitimate son, unmarried daughter, widowed mother and an infirm son or daughter.

Thus a gay or a lesbian couple cannot claim the benefits under this section. This is not an isolated example and there are other such Acts that are discriminatory towards homosexuals. The Provident Fund Scheme, 1952 and the Payment Of Gratuity Act, 1972 define family in such away that a lesbian or gay couple. I end this issue with a quote ?There are several sections in the Indian Penal Code which are anachronistic in a changed world. Section 377 is a prime example. As a matter of fact, Section 377 as it stands, would have made what Clinton did to Monica Lewinsky or rather what Monica Lewinsky provided to Clinton, an offence. I am being discreet, because after all, some things can only be dealt with orally and cannot be put down on paper! The crucial words are "against the order of nature." The possibilities are immense and the imagination can well run riot. Perhaps the way out is now to argue that nature and its various orders have themselves changed.

Why There Is Need For Legal Recognition:

A recent study of sexual practices in rural India by the United Nations Population Fund (UNFPA) found that `male-to-male sex is not uncommon. In fact a higher percentage of men in the study reported having male-to-male sex than sex with sex workers. This was true of both married as well as unmarried men. Close to 10 per cent unmarried men and 3 per cent married men reported having had sexual intercourse with other men in the past 12 months." The survey covered 50 villages in five districts of five states with feedback on sexual practices from close to 3,000 respondents and in-depth interviews on intimate habits from 250 people. The data is indicative of a reality the government is either unable or unwilling to see.

Love is love. The real threat to marriage is the alarmingly high divorce rate. Marriage is also a legal joining of two individuals. People who are not religious choose to get married in a registry office and not in church. Marriage shows the strongest commitment you can make to one another. Gay men and lesbians are just as human and have the same needs and desires as heterosexual human beings. I fail to see what God has to do with this Marriage in this instance is not religious, but a legal joining. Getting married is the ultimate way of showing your love and commitment to your partner, so why should gay people be deprived of this right. Who are we to sit and judge anyway. Same sex marriages should be legalized. If people find gay relationships contrary to their religion, it is up to them to refrain. Those who do not share their religious opinions should be free to make their own choice on this as on other issues. Gay men and lesbians are just as human and have the same needs and desires as heterosexual human beings.

The argument that same sex marriages should not be made legal "because they do not produce kids" is ridiculous. Should heterosexual couples over 50 not be allowed to marry as they cannot produce kids either? If two people love each other and want to unite their destinies, then it is a beautiful thing which should be celebrated. Whether it is called "marriage" or "life pact" does not matter. Same-sex unions harm no one; one's support or opposition to this is a matter of personal belief and morality, with which the government has no business to interfere.

The universality of Human rights demands that prevailing and dominant cultural and social norms cannot be invoked in a manner as to circumvent or restrain fundamental and constitutional rights. If we were to accept the government's arguments in the Delhi high court case, then many of the progressive legislations in my country would never have been enacted. For example, even today there are many men who think that tradition gives them a right to beat up their wives, or that they deserve to get a very fat dowry just because they were born with a penis. If we give in to these

cultural beliefs, then there is nothing to turn round the legislations that we have made to stop violence against women or dowry and dowry related deaths

Conclusion

On the basis of the whole discussion on the aspect of same sex marriage that is Should it be legalized or not. This is more of a religious debate then a political one. In which I have given my arguments in favour of decriminalizing it, I finally conclude by saying that homosexuality is not an offence, it is just a way of pursuit of happiness, a way to achieve sexual happiness or desire. I can see absolutely no reason, apart from blind prejudice, which prevents two gay people going through a civil ceremony which will give them the rights and securities which heterosexual couples enjoy. Marriage is a sign of commitment and love. If two men or two women want to show that commitment, how does that destroy or damage the ideals of marriage. In my view, it clearly demonstrates it. Aren't we living in an age which respects the individual's right to choose Isn't India supposed to be the land of the free In our society people have branded homosexuals as queer. Yet homosexuality is not new nor is it against the Indian culture, it has always existed and with much lesser prosecution, that under Section-377 of the IPC, which is based on British Offences against the Persons Act.

What should be the right approach to deal with same sex marriages, the issues are quite vast and complex. However, the desirability and feasibility of such an approach remain to be ascertained. In any event there is a growing conviction that our present method of criminalizing the same sex sexual activity neither helps the homosexuals nor protects the society in general. We thus need to legitimate same sex marriages in order to move forward in the direction of human rights.

Definition

Constitution means a document having a special legal sanctity which sets out the frame-work and the principal functions of the organs of the Government of a State and declares the principles governing the operation of those organs.

The term constitutional law has been defined by many writers. Hibbert defines Constitutional Law as "the body of rules governing the relation between the sovereign and his subjects and the different parts of the sovereign body".

According to Dicey: "Constitutional law includes all rules which directly or indirectly affect the distribution or exercise of the sovereign power of the State. Hence it includes all rules which define the members of the sovereign power; all rules which regulate the relation of such members to each other or which determine the mode in which the sovereign power or the members thereof exercise their authority".

Classification:

State can be either unitary or Composite. A unitary state in one which is not made up of territorial divisions which are states them selves. The Central Government is all-powerful; such states can make a constitutional law applicable to such government only. A composite state is one which is itself an aggregate or group of constituent states. Composite states are also three in kinds those are imperial, federal or confederal to which there exists central governments. The constitutions also can be prepared as per the pattern of the governments are formed.

Sources of Constitution:

The framers of the Indian Constitution framed, the most important chapter of the Fundamental Rights on the model of the American Constitution, and adopted the parliamentary system of government from the United Kingdom; they have taken the idea of the directive principles of state policy from the Constitution of Ireland, and added elaborate provisions relating to Emergency in the light of the Constitution of the German Reich and the Government of India act, 1935.

Constitutional Conventions:

The first meeting of the Assembly was held on 9th December, 1946 as the sovereign Constituent Assembly for India. On December 11, Dr.Rajendra Prasad was elected its permanent Chairman. It was held in an atmosphere of uncertainty, because the Muslim League boycotted the Assembly. In spite of this, the Assembly made a substantial progress and adopted and 'Objective Resolution' which later became the Preamble of the Constitution. It appointed various Committees to deal with different aspects of the Constitution. The report of the Committees formed the basis on which the first draft of the constitution was prepared. On August 29, 1947, a Drafting Committee of 7 members was set up under the Chairmanship of Dr.Ambedkar.

SALIENT FEATURES OF THE INDIAN CONSTITUTION:

1. The lengthiest Constitution in the world: The Indian Constitution is the lengthiest and the most detailed of all the written Constitutions of the world. While the American Constitution originally consisted of only 7 Articles, the Australian Constitution 128 Articles, the Canadian Constitution 147 Articles, the Indian Constitution originally consisted of 395 Articles divided into 22 Parts and 8 Schedules, at present, the though still, the last numbered Article is 395 and the last numbered part is 22, yet the actual articles are 460 in number and 25 parts at present and the Schedules at present are 12 in number. Since 1950 Articles have been repealed and several Articles have been added to the Constitution. This extraordinary bulk of the Constitution is due to several reasons:-

(1) The framers of the Indian Constitution have gained experience from the working of all the known constitutions of the world. They were aware of the difficulties faced in the working of these constitutions. This was the reason that they sought to incorporate good provisions of those

constitutions in order to avoid defects and loopholes that might come in future in the working of the Indian Constitution. The framers of the Indian Constitution framed, the most important chapter of the Fundamental Rights on the model of the American Constitution, and adopted the parliamentary system of government from the United Kingdom; they have taken the idea of the directive principles of state policy from the Constitution of Ireland, and added elaborate provisions relating to Emergency in the light of the Constitution of the German Reich and the Government of India act, 1935.

(2) The Indian Constitution lays down the structure not only of the Central Government but also of the States. The American Constitution leaves the states to draw up their own constitutions.

(3) The vastnesses of the country and peculiar problems relating to the language have added to the bulk of the constitution. Establishment of a Sovereign, Socialist, Secular, Democratic Republic: The Preamble of the Constitution declares that India to be a Sovereign, Socialist, Secular, Democratic Republic. The word 'Sovereign' emphasizes that India is no more dependent upon any outside authority. It means that both internally and externally India is sovereign. The term 'Socialist' has been inserted in the Preamble by the Constitution 42nd Amendment act, 1976. The word 'Socialism' is used in democratic as well as socialistic Constitutions. The term 'Secularism' means a State which has no religion of its own as recognized religion of state. It treats all religions equally. In a secular State the State regulates the relation between man and man. It is not concerned with the relation of man and God. The term 'Democratic' indicates that the Constitution has established a form of Government which gets its authority from the will of the people. The rulers are elected by the people and are responsible to them. Justice, Liberty, Equality and Fraternity which are essential characteristics of a democracy are declared in the preamble of the Constitution as the very objectives of the Constitution. The Preamble to the Constitution declares that the Constitution of India is adopted and enacted by the people of India and they are the ultimate master of the Republic. Thus the real power is in hands of the people of India, both in the Union and in the States. The term 'Republic' signifies that there shall be an elected head of the State who will be the chief executive head. The President of India, unlike the British King, is not a hereditary monarch but an elected person chosen for a limited period. It is an essential ingredient of a Republic.

2. Parliamentary form of Government: The Constitution of India establishes a parliamentary form of Government both at the Centre and the States. The framers of the Constitution preferred the parliamentary system of government mainly for two reasons—(1) the system was already in existence in India and people were well acquainted with it, (2) it provides for accountability of ministers to the Legislature.

3. Unique blend of rigidity and flexibility: It has been the nature of the amending process itself in federations which had led political scientists to classify federal Constitution as rigid. A rigid Constitution is one which requires a special method of amendment of any of its provisions while in flexible Constitution any of its provisions can be amended by ordinary legislative process. A written Constitution is generally said to be rigid. The Indian Constitution, though written, is sufficiently flexible.

4. Fundamental Rights: These rights are prohibitions against the State. The state cannot make a law which takes away or abridges any of the rights of the citizens guaranteed in the part III of the Constitution. If it passes such a law it may be declared unconstitutional by the courts. But mere declaration of certain Fundamental Rights will be of no use if there is no machinery for their enforcement.

5. Directive Principles of State Policy: The directive Principles of State Policy contained in part IV of the Constitution set out the aims and objectives to be taken up by the States in the governance of the country.

6. A Federation with strong centralizing tendency: The most remarkable feature of the Indian

Constitution is that being a federal Constitution it acquires a unitary character during the time of emergency. During the proclamation of emergency the normal distribution of powers between the centre and the States undergoes a vital change. The Union Parliament is empowered to legislate on any subjects mentioned in State List. The Central Government is empowered to give directions to States as to the manner in which it should exercise its executive powers.

7. Adult Suffrage: The old system of communal electorates has been abolished and the uniform adult suffrage system has been adopted. Under the Indian Constitution every man and woman above 18 years of age has been given the right to elect representatives for the legislature. The adoption of the universal Adult Suffrage without any qualification either of sex, property, taxation, or the like is a bold experiment in India, having regard to the vast extent of the country and its population, with an overwhelming illiteracy. This suffrage is wider than all the democratic countries which have given right to vote to their people.

8. An Independent Judiciary: Mere enumeration of a number of fundamental rights in a Constitution without any provision for their proper safeguards will not serve any useful purpose. Indeed, the very existence of a right depends upon the remedy for its enforcement. Unless there is remedy there is no right, goes a famous maxim. For this purpose an independent and impartial judiciary with a power of judicial review has been established under the Constitution of India. It is the custodian of the rights of citizens. Besides, in a federal Constitution it plays another significant role of determining the limits of power of the Centre and States.

9. A Secular State: A Secular State has no religion of its own as recognized religion of State. It treats all religions equally.

10. Single Citizenship: Though the Constitution of India is federal and provides for dual polity i.e., Centre and States, but it provides for a single citizenship for the whole of India. Every Indian is the citizen of India and enjoys the same rights of citizenship no matter in what State he resides.

11. Fundamental Duties: The Fundamental Duties are indeed to serve as a constant reminder to every citizen that while the Constitution has specifically conferred on them certain Fundamental Rights, it also requires the citizens to observe certain basic norms of democratic behaviors.

UNIT 2

Parliament:

Parliament of India consists of three organs. The President, the Council of States (the Rajya Sabha) and the House of the People (the Lok Sabha). Though President is not a member of either House of Parliament yet, like the British Crown, he is an integral part of the Parliament and performs certain functions relating to its proceedings. The President of America is not an integral part of the Legislature. In India, the President summons the two Houses of Parliament, dissolves the House of People and gives assent of Bills. It is to be noted that, though the Indian Constitution provides for the parliamentary form of Government but unlike Britain, the Parliament is not supreme under the Indian Constitution. In India, the Constitution is supreme. In England, laws passed by the parliament cannot be declared unconstitutional while the Indian Constitution expressly vests this power in the courts. The Indian Parliament is the creature of the Constitution and derives all its powers from the Constitution. It is not a sovereign body.

Parliamentary Sovereignty:

What is Sovereignty? In its popular sense, the term sovereignty means supremacy or the right to demand obedience. In the British Constitution, the legislative authority alone resides in Parliament while executive authority resides in the crown. It is to be noted that, though the Indian Constitution provides for the parliamentary form of Government but unlike Britain, the Parliament is not supreme under the Indian Constitution. In India, the Constitution is supreme. In England, laws passed by the parliament cannot be declared unconstitutional while the Indian Constitution expressly vests this

power in the courts. The Indian Parliament is the creature of the Constitution and derives all its powers from the Constitution. It is not a sovereign body. Under the Indian Constitution, Article 53 provides that the executive power of the Indian Union is vested in the President of India. Legislative power resides in Parliament which comprises the President, the Council of States and the House of the People. The Constitution can be amended only when the amending bill after being duly passed as required by article 368, has received the assent of the President. According to Austin, the sovereign possesses unlimited powers, but experience shows that there is no power on earth which can wield unlimited powers. It is suggested that sovereignty may be located in the constitution-amending body. However, that cannot be done in India whose Constitution does not prescribe only one procedure for amending the Constitution. Some amendments can be made by Parliament itself without the concurrence of the States. Some amendments mentioned in the Proviso to Article 368 of the Indian Constitution require in addition ratification by the legislatures of one-half of the States. As there is not one constitution-amending body for all purposes, it is not the repository of sovereign power. Moreover, the constitution-amending body functions rarely and it is artificial to ascribe sovereignty to it.

Parliamentary Privileges:

Parliamentary Privilege is defined by Sir T.F.May as: "Some of the peculiar rights enjoyed by each House collectively as a constituent part of the Parliament and by the members of each house individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals. The constitutional provisions regarding privileges of the state Legislature and Parliament are identical. Articles 105 and 194 provide for privileges of the Legislature in India. While Article 105 deals with Parliament Article 194 deals with State Legislatures. The Constitution expressly mentions two privileges (a) freedom of speech in the legislature and (b) right of publication of its proceedings. Prior to the 44th Amendment with regard to other privileges Article 105 (3) provided that the powers, privileges and immunities of each House until they were defined by the Parliament shall be those of the House of Commons in England. After the 44th Amendment Article 105 now provides that in other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of the 44th Amendment Act, 1978. Freedom of Speech:- In England this privilege of the House of Commons is well established. It has been given statutory recognition by Bill of Rights in 1689 which says that the freedom of speech or debates in Parliament ought not to be impeached or questioned in any court or out of Parliament. The Indian Constitution expressly guarantees this privilege in Article 105 which says— "There shall be freedom of speech in Parliament and that no Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any Committee thereof." This article thus gives absolute immunity from Courts for anything said within the four walls of the House during the course of proceedings of the House or its Committees. So what is protected is the speech within the House. Outside the House a member of House is a good as any other citizen and if a member repeats or publishes a defamatory speech made by him within the House, he does so on his own responsibility and risk and will be held liable for prosecution under Section 500 of the Indian Penal Code.

Executive Power

The Constitution has conferred extensive executive powers on the President. The executive power of the Union of India is vested in him. He is the head of the Indian Republic. All executive functions are executed in the name of the President, authenticated in such manner as may be prescribed by rules to be made by the President (Article 77). He has power to appoint the Prime Minister and on his advice

other Ministers of the Union, the Judges of the Supreme Court, and the High Courts, the Governors of the States, the Attorney-General, the Comptroller and Auditor-General, the Chairman and Members of the Public Service Commission, the Members of the Finance Commission and Official Commissions, Special Officer for Scheduled castes and Scheduled Tribes, Commission to report on the administration of Scheduled Areas, Commission to investigate into the conditions of backward classes, Special Officer for Linguistic minorities. The above-mentioned official holds their office during the pleasure of the President. This means that he has the power to remove them from their post. This power, however, to be exercised subject to the procedure prescribed by the Constitution. It is, however, to be noted that he has to exercise his executive powers on the advice of the Council of Ministers. f. Collective Responsibility of Cabinet: The basic principle of Parliamentary form of Government is the principle of collective responsibility. In England, this principle works on well established conventions. In India, this principle ensured by marking specific provisions in the Constitution. Article 75 (3) provides that the Council of Ministers shall be collective responsibility to the Lok Sabha. The principle of collective responsibility means that the Council of Ministers is as a body responsible to the Lok Sabha for the general conduct of affairs of the Government. The Council of Ministers work as a team and all decisions taken by the cabinet are the joint decisions of all its members. No matter whatever be their personal differences of opinion within the Cabinet, but once a decision has taken by it, it is the duty of each and every Minister to stand by it and support it both in the Legislature and outside. Lord Salisbury explained this principle of collective responsibility thus: "For all that passes in the Cabinet each member of it who does not resign is absolutely irretrievably responsible, and has no right afterward to say that he agreed in one sense to a compromise while in another he was persuaded by his colleagues. Thus the only alternative before a Minister who is not prepared to support and defend the decision of the Cabinet is to resign. This is a great weapon in the hands of the Prime Minister through which he maintains unity and discipline in his colleagues (Cabinet). A Minister who does not agree with Prime Minster or the Cabinet has the only alternative, that is, to resign from the Cabinet. According to this rule, the Council of Ministers is collectively responsible to the Lok Sabha, hence as soon as a Ministry looses the confidence of the House or is defeated on any question of policy, it must resign.

Judiciary – Jurisdiction of Supreme Court and High Courts: Supreme Court—the Guardian of the Constitution:

The Supreme Court under our Constitution is such arbitration. It is the final interpreter and guardian of the Constitution. In addition, to the above function of maintaining the supremacy of the Constitution, the Supreme Court is also the guardian of the Fundamental rights of the people. Jurisdiction of the Supreme Court: A Court of Record: Article 129 makes the Supreme Court a 'Court of Record' and confers all the powers of such a court including the power to punish for its contempt. A Court of Record is a court whose records are admitted to be of evidentiary value and they are not to be questioned when they are produced before the court. Once a court is made a Court of Record, its power to punish for contempt necessarily follows from that position. The power to punish for contempt of court has been expressly conferred on the Supreme Court by our Constitution. This extraordinary power must be sparingly exercised only where the public interest demands. Original Jurisdiction—Article 131: The Supreme Court has original jurisdiction in any dispute:- (a) Between the Government of India and one or more States; (b) Between the Government of India and any State or States on one side one or more other States on the other; (c) Between two or more States. The Supreme Court in its original jurisdiction cannot entertain any suits brought by private individuals against the Government of India. The dispute relating to the original jurisdiction of the Court must involve a question of law or fact on which the existence of legal right depends. This means that the Court has no jurisdiction in matters of political nature. The term 'legal right' means a right recognized by law and capable of being enforced by the power of a State but not necessarily in

a court of law. The original jurisdiction of the Supreme Court, however, does not extend to the following matters: (1) Article 131 of the Constitution says, that, the jurisdiction of the Supreme Court shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which was executed before the commencement of the Constitution and continues to be in operation or which provides that the jurisdiction of the Supreme Court shall not extend to such a dispute. (2) Under Article 264 Parliament may by law exclude the jurisdiction of the Supreme Court in disputes with respect to the use, distribution or control of the water of any inter-State river or river-valley. (3) Matters referred to the Finance Commission (Article 280 (4) The adjustment of certain expenses between the Union and the State (Article 290). Appellate Jurisdiction—Article 132: The Supreme Court is the highest Court of Appeal in the country. The writ and decrees of the Court run throughout the country. It can be truly said that the jurisdiction and powers of the Supreme Court in their nature and extent are wider than those exercised by the High Courts of any country in the Commonwealth or by the Supreme Court of the U.S.A.

The Appellate Jurisdiction of the Supreme Court can be divided into four main categories:- (a) Constitutional matters, (b) Civil matters, (c) Criminal matters, (d) Special leave to appeal. Power of the Supreme Court to withdraw and transfer cases –article 139-A: Article 139-A (1) provides that if on an application made by the Attorney-General of India or by a party or on its own motion the Supreme Court is satisfied that cases involving the same or substantially the same question of law are pending before the supreme Court and one or more High Courts or before two or more High Courts and that such questions are substantially question of general importance, it may withdraw them and dispose them itself. It may after disposing of the said question of law return any case to the High Court with a copy of its judgment and then the High Court will dispose of the case in accordance with such judgment. Clause (2) of Article 139-A empowers the Supreme Court to transfer cases, appeals or other proceedings from any High Court to another High Court it thinks it expedient to do so for the end of justice. Advisory Jurisdiction of the Supreme Court—Article 143: Article 143 provides that if at any time it appears to the President that—(a) a question of law or fact has arisen or is likely to arise, and (b) the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question for the Advisory opinion of the Court and the Court may after such hearing as it thinks fit, report to the President its opinion thereon. Under clause (2), if the President refers to the Supreme Court matters which are excluded from its jurisdiction under the provision to Article 131, the Court shall be bound to give its opinion there on. Law declared by the Supreme Court to be binding on all courts—Article 141: The judgment of the Supreme Court will be binding on all courts in India. The expression "all courts, within the territory of India" clearly means courts other than the Supreme Court. Thus the Supreme Court is not bound by its own decisions and may in proper case reverse its previous decisions. Jurisdiction of the High Courts: A Court of Record:- Article 215 declares that every High Court shall be a Court of Record and shall have all powers of such a court including the power to punish to punish for its contempt. The scope and nature of the power of High Court under this Article is similar to the powers of the Supreme Court under Article 129.

General Jurisdiction: Article 225 says that subject to the provisions of the Constitution and to the provision of any law of the appropriate Legislature (a) the jurisdiction of the High Court, (b) the law administered in the existing High Court, (c) the powers of the judges in relation to the administration of justice in the courts, (d) the power to make rule of the High Court shall be the same as immediately before the commencement of this Constitution. Thus the pre-Constitutional jurisdiction of the High Court is preserved by the Constitution. Article 225 thus gives jurisdiction over revenue matters. In pre-Constitution period the decisions of the Privy Council were binding on all the High Courts under Section 212 of the Government of India Act. The effect of the present Article is the same and they are still binding on the High Courts unless it is reversed by the Supreme Court or by a

law of the appropriate legislature. This means that the jurisdiction and powers of the High Courts can be changed both by the Union Parliament and the State Legislatures. Power of superintendence over all courts by the High Courts: Under Article 227 every High Court has the power of the superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. For this purpose, the High Court may call returns from them, make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts and prescribe forms in which books, entries and accounts are to be kept by the officers of such courts, and settle table of fees to be given to the sheriff, clerks, attorneys, advocates and pleaders. However this power has given for superintendence of High Court does not extend over any Court or Tribunal constituted by law relating to the Armed Forces. Transfer of certain cases to High Courts: Under 228 the High Court has power to withdraw a case from a subordinate Court, if it satisfied that a case pending in a subordinate Court involves a substantial question of law as to the interpretation of the Constitution. It may then either dispose of the case itself or may determine the said question of law and return the case to the subordinate Court with a copy of its judgment. The subordinate Court will then decide the case in conformity with the High Court's judgment. Writ Jurisdiction of the High Court (Article 226): Article 226 provides that not withstanding anything in Article 32 every High Court shall have power, throughout the territorial limits in relation to which it exercises jurisdiction to issue to any person or authority including the appropriate cases, any government, within those territories, directions, orders of writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them –(a) for the enforcement of fundamental rights conferred by Part III, and (b) for 'any other purpose'. Thus the jurisdiction of a High Court is not limited to the protection of the fundamental rights but also other legal rights as is clear from the words "any other purpose". Those words make the jurisdiction of the High Court more extensive than that of the Supreme Court which is confined to only for the enforcement of fundamental rights. The words "for any other purpose", refer to enforcement of a legal right or legal duty. They do not mean that a High Court can issue writs for any purpose it pleases. Extension of jurisdiction of High Court: Under article 230, Parliament can by law extend or exclude jurisdiction of a high Court over any Union Territory. The Legislature of a State cannot increase, restrict or abolish the jurisdiction.

Independence of Judiciary: Independence of judiciary—Under the Constitution:
Only an impartial and independent judiciary can protect the rights of the individual and provide equal justice without fear or favor. It is, therefore, very necessary that the Supreme Court should be allowed to perform its functions in an atmosphere of independence and be free from all kinds of political pressures. The Constitution has made several provisions to ensure independence of Judiciary. Security of tenure: The Judges of the Supreme Court have security of tenure. They cannot be removed from office except by an order of the President and that also only on the ground of proved misbehavior or incapacity, supported by a resolution adopted by a majority of total membership of each House and also by a majority of not less than 2/3 of the members of the House present and voting. Parliament may, however, regulate the procedure for presentation of the address and for investigation and proof of the misbehavior or incapacity of a Judge. But Parliament cannot misuse this power, because the special procedure for their removal must be followed. The following are some of other important grounds explaining independence of Judiciary:- 1. Salary of Judges fixed, not subject to vote of Legislature, 2. Parliament can extend, but cannot curtail the jurisdiction and power of the Supreme Court, 3. No discussion in Legislature on the conduct of the Judges, 4. Power to punish for its contempt, 5. Separation of Judiciary from executive, 6. Judges of the Supreme Court are appointed by the Executive with the consultation of Legal Experts, 7. Prohibition on Practice after Retirement. Thus the position of the Supreme Court is very strong and its independence is adequately guaranteed. However, there are certain disturbing trends which are likely

to threaten the independence of judiciary at present. (1) Although Article 124 vests the legal power of appointment in the executive but the executive is required to 'consult' legal experts i.e., judges of the Supreme Court and High Courts in appointing judges of the higher courts. But unfortunately, the Supreme Court interpreted the word 'consultation' in such a literal manner that it gave virtually discretion in the matter. In judges transfer case I (S.P.Gupta Vs Union of India) the Supreme Court held that the word "consultation", did not mean concurrence and the Executive was not bound by the advice given by the judges. The Government may completely ignore the advice of legal experts. Thus the power of appointment of the Judges of the Supreme Court and the transfer of the High court Judges was solely vested in the Executive from whose dominance the Judiciary was expected to be free. By conceding the power of appointment exclusively to the Executive, it is submitted, the court had itself put the independence of the judiciary into danger. Mr. Justice Bhagwati of the Supreme Court in the S.P.Gupta's case had suggested for establishment of a judicial commission for recommending the names of persons for the appointment of the Judges of the Supreme Court and High Courts. (2) The power of the President under article222 to transfer a judge from one High Court to another may also be used to undermine the independence of the judiciary.

UNIT 3

Generally, three models are followed in the matter of division of powers in a federation. In the first model, the powers of the Centre are defined and the residuary powers are left to the States. This model is found in America. In the second module, the powers of the federating units or States are defined and the residuary powers are given to the centre. Canada follows this model. And in the third model, the powers of both the governments are clearly laid down. Australia has this model of federation. In India, we follow the combination of both the Canadian and the Australian models. The Constitution of India divides powers between the Union and the State governments. The Seventh Schedule of the Constitution includes three lists of subjects - the Union List, the State List and the Concurrent List. The Central or Union Government has exclusive power to make laws on the subjects which are mentioned in the Union List. The States have the power to make law on the subjects which are included in the Concurrent List. With regard to the Concurrent List, both the Central and State governments can make laws on the subjects mentioned in the Concurrent List. Finally, the subjects which are not mentioned in the above three lists are called residuary powers and the Union government can make laws on them. It may be noted here that in making laws on the subjects of the Concurrent list, the Central government has more authority than the State governments. And on the subjects of the State List also the Central government has indirect control. All this shows that though the Indian Constitution has clearly divided powers between the two governments, yet the Central government has been made stronger than the State governments. We can discuss the division of powers between the two governments in India under three headings, such as, legislative relations, administrative relations and financial relations with reference to the three lists.

a. Legislative powers

The President of India is a component part of the Union Parliament. In theory he possesses extensive legislative powers. He has power to summon and prorogue the Parliament and he can dissolve the Lok Shaba. Article 85 (1), however, imposes a restriction on his power. The President is bound to summon Parliament within six months from the last sitting of the former session. If there is a conflict between the two houses of Parliament over an ordinary Bill he can call a joint sitting of both Houses, to resolve the deadlock (Article 108). At the commencement of each session the President addresses either House of Parliament of a joint session of a Parliament. In his address to joint session of Parliament he outlines the general policy and programme of the Government. His speech is like that

of the King in England and is prepared by the Prime Minister. He may send message to either Houses of Parliament (Art. 86). Every Bill passed by both Houses of Parliament is to be sent to the President for his assent (Article 111). He may give his assent to the Bill, or withhold his assent or in the case of a bill other than a money-bill, may return it to the House for reconsideration on the line suggested by him. If the bill is again passed by both the houses of the Parliament with or without amendment, he must give his assent to it when it is sent to him for the second time. A bill for the recognition of a new State or alteration of State boundaries can only be introduced in either House of the Parliament after his recommendation (Article3). The State Bills for imposing restrictions on freedom of trade and commerce require his recommendation (Article 304). He nominates 12 members of the Rajya Sabha from among persons having special knowledge or practical experience of Literature, Science, Art and Social Services [Article 80(3)]. He is authorized by the Constitution to nominate two anglo-Indians to the Lok Sabha, if he is of opinion that the anglo-Indians community is not adequately represented in that House (Article 331). The President has to lay before the Parliament the Annual Finance Budget, the report of Auditor-General, the recommendations of the Finance Commission, Report of the Union Public Service Commission, and report of the Special Commission for Scheduled Castes and Scheduled Tribes, the report of the Commission of the Backward Classes and the report of the Special Officer for linguistic minorities

b. Administrative powers

As in legislative maters, in administrative matters also, the Central government has been made more powerful than the States. The Constitution has made it clear that the State governments cannot go against the Central government in administrative matters. The State governments have to work under the supervision and control of the Central government. The States should exercise its executive powers in accordance with the laws made by the Parliament. The Central government can make laws for maintaining good relations between the Centre and the States. It can control the State governments by directing them to take necessary steps for proper running of administration. If the State fails to work properly or according to the Constitution, it can impose President's rule there under Article 356 and take over its (the State's) administration. Again, there are some officials of the Central government, working in the States, through which it can have control over the State govern 1. Article 257 of the Constitution lays down that the executive authority of every State shall be exercised in such a way that it does not impede or prejudice the exercise of the executive power of the Union. 2. There are some functionaries of the Union government who serve the State governments. The Governor of a State is appointed by the President who acts as a central agent in the State. The Chief Justice and the Judges of a High Court are appointed by the President and he can also remove them if a resolution is passed by the Parliament in this regard. The offices of the All India Services are appointed by the Central government but they serve in different States.

c. Financial powers

Article 280 provides for the establishment of a Finance Commission. The President shall within two years from the commencement of the constitution and thereafter at the expiration of every fifth year or at such earlier time as he considers necessary constitute a Finance Commission. The Finance Commission shall consist of a Chairman and four other members appointed by the President. Parliament may by law prescribe qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected. In exercise of the power under Article 80 (1), Parliament has passed the Finance (Miscellaneous Provision) Act, 1951. It provides that the Chairman of the Commission shall be selected from among persons who have had experience in public affairs. The other four members shall be selected from among persons who (1)

are, or have been, or are qualified to be appointed as judges of a High Court; or (2) have special knowledge of the Finance and accounts of Government, or (3) have had wide experience in financial matters and in administration, or (4) have special knowledge of economics. The members of the Commission shall hold office for such period as may be specified in the Presidential order and shall be eligible for appointment. The Commission is empowered to determine its procedure and shall have all the powers of a civil court in respect of summoning and enforcing the attendance of witnesses, production of any document and requisitioning any public record from any court or office.

Relevant Doctrines:

(a) Territorial Nexus:

Article 245(1) of the Constitution says that subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State, according to Article 245(2) no law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation. Thus, the Constitution confers the power to enact laws having extra-territorial operation only to the Union Parliament and not to the State legislature, and consequently and extra-territorial law enacted by any State is changeable unless the same is protected on the ground of territorial nexus. If a State law has sufficient nexus or connection with the Subject-matter of that law, the state law is valid even when it has extra-territorial operation. It could, therefore, be said that a State Legislature is also empowered to enact a law having extra-territorial operation subject to the condition that even though the subjectmatter of that law is not located within the territorial limits of the State, there exists as sufficient nexus of connection between the two. The area in which the principle of territorial nexus has been applied most in India is taxation. In State of Bombay Vs R.M.D. Chamarbangwala, a newspaper printed and published at Bangalore had wide circulation in the State of Bombay. Through this news paper the respondent conducted and ran prize competitions for which the entries were received from the State of Bombay through agents and depots established in the State to collect entry forms and fees for being forwarded to the head office at Bangalore. The Bombay Legislature imposed a tax on the business of prize competitions in the state by enacting the Act of 1952 and amending the Bombay Lotteries and prize Competitions and Tax Act, 1948. The respondent contended that he was not bound to pay the said tax on the ground of extraterritoriality. The Supreme Court ruled that when the validity of an act is called in question the first thing for the court to do is to examine as to whether the Act is called in question the first thing for the court to do is to examine as to whether the Act is a law with respect to a topic assigned to the particular legislature which enacted it because under the provisions conferring legislative powers on it such legislature can only make a law for its territory or any part thereof and its laws cannot, in the absence of a territorial nexus, have any extra-territorial operation. For sufficiency of territorial connection, two elements were considered by the court, namely, (1) the connection must be real and not illusory, and (2) the liability sought to be imposed must be pertinent to that connection. It was held that all the activities which the competitor was ordinarily expected to undertake took place in the State of Bombay and there existed a sufficient territorial nexus to enable the Bombay Legislature to tax the respondent who was residing outside the state. Some other example of cases:- 1. Tata Iron and Steel Company Vs. State of Bihar, AIR 1958 SC 452 2. State of Bihar vs. Charusila Das, AIR1959 SC 1002.

(b) Harmonious Construction

When two or more provisions of the same statute are repugnant, the court will try to construe

the provisions in such a manner, if possible, as to give effect to both by harmonizing them with each other. The court may do so by regarding two or more apparently conflicting provisions as dealing with separate situations or by holding that one provision merely provides for an exception of the general rule contained in the other. The question as to whether separate provisions of the same statute are overlapping or are mutually exclusive may, however, be very difficult to determine. The basis of the principle of harmonious construction probably is that the legislature must not have intended to contradict itself. This principle has been applied in a very large number of cases dealing with interpretation of the Constitution. It can be assumed that when the legislature gives something by one hand it does not take away the same by the other. One provision of an Act does not make another provision of the same Act useless. The legislature cannot be presumed to contradict itself by enacting apparently two conflicting provisions in the same Act. In State of Bombay v. F.N. Balasara, while deciding upon the constitutionality of the Bombay Prohibition Act, 1949, enacted by the Bombay Legislature, whereby restrictions on production and sale of liquor were put, the Supreme Court observed that the expression possession and sale occurring in entry 31 of List II are to be read without any qualification. Under that entry the State Legislature has the power to prohibit possession, use and sale of intoxicating liquor absolutely. The word import in Entry 19 of List I standing by itself does not include with sale or possession of the article imported into country by a person residing in the territory into which it is imported. There is, therefore, no real conflict between entry 31 of List II and Entry 19 of List I. Consequently, the Act of 1949, in so far as it purports to restrict possession, used and sale of foreign liquor, is not an encroachment on the field assigned to the Federal Legislature. Some other cases: 1. Raj Krishna Vs Binod, AIR 1954 SC 202 2. Bengal Immunity Company Vs State of Bihar, AIR 1955 SC 661.

(c) Pith and Substance :

The Doctrine “Pith and Substance” means, that if an enactment substantially falls within the powers conferred by the Constitution upon the legislature by which it was enacted, it does not become invalid merely because it incidentally touches upon subjects within the domain of another legislature as designated by the Constitution. Within their respective spheres, the Union and the State Legislatures are made supreme and they should not encroach into the sphere reserved to the other. If a law passed by one encroaches upon the field assigned to the other the Court will apply the doctrine of ’pith and substance’ to determine whether the Legislature concerned was competent to make it. If the ‘pith and substance’ of law, i.e., the true object of the legislation or a statute, relates to a matter with the competence of Legislature which enacted it, it should be held to be intra virus even though it might incidentally trench on matters not within the competence of Legislature. In order to ascertain the true character of the legislation one must have regard to the enactment as a whole, to its object and to the scope and effect of its provisions. The Privy Council applied this doctrine in Profulla Kumar Mukerjee Vs Bank of Khulna, AIR 1947. In this case the validity of the Bengal Money Lenders’ Act, 1946, which limited the amount and the rate of interest recoverable by a money-lender on any loan was challenged on the ground that it was Ultra virus of the Bengal Legislature in so far as it related to ‘Promissory Notes’, a Central subject. The Privy Council held that the Bengal Money-lenders’ Act was in pith and substance a law in respect of moneylending and money-lenders-a State subject, and was valid even though it trenched incidentally on “Promissory note”—a Central subject. In 1980 in the case of Ishwari Khetal Sugar Mills Vs State of U.P., the validity of the U.P. Sugar Undertakings (Acquisition) Act,1971, was challenged on the ground that the State Legislature had no competence to enact the impugned law on the ground that it fell under Parliament’s

legislative power under Entry 52 of List I. It was contended that in view of the declaration the Parliament had made under Entry 52 List I to take the Sugar Industry under its control, that industry went out of Entry 24 of List II and hence the State Legislature was divested of all legislative power to legislate in respect of Sugar Industry and as the impugned legislation was in respect of industrial undertaking in Sugar (Entry 52 of List I) a central subject the impugned legislation was void. The Court, however, rejected these contentions and held that there was no conflict between that State Act and the Central Act under Industries Act, 1951. The power of acquisition or requisition of property in Entry 42, List III is an independent power and the impugned Act being in pith and substance, an Act to acquire scheduled undertakings the power of the State Legislature to legislate is referable to entry 42 and its control was taken over by the Central Government.

(d) Repugnancy:

Article 254 (1) says that if any provision of law made by the Legislature of the State is repugnant to any provision of a law made by Parliament which is competent to enact or to any provision of the existing law with respect to one of the matters enumerated in the Concurrent List, then the law made by Parliament, whether passed before or after the law made by the Legislature of such stage or, as the case may be, the existing law shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy be void. Article 254 (1) only applies where there is inconsistency between a Central Law and a State Law relating to a subject mentioned in the Concurrent List. But the question is how the repugnancy is to be determined? In M.Karunanidhi vs Union of India, in 1979, Fazal Ali, J., reviewed all its earlier decisions and summarized the test of repugnancy. According to him a repugnancy would arise between the two statutes in the following situations: 1. It must be shown that there is clear and direct inconsistency between the two enactments [Central Act and State Act] which is irreconcilable, so that they cannot stand together or operate in the same field. 2. There can be no repeal by implication unless the inconsistency appears on the face of the two statutes. 3. Where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collusion with each other, no repugnancy results. 4. Where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field. The above rule of repugnancy is, however, subject to the exception provided in clause (2) of this Article. According to clause (2) if a State law with respect to any of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament, or an existing law with respect of that matter, then the state law if it is has been reserved for the assent of the President and has received his assent, shall prevail not withstanding such repugnancy. But it would still be possible for the parliament under the provision to clause (2) to override such a law by subsequently making a law on the same matter. If it makes such a law the State Law would be void to the extent of repugnancy with the Union Law.

UNIT 4

Amendment of Constitution:

Provision for amendment of the Constitution is made with a view to overcome the difficulties which may encounter in future in the working of the Constitution. “It has been the nature of the amending process itself in federation which has led political scientist to classify federal Constitution as rigid. A federal Constitution is generally rigid in character as the procedure of amendment is unduly complicated. The procedure of amendment in American Constitution is

very difficult. So is the case with Australia, Canada and Switzerland. It is a common critism of federal Constitution that is too conservative, too difficult to alter and that it is consequently behind the times." The framers of the Indian Constitution were keen to avoid excessive rigidity. They were anxious to have a document which could grow with a growing nation, adapt itself to the changing need and circumstances of a growing people. The nature of the 'amending process' envisaged by the framers of our Constitution can best be understood by referring the following observation of the late Prime Minister Pt.Nehru, "While we want this Constitution be as solid and permanent as we can make it, there is no permanence in the Constitution. There should be certain flexibility. If you make anything rigid and permanent you stop the nation's growth, of a living, vital, organic people……In any event, we could not make this Constitution so 'rigid' that it cannot be adopted to changing conditions. But the framers of Indian Constitution were also aware of the fact that if the Constitution was so flexible it would be a playing of the whims and caprices of the ruling party. They were, therefore, anxious to avoid flexibility of the extreme type. Hence, they adopted a middle course. It is neither too rigid to admit necessary amendments, nor flexible for undesirable changes. The machinery of amendment should be like a safety valve, so devised as neither to operate the machine with too great facility nor to require, in order setting in motion, an accumulation of force sufficient to explode it. The Constitution-makers have, therefore, kept the balance between the danger of having non-amendable Constitution and a Constitution which is too easily amendable.

For the purpose of amendment the various Articles of the Constitution are divided into three categories: (1) Amendment by Simple Majority, (2) Amendment by Special Majority and (3) By Special Majority and Ratification by States. Procedure for Amendment: A Bill to amend the Constitution may be introduced in either House of Parliament. It must be passed by each House by a majority of the total membership to that House and by a majority of not less than 2/3 of the members of that House present and voting. When a Bill is passed by both Houses it shall be presented to the president for his assent who shall give his assent to Bill and thereupon the Constitution shall stand amended. But a Bill which seeks to amend the provisions mentioned in Article 368 requires in addition to the special majority mentioned above the ratification by the ½ of the States.

Doctrine of Basic Structure:

Theory of Basic Structure of the Constitution – A limitation on amending power: The Judges have enumerated certain essentials of the basic structure of the Constitution, but they have also made it clear that they were only illustrative and not exhaustive. They will be determined on the basis of the facts in each case. The validity of the Constitution (24th Amendment) Act, 1971, was challenged in Keshvananda Bharati Vs State of Kerala, popularly known as the Fundamental Right's case the petitioners had challenged the validity of the Kerala Land Reforms Act 1963. But during the pendency of the petition the Kerala Act was amended in 1971 and was placed in the Ninth Scheduled by the 29th Amendment Act. The petitioners were permitted to challenge the validity of Twenty Fourth, Twenty Fifth and Twenty Ninth Amendment to the Constitution also. The question involved was as to what was the extent of the amending power conferred by Article 368 of the Constitution? On behalf of the Union of India it was claimed that amending power was unlimited and short of repeal of the Constitution any change could be effected. On the other hand, the petitioner contended that the amending power was wide but not unlimited. Under Article 368 Parliament cannot destroy the "basic feature" of the Constitution. A Special Bench of 13 Judges was constituted to hear the case. The Court by majority overruled the Golak Nath's case which denied Parliament the power to amend fundamental rights of citizens. The majority held that Article

368 even before the 24th Amendment contained the power as well as the procedure of amendment. The Court held that underArt.368 Parliament is not empowered to amend the basic structure or framework of the Constitution.

LAW OF CRIMES-I (205)

UNIT ONE

Introduction to Substantive Criminal Law a. Extent and operation of the Indian Penal Code b. Definition of Crime c. Constituents Elements of Crime: Actus Reus and Mens rea

History of the Indian Penal Code:

During the British Period the Governor General Appointed the "Indian Law Commissioners" in order to judge the condition of the penal laws prevalent in India and suggest a comprehensive Penal Code. In the year 1834 the First Law Commission was constituted headed by Lord Macauley for drafting the Indian Penal Code. The Draft underwent various levels of scrutiny and was finally passed and received the Governor General's assent on 6th October 1860 and came to force on 1st January 1862.

The IPC is a comprehensive piece of legislation, which initially consisted of 23 Chapters and 511 Sections and as a result of various amendments that it has gone through there are finally 538 sections.

Extent and Operation of the Indian Penal Code:

The Chapter 1(Sections 1-5) of the Indian Penal Code deals with the extent and operation. According to Section 1 of the Code the Name of the Code shall be Indian Penal Code and the same shall be applicable to whole of India except Jammu and Kashmir vide Article 370 of the Constitution of India. **Every person** shall be liable to punishment under this code for every act or omission contrary to the Act and not otherwise.

Section 2 of the Act deals with the Intra Territorial Jurisdiction, i.e. offence committed in India and punished under the Code. This section asserts liability on the basis of locality and place of commission of offence. In order to invoke the code it must be proven that the offence was committed within the Indian Territory. The term "**Indian Territory**" has been defined to include land, water (inland water including the river, canals etc.) and the portions of sea. "Every Person" includes Citizen, non citizen and even Foreigners visiting India. Although the same excludes judicial person (companies etc.), though the same shall be liable for the actions of their directors because of the principle of Vicarious Liability.

Cases:

In the case of **State of Maharashtra vs. M.H. George (AIR 1965 SC 722)**, it was held that the foreigner who enters India by accepting the allegiance of Indian laws is also liable for punishment in case an offence is committed under the code and that he cannot take a plea of "ignorance of law".

In the case of **R vs. Esop [(1836) 7 ER 203],** it was held that no person can take the plea of not being aware of the criminality of the act in the country. In this case the person had contended that unnatural offence was not a criminal act in his land of origin Baghdad and that he was not aware of the fact that the same was a criminal act. Such an argument was negated and the person was convicted.

In the case of **Mobark Ali vs. State of Bombay (AIR 1957 SC 857),** Pakistani citizen made a false representation while in Karachi o the complainant in Bombay through letters, phone calls and telegrams which induced the complainant to part with an amount of around Rs. 5 lacs to the agent of the accused in Bombay so that rice could be shipped from Karachi to Bombay. NO rice was supplied. The accused was caught in England and brought to Bombay where he was prosecuted and convicted under Section 420 for cheating. The Supreme Court upheld the conviction even though the person was physically present in Bombay.

The application of the Act depends upon the place where the offence is committed and not on the nationality or place of residence of the offender. So, a person physically present outside India can commit an offence within India and shall be Punishable under the code. Thus, the code shall be Extra Territorially applicable in the following cases:

1. any citizen of India in any place without or beyond India;
2. any person on a ship or aircraft registered in India;
3. any person in any place beyond India wherein the target of the offence being a computer resource located in India.

Section 4 of the IPC extends the application of the code to an offence committed outside India by an Indian citizen and offence committed on a ship or aircraft registered in India. The rationale behind this extension of criminal jurisdiction o the courts is based on the contention that every sovereign state can regulate the conduct of its citizen, where they might be for the time being. Clause 2 of section 4 gives Admiralty jurisdiction to the Indian Courts and the power to try offences committed on any ship or aircraft registered in India. A ship is considered to be a floating island belonging to the country whose flag it is bearing. Thus all the vessels are considered as the part of the territory of the country whose flag they fly.

Exception to applicability of the Act:

The Act is not applicable to soldiers, sailors or airmen 'in the service of the Government of India' because there are different laws for punishing such personnel.

B. Definition of Crime

Many jurists have defined crime in their own ways some of which are as under:

- **Blackstone** defined crime as an act committed or omitted in violation of a public law either forbidding or commanding it.
- **Stephen** observed a crime is a violation of a right considered in reference to the evil tendency of such violation as regards the community at large
- .**Oxford Dictionary** defines crime as an act punishable by law as forbidden by statute or injurious to the public welfare.

Fundamental Elements Of Crime: There are four elements which go to constitute a crime, these are:-

1. Human being
2. Mens rea or guilty intention
3. Actus reus or illegal act or omission
4. Injury to another human being

Human Being- The first element requires that the wrongful act must be committed by a human being. In ancient times, when criminal law was largely dominated by the idea of retribution, punishments were inflicted on animals also for the injury caused by them, for example, a pig was burnt in Paris for having devoured a child, a horse was killed for having kicked a man. But now, if an animal causes an injury we hold not the animal liable but its owner liable for such injury.

So the first element of crime is a human being who- must be under the legal obligation to act in a particular manner and should be a fit subject for awarding appropriate punishment.

Section 11 of the Indian Penal Code provides that word 'person' includes a company or association or body of persons whether incorporated or not. The word 'person' includes artificial or juridical persons.

Mens Rea- The second important essential element of a crime is mens rea or evil intent or guilty mind. There can be no crime of any nature without mens rea or an evil mind. Every crime requires a mental element and that is considered as the fundamental principle of criminal liability. The basic requirement of the principle mens rea is that the accused must have been aware of those elements in his act which make the crime with which he is charged.

There is a well known maxim in this regard, i.e. "actus non facit reum nisi mens sit rea" which means that, the guilty intention and guilty act together constitute a crime. It comes from the maxim that no person can be punished in a proceeding of criminal nature unless it can be showed that he had a guilty mind.

Actus Reus [Guilty Act Or Omission] - The third essential element of a crime is actus reus. In other words, some overt act or illegal omission must take place in pursuance of the guilty intention. Actus reus is the manifestation of mens rea in the external world. Prof. Kenny was the first writer to use the term 'actus reus'. He has defined the term thus- "such result of human conduct as the law seeks to prevent".

Injury- The fourth requirement of a crime is injury to another person or to the society at large. The injury should be illegally caused to any person in body, mind, reputation or property as according to Section 44 of IPC, 1860 the injury denotes any harm whatever illegally caused to any person in body, mind, reputation or property.

Stages Of A Crime

If a person commits a crime voluntarily or after preparation the doing of it involves four different stages. In every crime, there is first intention to commit it, secondly, preparation to commit it, thirdly, attempt to commit it and fourthly the accomplishment. The stages can be explained as under-

1. Intention- Intention is the first stage in the commission of an offence and known as mental stage. Intention is the direction of conduct towards the object chosen upon considering the motives which suggest the choice. But the law does not take notice of an intention, mere intention to commit an offence not followed by any act, cannot constitute an offence. The obvious reason for not prosecuting the accused at this stage is that it is very difficult for the prosecution to prove the guilty mind of a

person.

2. Preparation- Preparation is the second stage in the commission of a crime. It means to arrange the necessary measures for the commission of the intended criminal act. Intention alone or the intention followed by a preparation is not enough to constitute the crime. Preparation has not been made punishable because in most of the cases the prosecution has failed to prove that the preparations in the question were made for the commission of the particular crime.

If A purchases a pistol and keeps the same in his pocket duly loaded in order to kill his bitter enemy B, but does nothing more. A has not committed any offence as still he is at the stage of preparation and it will be impossible for the prosecution to prove that A was carrying the loaded pistol only for the purpose of killing B.

Preparation When Punishable- Generally, preparation to commit any offence is not punishable but in some exceptional cases preparation is punishable, following are some examples of such exceptional circumstances-

- Preparation to wage war against the Government - Section 122, IPC 1860; Preparation to commit depredation on territories of a power at peace with Government of India- Section 126, IPC 1860;
- Preparation to commit dacoity- Section 399, IPC 1860;
- Preparation for counterfeiting of coins or Government stamps- Sections 233-235, S. 255 and S. 257;
- Possessing counterfeit coins, false weight or measurement and forged documents. Mere possession of these is a crime and no possessor can plead that he is still at the stage of preparation- Sections 242, 243, 259, 266 and 474.

4. Attempt- Attempt is the direct movement towards the commission of a crime after the preparation is made. According to English law, a person may be guilty of an attempt to commit an offence if he does an act which is more than merely preparatory to the commission of the offence; and a person will be guilty of attempting to commit an offence even though the facts are such that the commission of the offence is impossible. There are three essentials of an attempt:-

· Guilty intention to commit an offence;

· Some act done towards the commission of the offence;

· The act must fall short of the completed offence.

Attempt Under The Indian Penal Code, 1860- The Indian Penal Code has dealt with attempt in the following four different ways-

· Completed offences and attempts have been dealt with in the same section and same punishment is prescribed for both. Such provisions are contained in Sections 121, 124, 124-A, 125, 130, 131, 152, 153-A, 161, 162, 163, 165, 196, 198, 200, 213, 240, 241, 251, 385, 387, 389, 391, 394, 395, 397, 459 and 460.

Secondly, attempts to commit offences and commission of specific offences have been dealt with separately and separate punishments have been provided for attempt to commit such offences from those of the offences committed. Examples are- murder is punished under section 302 and attempt to murder to murder under section 307; culpable homicide is punished under section 304 and attempt to commit culpable homicide under section 308; Robbery is punished under section 392 and attempt to commit robbery under section 393.

· Thirdly, attempt to commit suicide is punished under section 309;

· Fourthly, all other cases [where no specific provisions regarding attempt are made] are covered under section 511 which provides that the accused shall be punished with one-half of the longest term of imprisonment provided for the offence or with prescribed fine or with both.

4. Accomplishment Or Completion- The last stage in the commission of an offence is its accomplishment or completion. If the accused succeeds in his attempt to commit the crime, he will be guilty of the complete offence and if his attempt is unsuccessful he will be guilty of an attempt only. For example, A fires at B with the intention to kill him, if B dies, A will be guilty for committing the offence of murder and if B is only injured, it will be a case of attempt to murder.

UNIT TWO

General Exceptions (Sections 76-106) (Lectures-12) a. Definitions b. Mistake c. Judicial and Executive acts d. Accident e. Necessity f. Infancy g. Insanity h. Intoxication i. Consent j. Good Faith k. Private Defense against Body and Property

The Criminal law covers various punishments which vary from case to case. But it is not always necessary that a person gets punished for a crime which he/she had committed. The Indian Penal Code (IPC), 1860 recognizes defences in Chapter IV under "General Exceptions". Section 76 to 106 covers these defences which are based on the presumption that a person is not liable for the crime committed. These defences depend upon the circumstances prevailing at that point of time, mens rea of person and reasonability of action of that accused.

Every offence is not absolute, they have certain exceptions. When IPC was drafted, it was assumed that there were no exceptions in criminal cases which were a major loophole. So a separate Chapter IV was introduced by the makers of the Code applicable to the entire concept.

In short, the object of Chapter IV includes:

Exceptional circumstances in which an individual can escape liability.

Making Code construction simpler by removing the repetition of criminal exceptions.

Burden of Proof

Generally, Prosecution has to prove its case beyond reasonable doubt against the accused.

Before the enforcement of the Indian Evidence Act 1882, the prosecution had to prove that the case does not fall under any exception, but section 105 of Evidence act shifted the burden on the claimant. But in exceptions, as per Section 105 of Evidence Act, a claimant has to prove the existence of general exception in crimes.

The fabric of Chapter IV

Section 6 of IPC

"Throughout this code, every definition of offence, every penal provision and every illustration of every such definition or penal provision, shall be understood subject to exceptions contained in the chapter titled General Exceptions".

The General Exceptions are divided into 2 categories:

Excusable Acts

Judicially Justifiable Acts

Excusable Acts	Justifiable Act
A mistake of Fact under section 76 and 79.	An act of Judge and Act performed in pursuance of an order under Section 77 and 78.
Accident under Section 80.	The necessity under 81.
Infancy – Section 82 and 83.	Consent under Section 87 – 89 and Section 90 and 92.
Insanity – Section 84.	Communication under Section 93.
Intoxication – Section 85 and 86.	Duress under Section 94.
	Trifles under Section 95.
	Private Defence under Section 96 – 106.

Excusable Acts

An Excusable Act is the one in which though the person had caused harm, yet that person should be excused because he cannot be blamed for the act. For example, if a person of unsound mind commits a crime, he cannot be held responsible for that because he was not having mens rea. Same goes for involuntary intoxication, insanity, infancy or honest mistake of fact.

A mistake of Fact under Section 76 and 79

Under Section 76: Act done by a person bound or by mistake of fact believing, himself to be bound by law in included. Nothing is an offence which is done by a person who is or by reason of a mistake of fact, not by mistake of law in good faith believes himself, to be, bound by law to do such act. It is derived from the legal maxim "ignorantia facti doth excusat, ignorantia juris non excusat".

Example: If a soldier firing on a mob by the order of his officer in conformity through the command of the law, then he will not be liable.

Under Section 79: Act done by a person justified or by mistake of fact believing, himself justified, by law is included. Nothing is an offence which is done by any person who is justified by law, or who by reason of mistake of fact and not mistake of law in good faith, believes himself to be justified by law, in doing that particular act

Example: A thought Z to be a murderer and in good faith and justified by law, seizes Z to present him before authority. A has not committed any offence.

Case law for Section 79

In *Kiran Bedi v. Committee of Inquiry*, petitioner refused to deposed to the beginning of the inquiry as she believed that she could depose only at the end of the inquiry

Accident under Section 80

Includes an Accident committed while doing a lawful act. Nothing is an offence which is done by accident or misfortune, without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Example: Suppose M is trying to shoot a bird with a gun but unfortunately the bullet reflected from the oak tree causing harm to N, then, M will not be liable.

Case law for Section 80

In *King Emperor v. Timmappa*, a division bench held that shooting with an unlicensed gun does not debar an accused from claiming defence under Section 81 of IPC. The appeal of acquittal was dismissed and the order of trial magistrate was upheld. The court was of the opinion that there is no reason why sentence awarded under Section 19(e) of the Indian Arms Act should be enhanced. The respondent was liable under the provision but no more. He just borrowed a gun for few minutes to kill as he thought a wild animal might attack him and his partners. The application was dismissed regarding enhancement of sentence.

Infancy – Section 82 and 83

Section 82: It includes an act of a child below seven years of age. Nothing is an offence which is done by a child under seven years of age.

Suppose a child below seven years of age, pressed the trigger of the gun and caused the death of his father, then, the child will not be liable.

Section 83: It includes an act of a child above seven and below twelve of immature understanding. Nothing is an offence which is done by a child above seven years of age and under twelve, who has not yet attained sufficient maturity of understanding to judge the nature and repercussions of his conduct during that occasion.

Example: Suppose a child of 10 years killed his father with a gun in the shadow of immaturity, he will not be liable if he has not attained maturity.

Case law for Section 83

In *Krishna Bhagwan v. State of Bihar*, Patna High Court upheld that if a child who is accused of an offence during the trial, has attained the age of seven years or at the time of decision the child has attained the age of seven years can be convicted if he has the understanding an knowledge of the

offence committed by him.

Insanity – Section 84

Act of a person of unsound mind. Nothing is an offence which is done by a person who at that time of performing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

Example: A, who is insane or unsound, killed B with a knife, thinking it to be a fun game, will not be liable for B's death as he was not aware of the nature of act and law. he was incapable of thinking judiciously.

Case law for Section 84

In *Ashiruddin Ahmed vs. State*, the accused Ashiruddin was commanded by someone in paradise to sacrifice his own son, aged 4 years. Next morning he took his son to a Mosque and killed him and then went straight to us uncle, but finding a chowkidar, took the uncle nearby a tank and told him the story.

The Supreme Court opined that the accused can claim the defence as even though he knew the nature of the act, he did not know what was wrong.

Intoxication – Section 85 and 86

Section 85: Act of a person incapable of judgment by reason of intoxication caused against his will. Nothing is an offence which is done by a person who at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law, provided that the thing which intoxicated him was administered involuntarily without his will or knowledge.

Example: A drank alcohol given by a friend thinking it to be a cold drink. He became intoxicated and hit a person on driving his car back home. He will not be liable as alcohol was administered to him without his will and knowledge.

Section 86: Offence requiring a particular intent or knowledge committed by one who is intoxicated. This applies to cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in state of intoxication, shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.

Example: A person intoxicated, stabs another person under influence of alcohol which was administered to him in the party against his knowledge or will, will not be liable. But if that person had stabbed that person under voluntary intoxication, then he will be liable.

Case law for Section 86

In *Babu Sadashiv Jadhav case*, the accused was drunk and fought with the wife. He poured kerosene and set her on fire and started extinguishing the fire. The court held that he intended to cause bodily injury which was likely to cause death under section 299(20 and sentenced h under section 304, Part I of code).

Justifiable Acts

A justified act is one which would have been wrongful under normal conditions but the circumstances under which the act was committed makes it tolerable and acceptable.

Act of Judge and Act performed in pursuance of an order under Section 77 and 78

Section 77: Act of Judge when acting judicially. Nothing is an offence which is done by a judge when acting judicially in the exercise of any power which is, or which in good faith he believes to be, given to him by law.

Example: Giving Capital Punishment to Ajmal Kasab was done under the judicial powers of judges.

Section 78: Act done pursuant to the Judgement or order of the court. Nothing which is done in pursuance of, or which is warranted by the judgment or order of, a court of justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the court may have no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the court had such jurisdiction.

Example: A judge passing an order of giving lifetime jail punishment, believing in good faith that the court has jurisdiction, will not be liable.

Necessity under 81

Act likely to cause harm, but done without criminal intent, and to prevent other harm. Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm if it is done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Example: A Captain of a ship turned the direction of the ship of 100 people in order to save their lives, but harming the life of 30 people of a small boat, without any intention or negligence or fault on his part. He will not be liable because necessity is a condition in which a person causes small harm to avoid great harm.

Case law for Section 81

In *Bishambher v. Roomal*, 1950, the complainant Bishambhara had molested a girl Nathia. Khacheru, Mansukh, and Nathu were accused related to father of the girl. The Chamars were agitated and

determined to punish Bhishambher. Rumal Singh, Fateh Singh, and Balwant Singh intervened and tried to bring a settlement. They collected a panchayat and the complainant's black was blackened and given shoe beating. It was found by the court that accused had intervened in good faith but the panchayat was having no authority to take such a step.

Consent under Section 87 – 89 and Section 92

Section 87: Act not intended and not known to be likely to cause death or grievous hurt, done by consent. Nothing which is not intended to cause death, or grievous hurt, and which is not known by the doer which is likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or to be intended by the doer to cause, to any person, above 18 years of age, who has given consent, whether express or implied, to suffer that harm; or by reason of any harm which it may be known by the doer to be likely to cause to any such person who has consented to that risk of harm.

Example: A and E agreed to fence each other for enjoyment. This agreement implies the consent of each other to suffer harm which, in the course of such fencing, may be caused without foul play and if A while playing fairly hurts E, then A, has committed no offence.

Case law for Section 87

In *Poonai Fattemah v. Emp*, the accused who professed to be a snake charmer, induced the deceased to believe him that he the power to protect him from any harm caused by the snake bite. The deceased believed him and got bitten by the snake and died. The defence of consent was rejected.

Section 88: Act not intended to cause death, done by consent in good faith for person's benefit. Nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause, or be intended by the doer to cause, or be known by the doer to be likely to cause, to any person for whose benefit it is done in good faith, and who has given a consent, whether express or implied to suffer that harm, or to take the risk of that harm.

Case law for Section 88

In *R.P Dhanda V. Bhurela*l, the appellant, a medical doctor, performed an eye operation for cataract with patient's consent. The operation resulted in the loss of eyesight. The doctor was protected under this defence as he acted in good faith.

Section 89: Act done in good faith for the benefit of a child or insane person, by or by consent of the guardian. Nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be

intended by the doer to cause or be known by the doer to be likely to cause to that person

Section 92: Act done in good faith for benefit of a person without consent. Nothing is an offence by reason of any harm which it may causes to a person for whose benefit it is done in good faith, even without that person's consent, if the circumstances are such that it is impossible for that person to signify consent, or if that person is incapable of giving consent, and has no guardian or other person in lawful charge of him from whom it is possible to obtain consent in time for the thing to be done with benefit.

Section 90: Consent known to be given under fear or misconception. A consent is not such a consent as is intended by any section of this Code,

if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

Consent of insane person if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of children, the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

Case law for Section 90

In *Jakir Ali v. State of Assam*, it was proved beyond doubt that the accused had sexual intercourse with the victim on a false promise of marriage. The Gauhati High Court held that submission of the body by a woman under fear or misconception of fact cannot be construed as consent and so conviction of the accused under sections 376 and 417 of the Indian Penal Code was proper.

Section 91: Exclusion of acts which are offences independently of harm caused. The exceptions in sections 87, 88 and 89 do not extend to acts which are offences independently of any harm which they may cause, or be intended to cause or be known to be likely to cause, to the person giving the consent, or on whose behalf the consent is given.

Communication under Section 93

Communication made in good faith. No communication made in good faith is an offence by reason of any harm to the person to whom it is made if it is made for the benefit of that person.

Example: A doctor in good faith tells the wife that her husband has cancer and his life is in danger. The wife died of shock after hearing this. The doctor will not be liable because he communicated this news in good faith.

Duress under Section 94

Act to which a person is compelled by threats. Except murder, and offences against the state punishable with death, nothing is an offence which done by a person compelled to do it under threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence, provided the person doing the act did not of his own accord, or from reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Example: A was caught by a gang of dacoits and was under fear of instant death. He was compelled to take gun and forced to open the door of house for entrance of dacoits and harm the family. A will not be guilty of offence under duress.

Trifles under Section 95

Act causing slight harm is included under this section. Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause, any harm if that harm is so slight that no person of ordinary sense and temper would complain of such harm.

Case law for Section 95

In *Mrs. Veeda Menezes v. Khan*, during the course of exchange of high tempers and abusive words between appellant's husband and the respondent, the latter threw a file of papers at the former which hit the appellant causing a scratch on the elbow. SC said that the harm caused was slight and hence, not guilty.

Private Defence under Section 96 – 106

Section 96: Things done in private defence.

Nothing is an offence in which a person harms another person in the exercise of private defence.

Section 97: Right of private defence of body and property.

Every person has a right to private defence, provided under reasonable restriction under Section 99.

Protecting his body or another person's body, against any offence in which there is a danger to life.

Protecting his or another person's movable or immovable property, against any offence like theft, robbery, mischief or criminal trespass or an attempt to commit theft, robbery, mischief or criminal trespass.

Example: A father, in order to protect the life of daughter from the attack of a thief, shoots him in his

leg. But the father will not be liable as he was protecting the life of his daughter.

Case law for Section 97

In *Akonti Bora v. State of Assam*, the Gauhati High Court held that while exercising the right of private defence of property the act of dispossession or throwing out a trespasser includes right to throw away the material objects also with which the trespass has been committed.

Section 98: Right of private defence against the act of a person of unsound mind etc.

When an act which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person doing that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

Example: A attempts to kill Z under influence of insanity but A is not guilty. Z can exercise private defence to protect himself from A.

Section 99: Acts against which there is no right of private defence.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or

Attempted to be done, by a public servant acting in good faith under color of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or

Attempted to be done, by the direction of a public servant acting in good faith under colour of his office though that direction may not be strictly Justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

The harm caused should be proportional to that of imminent danger or attack.

Case law for Section 99

In *Puran Singh v. State of Punjab*, the Supreme Court observed that where there is an element of invasion or aggression on the property by a person who has no right of possession, then there is obviously no room to have recourse to the public authorities and the accused has the undoubted right to resist the attack and use even force, if necessary.

Section 100: When the right of private defence of the body extends to causing death.

Assault causing reasonable apprehension of death.

Reasonable apprehension of grievous hurt.

Committing rape

Unnatural lust

Kidnapping or abducting

Wrongfully confining a person in which that person reasonably apprehends the assault and not able to contact public authority.

Act of throwing or attempting to throw acid, causing apprehension in the mind that assault will cause grievous hurt.

Case law for Section 100

In *Yogendra Morarji v. state*, the SC discussed in detail the extent and limitations of the right of private defence of the body. There must be no safe or reasonable mode of escape any retreat for the person confronted with imminent peril to life or bodily harm except by inflicting death.

Section 101: When such rights extend to causing any harm other than death.

If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in section 99, to the voluntary causing to the assailant of any harm other than death.

Case law for Section 101

In *Dharmindar v. State of Himachal Pradesh*, that onus of proof to establish the right of private defence is not as onerous as that of a prosecution to prove its case. Where the facts and circumstances lead to a preponderance of probabilities in favor of the defence case it would be enough to discharge the burden to prove the case of self-defence.

Section 102: Commencement and continuance the right of private defence of the body.

The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed; it continues as long as such apprehension of danger to the body continues.1

Example: A, B, and C were chasing D to kill him in order to take revenge, but suddenly they saw a policeman coming from another side. They got afraid and turned back to run. But D shoots B in his leg, even when there was no imminent danger of harm. D will be liable as there was no apprehension of death or risk of danger.

Section 103: When the right of private defence of property extends to causing death.

Robbery;

House-breaking by night;

Mischief by fire committed on any building, tent or vessel, building, tent or vessel used as a human dwelling, or a place for the custody of property;

Theft, mischief, or house-trespass, under such circumstances, as may reasonably cause apprehension that death or grievous hurt will be the consequence if such right of private defence is not exercised.

Example: C Attempts to stab D maliciously while committing burglary in D's house. There is a reasonable apprehension in the mind of D that C will hurt him grievously, so in order to save himself and property, C throttled D with a knife in his chest, causing Death. C will not be liable.

Case law for Section 103

In *Mohinder Pal Jolly v. State*, the deceased worker and some of his colleagues were shouting slogans for demands outside the factory. Some brickbats were also thrown by them which damaged the property of the owner who fired two shots from outside his office room, one of which killed the deceased worker. The court held that it was a case of mischief and the accused will not get the defence of this section.

Section 104: When such right extends to causing harm other than death.

If the offence, the committing of which, or the attempting to commit which occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding section, that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in section 99, to the voluntary causing to the wrong-doer of any harm other than death.

Example: If A has committed criminal trespass in order to annoy B or hurt him, then B will have the right to harm A in proportional manner, not causing death of the person.

Case law for Section 104

In *V.C Cheriyan v. State*, the three deceased along with other persons had illegally laid a road through private property of the church. A criminal case was pending against them. The three accused belonging to church put up barricades across this road. The deceased was stabbed by accused and Kerela HC held that private defence does not extend to causing the death of a person in this case.

Section 105: Commencement and continuance of the right of private defence of property.

The right of private defence of the property commences when:

A reasonable apprehension of danger to the property commences. The right of private defence of property against theft continues until the offender has effected his retreat with the property

Or, either the assistance of the public authorities is obtained,

Or, the property has been recovered.

The right of private defence of property against robbery continues as long as the,

Offender causes or attempts to cause to any person death or hurt

Or, wrongful restraint

As long as the fear of instant death or

Instant hurt or

Instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

Example: Suppose a thief into the house of an individual, and attempts to hurt him instantly with a knife, then that individual has the right to act in private defence and harm that thief to save life and property.

Case law for Section 105

In *Nga Pu Ke v. Emp*, paddy sheaves belonging to the accused were removed illegally by a person. Accused attacked the cartmen and that cartmen jumped off the carts and ran away leaving sheaves. The accused still chased him and attacked him leading to death. The court held him as guilty of offence.

Section 106: Right of private defence against deadly assault when there is a risk of harm to innocent person.

If in the exercise of private defence against an assault, a person causes apprehension of death, in which defender has no choice but harming an innocent person, his right will extend to that running of risk. 4

Example: C is attacked by a mob who attempts to murder him. He cannot exercise his right to private defence without firing on the mob. In order to save himself, he is compelled to hurt innocent children while firing so C committed no offence as he exercised his right.

Conclusion

So these were the general exceptions which are available to the accused to escape liability or save himself from the offence committed. It may extend to even causing the death of a person or harm an innocent person too depending upon the circumstances. The accused should also have the right to be heard, keeping in view the democratic character of our nation. That's why these exceptions are provided so as to represent oneself in the court of law.

UNIT THREE

Incoherent Forms of Crime a. Joint and Constructive Liability b. Criminal Conspiracy c. Attempt d. Abetment

The concept of Joint Liability is present both in civil and criminal law. But here we will discuss only criminal joint liability.

The concept of joint liability comes under Section 34 of IPC which states that "when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." The section can be explained as when two or more persons commit any criminal act and with the intention of committing that criminal act, then each of them will be liable for that act as if the act is done by them individually.

"The mind was apt to take pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individuals, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete" – A warning addressed by Baron Alderson to the jury in Reg v. Hodge (1838) 2 Lew 227, on danger that conjecture or suspicion may take the place of legal proof.

"The conspirators invariably deliberately, plan and act in secret over a period of time. It is not necessary that each one of them must have actively participated in the commission of the offence or was involved in it from start to finish. What is important is that they were involved in the conspiracy or in other words, there is a combination by agreement, which may be expression or implied or in part implied…" Firozuddin Basheeruddin and others vs. State of Kerala, 2001 SCC (Crl) 1341.

"The offence of conspiracy to commit a crime is different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients they are, therefore quite separate offences." [Leo Roy

Frey V. Suppdt. Distt. Jail (AIR 1958 SC 119)].

"Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy." State v. Nalini, (1999) 5 SCC 253

"The essential ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. - Rajiv Kumar v. State of U.P., (2017) 8 SCC 791

The above mentioned judicial pronouncements crystallize the law on criminal conspiracy as applicable in India.

Criminal conspiracy under the Indian Penal Code (IPC) is a substantive offence in itself and punishable separately. There have been rare instances where persons have been tried for commission of the substantive act of criminal conspiracy.

However, most commonly, the charge of criminal conspiracy is slapped on an accused person along with the charge of a substantive offence under the IPC or any other law which he may be accused of committing along with other co-conspirators.

Criminal conspiracy is hatched to commit an illegal act which is an offence punishable under law. It is not essential that the accused person must do an overt act, and mere agreement between two or more persons to commit an illegal act is sufficient to constitute the offence of criminal conspiracy. It is also not necessary that the object of the conspiracy should have been achieved for it to be considered as an offence. Even if the conspiracy fails on account of abandonment or detection before commission of offence, the very act of entering into an agreement by the co-conspirators is itself an offence and punishable under the law.

However, it has to be kept in mind that the standard of proof for the act of criminal conspiracy is the same as that of any other criminal offence i.e. beyond reasonable doubt.

In the case of State (NCT of Delhi) v. Navjot Sandhu, AIR 2005 SC 3820, it was held that:

"A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused in the offence of criminal conspiracy".

Also, in the case of State of Maharashtra & Ors. v. Som Nath Thapa &Ors., (1996) 4 SCC 659, it was observed that:

“for a person to conspire with another, he must have knowledge of what the co-conspirators were wanting to achieve and thereafter having the intent to further the illegal act takes recourse to a course of conduct to achieve the illegal end or facilitate its accomplishment.”

In Subramaniam Swamy v. A Raja, (2012) 9 SCC 257, it was held that,

“suspicion cannot take the place of legal proof and existence of a meeting between the accused persons is not by itself sufficient to infer the existence of criminal conspiracy.”

But the use of the offence of criminal conspiracy in contemporary times by investigating agencies and courts is not in accordance with the above stated well-settled principles of law. This has resulted in dilution of the law relating to criminal conspiracy.

In many cases today, the concept of 'deemed presumption' is applied, which is otherwise not available under the IPC. Undoubtedly, criminal conspiracies are hatched in secrecy and can only be perceived by actions of the participants, however that should not in any way dilute the standard of proof of “beyond reasonable doubt” that must be met by the prosecution.

It has never been easy to get direct evidence for proving an offence under Section 120-A, which defines criminal conspiracy. Considering this fact, Section 10 of the Indian Evidence Act comes into play.

This section can be divided into two parts: firstly where there is reasonable ground to believe that two or more persons have conspired to commit an offence or an actionable wrong. Only when this condition precedent is satisfied, the second part of the section comes into operation i.e. anything said, done or written by any one of such persons in reference to the common intention after the time when such intention was first entertained by any one of them is a relevant fact against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy.

It is therefore necessary that a prima facie case of conspiracy has to be established for application of Section 10. The second part of section permits the use of evidence which otherwise could not be used against the accused person. Sardar Sardul Singh Caveeshar v. State of Maharashtra [(1964) 2 SCR 378], is an authority on this issue.

The English rule on this matter is, in general, well settled. It is a common law rule. R.v. Blake illustrates the two aspects of it, i.e. what is admissible and what is inadmissible. What was held to be admissible against the conspirator was the evidence of entries made by his fellow conspirator contained in various documents actually used for carrying out the fraud. But a document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other.

The basic concepts of criminal conspiracy as enumerated above are losing their essence, resulting in misuse of this provision to the detriment of proper manifestation of law on this subject. It has been observed that trial courts in India are not following these principles. What is being done is that first they look for evidence which may be permitted under Section 10 of the Evidence Act and then apply it to the facts of a case to presume existence of criminal conspiracy.

It has to be ensured that all the stakeholders of the justice delivery mechanism do their duty diligently, and in a manner which is in consonance with the concept of criminal law as settled, followed and practiced.

The police and other investigating agencies, wanting to make someone an accused, in spite of a case having no evidence, use this age-old formula of invocation of Section 120-B IPC and bring all named in the charge sheet under its umbrella.

There have been numerous instances of such invocation of Section 120B IPC, like in the Indira Gandhi murder case, where Balbir Singh was convicted by the trial court. His conviction was upheld by High Court, but he was ultimately acquitted by the Supreme Court. In the Parliament House Attack case, the trial court convicted all the accused, but the High Court acquitted SAR Gillani and Afsan Guru. The Supreme Court ultimately upheld the judgment of the High Court for these two persons. Similarly, in the Jain Hawala case, the trial court framed charges against both VC Shukla and LK Advani along with the Jain Brothers. However, the High Court discharged them, an order which was confirmed by the Supreme Court by dismissing the appeal of the CBI.

Certain pressure groups in their zeal to prove their relevance, start exerting unnecessary pressure on our very robust and independent justice delivery mechanism. This should be shunned, otherwise there are chances of misuse or wrong implementation of the law of criminal conspiracy to achieve misplaced moral victories.

The well-established rule of criminal justice “fouler the crime higher the proof” should always be remembered and followed. This, in my belief, is still the hallmark of our superior courts, but we have to remain cautious and not allow it to get diluted, especially by our investigating agencies.

The ingredients of section 34 of IPC are-

1) A criminal act is done by several persons;
2) The criminal act must be to further the common intention of all;
3) There must be participation of all the persons in furthering the common intention.

Let us take a hypothetical situation- There are two persons A and B. Both of them decided to rob a bank to earn some quick money. Both of them decided in advance that they will not hurt anybody and they will only take the money. After reaching the bank A tells B to guard the gate of the bank while he takes the money. When A was taking the money, security guard came running towards A. A out of fear, stabbed the security guard with a knife due to which he died. After that A ran with B along with the knife. In this case, even though B had no intention of killing the security guard but he will also be liable for the murder of security guard and robbery along with A.

he concept of Joint Liability is embodied under Section 34 of Indian Penal Code – "Acts done by several persons in furtherance of common intention- when a criminal act is done by several persons in furtherance of common intention of all, each of such persons is liable for that act in the same manner as if done by him alone." When IPC was enacted in 1860, section 34 at that time didn't included words 'in furtherance of common intention', then an amendment was made in year 1870 to amend Indian Penal Code and then these words were included in the section 34. The amended section 34 of IPC simply says that all those persons who have committed a crime with a common intention and they have acted while keeping in mind the common intention, then everyone should be liable for the acts of another done in common intention as if the act is done by the person alone. It happens that different persons perform different acts in the commission of the act or non commission of the act, even though when section 34 applies, all the persons in group are jointly liable for the acts of another.

The concept of Joint Liability was evolved in the case of Reg v. Cruise, in this case police had gone to arrest A at his home. B, C and D were also present at that time. When all the three persons saw police coming, they came out of the house and gave a blow on the police and they drove them away. The court held that all the three are liable for the blow even if the blow was given by only one person.

The ingredients of Section 34 are:

· There should be criminal act- Criminal Act means that either committing the act or omitting to commit the act, which is an offence under IPC.

That criminal act is done by several persons- For the Section to apply, it is necessary that the act is done by more than one person as if the act is done by only one person then this section does not applies. That criminal act is done in the furtherance of common intention of all- it means that the

persons should have decided in advance about the commission of the act and every one of them have acted keeping in mind that common intention.There should be participation in some way or other in the commission of the act- the persons cannot be held liable if they have decided what to do and then they have not done that thing, every person who is a part of the group should do something so as to participate in the commission of the act. The case of Barendra Kumar Ghosh v. King Emperor was one of the earliest cases where the court convicted another person for the act of another done in furtherance of common intention. The facts of the case are, a group of armed persons entered in the police station on 3rd August, 1923. They demanded money from the post master where he was counting the money. They fired from the pistol at the postmaster, due to which the postmaster died on the spot. All of the accused ran away without taking money. The Police was able to catch Barendra Kumar Ghosh who was standing outside the post office as a guard. Barendra's contention was that he was only standing as a guard but the Calcutta high court convicted him for murder under section 302 r/w section 34 of Indian Penal Code. When he appealed in the Privy Council, his appeal was rejected.

Section 34 of Indian Penal Code gives only a general definition as to what constitutes joint liability, it does not give any punishment for criminal acts done jointly by two or more than two persons. This section is only a rule of evidence and it does not create any substantial offence. Section 34 on its own does not create any distinct offence and it lays down just a principle of liability that when two or more persons do something which is contrary to law, then both of them should be held liable. The Section 34 of IPC is a principle of constructive liability and the essence of that liability is existence of common intention in the minds of accused. There is also a canon in the criminal jurisprudence that the courts cannot distinguish between the conspirators and it is possible for them to see what part is played by which conspirator in the commission of the crime, so each person is held jointly liable for the acts of another. Since section 34 is itself not an offence, so every time when any criminal act is done by two or more persons, then both the sections i.e. section for that criminal offence and section of joint liability is applied. In the above case also, section 34 was applied with section 302 of IPC so as to convict the offender. As no offence is prescribed under section 34 of IPC, this section is always read with other sections of IPC. Some of the sections in which the concept of joint liability is discussed in IPC are section 34, section 120A and 120 B, section 149 of IPC.

Section 120A of Indian Penal Code gives definition as to what constitutes criminal conspiracy-

"when two or more persons agree to do, or cause to be done,-

· An illegal act, or

An act which is not illegal by means, such an agreement is designated as criminal conspiracy provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

The definition simply means that when two or more persons agree to do some illegal act or agree to do a legal act by illegal means then that amounts to criminal conspiracy. The act is only which has been agreed by the parties earlier and not any other act. The term illegal has been defined in the Indian Penal Code in section 43- " the word illegal is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be legally bound to do whatever is illegal in him to omit."

When the IPC was enacted, it had only two provisions through which conspiracy was made punishable. One provision was the abetment by conspiracy and other was special offences which require more than 2 persons for committing them. When the IPC was amended in the year 1870, the law of conspiracy was widened by the insertion of section 121A which is waging war or attempting to wage war against government of India. In the year 1913 when Indian Criminal Law Amendment Act came, then chapter V-A was added in the Indian Penal Code and thus adding two sections i.e. section 120A and section 120B.

The main essence of conspiracy that is embodied in section 120A of Indian Penal Code is the unlawful agreement and ordinarily the offence is complete when the unlawful agreement is framed. It is not necessary that there should be some overt act in furtherance of the agreement made and it is not at all necessary that the object for which the conspiracy was made should be achieved.

Section 120B of Indian Penal Code prescribes punishment for the offence of criminal conspiracy- "Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

This section gives punishment for criminal conspiracy. It simply says that every person who is a part of criminal conspiracy for offences punishable with death, imprisonment for life or rigorous imprisonment for two years or upwards will be punished in the same was as if that person has abetted the offence and whoever is a party to any other conspiracy will be punished with imprisonment for a period not more than six months or fine or both.

A view came that a person should not be charged for conspiracy, if due to that conspiracy, some act has been omitted. This view was not correct. The criminal conspiracy is itself an independent offence and even if other offences are committed in pursuance of criminal conspiracy, then also the person is charged for criminal conspiracy as the liability of conspirators is still present.

Section 149 of Indian Penal Code deals with offence in which every member of an unlawful assembly is guilty of offence committed in prosecution of common object. The sections says that-"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence." This section simply means that if any member of an unlawful assembly commits an offence in prosecution of common object for which the assembly was formed, if the members of the assembly knew that such act is likely to be committed for achieving that common object, then every person who is a member of that unlawful assembly will be guilty of that offence. The punishment under section 149 is same as that of the offence which is committed in the unlawful assembly. If the prosecution wants to prove a person under section 149 of IPC, then it has to prove the presence of the person at the site and his participation in the unlawful assembly. This section creates a constructive liability or vicarious liability on the members of the unlawful assembly for the unlawful acts committed in pursuance of the common object. Once the case of a person falls in this section, the question that he did nothing with his own hands is immaterial. He cannot take the defence that he didn't commit that offence, every person in an unlawful assembly knows the natural and probable consequences of the object to be achieved by the

unlawful assembly. Mere part of an unlawful assembly will make all the persons liable for the unlawful act of other members. In this section, the liability of the members other than the principle offender is based on the fact that whether other members knew that the offence that was committed was likely to be caused in pursuance of the common object.

Case Laws Analysis

In the case of Rangaswamy v. State of Tamil Nadu, accused no. 3 was convicted by the trial court for committing offences contrary to section 302 r/w section 34; section 307 r/w section 34 and section 506 of IPC. He came to the Supreme Court with the pleading that he was only with friendly terms with accused no. 1 and accused no. 2 and he did not shared common intention with them to kill the deceased or to attack deceased companion. He said that it was by chance that he was present at the site of offence and he had not participated in the commission of the offence. The accused no. 1 had a prior enmity with the deceased as he was accused of murdering brother of accused no. 1 and then he was released on bail. The occurrence of crime took place in bazaar. The court held that presence of accused no. 3 was established at the site of offence but there is no evidence to show that he shared a common intention with the other two accused. The Supreme Court acquitted accused no. 3 of all the charges.

In the case of William Stanley v. State of Madhya Pradesh, the accused in this case was a 22 year old man who was in love with the sister of the deceased. The deceased didn't like his intimacy. On the day of occurrence, there was a quarrel between the deceased and the accused and the accused was asked to go away from the house. Later, the accused returned with his younger brother and called the sister of deceased to come out. Instead of the sister, the deceased brother came out. There was a heated exchange of words. The accused slapped the deceased on the cheek. Then accused snatched hockey stick from his younger brother and gave one blow on the head of deceased due to which his skull was fractured. The deceased died in hospital 10 days later. According to doctor, the injury was such as likely to cause death. Both accused and his co- accused brother were charged for murder under section 302 read with section 34 of IPC. The co-accused brother was acquitted of all the charges but appellant was held guilty under section 302 of IPC. On the facts of the case, the conviction was altered into culpable homicide not amounting to murder under section 304 of IPC.

In the case of Chhotu v. State of maharashtra, the complainant party was attacked by the accused as a result of which one person died. The witness produced stated that three persons were assaulting the

deceased and the fourth one was simply standing holding a knife in his hand. It was held that only three accused were liable under section 302/34 of IPC and fourth one didn't share the common intention.

In the case of Dadasaheb Patalu Misal and others v. State of Maharashtra, an incident happened at the village Panchegaon-Khurd, Taluka Sangola, District Solapur on the morning of 30th July 1980 around 7.30 A.M. The case is about 32 accused who formed into an unlawful assembly with the common object of forcibly removing the wood from the scene of offence. They were even ready to do a murderous assault it required. The accused armed themselves with axes, sticks, spears, iron bars and whips, etc. and went to the scene of offence on that particular day and started removing woods. The complainant and his brothers also came to the site. When complainant stopped them from taking away wood, accused no. 1 suddenly inflicted an axe blow on ganpati. Then other accused also inflicted blows on ganpati. Accused no. 2 inflicted blow on vithoba who was going towards ganpati. The court convicted only some of the persons for unlawful assembly and the remaining were acquitted. The court also said that presence of a person at the site of offence even with weapons does not amount that he is a part of the offence.

In the case Ramdan and another v. State of Rajasthan, the appellants were convicted under section 307/34 of IPC. The facts are as follows. On 30th april, 1970, head constable Jangbahadur along with his party proceeded for patrolling. At about 6 P.M., they observed footprints of four camels having entered into Indian Border from Pakistan. The footprints were followed. Lakinram along with his party was also following the footprints. When his party reached outside the village Bogniyai, it was observed that the foot-prints of the two camels were diverted towards village Negarda and of the two camels went straight. Then there was a firing between accused party and border security force. The appellants were just moving here and there at the time of firing and finally sat under a tree. The court acquitted both the persons saying that section 34 is not applicable.

In the case of Rambaboo son of Kailash Narain and others v. State, a F.I.R was lodged by Bhajan Lal at 11:30 PM on 2nd september, 1979 in Kakwan district, Kanpur. He said in his F.I.R that on the aforesaid date akanoont about 8:30 PM, Ram Saran Bahelia came to his house from Ambari Har and told him that his brother Raj Kumar Pradhan had been murdered in Usar land between village Anayee and Sargavan. Bhajanlal then went to that place with other people in the village and saw that the dead body of Raj Kumar is in the field of Mohan Lal Dhanuk. Then he went to lodge complaint.

A number of names came up in investigation. Dayashankar, a prosecution witness said that he heard them making conspiracy against Raj Pradhan. The appellants were acquitted of all the charges against them.

In the case of State of Haryana v. Pradeep Kumar and others, some persons were charged under murder of Krishnan Kumar Khandelwal who was a major contestant and majority of party members were supporting him. The respondent who was also present at the time of murder and believed to be main conspirator was acquitted by the court. When the state appealed against the acquittal of Pradeep Kumar, it was rejected by Supreme Court.

In the case of Raju@Raj Kumar v. State of Rajasthan, the facts of the case are as follows, person filed a complaint in police station that when he and his father were at his uncle's residence, 10 to 12 persons came in the room and after surrounding his father, they killed him. According to the FIR, there was enmity between Ram Kishan Khandelwal on one hand and Hanuman, Hanif, Chhitar and Ramesh Shanker on the other hand. It was said the actual murder was done by Iqbal, Aziz, Raju Naik (appellant herein), Mahendra Singh, Hamid and Firoz. According to post-mortem report, the death was due to Syncope. Then court held that the conviction and sentence passed by session court is not correct and it ordered the acquittal of accused. The accused number 8 Sayeed was also acquitted of the charges as the allegations against him could not be proved.

In the case of Heera and another v. State of Rajasthan, a person was crushed by a vehicle at the bus stand. On the statement of witnesses, the police found that murder was done by 7 persons. The accused Heera and Rama @ Ram Singh along with co accused Anna. Mangla, Modu, Dharma and Satya Narayan were arrested. Some of the co-accused were acquitted and remaining were not. The court allowed the appeal and set aside the conviction of accused and he was set free.

In the case of Balaji Gunthu Dhule v. State of Maharashtra, the Supreme Court set aside the conviction of petitioner. The facts of the case are as follows; there was a quarrel between Ranga Rao (deceased) and Shantabai (other accused who died during trial). There was allegation that the accused persons have killed Ranga Rao. The appellant in his statement under Section 313 of the Code admits that there was a quarrel between Shantabai (deceased accused) and P.W. 10 and while rushing to the spot of quarrel the deceased involuntarily fell on a cement concrete platform - Otta and

thereby suffered the fatal injury. The court then acquitted the appellant even though he was present at the site of offence.

Conclusion and Suggestions

The concept of joint liability is embodied in section 34 of Indian penal Code. This section just gives the definition of joint liability and it does not give any punishment for the same. This section has to be read with various other sections of IPC like section 120A which gives definition of criminal conspiracy, section 120 B which gives punishment for criminal conspiracy and section 149 which deals with unlawful assembly. This section 34 cannot be applied on its own and has to be applied with some other section so as to make a person jointly liable for that offence.

UNIT FOUR

Punishment a. Offence against the State b. Offence against Public Tranquility c. Theories of Punishment with special reference to Capital Punishment

A. Chapter VI, Section 121 to Section 130 of the Indian Penal Code deals with offences against State. Section 121A and Section 124A were added to the code in 1870. The Indian Penal Code 1860 has made provisions to safeguard and preserve State's existence and has provided the most Severe punishment of the death sentence or life imprisonment and fine in case of offence against the state.

1) Waging, or attempting to wage war, or abetting waging of war, against the Government of India. 121.

Section 121 of the Indian Penal Code, 1860 says that whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

Illustration :

A joins an insurrection against the Government of India. A has committed the offence defined in this section

Ingredients of Section 121:

To constitute the offence under Section 121 of the Indian Penal Code the following ingredients must exist:

(1) Accused must wage war, or

(2) Attempt to wage war

(3) Abet the waging of such war.

(4) Against the Government of India

The offence under Section 121 is cognizable, non-bailable, non-compoundable and triable by Court of Session.

2) Conspiracy to commit offences punishable by section 121:

Section 121A was added to the Indian Penal Code in 1870. It says that whoever within or without India conspires to commit any of the offences punishable under section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation -

To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

3) Collecting arms, etc., with intention of waging war against the Government of India:

Section 122 of the Indian Penal Code says that, Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Ingredients of Section 122:

To invoke Section 122 of the Code following ingredient must be satisfied

(1) A person collects a men, arms or ammunition, or otherwise prepares to wage war,; and
(2) He does so with the intention of either waging war against the Government of India or being prepared to wage war against Government of India.

The offence under Section 122 of The Indian Penal Code is Cognizable, non-compoundable, non-bailable and triable by Court of Session.

4) Concealing with intent to facilitate design to wage war:

Section 123 of the Code says that whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against the Government of India, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Ingredients :

Essentials Ingredients of Section 123 of the Indian Penal Code are as follows

(1) A person commits an act or illegal or mission;
(2) He thereby conceals the existence of a design to wage war against the Government of India.
(3) He intends by such concealment to facilitate the waging war or knows it to be likely that, such concealment will facilitate the waging of War.

The offence under section 123 is cognizable, non-bailable non-compoundable, and tribal by Court of Session

5) Assaulting President, Governor, etc., with intent to compel or restrain the exercise of any lawful power. 124:

According to Section 124 of the Code Whoever, with the intention of inducing or compelling the President of India, or Governor of any State, to exercise or refrain from exercising in any manner any of the lawful powers of such President or Governor, assaults or wrongfully restrains, or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such President or Governor, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

B. This section is an extension of the second clause of Section 124A, of the Indian penal code, which makes conspiracy to overawe by means of criminal force or show of criminal force Government of India or any state Government punishable.

The offence under section 123 is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

6) Sedition:

Section 124A of the Indian Penal Code runs as follows:

Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, a shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1:

The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2:

Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3:

Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Essential Ingredients of Sedition:

Following are the essential ingredients of this section:

1) Bringing to attempting to bring into hatred; or

2) Exciting or attempting to excite disaffection against the Government of India;

3) Such act or attempt may be done -

(a) by words, either spoken or written, or

(b) by any signs, or

(c) visible representation; and

4) The act must be intentional

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

7) Waging war against any Asiatic Power in alliance with the Government of India:

Section 125 of the Indian Penal Code says that whoever wages war against the Government of any Asiatic Power in alliance or at peace with the Government of India or attempts to wage such war or abets the waging of such war, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

8) Committing depredation on territories of Power at peace with the Government of India:

Section 126 says that, Whoever commits depredation, or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the Government of India, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

9) Receiving property taken by war or depredation mentioned in sections 125 and 126 :

Section 127 of the Indian Penal Code says that whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

10) Public servant voluntarily allowing prisoner of state or war to escape:

According to Section 128 of the Indian Penal Code, whoever, being a public

servant and having the custody of any State prisoner or prisoner of war, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

11) Public servant negligently suffering such prisoner to escape (Section 129):

Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

The offence under this section is cognizable, bailable non-compoundable, and tribal by Magistrate of First Class

12) Aiding escape of, rescuing or harbouring such prisoner:
Section 130 of the Indian Penal Code says that, whoever knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation -

A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

C. Offences against Public Tranquility

141. Unlawful assembly.

An assembly of five or more persons is designated an “unlawful assembly“, if the common object of the persons composing that assembly is-

First – To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful

power of such public servant; or
Second – To resist the execution of any law, or of any legal process; or
Third – To commit any mischief or criminal trespass, or other offence; or
Fourth – By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
Fifth – By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation-

An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

142. Being member of unlawful assembly.

Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

143. Punishment.

Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 6 months, or fine, or both—cognizable—Bailable— Triable by any Magistrate—Non-compoundable.

144. Joining unlawful assembly armed with deadly weapon.

Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 2 years, or fine, or both—Cognizable—Bailable— Triable by any Magistrate—Non-compoundable.

145. Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.

Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 2 years, or fine, or both—Cognizable—Bailable— Triable by any Magistrate—Non-compoundable.

146. Rioting.

Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

147. Punishment for rioting.

Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 2 years, or fine, or both—Cognizable—Bailable— Triable by any Magistrate—Non-compoundable.

COMMENTS

The Sub-Inspector was pursuing investigation which is his duty and therefore it could not be said that while he was pursuing the investigation, it was in pursuance of an unlawful object and therefore no conviction could be passed under section 147;

Maiku v. State of Uttar Pradesh, (1989) Cr LJ 860 : AIR 1989 SC 67.

148. Rioting, armed with deadly weapon.

Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 3 years, or fine, or both—Cognizable—Bailable— Triable by Magistrate of the first class—Non-compoundable.

COMMENTS

There must be nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same;

Allauddin Mian Sharif Mian v. State of Bihar, (1989) Cr LJ 1466 : AIR 1989 SC 1456.

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.

If an offence is committed by any member of an unlawful assembly in prosecution of the common

object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

CLASSIFICATION OF OFFENCE

Punishment—The same as for the offence—According as offence is cognizable or non-cognizable—According as offence is bailable or non-bailable—Triable by court by which the offence is triable—Non-compoundable.

COMMENTS

(i) It is well settled that once a membership of an unlawful assembly is established, it is not incumbent on the prosecution to establish whether any specific overt act has been assigned to any accused. Mere membership of the unlawful assembly is sufficient; State of Maharashtra v. Joseph Mingel Koli, (1997) 2 Crimes 228 (Bom)

(ii) Every member of an unlawful assembly is vicariously liable for the acts done by others either in the prosecution of the common object of the unlawful assembly or such which the members of the unlawful assembly knew were likely to be committed; State of Maharashtra v. Joseph Mingel Koli, (1997) 2 Crimes 228 (Bom)

150. Hiring, or conniving at hiring, of persons to join unlawful assembly.

Whoever hires or engages or employs, or promotes, or connives at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

CLASSIFICATION OF OFFENCE

Punishment—The same as for a member of such assembly, and for any offence committed by any members of such assembly—Cognizable—According as offence is bailable or non-bailable—Triable by court by which the offence is triable—Non-compoundable.

151. Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.

Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall

be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Explanation-

If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 6 months, or fine, or both—Cognizable— Bailable—Triable by any Magistrate—Non-compoundable.

152. Assaulting or obstructing public servant when suppressing riot, etc.

Whoever assaults or threatens to assault, or obstructs or attempts to obstruct, any public servant in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens, or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 3 years, or fine, or both—Cognizable—Bailable— Triable by Magistrate of the first class—Non-compoundable.

153. Wantonly giving provocation with intent to cause riot—if rioting be committed—if not committed.

Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Para I: Punishment—Imprisonment for 1 year, or fine, or both—Cognizable— Bailable—Triable by any Magistrate—Non-compoundable.

Para II: Punishment—Imprisonment for 6 months, or fine, or both—Cognizable— Bailable—Triable by Magistrate of the first class—Non-compoundable.

153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

(1) Whoever-

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or

(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Offence committed in place of worship, etc- Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

CLASSIFICATION OF OFFENCE

Para I: Punishment—Imprisonment for 3 years, or fine, or both—Cognizable— Non-bailable—Triable by any Magistrate of the first class—Non-compoundable.

Para II: Punishment—Imprisonment for 5 years and fine—Cognizable—Non- bailable—Triable by Magistrate of the first class—Non-compoundable.

COMMENTS

(i) Mens rea is a necessary ingredient for the offence under section 153A of the Indian Penal Code; Bilal Ahmed Kaloo v. State of Andhra Pradesh, (1997) 7 Supreme Today 127.

(ii) Publication of the words or representation is not necessary under section 153A of the Indian Penal Code;

Bilal Ahmed Kaloo v. State of Andhra Pradesh, (1997) Supreme Today 127.

153AA. Punishment for knowingly carrying arms in any procession or organising, or holding or taking part in any mass drill or mass training with arms.

Whoever knowingly carries arms in any procession or organizes or holds or takes part in any mass drill or mass training with arms in any public place in contravention of any public notice or order issued or made under section 144A of the Code of Criminal Procedure, 1973 shall be punished with imprisonment for a term which may extend to six months and with fine which may extend to two thousand rupees.

Explanation-

"Arms" means articles of any description designed or adapted as weapons for offence or defence and includes fire-arms, sharp edged weapons, lathis, dandas and sticks.

CLASSIFICATION OF OFFENCE

Punishment-Imprisonment for 6 months and Fine of 2,000 rupees- Cognizable- Non-Bailable—Triable by any Magistrate—Non-compoundable.

153B. Imputations, assertions prejudicial to national-integration.

(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise,-

(a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India, or

(b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India, or

(c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Whoever commits an offence specified in sub-section (1), in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

CLASSIFICATION OF OFFENCE

Para I: Punishment—Imprisonment for 3 years, or fine, or both—Cognizable— Non-bailable—Triable by any Magistrate of the first class—Non-compoundable.
Para II: Punishment—Imprisonment for 5 years and fine—Cognizable—Non- bailable—Triable by Magistrate of the first class—Non-compoundable.

154. Owner or occupier of land on which an unlawful assembly is held.

Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

CLASSIFICATION OF OFFENCE

Punishment—Fine of 10,000 rupees—Non-cognizable—Bailable—Triable by any Magistrate—Non-compoundable.

155. Liability of person for whose benefit riot is committed.

Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land, respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

CLASSIFICATION OF OFFENCE

Punishment—Fine—Non-cognizable—Bailable—Triable by any Magistrate—Non- compoundable.

156. Liability of agent of owner or occupier for whose benefit riot is committed.

Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes p lace, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom,

the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

CLASSIFICATION OF OFFENCE

Punishment—Fine—Non-cognizable—Bailable—Triable by any Magistrate—Non- compoundable.

157. Harbouring persons hired for an unlawful assembly.

Whoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control any persons, knowing that such persons have been hired, engaged or employed, or are about to be hired, engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 6 months, or fine, or both—Cognizable— Bailable—Triable by any Magistrate—Non-compoundable

158. Being hired to take part in an unlawful assembly or riot.

Whoever is engaged, or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in Section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,

or to go armed- and whoever, being so engaged or hired as aforesaid, goes armed or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Para I: Punishment—Imprisonment for 6 months, or fine, or both—Cognizable—Bailable—Triable by any Magistrate—Non-compoundable.

Para II: Punishment—Imprisonment for 2 years, or fine, or both—Cognizable— Bailable—Triable by any Magistrate—Non-compoundable.

159. Affray.

When two or more persons, by fighting in a public place, disturb the public peace, they are said to "commit an affray".

160. Punishment for committing affray.

Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for one month, or fine of 100 rupees, or both— Cognizable—Bailable—Triable by any Magistrate—Non-compoundable.

1. Kinds of Punishment: - From *Indian Penal Code*, 1860

2. Theories of Punishment

Retribution

One of the oldest and most basic justifications for punishment involves the principles of revenge and retribution. This equation of punishment with the gravity of the offense is embedded in the Judeo–Christian tradition in the Mosaic laws of the Old Testament that emphasize the idea of "an eye for an eye." Neither constrained by questions of offender culpability nor directed at preventing future wrongdoing, have offenders under a retributive philosophy simply got what they deserve. Punishment is justified on its own grounds, a general principle that has remained popular throughout Western history in both law and widespread public beliefs about how justice should be dispensed in democratic societies.

The classical retributive principle of "let the punishment fit the crime" was the primary basis for criminal sentencing practices in much of Western Europe in the nineteenth century. This principle of punishment was subsequently modified in neoclassical thought to recognize that some offenders who commit similar offenses may be less blameworthy or culpable due to factors outside of their control (e.g., diminished capacity, mental disease or defect, immaturity). Under this revised retributive theory of just deserts, punishment should fit primarily the moral gravity of the crime and, to a lesser extent, the characteristics of the offender. A current example of retributive principles being used as the basis for punishment involves mandatory sentencing policies and sentencing guidelines systems in the United States. Mandatory sentences dictate uniform sanctions for persons who commit particular types of offenses (e.g., enhanced penalties for crimes committed with firearms), whereas determinate sentencing guidelines prescribe specific punishments based on the severity of the criminal offense and the extensiveness of the offender's prior criminal record.

Consistent with a retributive philosophy, punishment under these sentencing systems focuses primarily on the seriousness and characteristics of the criminal act rather than the offender.

Although retribution is often linked to criminal sanctions, it is equally applicable to other types of legal sanctions and informal sanctions. For example, civil litigation that is based on the principle of

strict liability is similar to retributive philosophy in that compensatory and punitive damages focus on the gravity of the prohibited act rather than characteristics of the offender. Lethal and nonlethal sanctions that derive from blood feuds between rival families, range wars in agrarian communities, terrorist attacks on civilian and government targets, and acts of "street justice" by vigilante groups and other extrajudicial bodies are often fuelled by the twin motives of revenge and retribution. Various economic punishments and sanctions that restrict business practices (e.g., asset forfeitures, injunctions, product boycotts, worker strikes and slowdowns, revocation of licenses, decertification of programs, cease-and-desist orders, denial of benefits) may be justified on various utilitarian grounds like protecting society or deterring wrongdoing, but they may ultimately reflect the widespread belief in letting the punishment fit the crime.

Retribution as a penal philosophy has been criticized on several fronts when it is actually applied in practice. First, strict retributive sanctions based solely on the nature of the offense (e.g., mandatory sentences for drug trafficking, the use of firearms in the commission of crimes) are often criticized as being overly rigid, especially in societies that recognize degrees of individual culpability and blameworthiness. Second, the principle of *lex talionis* (i.e., the "eye for an eye" dictum that punishment should correspond in degree and kind to the offense) has limited applicability. For example, how do you sanction in kind, acts of drunkenness, drug abuse, adultery, prostitution, and/or traffic violations like speeding? Third, the assumption of proportionality of punishments (i.e., that punishment should be commensurate or proportional to the moral gravity of the offense) is untenable in most pluralistic societies because there is often widespread public disagreement on the severity of particular offenses.

Under these conditions, a retributive sentencing system that espouses proportional sanctions would be based on the erroneous assumption that there is public consensus in the rankings of the moral gravity of particular types of crime. Even with these criticisms, however, the retributive principle of *lex talionis* and proportionality of sanctions remains a dominant justification of punishment in most Western cultures. Retribution under a Judeo–Christian religious tradition offers a divine justification for strict sanctions and it clearly fits popular notions of justice (e.g., "he got what was coming to him"). The dictum of "let the punishment fit the crime" also has some appeal as a principled, proportional, and commensurate form of societal revenge for various types of misconduct.

One of the most convincing statements of the retribution theory was given by Immanuel Kant in the eighteenth century as follows:

….Punishment can never be administered merely as means for promoting another good, either with

regard to the criminal himself to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means of subservient to the purpose of another, not be mixed up with the subjects of Real Rights (i.e. goods or property). Against such treatment his inborn personality has a right to protect him , even although he may be condemned to loose his civil personality. He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow citizens.

Incapacitation

A primary utilitarian purpose for punishment involves various actions designed to decrease the physical capacity of a person to commit criminal or deviant acts. This principle of incapacitation focuses on the elimination of individuals' opportunity for crime and deviance through different types of physical restraints on their actions. The conditions of confinement may be so deplorable that they reduce the offender's subsequent desire to engage in misconduct, but such a deterrent effect is not a necessary component of incapacitation in its pure and earliest form. A plethora of devices, techniques, and structures have been used throughout history as means for incapacitation. The early tribal practices of banishment to the wilderness, the English system of "transportation" of convicts to other colonies in the seventeenth and eighteenth centuries, the exile of citizens in ancient Greek society, and political exile in more modern times are examples of incapacitated sanctions because they involve the physical removal of persons from their former communities, thereby restricting their physical opportunity for misconduct in the original setting. The stocks and pillory in English history and Colonial America were devices used for both public ridicule and incapacitation.

The function of incapacitation may also be served by other types of legal and extra legal restrictions on one's behaviour. Other legal forms of incapacitation involving civil or administrative decrees include court-ordered injunctions and restraint-of-trade agreements, restraining orders in domestic violence cases, revocations of licenses, foreclosures, and the passage of certification requirements to perform particular tasks (e.g., college degree requirements for teaching, passing medical board and bar exams for practicing medicine or law). Many of these actions are economic sanctions in that they carry financial consequences for those involved, but these civil and administrative rules can also be seen as incapacitated in that they place physical restrictions on one's possible actions. The most widely known type of incapacitation involves some form of incarceration, or what others have termed "penal bondage." Aside from their incapacitated effect on restricting immediate criminal opportunities, penal bondage of criminals, vagrants, debtors, social misfits, and other disadvantaged

groups across time periods and geographical contexts has often included a component of forced labour (e.g., public works projects, forced servitude in military campaigns) as a condition of confinement.

Physical structures for incapacitation may have different purposes or functions besides the physical restraint of the body. These places of confinement are described across time and space in context-specific terms like towers, workhouses, jails, prisons, correctional or treatment facilities, cottages, and mental institutions. The specific language used for descriptive purposes also signifies their functions beyond physical incapacitation. During the last half century, several new forms of incapacitation have emerged. For example, shock incarceration programs involve short-term incarceration of juvenile offenders to show them the pains of imprisonment and scare them into a future life of conformity. Another variant of incapacitation, intensive-supervision probation (ISP), leaves adjudicated criminals in their community but under the watchful eye of probation officers or other legal authorities.

Although research suggests that a small pool of people commits the predominant share of violent and property crime, efforts to successfully predict these high-risk offenders suffer from numerous ethical and practical problems, including high rates of both “false positives” (i.e., falsely labelling someone as a high-risk offender)and “false negatives” (i.e., releasing high-risk offenders because they were erroneously characterized as low-risk).

Contrary to early historical patterns of incapacitation that emphasized the reduction of the physical opportunity for crime and deviance, modern versions of this philosophy are more “forward-looking” in terms of focusing on the utility of punishments for changing offenders’ criminal motivations once they are no longer physically restrained from committing deviance. In this way, incapacitation is united with other utilitarian philosophies for punishment. Different types of incapacitated sanctions may serve as the initial framework for establishing successful programs of deterrence and rehabilitation.

Deterrence

The doctrine of deterrence asks a fundamental question about the relationship between sanctions and human behaviour: Are legal and extra legal sanctions effective in reducing deviance and achieving conformity? Punishment is said to have a deterrent effect when the fear or actual imposition of punishment leads to conformity. Specifically, punishments have the greatest potential for deterring misconduct when they are severe, certain, and swift in their application. Punishments are also widely assumed to be most effective for instrumental conduct and for potential offenders who have low

commitment to deviance as a livelihood (e.g., the person is not a professional criminal) The deterrent effect of a particular type of punishment depends upon several factors. These are:

(1) the social structure and value system under consideration
(2) the particular population in question
(3) the type of law being upheld
(4) the form and magnitude of the prescribed penalty
(5) the certainty of apprehension and punishment, and
(6) the individual's knowledge of the law as well as the prescribed punishment, and his definition of the situation relative to these factors

Deterrence is based on a rational conception of human behaviour in which individuals freely choose between alternative courses of action to maximize pleasure and minimize pain. From this classical perspective on crime and punishment, criminal solutions to problems become an unattractive option when the costs of this conduct exceed its expected benefit. Swift, certain, and severe sanctions are costs that are assumed to impede the likelihood of engaging in deviant behaviour. From a deterrence standpoint, any type of punishment (e.g., monetary, informal, incapacitative, corporal) has a potential deterrent effect as long as it is perceived as a severe, certain, and swift sanction.

The research literature on the effectiveness of criminal punishments outlines the four major types of deterrence, which include the following:

- *Specific deterrence* involves the effectiveness of punishment on that particular individual's future behaviour. Recidivism rates (e.g., rates of repeat offending among prior offenders) are often used to measure the specific deterrent value of punishments.
- *General deterrence* asks whether the punishment of particular offenders deters other people from committing deviance. A comparison of crime rates over time or across jurisdictions is typically used to ascertain the general deterrent value of punishment.
- *Marginal deterrence* focuses on the relative effectiveness of different types of punishments as either general or specific deterrents. For example, if recidivism rates for drunk drivers are higher for those who receive monetary fines than those who received jail time, jail time would be rated higher in its marginal deterrent value as a specific deterrent for drunk driving. Similarly, debates about capital punishment often focus on the marginal deterrent value of life imprisonment compared to the death penalty as a general deterrent for murder.
- *Partial deterrence* refers to situations in which the threat of sanction has some deterrent value even when the sanction threats do not lead to law abiding behaviour. For example, if a thief picked or "lifted" someone's wallet rather than robbing them at gunpoint (because the thief was fearful of the

more serious penalty for committing an armed robbery), the thief would be treated as a "successful" case of partial deterrence.

When the philosophy of deterrence is used in the context of penal reform, it is often as a justification for increasing the severity of sanctions, particularly in Western developed countries. Legislative responses to terrorist attacks, drug trafficking, child abductions, etc., have been directed primarily at increasing the severity and/or duration of punishments. Although these greater punitive measures may serve to pacify widespread public demands to "get tough" on crime, the specific and general deterrent effect of such efforts is probably limited without attention to the other necessary conditions for effective deterrence (i.e., high certainty and high celerity of punishments).

Empirical efforts to assess the effectiveness of deterrence are limited by several basic factors. First, persons may abide by laws or desist in deviant behaviour for a variety of reasons other than the looming threat or fear of legal sanctions. Some of these non deterrence constraints on behaviour include one's moral/ethical principles, religious beliefs, physical inability to commit the deviant act, and lack of opportunity. Second, neither swift nor certain punishment exists in most legal systems in the contemporary world. The majority of criminal offenses are typically unknown to the legal authorities and, even among the known offenses, only a small proportion result in an arrest and conviction. Third, the severity of punishment actually received by offenders is often far less than mandated by law, due to the operation of such factors as plea bargaining, charge reductions, etc.

Rehabilitation

Although it may seem contradictory or at least somewhat odd to assert that we punish for the treatment and reform of offenders, this basic principle underlies the rehabilitation purpose of punishment. The ultimate goal of rehabilitation is to restore a convicted offender to a constructive place in society through some combination of treatment, education, and training.

The salience of rehabilitation as a punishment philosophy is indicated by the contemporary jargon of "correctional facilities," "reformatories," and "therapeutic community" now used to describe jails, prisons, and other institutions of incapacitation. The link between places of incapacitation and reform is established throughout much of written history. The earliest forms of penal confinement in dungeons, towers, caves, and other dark and dreary places were largely incapacitative in their primary function, but some degree of moral and spiritual enlightenment was expected of those condemned to long periods of solitary confinement.

This idea of restraint to reform is evident within the context of religious penance in Judeo–Christian practices in Western Europe and the British colonies in North America and elsewhere. It is also

manifested in U.S. history in the early development of reformatories and penitentiaries. These large-scale incarceration structures punished misguided youth and criminals by isolating them so they could reflect on their deviant actions, repent, and subsequently reform their behaviour. Confinement and reflection for spiritual reform are also of central importance in the religious principles found in Hinduism and Buddhism.

In contrast to retribution that emphasizes uniform punishments based on the gravity of the misconduct, rehabilitation focuses on the particular characteristics of individual offenders that require treatment and intervention. This individualized treatment approach is logically consistent with indeterminate sentencing structures that give judges enormous discretion to tailor punishments for the greatest good to the individual offender and provide parole boards with equally high discretion to release or retain offenders for future treatment. Through the application of current theories of human behaviour and the latest therapeutic techniques for behavioural modification, rehabilitation experienced growing acceptance in many countries throughout much of the twentieth century.

National fiscal restraints, declines in correctional budgets for program development, high public outcry for more severe and longer prison sentences, and a growing crime-control political ideology that focuses on suppression of criminal behaviour rather than its early prevention are current conditions in Western societies that are largely antithetical to the ideas of treatment and rehabilitation.

Restoration

One of the most recent goals of punishment derives from the principles of restoration. As an alternative to other punishment philosophies (e.g., retribution, incapacitation, rehabilitation), restorative justice fundamentally challenges our way of thinking about crime and justice. The global victims' rights movement is a relatively new phenomenon, but, the general roots of restorative justice can be traced back to the early legal systems of Western Europe, ancient Hebrew justice, and precolonial African societies.

Restorative justice literally involves the process of returning to their previous condition all parties involved in or affected by the original misconduct, including victims, offenders, the community, and even possibly the government. Under this punishment philosophy, the offender takes full responsibility for the wrongdoing and initiates restitution to the victim. The victim and offender are brought together to develop a mutually beneficial program that helps the victim in the recovery process and provides the offender a means of reducing their risks of re-offending.

The theory of reintegrative shaming developed by John Braithwaite is based on the principles of restorative justice. Offenders take personal responsibility for their actions and condemnation is focused on the deviant act, rather than the offender, and its impact on the victim and the community. Both the offender and the community need to be reintegrated as a result of the harm caused by the criminal behaviour. Community mediation groups, neighbourhood councils, local support groups, and victim–offender conferences are the primary means of achieving these restorative efforts. The principles of restorative justice have been applied to the study of both criminal and civil sanctions. For example, the institutionalized practice of "written apology" and "letter of forgiveness" in the Japanese criminal justice system is designed to express remorse and make restitution. By accepting the apology, the victim forgives the offender. In all cases of restorative justice, the goal is to restore both the individual parties and their community's sense of wholeness. It stresses the harm caused to victims of crime and requires offenders to engage in financial restitution and community service to compensate the victim and the community and to 'make them whole once again'.

Kant argued that, even if no possible advantage can be found in punishing a given criminal, the punishment must nonetheless be imposed. To illustrate the categorical nature of this imperative, he constructed his famous example: "Even if a civil society resolved to dissolve itself with the consent of all its members- as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world- the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that everyone may realize the desert of his deeds and that guilt may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice".

Thus, it is clear that no theory of punishment can achieve the real purpose of punishment solely. Caldwell observes in this regard: "Punishment is an art which involves the balancing of retribution, deterrence and reformation in terms not only of the court and the offender but also of the circumstances in which it takes place and in the balancing of these purposes of punishments, first one and then the other, receives emphasis as the accompanying conditions change".

3. **Death Sentence**

Death Penalty

Capital offences in most time periods and places have included both acts that are considered *Mala en se* and acts that are *Mala Prohibita. Mala en se* crimes are wrong because of their intrinsic evil nature whereas *Mala Prohibita* crimes are wrong because some political authority has defined them

as illegal. Capital punishment is the execution of a perpetrator for committing a heinous crime, and it is a hotly debated topic in the present scenario. A dispassionate analysis of criminological jurisprudence would reveal that capital punishment is justified only in extreme cases in which a high degree of culpability is involved causing grave danger to society. Capital punishment is awarded for capital offences involving planned murder, multiple murders, rape and murder etc. Throughout history, civilizations have used capital punishment as a means of keeping social order as well as retribution. Many cultures throughout the ages have used capital punishment for grave offences, ranging from theft to murder. Many ancient societies accepted the idea that certain crimes deserved capital punishment.

"The Code of Hammurabi a legal document from ancient Babylonia (in modern-day Iraq), contained the first known death penalty laws. Under the code, written in the 1700s B.C., twenty-five crimes were punishable by death. These crimes included adultery (cheating on a wife or husband) and helping slaves escape. Murder was not one of the twenty-five crimes." Ancient Roman and Mosaic Law authorized the thought of retribution, they believed in the rule of "an eye for an eye and a tooth for a tooth", in the same way, the ancient Egyptians, Assyrians and Greeks all executed citizens for a variety of crimes. The most prominent people executed are Socrates and Jesus.

In England, during the reigns of King Canute and William the Conqueror the death penalty was not used. Later, Britain reinstated the death penalty and brought it to the American colonies. Most of the death sentences involved torture, such as burning at the stake, breaking on the wheel, slow strangulation and many more severe punishments, but as humanitarian movement grew in strength and the intensity of the punishments by then, have reduced. At present the common modes of execution of death sentence, which are prevailing in the different parts of the world are, electrocution, guillotine, shooting, gas chamber, hanging and lethal injection.

TABLE: PROVISIONS/LAWS PROVIDING DEATH PENALTY

Provisions under the Indian Penal Code/Other Laws	**Nature of Offense**
Section 120B IPC	Being a party to a criminal conspiracy to commit a capital offense
Section 121 IPC	Waging, or attempting to wage war, or abetting waging of war, against the Government of India
Section 132 IPC	A betting a mutiny in the armed forces (if a mutiny occurs as a result), engaging in mutiny
Section 194 IPC	Giving or fabricating false evidence with intent to procure a

	conviction of a capital offense
Section 302 IPC	Murder
Section 303 IPC	Punishment for Murder by Life Convict
Section 305 IPC	Abetting the suicide of a minor, mentally ill person, or intoxicated person
Section 364A IPC	Kidnapping, in the course of which the victim was held for ransom or other coercive purposes.
Section 396 IPC	Banditry with murder - in cases where a group of five or more individuals commit banditry and one of them commits murder in the course of that crime, all members of the group are liable for the death penalty.
376A of IPC and Criminal Law (Amendment) Act, 2013	Rape if the perpetrator inflicts injuries that result in the victim's death or incapacitation in a persistent vegetative state, or is a repeat offender
Part II Section 4 of Prevention of Sati Act	Aiding or abetting an act of Sati
Bombay Prohibition (Gujarat Amendment) Bill, 2009	In Gujarat only - Manufacture and sale of poisoned alcohol which results in death(s)

Capital Offences in other laws

Sl. No.	**Section Number**	**Description**
1.	Sections 34, 37, and 38(1)	*The Air Force Act*, 1950
2.	Section 3(1)(i)	*The Andhra Pradesh Control of Organised Crime Act*, 2001
3.	Section 27(3)	*The Arms Act*, 1959 (repealed)
4.	Sections 34, 37, and 38(1)	*The Army Act*, 1950
5.	Sections 21, 24, 25(1)(a), and 55	*The Assam Rifles Act*, 2006
6.	Section 65A(2)	*The Bombay Prohibition (Gujarat Amendment) Act*, 2009
7.	Sections 14, 17, 18(1)(a), and 46	*The Border Security Force Act*, 1968
8.	Sections 17 and 49	*The Coast Guard Act*, 1978
9.	Section 4(1)	*The Commission of Sati (Prevention) Act*, 1987
10.	Section 5	*The Defence of India Act*, 1971
11.	Section 3	*The Geneva Conventions Act*, 1960
12.	Section 3 (b)	*The Explosive Substances Act*, 1908
13.	Sections 16, 19, 20(1)(a), and 49	*The Indo-Tibetan Border Police Force Act*, 1992
14.	Section 3(1)(i)	*The Karnataka Control of Organised Crime Act*, 2000

15.	Section 3(1)(i)	*The Maharashtra Control of Organised Crime Act*, 1999
16.	Section 31A(1)	*The Narcotics Drugs and Psychotropic Substances Act*, 1985
17.	Sections 34, 35, 36, 37, 38, 39, 43, 44, 49(2)(a), 56(2), and 59	*The Navy Act*, 1957
18.	Section 15(4)	*The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act*, 1962
19.	Sections 16, 19, 20(1)(a), and 49	*The Sashastra Seema Bal Act*, 2007
20.	Section 3(2)(i)	*The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act*, 1989
21.	Section 3(1)(i)	*The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act*, 2002;
22.	Sections 10(b)(i) and Section 16(1)(a)	*The Unlawful Activities Prevention Act*, 1967
Source: India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.31-32		

Death Sentence has been used as an effective weapon of retributive justice for centuries. The justifications argued that it is lawful to forfeit the life of a person who takes away another life. A person who kills another must be eliminated from the society and therefore, fully merits his execution, thus the motive for death penalty may include vengeance, which is compensatory and reparatory satisfaction for an injured party, group or society. The fear of being condemned to death is perhaps the greatest deterrent, which keeps a person away from criminality. The topic of capital punishment is difficult to discuss as there are varied opinions on the issue.

Capital punishment in the past was intended to inflict pain and suffering and the same time to be a public spectacle delivering a moral message through a dreadful example of the cost of sin and crime. To take but one example: David Johnson explains that in Japan in the period up to 1867, when most crimes were punished by death, 'execution methods ranged from boiling, burning and crucifixion to several levels of beheading ... Prior to execution, condemned criminals were paraded through the streets on horseback. Afterwards, bodies and heads were displayed on platforms or carried through the streets'.

Because it results in the death of the accused, capital punishment is the ultimate corporal sanction. The wide variety of methods of execution used over time and place can be distinguished according to whether they involve instant or slow death. Beheadings, hangings, and strangulations have been

identified as the most common means for merciful or instant death. The use of firing squads, gas chambers, and lethal injections are modern forms of instant death. In contrast, lethal methods associated with a slow or lingering death included the acts of burning, boiling, stoning, crucifixion, draw and quartering, and being "broken on the wheel."

Public executions have been condemned by the United Nations Human Rights Committee as 'incompatible with human dignity. In Resolution 2004/67 the Commission on Human Rights urged states to ensure that where capital punishment occurs it shall not be carried out in public or in any other degrading manner. Yet executions have taken place in public, or been broadcast on television, in at least 19 countries or territories since 1995. To take a few recent examples: In Uganda military executions took place in 2002 in the presence of about 1,000 people and again in 2003 before 200 people.

In Kuwait, in January and May 2004, the bodies of prisoners executed by hanging were afterwards publicly displayed and four men were hanged in public in Kuwait City in October 2005 for trafficking in drugs. A public execution for murder took place by firing squad in Equatorial Guinea in April 2006, and in Vietnam, in April 2004, a woman was executed by firing squad 'in front of hundreds of spectators' for smuggling heroin. In Saudi Arabia, where public executions by beheading persist, four Sri Lankans were executed in February 2007 and subsequently their bodies were publicly displayed. The most important amongst these all is the execution of Saddam Husain which was broadcasted over the television and was available on the internet over the social networking sites and YouTube etc.

There remains much dispute about the proper role of doctors in the administration of the death penalty. In India the Supreme Court ruled in January 1995 that doctors employed in prisons had an obligation to participate in hangings by examining the body every few minutes after the drop to ensure that death had occurred. In strong contrast, the World Medical Association at its fifty-second meeting, held in Edinburgh in 2000, 'Resolved, that it is unethical for physicians to participate in capital punishment, in any way, or during any step of the execution process.

Views on Retention or Abolition of Death Penalty

Abolitionist of capital punishment argues that it leads to miscarriage of justice and the life imprisonment is a better substitute. They also argue that it violates the right to life of the criminal. The legal imposition in the society involves long and unavoidable delays. Retentionist argues that as it is served when someone is put to death for committing murder with aggravating circumstances, capital punishment removes criminals from the society and reduces the crime in long run.

It is to be stated that some of the arguments on both sides have substance and carry weight: Prof. H.L.A. Hart sums up the position in the following words: "There are indeed ways of defending and criticizing death penalty which are quite independent of the utilitarian position and of the questions of fact which the utilitarian will consider as crucial. For some people the death penalty is ruled out entirely as something absolutely evil which, like torture, should ' never be used however many lives it might save. Those who take this view find that they are sometimes met by the counter assertion that the death penalty is something which morality actually demands, a uniquely appropriate means of retribution or 'reprobation' for the worst of crimes, even if its use adds nothing to the protection of human life." However, there has been some proximity between these two views on some points.

The United Nations Committee that studied capital punishment found that 'it is generally agreed between the retentionist and abolitionists, whatever their opinion about the validity of comparative studies of deterrence, that the data's which now exist show no correlation between the existence of capital punishment and lower rates of crime.

Eight Objections to Death Penalty: The American Civil Liberties (ACLU) Union believes the death penalty inherently violates the constitutional ban against cruel and unusual punishment and the guarantees of due process of law and of equal protection under the law.

Arguments against the retention of the Capital Punishment:

1. The Capital Punishment is neither deterrent nor has the retributive value as witnessed by the history.
2. It is uncivilized, indecent, barbaric, cruel and revengeful and is stigma on the society.
3. It is inhuman, if one cannot give life how is it justified to take it.
4. If injustice happens with an innocent it cant be corrected.
5. It serves no economical gains and is immoral too.
6. It leaves no room for reformation of the guilty neither he gets the opportunity thereof

Arguments for retention of the Capital Punishment

1. All the social contracts theories have sanctioned rights of the State to penalize the criminal in the interest of the administration of justice and same a necessary effective tool.
2. Those offenders who are incorrigible and dangerous should be eliminated from the society in as much as they act heinously and have no regards for Human Values.
3. It has a deterrent and retributive effect which is the main aim of the administration of justice, as is substitute of private vengeance and revenge and to protect the society, the sentence is must.
4. The possibility of death sentence being wrongly used and abused can be eliminated by good laws and proper executions.
5. It is a sort of right of private defence to the society against the criminal.

6. It is constitutional as held by the judiciary.
7. It serves to protect the life and liberty of the individuals of the society.
8. It is economical and less cruel than keeping the one under imprisonment for life, leaving him to die at an indefinite time, with no hope to come out of prison.
9. It prevents overcrowding of prison. It has a great value in satisfying the victims of the crime.

At the initial stage, the provisions under the *Indian Penal Code*, 1860 prescribed death as a rule and life as an exception in case of a murder. But slowly with the passage of time the trend tilted towards liberalization of the interpretation and provided that if death sentence is to be awarded reasons for the same were to be mentioned and now the courts try to find out the special reasons while awarding death sentence. It is in the rarest of the rare case, that death sentence should be awarded. But the million dollar question still remains to be answered - what are those cases which come under the category of rarest of rare cases. The judges of the apex court and other courts subordinate to the apex court have not been able to specify the category rarest of rare cases". Thus there is inconsistency in the judgments delivered by the courts including the apex court while dealing with cases that carry death sentence or life imprisonment.

In India also a serious debate on the abolition of death sentence has been going on for quite a long time. Even during the British Rule, the Indians made a serious attempt to procure abolition of capital punishment. In the year 1931, Gaya Prasad Singh introduced a bill for the abolition of capital punishment in the Legislative Assembly, but a motion for circulation of the Bill was defeated after it was opposed by the government. After India became independent, a similar Bill was the introduced in the Lok Sabha by Mukand Lal Agarwal, a sitting Member of Parliament, in the year 1956, but the same was rejected by the Government. In the year 1958 a resolution for abolition was moved in Rajya Sabha by Prithvi Raj Kapoor. The same was withdrawn after a debate in the Rajya Sabha. On this Prithvi Raj said: "The ripples are created and it is in the air." Its purpose has been served, said Kapoor. In the year 1961, a further resolution was moved by Savitri Nigam, another Rajya Sabha member. But the same was negatived after debate.

In the year 1962, another resolution of abolition of capital punishment was moved in the Lok Sabha by Raghunath Singh, a sitting member of Parliament. The said resolution received a serious attention but was withdrawn on the undertaking given by the Government that a transcript of the whole debate would be forwarded to the Law Commission for consideration in the context of its review of the *Indian Penal Code*, 1860 and the *Criminal Procedure Code*, 1973. The Law Commission in the year 1967 submitted a separate report on capital punishment to the Government. The Report hence

favoured the retention. The 35th Law Commission Report's recommendations stated:

It is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition. Nor does the Commission treat lightly the argument of irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment, and the strong feeling shown by certain sections of public opinion, in stressing deeper questions of human values. Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population, and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts. On a consideration of all the issues involved, the Commission is of the opinion that capital punishment should be retained in the present state of the country.

The international community's consensus against the death penalty is growing; India thus is becoming increasingly isolated in its commitment to the death penalty. India has complied with the International Human Rights Instruments such as the International Covenant Civil and Political Rights but has not followed with abolishing the death penalty as so many other nations have done. In December 2007, India voted against a United Nations General Assembly resolution calling for a moratorium on the death penalty. In November 2012, India again upheld its stance on capital punishment by voting against the UN General Assembly draft resolution seeking to ban death penalty. On 31 August 2015, the Law Commission of India submitted 262nd Report to the government which recommended the abolition of capital punishment for all crimes in India, excepting the crime of waging war against the nation or for terrorism-related offences. The report cited several factors to justify abolishing the death penalty, including its abolition by 140 other nations, its arbitrary and flawed application and its lack of any proven deterring effect on criminals.

Code of Criminal Procedure and Death Sentence

- It is only the Sessions Court who alone can declare the death sentence as per the set of offences enlisted in the *Indian Penal Code,* 1860 i.e. the Judicial Magistrate below the rank of Sessions Judge has no authority to impose a death sentence.
- Prior to 1955, Section 367(5) of the *Code of Criminal Procedure,* 1898 insisted upon the Court to state its reasons if the sentence of death was not imposed in case of murder. But in 1955 Sub-Section

(5) of Section 367 was deleted. The deletion of Sub-Section (5) of Section 367 meant that normally the sentence of life imprisonment should be the rule and death sentence should be imposed only if there were aggravating circumstances.

- In the present *Code of Criminal Procedure* it is provided in Section 354 that the judge has to give special reasons for imposition of death sentence. Also, it is mandatory for the judge to allow hearing, for the punishment imposed.
- Section 366 of the *Code of Criminal Procedure* provides that when a Sessions Court passes a sentence of death, it will not be executed until the High Court confirms the same.

Constitutionality and Death Sentence

The Constitutionality aspect of Death Sentence will be discussed hereafter with the help of principles held in Case Laws:

Serial No	**Case and Citation**	**Held**
	Jagmohan Singh v. *State of U. P* (1973) 1 SCC 20	The first challenge to the constitutionality of the death penalty in India came in the 1973. he petitioners argued that the death penalty violated Articles 14, 19 and 21 of the *Constitution of India*. It was argued that since the death sentence extinguishes, along with life, all the freedoms guaranteed under Article 19(1) (a) to (g), it was an unreasonable denial of these freedoms and not in the interests of the public. Further, the petitioners argued that the discretion vested in judges in deciding to impose death sentence was uncontrolled and unguided and violated Article 14. Finally, it was contended because the provisions of the law did not provide a procedure for the consideration of circumstances crucial for making the choice between capital punishment and imprisonment for life, it violated Article 21. This case was decided before the *Code of Criminal Procedure* was re-enacted in 1973, making the death penalty an exceptional sentence. The Supreme Court found that the death penalty was a permissible punishment, and did not violate the Constitution.
	Ediga Anamma v. *State of Andhra Pradesh* (1974) 4 SCC 443.	In commuting the death sentence to life imprisonment, the Court observed the following: "In any scientific system which turns the focus, at the sentencing stage, not only on the crime but also the criminal, and seeks to personalise the punishment so that the reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt,

		may have to be brought to the notice of the Court when the actual sentence is determined." the court also said, "a legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life".
	Rajendra Prasad v. *State of Uttar Pradesh* 1979) 3 SCC 646	The Court found itself confronting, not the constitutionality of the death sentence, but that of sentencing discretion. The Court per majority (of two judges) said, "special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal".
	Bachan Singh v. *State of Punjab,* (1980) 2 SCC 684	The Court adopted the 'rarest of rare' guideline for the imposition of the death penalty, saying that reasons to impose or not impose the death penalty must include the circumstances of the crime and the criminal. Justice Bhagwati in his dissenting opinion found the death penalty necessarily arbitrary, discriminatory and capricious. He reasoned that "the death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape, from its clutches. This circumstance also adds to he arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21."
	Mithu v. *State of Punjab* (1983) 2 SCC 277.	The Supreme Court was confronted with the mandatory sentence of death enacted in Section 303 of the IPC. The Court held that the mandatory death sentence was unconstitutional, stating: "A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case".
	Deena v. *Union of India* (1983) 2 SCC 277.	Rejecting a constitutional challenge to execution by hanging, held that while a prisoner cannot be subjected to barbarity, humiliation, torture or degradation before the execution of the sentence, hanging did not involve these either directly or indirectly.
	Parmanand Katara v. *Union of India* 1995) 3 SCC 248.	The Court accepted that allowing the body to remain hanging beyond the point of death – the Punjab Jail Manual instructing that the body be kept hanging for half an hour after death – was a violation of the dignity of the person and hence unconstitutional.

	T.V. Vatheeswaran v. *State of Tamil Nadu* (1983) 2 SCC 68	The Court held that a delay in execution of sentence that exceeded two years would be a violation of procedure guaranteed by Article 21.
	Sher Singh v. *State of Punjab* 1983) 2 SCC 344	It was held that delay could be a ground for invoking Article 21, but that no hard and fast rule could be laid down that delay would entitle a prisoner to quashing the sentence of death.
.	*Triveniben* v. *State of Gujarat* 1989) 1 SCC 678	The Court said, "the only delay which would be material for consideration will be the delays in disposal of the mercy petitions or delay occurring at the instance of the Executive."
.	*Shatrughan Chauhan* v *Union of India.* (2014) 3 SCC 1.	This case also laid down guidelines for "safeguarding the interest of the death row convicts" which included reaffirming the unconstitutionality of solitary or single cell confinement prior to rejection of the mercy petition by the President, necessity of providing legal aid, and the need for a 14- day period between the rejection of the mercy petition and execution.
	Shatrughan Chauhan v. *Union of India*, (2014) 3 SCC 1, at paras 98-103	The Supreme Court has characterized the nature of mercy provisions (Articles"72 and 161) as constitutional duty rather than privilege or a matter of grace.
.	*Vikram Singh* v. *Union of India*, (Criminal Appeal No. 824 of 2013, Supreme Court of India, decided on August 21, 2015)	The Supreme Court acknowledged that "punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed" However, it held that "Section 364A cannot be dubbed as so outrageously disproportionate to the nature of the offence as to call for the same being declared unconstitutional" saying death sentences would only be awarded in the rarest of rare cases.
.	*Epuru Sudhakar* v. *Govt. of A.P*. (2006) 8 SCC 161	The exercise of power under Article 72 by the President and Article 161 by the Governor is subject to limited form of judicial review.
Source: India. Law Commission of India, Report no.262 on Death Penalty, August 2015		

Alternative to Death Penalty

Section 53 of the *Indian Penal Code*, 1860 enumerates various kinds of punishments that can be awarded to the offenders, the highest being the death penalty and the second being the sentence of imprisonment for life. At present there is no sentence that can be awarded higher than imprisonment

for life and lower than death penalty. In USA a higher punishment called "Imprisonment for life without commutation or remission" is one of the punishments. As death penalty is harsh and irreversible the Supreme Court has held that death penalty should be awarded only in the rarest of the rare cases, the committee considers that it is desirable to prescribe a punishment higher than that of imprisonment for life and lower than death penalty. Section 53 is suitably amended to include "Imprisonment for life without commutation or remission" as one of the punishments. Wherever imprisonment for life is one of the penalties prescribed under the *Indian Penal Code*, 1860 the following alternative punishment be added namely "imprisonment for life without commutation or remission". Wherever punishment of imprisonment for life without commutation or remission is awarded, the State Governments cannot commute or remit the sentence. Therefore, suitable amendment may be made to make it clear that the State Governments cannot exercise power of remission or commutation when sentence of "Imprisonment for life without remission or commutation" is awarded. This however cannot affect the Power of Pardon etc. of the President and the Governor under Articles 72 and 161 of the *Constitution of India*, 1950 respectively.

Countries that seek to abolish the death penalty face the task of establishing viable alternatives that sufficiently satisfy the demands of retribution while remaining proportionate to the gravity of the crime; that appear not to greatly lessen any possible marginal deterrent effect; that incapacitate those who continue to pose a genuine threat to public safety; and that provide a humane environment with opportunities for the prisoner to be rehabilitated, or at least not made more dangerous by the conditions of confinement.

In considering what should replace the death penalty they will, of course, need to bear in mind that there is a difference between:

(i) providing a suitable penalty in cases where the executive reprieves or commutes a death sentence;

(ii) replacing the death penalty for crimes of lesser seriousness than murder when the scope of capital punishment is being retracted;

(iii) finding a replacement penalty for murder when a mandatory death sentence is abolished and the courts are allowed discretion as to punishment; and

(iv) replacing capital punishment de jure at what is often the last cycle of the abolition process, when executions have been reserved for a small number of the most egregious murders:

BUSINESS ENVIRONMENT & ETHICAL PRACTICE (213)

UNIT-1

Meaning:

‘‘Business environment is the aggregate of all conditions, events and influences that surround and affect it.”—Keith Davis. Business environment means all of the internal and external factors that affect how the company functions including employees, customers, management, and supply and demand and business regulations

Concept:

Business firm is an open system. It gets resources from the environment and supplies its goods and services to the environment. There are different levels of environmental forces. Some are close and internal forces whereas others are external forces. External forces may be related to national level, regional level or international level. These environmental forces provide opportunities or threats to the business community. Every business organization tries to grasp the available opportunities and face the threats that emerge from the business environment. Business organizations cannot change the external environment but they just react. They change their internal business components (internal environment) to grasp the external opportunities and face the external environmental threats. It is, therefore, very important to analyze business environment to survive and to get success for a business in its industry. It is, therefore, a vital role of managers to analyze business environment so that they could pursue effective business strategy. A business firm gets human resources, capital, technology, information, energy, and raw materials from society. It follows government rules and regulations, social norms and cultural values, regional treaty and global alignment, economic rules and tax policies of the government. Thus, a business organization is a dynamic entity because it operates in a dynamic business environment.

Nature :

(i) System Approach:

In original, business is a system by which it produces goods and services for the satisfaction of wants, by using several inputs, such as, raw material, capital, labour etc. from the environment.

(ii) Social Responsibility Approach:

In this approach business should fulfill its responsibility towards several categories of the society such as consumers, stockholders, employees, government etc.

(iii) Creative Approach:

As per this approach, business gives shape to the environment by facing the challenges and availing the opportunities in time. The business brings about changes in the society by giving attention to the needs of the people.

Scope:

The scope of Business Economics is so wide that it embraces almost all the problems and areas of the manager and the firm. It deals with demand analysis and forecasting, resource allocation, production function, cost analysis, inventory management , advertising, price system, capital budgeting etc. However, the scope of managerial economics may be discussed under following points:

a) Demand analysis and forecasting : Demand forecasting is the process of finding the values for demand in future time period. The current values are needed to make optimal current pricing and promotional policies, while future values are necessary for planning future production inventories, new product development etc. A correct estimate of demand is essential for decision making, strengthening market position and enlarging profits.

b) Cost and Production Analysis: Production deals with the physical aspects of the business investment. It is the process whereby inputs are transformed into outputs. Efficiency of production depends on ratio in which various inputs are employed absolute level of each input and productivity of each input. A production function is the relation which gives us the technically efficient way of producing the output given the inputs. The firm must undertake cost estimation and forecasting to judge the optimality of present output levels and assess the optimal level of production in future.

c) Inventory Management: It refers to stock of raw materials which a firm keeps. If it is high, capital is unproductively tide up which might, if stock of inventory is reduced, be used for other productive purpose . On the other hand, if the level of inventory is low, production will be hampered. Hence, managerial economics with methods such as ABC analysis a simple simulation exercise and some mathematical models with a view to minimize inventory cost.

d) Advertising: Managerial economics helps in determining the total advertising cost and budget, the measuring of economic effects of advertising and form an integral part of decision making and forward planning.

e) Market Structure and Pricing Policies: Managerial economics helps to clear surplus

and excess demand to bring market equilibrium as there is continuos changes in market. Success of business firm depends on correctness of price decisions. Price theory works according to the nature of the market depending on the number of sellers, demand conditions etc.

f) Resource Allocation: Managerial economics with the help of advanced tools such as linear programming are used to arrive at the best course of action for the maximum use of the available resources and its substitutes.

g) Capital Budgeting: Capital is scarce and it costs something . Hence, managerial economics helps in decision making and forward planning on allocation of capital to various factors of productions, marketing and management.

h) Investment Analysis: It involves planning and control capital expenditure. Whether or not to invest funds in purchase of assets or other resources in an attempt to make profit and how to choose among completing uses of funds. Managerial economics help in analysis and decision making on the investment of funds.

i) Risk and Uncertainty Analysis: As business firm have to operate under conditions of risk and uncertainty both decision making and forward planning becomes difficult. Hence managerial economics helps the business firm in decision making and formulating plans on the basis of past data, current information and future prediction.

Importance:

In a globalised economy, the business environment plays an important role in almost all business enterprises. The significance of business environment is explained with the help of the following points:

(i) Help to understand internal Environment:

It is very much important for business enterprise to understand its internal environment, such as business policy, organization structure etc. In such case an effective management information system will help to predict the business environmental changes.

(ii) Help to Understand Economic System:

The different kinds of economic systems influence the business in different ways. It is essential for a businessman and business firm to know about the role of capitalists, socialist and mixed economy.

(iii) Help to Understand Economic Policy:

Economic policy has its own importance in business environment and it has an important place in business. The business environment helps to understand government policies such as, export-import

policy, price policy; monetary policy, foreign exchange policy, industrial policy etc. have much effect on business.

(iv)Help to Understand Market Conditions:

It is necessary for an enterprise to have the knowledge of market structure and changes taking place in it. The knowledge about increase and decrease in demand, supply, monopolistic practices, government participation in business etc., is necessary for an enterprise.

Types: Internal, External: There are two types of environmental factors: internal environmental factors and external environmental factors. Internal environmental factors are events that occur within an organization. Generally speaking, internal environmental factors are easier to control than external environmental factors. Some examples of internal environmental factors are as follows:

- Management changes
- Employee morale
- Culture changes
- Financial changes and/or issues

External environmental factors are events that take place outside of the organization and are harder to predict and control. External environmental factors can be more dangerous for an organization given the fact they are unpredictable, hard to prepare for, and often bewildering. Some examples of external environmental factors are noted below:

- Changes to the economy
- Threats from competition
- Political factors
- Government regulations
- The industry itself

Micro and Macro Environment:

Micro Environment The microenvironment is also called the operating, competitive or task environment. It consists of sets of forces and conditions that originate with suppliers, distributors, customers, creditors, competitors, and shareholders, as well as trade unions, and the community in which the business operates. These forces, on a daily basis, impact the organisation's ability to obtain inputs and discharge of its outputs. Factors in the microenvironment are largely within the control of the managers. In this way, organisations can be much more proactive in dealing with the task environment than in dealing with the macro environment.

Forces in the microenvironment result from the actions of four main elements or groups, namely suppliers, distributors, customers, and competitors. These groups affect the manager's or firm's ability to produce on a daily, weekly and monthly basis, and thus significantly impact short-term decision making. Let's examine these main actors.

Suppliers:

Suppliers are individuals or organisations that provide (supply) an enterprise with the various inputs (such as raw materials, component parts, or employees) required for production. It is important that the manager ensures a reliable supply of input resources. The effectiveness of the supply system determines the organisation's long-term survival and growth.

Changes in the nature, numbers, or types of any supplier result in forces that produce opportunities and threats to which the managers must respond if their organisation is to prosper. Another major supplier-related threat that confronts managers pertains to prices of inputs. When supplies bargaining position with an organisation is so strong, they can raise the prices of inputs that they supply the organisation. A supplier's bargaining position is especially strong if:

(1) The supplier is the source of an input, and
(2) The input is vital to the organization

In addition to raising prices, suppliers can make operations difficult for an organisation by restricting its access to important inputs. For example, a reduction in government funding in terms of financial resources impact universities. In the same vein, a cut in quota of the supply of crude oil by OPEC member countries affect global consumption of unrefined or refined petroleum.

Distributors:

In the microenvironment of business, another group of actors are distributors. Distributors are organisations that help other organisations sell their goods and services to customers. The decisions that managers make on how to distribute products to customers can have an important effect on organisational performance.The changing nature of distributors and distribution methods can also bring opportunities and threats for managers. If distributors are so large and powerful that they can threaten the organization by demanding that it reduces the prices of its goods and services, then, the

manager becomes constrained and challenged. In contrast, the power of the distribution may be weakened if there are many options or alternatives.

Customers

Customers are another group of actors in the operating environment of business. Customers are the individuals and groups that buy the goods and services that an enterprise produces, changes in the numbers and types of customers or changes in customers' tastes and needs result in opportunities and threats. A forward looking organisation must meet the needs and wants of its customers or exceed the customers' expectations. The organisation must have a customer orientation to succeed in this competitive, unpredictable and challenging business environment.

Competitors

Competitors are businesses that produce goods and services that are similar to a particular organisation's goods and services. Put differently, they are organisations that are vying for same customers. Rivalry between competitors is potentially the most threatening force that managers must deal with. A high level of rivalry often results in price competition, and falling prices reduce access to resources and lower profit.

Macro Environment This environment refers to the wide ranging economic, socio-cultural, political and legal, and technological forces that affect the organisation and its operating environment. These forces originate beyond the firm's operating situation. The macroenvironment is also called the external or remote environment.

Economic Forces

The economic forces have significant impact on the success of any organisation. These forces on factors affect the conditions of procurement (buying) and sales market. For example, in Nigeria (as elsewhere) where the Naira is so devalued relative to foreign currencies (e.g. the dollar and pound), importation of required inputs of production constitutes a major threat to the corporate managers. In the same vein, during periods of unhealthy economic growth occasioned by such factors as inflation, rising unemployment, high interest rates, and high taxes, among others, individuals as well as businesses have problems. This is more serious in the case of emerging enterprises, or new entrants.

Political and Legal Forces : The political and legal forces are paralleled to the social environment. This is because; laws are ordinarily passed following social pressures and problems. In Nigeria, as elsewhere, laws regulating the macro environment include legislations on monetary and fiscal policies, percentage of industrial emission, into the air, safety and health at work, wage and price control. Others are equal employment opportunity, contract of employment, and law of collective bargaining, among others. These regulations influence business operations either positively or negatively. Legislation on fiscal and monetary policies, for example, might encourage favourable tax reliefs and financial assistance for small-scale industry. The challenge, though, is that considering the nature of our political climate, legislations change at the whims and caprices of political and government leaders. There is political instability in Nigeria, this way, existing legislations change as new political and government leaders emerge. In this light, corporate managers should consider regulations both as threats and opportunities. Besides, political and government leaders, the actions or political activities by pressure groups and lobbying groups should be taken into consideration, when considering investments or projects.

Technological Forces: Technological forces or factors could be said to be the most pervasive in the environment. Technology refers to the application of knowledge base which science provides. It is a well established fact that information and communication technology has revolutionized business operations. Consequently, organisations that apply knowledge that is rapidly changing and complex are highly vulnerable. These changes bring about new inventions and gradual improvements in methods, in design, in materials, in application, in efficiency, and diffusion into new industries. Corporate managers must adapt or adjust to these changes, in order to survive and prosper in this competitive and challenging business environment. The changes constitute threats and opportunities for any manager.

Socio-cultural Forces

Socio-cultural forces have to do with the attitudes and values of the society, and these to a great extent, shape behaviour. For example, in certain parts of Northern Nigeria (where Sharia Penal Code is “strictly” observed), there are restrictions on the sales and consumption of tobacco, alcoholic liquors and others. A manager in these parts faces unique challenges. He has to undertake deliberate and planned strategy of market segmentation. Similarly, in Southern Nigeria, there are changes in attitude to the issue of environmental degradation or pollution. This has led to frequent restiveness

or unrest in the Niger Delta. The challenges before the managers of the multinational oil companies are unimaginable.Changes in socio-cultural factors also impact the business enterprise in its internal relations with employees within the context of changes in attitude to work changes in political awareness, and cultural norms, among others.

Environment scanning:

Environmental scanning is one of the essential components of the global environmental analysis. Environmental monitoring, environmental forecasting and environmental assessment complete the global environmental analysis. The global environment refers to the macro environment which comprises industries, markets, companies, clients and competitors. Consequently, there exist corresponding analyses on the micro-level. Suppliers, customers and competitors representing the micro environment of a company are analyzed within the industry analysis.

Environmental scanning can be defined as 'the study and interpretation of the political, economic, social and technological events and trends which influence a business, an industry or even a total market'.The factors which need to be considered for environmental scanning are events, trends, issues and expectations of the different interest groups. Issues are often forerunners of trend breaks. A trend break could be a value shift in society, a technological innovation that might be permanent or a paradigm change. Issues are less deep-seated and can be 'a temporary short-lived reaction to a social phenomenon'.A trend can be defined as an 'environmental phenomenon that has adopted a structural character'

Monitoring:

Environmental monitoring describes the processes and activities that need to take place to characterize and monitor the quality of the environment. Environmental monitoring is used in the preparation of environmental impact assessments, as well as in many circumstances in which human activities carry a risk of harmful effects on the natural environment. All monitoring strategies and programmes have reasons and justifications which are often designed to establish the current status of an environment or to establish trends in environmental parameters. In all cases the results of monitoring will be reviewed, analysed statistically and published. The design of a monitoring programme must therefore have regard to the final use of the data before monitoring starts.

Assessing Risk in Business Environment:

The process of identifying risks, assessing risks and developing strategies to manage risks is known as risk management. A risk management plan and a business impact analysis are important parts of

your business continuity plan. By understanding potential risks to your business and finding ways to minimise their impacts, you will help your business recover quickly if an incident occurs.Types of risk vary from business to business, but preparing a risk management plan involves a common process. Your risk management plan should detail your strategy for dealing with risks specific to your business.

Emerging Sectors of Indian Economy:

Some promising sectors of the Indian economy with high growth potential are discussed below:

1. Engineering

The engineering sector has remained a high potential business, which has played a crucial role in boosting the economy and supporting the growth of other key sectors of the economy. It contributes almost 8 percent to the annual GDP. India is the largest exporter of machinery and other engineering products in the third world countries. India competes successfully in the global capital goods market, catering to the needs of steel plants, power plants, cement, petrochemical units as well as mining. It also exports farm equipment, such as tractors and harvesters, construction machinery, passenger cars, electrics, electronics and pollution control equipment.

2. Transportation

The transportation industry is an evergreen sector in India, with very large potential for growth. This sector comprises roadways, ports, super highways, rail as well as aviation. It is a high growth sector contributing to 8.5% of GDP. This sector has unique opportunities of foreign investments in highway construction and management but is also bogged down by issues of land acquisition and environmental clearances. Aviation too has good potential under new FDI norms. Railways are yet to open up for private investment, but will offer tremendous opportunities as and when it gets restrictions are lifted.

4. Banking and Insurance

The banking sector in India has witnessed a vast growth, supported by sizeable investments in IT and diversification of innovative service offerings. The banking sector index has increased at a compounded rate of over 10-12 percent per annum since the year 2001. Mutual funds of this sector have given a return of 9 to 12% over last 3 years. As and when public sector banks are privatized the value discovery process could result in gains for investors.

India’s life insurance business ranks fifth among the largest global markets. The sector has been growing at rates exceeding 20%. The nonlife insurance Industry has grown at rate of 15%. The insurance sector opened up to private investors in last few years and the market is getting competitive

with the entry of global players. Overall this strengthens the risk management capability of the economy.

5. Real estate

With ever growing demand for housing and commercial space, Indian real estate has emerged as one of the fastest growing sectors of the emerging markets. It has attracted significant participation of foreign investors. Real estate has been contributing as much as 13% of the country's GDP. Rapid corporatization has helped it to attract funds from the capital market. Rapid urbanization has helped the sector to grow.

6 Retailing business

From the present market size of US$ 500 billion, the Indian retailing trade is expected to reach US$ 1.3 trillion by the end of 2020, as per the report of Ministry of food and consumer affairs in India. The opportunity has attracted significant investments from global players. India's rapidly growing urbanization has contributed to the growth of the organized retailing in the country. The retail industry is the backbone of growth of the economy with over 20% contribution towards the national GDP. The Indian retail sector is ranked among the top five global retail markets.

Social responsibility of business towards Employee, Community Share Holders and Consumers:

Employee: No Enterprise can succeed without the whole-hearted cooperation of the employees. Responsibility of business towards employees is in the form of training, promotion, proper selection, fair wages, safety, health, worker's education, comfortable working conditions, participation management etc.

The employees should be taken into confidence while taking decisions affecting their interests. The workers should be offered incentives for raising their performance. Mental, physical, economic and cultural satisfaction of employees should be taken care of. If business looks after the welfare of employees then they will also work whole heartedly for the prosperity of business.

The committee that conducted 'social audit' of TISCO (Tata Iron and Steel Company) observes, "not only should the company carry out its various obligations to the employees as well as the larger community as a matter of principle, but this has also led to a higher degree of efficiency in TISCO works and an unparalleled performance in industrial peace and considerable team spirit and discipline which have all resulted in high productivity and utilisation of capacity."Thus, by discharging its responsibility to employees the business advances its own interests.

'TATAS' have been the first to enforce certain laws in favour of employees. Similarly Godrej &

Boyce, Shriram Industries and TVS groups are also good employers. Financial position of company and economic conditions of nation should be taken into consideration while spending on labour welfare during performance of responsibility towards employees.

Consumers:

Responsibility of business towards consumer extends to:

(i) Product:

Quality goods should be produced and supplied. Distribution system should make goods easily available to avoid artificial scarcities and after sales service should be prompt. Buying capacity and consumer preferences should be taken into consideration while deciding the manufacturing policies. The care must be exercised in supplying the goods of quality which has no adverse effect on the health of consumers.

(ii) Marketing:

To avoid being misled by wrong claims about products through improper advertisements or otherwise, the consumer should be provided full information about the products including their adverse effects, risks and care to be taken while using the products.

Consumers all over the world are, by and large, dissatisfied because the performance of businessman is far from satisfactory. Consumer is not the king in our country but a vehicle used by businessmen for driving towards the goal of profit maximisation.

As a result of which the concept of 'consumerism' has come up to protect the rights of consumers. Even the government is interfering in a big way to protect the interests of consumers.

Shareholders:

Shareholders who are the owners of business should be provided with correct information about company to enable them to give them true and fair position of the company to enable them to decide about further investments.

Company should provide a fair return on the investment made by shareholders. If shareholders do not get proper dividend then they will hesitate to invest additional funds in the concern. Shareholders should be kept fully informed about the working of the company for healthy growth of the business. The Companies Act 1956 also requires company to give full disclosure in the published statements.

Company should strengthen the share prices by its growth, innovation and diversification. At the same time shareholders shall also offer wholehearted support and co-operation to the company to protect their own interests.

Community:

Responsibility of business towards community and society includes spending a part of profits towards civic and educational facilities. Every industrial undertaking should take steps to dispose of Industrial wastes in such a way that ecological balance is maintained and environmental pollution is prevented.

Rehabilitating the population displaced by business units should also De part of responsibly of business? Business houses should set up units at those places where sufficient space is available for housing colonies of workers. The promotion of small scale industries will help not only nation but will also help in building up a better society.

Unit-II

Meaning of Business Economy: Business economics is a field in economics that deals with issues such as business organization, management, expansion and strategy. Studies might include how and why corporations expand, the impact of entrepreneurs, the interactions between corporations and the role of governments in regulation.

Types of Economies: Free, Capitalization, Socialistic and Mixed Economy

Capitalism is an economic system and a mode of production in which trade, industries, and the means of production are largely or entirely privately owned. Such private firms and proprietorships are usually operated for profit, but may be operated as private nonprofit organizations.Central characteristics of capitalism include private property, capital accumulation, wage labour and, in some situations, fully competitive markets. In a capitalist economy, the parties to a transaction typically determine the prices at which assets, goods, and services are exchanged.

The degree of competition, role of intervention and regulation, and scope of state ownership varies across different models of capitalism. Economists, political economists, and historians have taken different perspectives in their analysis of capitalism and recognized various forms of it in practice. These include *laissez-faire* or free market capitalism, welfare capitalism, crony capitalism, corporatism, "third way" social democracy and state capitalism. Each model has employed varying degrees of dependency on free markets, public ownership, obstacles to free competition, and inclusion of state-sanctioned social policies.

The extent to which different markets are free, as well as the rules defining private property, is a matter of politics and policy. Many states have a mixed economy, which combines elements of both capitalism and centrally planned economies Capitalism has existed under many forms of government, in many different times, places, and cultures.Following the demise of feudalism, mixed capitalist systems became dominant in the Western world and continue to spread
Socialist economics refers to the economic theories, practices, and norms of hypothetical and existing socialist economic systems.

A socialist economic system is based on some form of social ownership of the means of production, which may mean autonomous cooperatives or direct public ownership; wherein production is carried out directly for use. Where markets are utilized for allocating inputs and capital goods among economic units, the designation market socialism is used. When planning is utilized, the economic system is designated a planned socialist economy. Non-market forms of socialism usually include a system of accounting based on calculation-in-kind or a direct measure of labor-time as a means to value resources and goods.

The term *socialist economics* may also be applied to analysis of former and existing economic systems that call themselves "socialist", such as the works of Hungarian economist János Kornai.
Socialist economics has been associated with different schools of economic thought. Marxian economics provided a foundation for socialism based on analysis of capitalism, while neoclassical economics and evolutionary economics provided comprehensive models of socialism. During the 20th century, proposals and models for both planned economies and market socialism were based heavily on neoclassical economics or a synthesis of neoclassical economics with Marxian or institutional economics.

A mixed economy is an economic system that is variously defined as containing a mixture of markets and economic planning, in which both the private sector and state direct the economy; or as a mixture of public ownership and private ownership; or as a mixture of free markets with economic interventionism. Most mixed economies can be described as market economies with strong regulatory oversight and governmental provision of public goods. Some mixed economies also feature a variety of state-run enterprises.

In general the mixed economy is characterized by the private ownership of the means of production, the dominance of markets for economic coordination, with profit-seeking enterprise and the accumulation of capital remaining the fundamental driving force behind economic activity. But unlike a free-market economy, the government would wield indirect macroeconomic influence over the economy through fiscal and monetary policies designed to counteract economic downturns and capitalism's tendency toward financial crises and unemployment, along with playing a role in interventions that promote social welfare. Subsequently, some mixed economies have expanded in scope to include a role for indicative economic planning and/or large public enterprise sectors.

Economies ranging from the United States to Cuba have been termed mixed economies. The term is also used to describe the economies of countries which are referred to as welfare states, such as the Nordic countries. Governments in mixed economies often provide environmental protection, maintenance of employment standards, a standardized welfare system, and maintenance of competition.

Free economy:

An economy that is based upon the principles of private enterprise and has a minimum of governmental restrictions — compare free enterprise, planned economy. A free market is a market system in which the prices for goods and services are set freely by consent between vendors and consumers, in which the laws and forces of supply and demand are free from any intervention by a government, price-setting monopoly, or other authority. A free market contrasts with a controlled market or regulated market, in which government intervenes in supply and demand through non-market methods such as laws creating barriers to market entry or directly setting prices. A free market economy is a market-based economy where prices for goods and services are set freely by the forces of supply and demand and are allowed to reach their point of equilibrium without intervention by government policy, and it typically entails support for highly competitive markets and private ownership of productive enterprises. Although free markets are commonly associated with capitalism in contemporary usage and popular culture, free markets have been advocated by market anarchists, market socialists, and some proponents of cooperatives and advocates of profit sharing.

Meaning of Economic Growth:

Economic growth is the increase in the market value of the goods and services produced by an economy over time. It is conventionally measured as the percent rate of increase in real gross domestic product, or real GDP.Of more importance is the growth of the ratio of GDP to population (GDP per capita, which is also called *per capita income*). An increase in growth caused by more efficient use of inputs is referred to as *intensive growth*. GDP growth caused only by increases in inputs such as capital, population or territory is called *extensive growth*.

In economics, "economic growth" or "economic growth theory" typically refers to growth of potential output, i.e., production at "full employment". As an area of study, *economic growth* is generally distinguished from *development economics*. The former is primarily the study of how countries can advance their economies. The latter is the study of the economic development process particularly in low-income countries.

Growth is usually calculated in *real* terms – i.e., inflation-adjusted terms – to eliminate the distorting effect of inflation on the price of goods produced. Measurement of economic growth uses national income accounting. Since economic growth is measured as the annual percent change of gross domestic product (GDP), it has all the advantages and drawbacks of that measure.

Factors affecting Economic Growth: Political institutions, property rights, and rule of law

In economics and economic history, the transition to capitalism from earlier economic systems was enabled by the adoption of government policies that facilitated commerce and gave individuals more personal and economic freedom. These included new laws favorable to the establishment of business, including contract law, the abolishment of anti-usury laws and laws providing for the protection of private property. When property rights are less certain, transaction costs can increase, hindering economic development. Enforcement of contractual rights is necessary for economic development because it determines the rate and direction of investments. When the rule of law is absent or weak, the enforcement of property rights depends on threats of violence, which causes bias against new firms because they cannot demonstrate reliability to their customers.

Productivity

Increases in labor productivity (ratio of value output to labor input) have historically been the most important source of real per capita economic growth (Note: There are various measures of productivity. The term used here applies to a broad measure of productivity. By contrast, Total factor productivity (TFP) measures the change in output not attributable to capital and labor. Many of the

cited references use TFP. Increases in productivity lower the real cost of goods. Over the 20th century the real price of many goods fell by over 90%

Historical sources of productivity growth

Economic growth has traditionally been attributed to the accumulation of human and physical capital, and increased productivity arising from technological innovation.

Before industrialization, technological progress resulted in an increase in population, which was kept in check by food supply and other resources, which acted to limit per capita income, a condition known as the Malthusian trap.The rapid economic growth that occurred during the Industrial Revolution was remarkable because it was in excess of population growth, providing an escape from the Malthusian trap.Countries that industrialized eventually saw their population growth slowdown, a phenomenon known as the demographic transition.

Increases in productivity are the major factor responsible for per capita economic growth – this has been especially evident since the mid-19th century. Most of the economic growth in the 20th century was due to reduced inputs of labor, materials, energy, and land per unit of economic output (less input per widget). The balance of growth has come from using more inputs overall because of the growth in output (more widgets or alternately more value added), including new kinds of goods and services (innovations)

During the Industrial Revolution, mechanization began to replace hand methods in manufacturing, and new processes streamlined production of chemicals, iron, steel, and other products. Machine tools made the economical production of metal parts possible, so that parts could be interchangeable

During the Second Industrial Revolution, a major factor of productivity growth was the substitution of inanimate power for human and animal labor. Also there was a great increase power as steam powered electricity generation and internal combustion supplanted limited wind and water power. Since that replacement, the great expansion of total power was driven by continuous improvements in energy conversion efficiency. Other major historical sources of productivity were automation, transportation infrastructures (canals, railroads, and highways) new materials (steel) and power, which includes steam and internal combustion engines and electricity. Other productivity improvements included mechanized agriculture and scientific agriculture including chemical fertilizers and livestock and poultry management, and the Green Revolution. Interchangeable parts

made with machine tools powered by electric motors evolved into mass production, which is universally used today.

Impact of Circular Flow of Money on Business:

The circular flow of economic activity is a model showing the basic economic relationships within a market economy. It illustrates the balance between injections and leakages in our economy. Half of the model includes injections, and half of the model includes leakages. The circular flow model shows where money goes and what it's exchanged for. The model includes households, businesses and governments. We also have the banking system that facilitates the exchange of money and, as we'll see in a minute, helps to productively turn savings into investment in order to grow the economy. In the circular flow of the economy, money is used to purchase goods and services. Goods and services flow through the economy in one direction while money flows in the opposite direction.

Large Scale and Small Scale Business: Small Scale Industry

(i) These industries employ less number of persons and capital.

(ii) Most of the work is done by manpower, small machines and tools.

(iii) Raw materials used are less and the production is consequently less.

(iv) They are scattered in rural and urban areas and are in the private sector, e.g., cycle, T.V., radio.

Large Scale Industry

(i) These industries employ a larger number of persons and capital.

(ii) The work is done mostly by larger machines and laborers.

(iii) Raw materials and used is large and there is mass production.

(iv) They are located in urban centres and are in the public sector or run by big industrialists, e.g., Cotton textiles, Jute textiles.

Role of Foreign Investments:

A foreign direct investment (*FDI*) is a controlling ownership in a business enterprise in one country by an entity based in another country.

Foreign direct investment is distinguished from portfolio foreign investment, a passive investment in the securities of another country such as public stocks and bonds, by the element of "control". According to the *Financial Times*, "Standard definitions of control use the internationally agreed 10 percent threshold of voting shares, but this is a grey area as often a smaller block of shares will give control in widely held companies. Moreover, control of technology, management, even crucial inputs can confer de facto control."

The origin of the investment does not impact the definition as an FDI, i.e., the investment may be made either "inorganically" by buying a company in the target country or "organically" by expanding operations of an existing business in that country.

Private Foreign Investment:

A private foreign investment is an investment made by a private individual or a private entity in a foreign country. This type of investment differs from other investments made by a foreign public or governmental entity in another country in that it is made by an individual or a private entity. Also known as a personal foreign investment, this type of investment frequently provides economic stimulation in other countries. It is not always the case, but certain foreign investments are sometimes considered to be a type of foreign aid, especially when made in third-world nations or other struggling economies. Strict rules apply to foreign investments and may vary according to the country where a private foreign investment is being made.

Depending on the country, a personal foreign investment may include an investment for personal use or may include a commercial investment. A commercial foreign investment is one made in an industry that would be considered commercially useful as opposed to another investment involving more personal use, such as residential real estate. A personal foreign investment may include a variety of investment types depending on what is permissible by the country where an investment is being made, as well as what investments are available.

Limitations and Degree of Foreign Investments:

Advantages of foreign direct investment

- It can stimulate the economic development of the country in which the investment is made, creating both benefits for local industry and a more conducive environment for the investor.
- It will usually create jobs and increase employment in the target country.
- It will enable resource transfer, and other exchanges of knowledge whereby different countries are given access to new skills and technologies.
- The equipment and facilities provided by the investor can increase the productivity of the workforce in the target country.

Disadvantages of foreign direct investment

- Foreign direct investment can sometimes hinder domestic investment, as it focuses resources elsewhere.
- Occasionally as a result of foreign direct investment exchange rates will be affected, to the advantage of one country and the detriment of the other.

- Foreign direct investment may be capital-intensive from the investor's point of view, and therefore sometimes high-risk or economically non-viable.
- The rules governing foreign direct investment and exchange rates may negatively affect the investing country.
- Investment in certain areas is banned in foreign markets, meaning that an inviting opportunity may be impossible to pursue.

Balancing risk and reward

Expanding your business abroad, buying into a foreign company or otherwise investing into another country's economy can be extremely financially rewarding, and may provide your organisation with the boost it needs to jump to a new level of success. However, direct foreign investment is also fraught with risks, and it is vital to investigate and assess the economic climate thoroughly before venturing into such an investment.

This is where your organisation can benefit from hiring a financial expert accustomed to working internationally – he or she will be able to give you a clear and thoroughly researched picture of the prevailing economic landscape in your target country, as well as monitoring the stability of the market, and predicting its future growth.

We live in an increasingly globalised economy, which means that foreign direct investment is becoming a more and more accessible option. Potential foreign direct investors, with the right expertise and planning

Government Policy: A government policy is a declaration of a government's political activities, plans and intentions relating to a concrete cause or, at the assumption of office, an entire legislative session. In certain countries they are announced by the head of government or a minister of the parliament. In constitutional monarchies this function may be fulfilled by the Speech from the Throne.

In Germany and Austria the Chancellor submits a government policy statement at the beginning of the session of the Bundestag , in which he announces the intended policies of the government during the next legislative session. The statement is not legally binding, but is a significant constitutional commitment for the parliament and the government. During the legislative period the federal government, through the Chancellor and the ministers, can give statements to the parliament through

the chancellor or the ministers concerning current political themes. It cannot however be obliged to give such statements.

Event Changes:

Inflation: Meaning, Causes and Measures to Check Inflation and Price Spiral

Meaning: Inflation is a highly controversial term which has undergone modification since it was first defined by the neo-classical economists. They meant by it a galloping rise in prices as a result of the excessive increase in the quantity of money. They regarded it "as a destroying disease born out of lack of monetary control whose results undermined the rules of business, creating havoc in markets and financial ruin of even the prudent."

Causes: Inflation is caused when the aggregate demand exceeds the aggregate supply of goods and services. We analyse the factors which lead to increase in demand and the shortage of supply.

Factors Affecting Demand:

Both Keynesians and monetarists believe that inflation is caused by increase in the aggregate demand.

They point towards the following factors which raise it.

1. Increase in Money Supply:

Inflation is caused by an increase in the supply of money which leads to increase in aggregate demand. The higher the growth rate of the nominal money supply, the higher is the rate of inflation. Modem quantity theorists do not believe that true inflation starts after the full employment level. This view is realistic because all advanced countries are faced with high levels of unemployment and high rates of inflation.

2. Increase in Disposable Income:

When the disposable income of the people increases, it raises their demand for goods and services. Disposable income may increase with the rise in national income or reduction in taxes or reduction in the saving of the people.

3. Increase in Public Expenditure:

Government activities have been expanding much with the result that government expenditure has also been increasing at a phenomenal rate, thereby raising aggregate demand for goods and services. Governments of both developed and developing countries are providing more facilities under public utilities and social services, and also nationalising industries and starting public enterprises with the result that they help in increasing aggregate demand.

4. Increase in Consumer Spending:

The demand for goods and services increases when consumer expenditure increases. Consumers may spend more due to conspicuous consumption or demonstration effect. They may also spend more whey they are given credit facilities to buy goods on hire-purchase and instalment basis.

5. Cheap Monetary Policy:

Cheap monetary policy or the policy of credit expansion also leads to increase in the money supply which raises the demand for goods and services in the economy. When credit expands, it raises the money income of the borrowers which, in turn, raises aggregate demand relative to supply, thereby leading to inflation. This is also known as credit-induced inflation.

6. Deficit Financing:

In order to meet its mounting expenses, the government resorts to deficit financing by borrowing from the public and even by printing more notes. This raises aggregate demand in relation to aggregate supply, thereby leading to inflationary rise in prices. This is also known as deficit-induced inflation.

7. Expansion of the Private Sector:

The expansion of the private sector also tends to raise the aggregate demand. For huge investments increase employment and income, thereby creating more demand for goods and services. But it takes time for the output to enter the market.

8. Black Money:

The existence of black money in all countries due to corruption, tax evasion etc. increases the aggregate demand. People spend such unearned money extravagantly, thereby creating unnecessary demand for commodities. This tends to raise the price level further.

9. Repayment of Public Debt:

Whenever the government repays its past internal debt to the public, it leads to increase in the money supply with the public. This tends to raise the aggregate demand for goods and services.

10. Increase in Exports:

When the demand for domestically produced goods increases in foreign countries, this raises the earnings of industries producing export commodities. These, in turn, create more demand for goods and services within the economy.

Control inflation:

Monetary policy

Governments and central banks primarily use monetary policy to control inflation. Central banks

such as the U.S. Federal Reserve increase the interest rate, slow or stop the growth of the money supply, and reduce the money supply. Some banks have a symmetrical inflation target while others only control inflation when it rises above a target, whether express or implied.

Most central banks are tasked with keeping their inter-bank lending rates at low levels, normally to a target annual rate of about 2% to 3%, and within a targeted annual inflation range of about 2% to 6%. Central bankers target a low inflation rate because they believe deflation endangers the economy.

Higher interest rates reduce the amount of money because fewer people seek loans, and loans are usually made with new money. When banks make loans, they usually first create new money, then lend it. A central bank usually creates money lent to a national government. Therefore, when a person pays back a loan, the bank destroys the money and the quantity of money falls. In the early 1980s, when the federal funds rate exceeded 15 percent, the quantity of Federal Reserve dollars fell 8.1 percent, from $8.6 trillion down to $7.9 trillion.

Monetarists emphasize a steady growth rate of money and use monetary policy to control inflation by increasing interest rates and slowing the rise in the money supply. Keynesians emphasize reducing aggregate demand during economic expansions and increasing demand during recessions to keep inflation stable. Control of aggregate demand can be achieved using both monetary policy and fiscal policy (increased taxation or reduced government spending to reduce demand).

Fixed exchange rate

Under a fixed exchange rate currency regime, a country's currency is tied in value to another single currency or to a basket of other currencies (or sometimes to another measure of value, such as gold). A fixed exchange rate is usually used to stabilize the value of a currency, vis-a-vis the currency it is pegged to. It can also be used as a means to control inflation. However, as the value of the reference currency rises and falls, so does the currency pegged to it. This essentially means that the inflation rate in the fixed exchange rate country is determined by the inflation rate of the country the currency is pegged to. In addition, a fixed exchange rate prevents a government from using domestic monetary policy in order to achieve macroeconomic stability.

Under the Bretton Woods agreement, most countries around the world had currencies that were fixed to the US dollar. This limited inflation in those countries, but also exposed them to the danger of speculative attacks. After the Bretton Woods agreement broke down in the early 1970s, countries gradually turned to floating exchange rates. However, in the later part of the 20th century, some countries reverted to a fixed exchange rate as part of an attempt to control inflation. This policy of using a fixed exchange rate to control inflation was used in many countries in South America in the

later part of the 20th century (e.g. Argentina (1991–2002), Bolivia, Brazil, and Chile).

Price spiral: The dreaded wage-price spiral -- also known as an inflationary spiral -- is a condition in which wages and prices rise in a continuing, self-perpetuating relationship that exerts inflationary pressure on an economy. In order for a wage-price spiral to occur, certain conditions in the economy must be present, including the widespread expectation of increasing prices

How a Wage-Price Spiral Occurs

When an economy is operating at near full employment and people have money to spend, demand for goods and services increases. To meet the demand, companies expand their businesses and hire more workers. However, at near full employment, most workers already have jobs. So companies have to lure workers with higher wages, which, of course, increases the companies' costs, explains the website Biz/ed. The workers then push for higher wages to meet the higher prices and expected price hikes, which increases company costs again. Theoretically, this continues in an inflationary spiral until a loaf of bread costs the proverbial wheelbarrow full of cash.

Unit-III:

Current State of Growth and Investment:

Interest Rate Structure:

The relationship between interest rates or bond yields and different terms or maturities. The term structure of interest rates is also known as a yield curve and it plays a central role in an economy. The term structure reflects expectations of market participants about future changes in interest rates and their assessment of monetary policy conditions. In general terms, yields increase in line with maturity, giving rise to an upward sloping yield curve or a "normal yield curve." One basic explanation for this phenomenon is that lenders demand higher interest rates for longer-term loans as compensation for the greater risk associated with them, in comparison to short-term loans.

Monetary Policy:

Monetary policy is the process by which the monetary authority of a country controls the supply of money, often targeting an inflation rate or interest rate to ensure price stability and general trust in the currency.

Further goals of a monetary policy are usually to contribute to economic growth and stability, to lower unemployment, and to predictable exchange rates with other currencies.

Monetary economics provides insight into how to craft optimal monetary policy.

Monetary policy is referred to as either being expansionary or contractionary, where an expansionary policy increases the total supply of money in the economy more rapidly than usual, and contractionary policy expands the money supply more slowly than usual or even shrinks it. Expansionary policy is traditionally used to try to combat unemployment in a recession by lowering interest rates in the hope that easy credit will entice businesses into expanding. Contractionary policy is intended to slow inflation in order to avoid the resulting distortions and deterioration of asset values.

Monetary policy differs from fiscal policy, which refers to taxation, government spending, and associated borrowing

Fiscal Environment:

Fiscal Environmentalism is a hybrid term of two traditional and often conflicting philosophies, environmentalism and fiscal conservatism, created to emphasize the growing understanding of the middle ground between the two, where the goals of each are simultaneously fulfilled. The result is an innovative business practice based upon principles of intelligent environmental design and financial discipline, associated with each. Fiscal environmentalism is a useful term for individuals who are familiar with either of the philosophies, and is related to very general concepts such as "sustainable business practices" and "socially responsible business practices", and other concepts more specific to traditional fields, such as Ecological Economics, and Environmental Management Systems. Compared to these other terms, fiscal environmentalism emphasizes fiscal discipline. It is used in discussions with business leaders who are looking to answer public demand for increased environmental awareness while still focusing on bottom-line success.

Competitive Environment: The competitive environment, also known as the market structure, is the dynamic system in which your business competes. The state of the system as a whole limits the flexibility of your business. World economic conditions, for example, might increase the prices of raw materials, forcing companies that supply your industry to charge more, raising your overhead costs. At the other end of the scale, local events, such as regional labor shortages or natural disasters, also affect the competitive environment.

Direct Competitors

Your direct competitors provide products or services similar to yours. For example, a small computer repair business competes with other local computer repair businesses, as well as large retail stores that offer computer repair services. Small retail shops compete with warehouse clubs and big-box

retail stores that use their huge buying power to lower overhead costs, enabling them to offer steep discounts that small stores can't afford.

Indirect Competitors

In addition to direct competitors, some businesses also face competition from providers of dissimilar products or services. For example, a fine dining restaurant competes with other local restaurants, but it also competes with nearby supermarkets that offer ready-to-eat meals. And a pottery studio that relies heavily on children's birthday parties must compete with other family-friendly establishments that offer children's activities, such as roller rinks, theme restaurants and children's museums.

Legislation for Unfair Trade Practices: The Consumer Protection from Unfair Trading Regulations 2008 (the CPRs) implement the EU Unfair Commercial Practices Directive. They introduce a general prohibition against unfair commercial practices, specific prohibitions against misleading and aggressive practices and a blacklist of 31 practices that will be deemed unfair in all circumstances.

The Government has also taken the opportunity to streamline and consolidate consumer protection legislation in the UK. The regulations amend the Consumer Protection Act and the Trades Description Act (amongst others) and revoke and replace the Control of Misleading Advertisements Regulations.

Who is affected?

The CPRs apply to business- to-consumer transactions and apply to conduct before, during and after the contract is made.

They also affect business-to-business practices closely connected to consumers. A trader supplying food products to a supermarket, for instance, will need to ensure its labelling complies with the CPRs.

In some circumstances, they could apply to a consumer-to-business transaction. If a consumer sells a car to a second hand car dealer, for example, the dealer would have to abide by the CPRs.

Unfair commercial practices

The general prohibition simply states that unfair commercial practices are prohibited. The wording is deliberately wide to catch any unfair practices that may be developed in the future.

A practice is unfair if it fails to meet the standard of "professional diligence" (the standard of skill and care that would reasonably be expected of a trader in its field of activity) and it materially impairs an average consumer's ability to make an informed decision, causing him to make a decision he would not otherwise have made.

In most cases, the average consumer will be taken to be reasonably well-informed, reasonably observant and circumspect. But where a trading practice is specifically targeted at a particular consumer group, the average consumer will be the average member of that group.

And if a clearly identifiable group of consumers is particularly vulnerable to a trading practice (because of age, infirmity or credulity) in a way a trader could reasonably be expected to foresee, and the practice is likely materially to distort decisions made only by that group, the benchmark will be the average member of that group.

For example, the hard of hearing might be particularly vulnerable to a trader's advertisement claiming that a telephone is "hearing aid compatible".

Misleading actions and omissions

Misleading acts and omissions are unfair commercial practices. In each case, the action or omission must cause or be likely to cause the average consumer to take a different decision.

A misleading action contains false information or in some way deceives (or is likely to deceive) the average customer. Examples include:

- providing misleading information about the main characteristics, availability or origin of a product, or false information about the trader himself (e.g. qualifications or awards);
- marketing a product in such a way that creates confusion with a competitor's products (e.g. by using a similar brand name or logo); and
- agreeing to be bound by a code of practice that contains a firm commitment (e.g. that its members will only use wood from sustainable sources), displaying the code logo, but breaching that commitment.

Misleading omissions are made when a trader omits or hides material information, provides it in an unclear, unintelligible, ambiguous or untimely manner, or fails to make it clear he has a commercial intent. What is material will depend on the circumstances, but it is generally defined as information the average consumer needs to make an informed decision.

Limitations of space or time and whether the trader has taken other steps to convey the information (such as stating "terms and conditions apply" and where they can be found) will be taken into account as part of the context.

When a trader makes an "invitation to purchase" (e.g. by including an order form in a press advertisement, or a page on a website enabling consumers to place an order) the regulations specify the material information that must be included unless that information is apparent from the context.

Consumer and Investor Protection:

A component of the Wall Street Reform and Consumer Protection Act of 2009 designed to expand the powers of the Securities and Exchange Commission (SEC). The act established a whistleblower reward for reporting financial fraud, increased liability for aiding and abetting, doubled funding to the SEC over a five-year period, and more. The act was part of regulators' attempt to prevent some of the problems that caused the financial crisis of 2008-2009 from reoccuring in the future

The Wall Street Reform and Consumer Protection Act of 2009 was created to improve accountability and transparency in the financial system. It included a Consumer Financial Protection Agency that would regulate mortgages, auto loans and credit cards.

A significant portion of the legislation is devoted to measures specifically intended to protect consumers and investors. Based on the belief held by some that lax consumer regulation—particularly with respect to retail mortgages—significantly contributed to the economic crisis, Congress has dramatically transformed the federal regulation of consumer financial services. The overhaul likely will usher in an era of increased substantive rulemaking and other supervisory controls, as well as increased federal and state enforcement and private civil litigation. During the financial crisis, many investors in stocks and other securities suffered devastating losses. Consequently, Congress has seen fit to respond with several new protections for investors and whistleblowers

Current Industrialization:

Trends: India has seen a rapid rise in industrialization in the past few decades, due its expansion in markets such as pharmaceuticals, bio-engineering, nuclear technology, informatics and technology-oriented higher education. These latest trends have made India more globally-minded as their desire to trade with the world increases.

It is said that India has deliberately targeted markets they know they can make instant in-roads into. Industries such as pharmaceuticals and bio-engineering have been seen as ideal in increasing the national income using the country's new-found expertise. Also, India now exports a whole variety of products and knowledge, including petroleum products, textile goods, jewellery, software, engineering goods, chemicals, and leather merchandise.

There are a lot of comparisons drawn between India's industrialisation model and that of China. Both countries have realised the importance of the export market and how to capitalise on their huge

workforces - allowing them to become leading powers in the global market on several fronts. Western countries look favourably to countries such as India and China due to their low production costs in comparison to European and US prices; again a favourable characteristic allowing the countries to build their economies.

The industrialisation of India looks set to continue for some time and the result could well be that India becomes a major player in many global markets in the future.

Industrial Policy:

The Industrial Policy plan of a country, sometimes shortened IP, is its official strategic effort to encourage the development and growth of the manufacturing sector of the economy.The government takes measures "aimed at improving the competitiveness and capabilities of domestic firms and promoting structural transformation.A country's infrastructure (transportation, telecommunications and energy industry) is a major part of the manufacturing sector that usually has a key role in IP.t is also the case that industries fail dismally to add to such a growing body of manufacturing industries.

Industrial policies are sector specific, unlike broader macroeconomic policies. They are often considered to be interventionist as opposed to laissez-faire economics. Examples of horizontal, economywide policies are tightening credit or taxing capital gain, while examples of vertical, sector-specific policies comprise protecting textiles from imports or subsidizing export industries. Free market advocates consider industrial policies as interventionist measures typical of mixed economy countries.

Many types of industrial policies contain common elements with other types of interventionist practices such as trade policy and fiscal policy. An example of a typical industrial policy is import-substitution-industrialization (ISI), where trade barriers are temporarily imposed on some key sectors, such as manufacturing. By selectively protecting certain industries, these industries are given time to learn (learning by doing) and upgrade.

Unit-IV

Changing Environment: Environmental change is defined as a change or disturbance of the environment caused by human influences or natural ecological processes. Environmental change can include any number of things, including natural disasters, human interference, or animal interaction.

Environmental change does not only encompass physical changes, but things like an infestation of invasive species is also environmental change

Stakeholder Management: The process of forming, monitoring and maintaining constructive relationships with investors by influencing their expectations of gain resulting from their investment appropriately. Stakeholder management also helps a business move toward its stated goals by keeping existing investors satisfied, and recruiting new investors as necessary, in a responsible and ethical way.Stakeholder management is a critical component to the successful delivery of any project, programme or activity. A stakeholder is any individual, group or organization that can affect, be affected by, or perceive itself to be affected by a programme.

Effective Stakeholder Management creates positive relationships with stakeholders through the appropriate management of their expectations and agreed objectives. Stakeholder management is a process and control that must be planned and guided by underlying principles

You may now have a long list of people and organizations that are affected by your work. Some of these may have the power either to block or advance. Some may be interested in what you are doing, others may not care. Map out your stakeholders on a Power/Interest Grid as shown by the image, and classify them by their power over your work and by their interest in your work. There are other tools available to map out your stakeholders and how best to influence then.

For example, your boss is likely to have high power and influence over your projects and high interest. Your family may have high interest, but are unlikely to have power over it. Someone's position on the grid shows you the actions you have to take with them:

- High power, interested people: these are the people you must fully engage and make the greatest efforts to satisfy.
- High power, less interested people: put enough work in with these people to keep them satisfied, but not so much that they become bored with your message.
- Low power, interested people: keep these people adequately informed, and talk to them to ensure that no major issues are arising. These people can often be very helpful with the detail of your project.
- Low power, less interested people: again, monitor these people, but do not bore them with excessive communication

Relevance of Ethics and Values in Business:

Ethical behaviour and corporate social responsibility can bring significant benefits to a business. For example, they may:

- attract customers to the firm's products, thereby boosting sales and profits
- make employees want to stay with the business, reduce labour turnover and therefore increase productivity
- attract more employees wanting to work for the business, reduce recruitment costs and enable the company to get the most talented employees
- Attract investors and keep the company's share price high, thereby protecting the business from takeover.

Unethical behaviour or a lack of corporate social responsibility, by comparison, may damage a firm's reputation and make it less appealing to stakeholders. Profits could fall as a result.

Values in Business:

Values and ethics in simple words mean principle or code of conduct that govern transactions; in this case business transaction. These ethics are meant to analyse problems that come up in day to day course of business operations. Apart from this it also applies to individuals who work in organisations, their conduct and to the organisations as a whole.

We live in an era of cut throat competition and competition breeds enmity. This enmity reflects in business operations, code of conduct. Business houses with deeper pockets crush small operators and markets are monopolised. In such a scenario certain standards are required to govern how organizations go about their business operations, these standards are called ethics.

Business ethics is a wider term that includes many other sub ethics that are relevant to the respective field. For example there is marketing ethics for marketing, ethics in HR for Human resource department and the like. Business ethics in itself is a part of applied ethics; the latter takes care of ethical questions in the technical, social, legal and business ethics.

Origin of Business Ethics

When we trace the origin of business ethics we start with a period where profit maximisation was seen as the only purpose of existence for a business. There was no consideration whatsoever for non-economic values, be it the people who worked with organisations or the society that allowed the business to flourish. It was only in late 1980’s and 1990’s that both intelligentsia and the academics as well as the corporate began to show interest in the same.

Nowadays almost all organisations lay due emphasis on their responsibilities towards the society and the nature and they call it by different names like corporate social responsibility, corporate governance or social responsibility charter. In India Maruti Suzuki, for example, owned the responsibility of maintain a large number of parks and ensuring greenery. Hindustan unilever, similarly started the e-shakti initiative for women in rural villages.

Globally also many corporations have bred philanthropists who have contributed compassion, love for poor and unprivileged. Bill gates of Microsoft and Warren Buffet of Berkshire Hathaway are known for their philanthropic contributions across globe.

Many organisations, for example, IBM as part of their corporate social responsibility have taken up the initiative of going green, towards contributing to environmental protection. It is not that business did not function before the advent of business ethics; but there is a regulation of kinds now that ensures business and organisations contribute to the society and its well being.

Nowadays business ethics determines the fundamental purpose of existence of a company in many organisations. There is an ensuing battle between various groups, for example between those who consider profit or share holder wealth maximisation as the main aim of the company and those who consider value creation as main purpose of the organisation.

The former argue that if an organisations main objective is to increase the shareholders wealth, then considering the rights or interests of any other group is unethical. The latter, similarly argue that profit maximisation cannot be at the expense of the environment and other groups in the society that contribute to the well being of the business.

Nevertheless business ethics continues to a debatable topic. Many argue that lots of organisations use it to seek competitive advantage and creating a fair image in the eyes of consumers and other stakeholders. There are advantages also like transparency and accountability.

Ethics in the Marketplace:

- If free markets are moral it's because they allocate resources & distribute commodities

1. in ways that are just
2. that maximize economic utility
3. that respect the liberty of both buyers and sellers

- These three benefits depend crucially on competition
- .Consequently, anticompetitive practices are morally dubious
- Two kinds of anticompetitive conditions and practices

- monopoly conditions: a market segment controlled by one seller
- oligopoly conditions: a market segment controlled by a few sellers

PERFECT COMPETITION:

A free market in which no buyer or seller has the power to significantly affect the prices at which goods are being exchanged.

PURE MONOPOLY:

A market in which a single firm is the only seller in the market and which new sellers are barred from entering.

OLIGOPOLY:

A market shared by a relatively small number of large firms that together can exercise some influence on process.

MARKET:

Any forum in which people come together for the purpose of exchanging ownership of goods or money.

EQUILIBRIUM POINT:

The point at which the amount of goods buyers want to buy exactly equals the amount of goods sellers want to sell, and at which the highest price buyers are willing to pay exactly equals the lowest prices sellers are willing to take.

DEMAND CURVE:

A line on a graph indicating the most that customers would be willing to pay for a unit of some product when they buy different quantities of those products.

SUPPLY CURVE:

A line on a graph indicating the prices producers must charge to cover the average costs to supplying a given amount of a commodity.

PRINCIPLE OF DIMINISHING MARGINAL UTILITY:

Each additional item a person consumes is less satisfying than each of the earlier items the person consumed.

PRINCIPLE OF INCREASING MARGINAL COSTS:

After a certain point, each additional item a seller produces costs more to produce than earlier items.

POINT OF EQUILIBRIUM:

The point at which the supply and demand curves meet, so amount buyers want to buy equals amount suppliers want to sell and price buyers are willing to pay equals price sellers are willing to take.

Perfectly Competitive Free Markets are characterized by the following 7 features:

1. There are numerous buyers and sellers, none of whom has a substantial share of the market.
2. All buyers and sellers can freely and immediately enter or leave the market.
3. Every buyer and seller has full and perfect knowledge of what every other buyer and seller is doing, including knowledge of prices, quantities, and quality of all goods being bought and sold.
4. The goods being sold in the market are so similar to each other that no one cares from which each buys or sells.
5. The costs and benefits of producing or using the goods being exchanged are borne entirely by those buying or selling the goods and not by any other external parties.
6. All buyers and sellers are utility maximizers. Each tries to get as much as possible for as little as possible.
7. No external parties(such as government) regulate the price, quantity, or quality of any of the goods being bought and sold in the market.

MORAL OUTCOMES OF PERFECTLY COMPETITIVE MARKETS:

- Achieve a certain kind of justice.
- Satisfy a certain version of utilitarianism.
- Respect certain kinds of moral rights.

MONOPOLY MARKET CHARACTERISTICS:

- One Seller
- High Entry Barriers
- Quantity below Equilibrium
- Prices above equilibrium and Supply Curve
- Can extract monopoly profit.

OLIGOPOLISTIC COMPETITION:

IMPERFECTLY COMPETITIVE MARKETS:

Markets that lie somewhere between the two extremes of the perfectly competitive market with innumerable sellers and the pure monopoly market with only one seller.

HIGHLY CONCENTRATED MARKETS:

Oligopoly markets that are determined by a few large firms.

HORIZONTAL MERGER:

The unification of two or more companies that were formerly competing in the same line of Business.

PRICE FIXING:

An agreement between firms to set their prices at artificially high levels.

MANIPULATION OF SUPPLY:

When firms in an oligopoly industry agree to limit their production so that prices rise to levels higher than those that would result from free competition.

EXCLUSIVE DEALING ARRANGEMENTS:

When a firm sells to a retailer on condition that the retailer will not purchase any products from other companies and/or will not sell outside of a certain geographical area.

TYING ARRANGEMENTS:

When a firm sells a buyer a certain good only on condition that the buyer agrees to purchase certain other goods from the firm.

RETAIL PRICE MAINTENANCE AGREEMENTS:

A manufacturer sells to retailers only on condition that they agree to charge the same set retail prices for its goods.

PRICE DISCRIMINATION:

To charge different prices to different buyers for identical goods or services.

UNETHICAL PRACTICES IN OLIGOPOLY INDUSTRIES:

- Price – Fixing
- Manipulation of supply
- Exclusive dealing arrangements
- Tying Arrangements
- Retail Price Maintenance Agreements
- Price Discrimination

Ethics and Employees:

A recurring theme in inquiries to the ASHA Ethics division is "employer demands." That is, employers requesting that our members and certificate holders engage in conduct that places them at risk for violating their ethical responsibilities. Ethically compromising requests might be to:

- use culturally insensitive tests in order to "qualify" a child for service
- request additional increments of treatment in order to cover travel expenses

- sign for Medicaid services in schools for children whom they have never seen and whose care they have not supervised
- provide treatment with which they disagree as a result of family/parent insistence
- provide treatment for which they havehad no training or experience

With employers under the jurisdiction of ASHA's Code of Ethics, an employee may have recourse through filing an ethics complaint. There is little recourse for such action when the employer is outside of ASHA's jurisdiction—but read on for some ideas. Demands are often made by employers who have no awareness of their employee's need to adhere to a code of ethics.

As employers, how do we acknowledge our employees' ethical obligations? How do we foster ethical decision-making practices among our employees? Or handle issues raised when employees must satisfy multiple codes of ethics/conduct by virtue of licensing, profession, or employment setting obligations?

As employers we need to familiarize ourselves with the codes of ethics of our employees' professions. We can review workplace practices and regulatory requirements in relation to the ethical responsibilities our employees must fulfill. We can create an ethics-friendly environment bypromoting ethics discussion and analysis of ethical issues that emerge. We can implement conflict resolution practices to avoid situations that rise to the leel where an ethics complaint is filed. We can encourage ethics education by conducting case reviews to improve skills for anticipating potential ethical predicaments and handling them responsibly. We can encourage discussions of the code of ethics of each of the professions represented in our workplace in a compare-and-contrast fashion. We can expect our employees to be knowledgeable about professional ethics and serious about fulfilling their affirmative ethical obligations.

As employees we can use every opportunity available in our workplace to inform and educate co-workers, administrators, and union leaders about professional ethics, especially if our employer (or administrator) is not a member of the profession. At the time of interview, ask if the employer's business entity or school district has a code of conduct or code of ethics. Ask employers how they foster ethically responsible professional practice. Work to establish conflict resolution strategies to seek solutions to ethically compromising issues. Union members should recognize their membership as a valuable resource, especially when they are reluctant to complain about employer demands because of fear of retaliation.

As employees, we can use the Code of Ethics proactively. For example, how do we evaluate and document the effectiveness of our services (Principle of Ethics I, Rule G)? Documentation is an

important tool for accumulating the data to use as a rationale for continuation or termination of service, or increasing our decreasing the frequency and intensity of service. Our reports, representing our independent judgment, may be submitted to a team and to the client/caregiver. How do we ensure and document our own clinical competence in evaluating and treating clients, including our acquisition of new knowledge and skills that might be necessary for client care (Principle of Ethics II, Rules B and C)? Knowing our Code of Ethics, anticipating ethical predicaments, and being able to document and provide a rationale for our actions are keys to successful, ethical practice.

Modern Business Ethics and Dilemmas:

Dilemmas;

Employees make decisions at all levels of a company, whether at the top, on the front line or anywhere in between. Every employee in an organization is exposed to the risk of facing an ethical dilemma at some point, and some ethical decisions can be more challenging to fully understand than others. Knowing how to resolve ethical dilemmas in the workplace can increase your decision-making effectiveness while keeping you and your company on the right side of the law and public sentiment.

Modern Business Ethics:

There was a time when roars of laughter might have greeted the juxtaposition of the words "business" and "ethics" in the same sentence. Wags within earshot would have contributed other such absurd oxymorons as "government efficiency" and "small fortune" .

These attitudes were at their peak in the "loadsamoney" Eighties, but persisted well into the following decade. Now, in a new millennium, the atmosphere couldn't be more different, at least in the public domain. No company with pretensions can survive without stating its commitment to making its money in an ethical fashion, from start to finish.

And there's been a parallel transformation in the MBA world. Although business schools still stress the earnings dividend associated with acquiring the qualification, nowhere is it suggested that business comes without responsibilities

Affirmative Action as a Form of Social Justice: “Affirmative Ac-tion in India and the United States”, is now a standard reference for anyone interested in exploring this ques-tion further. Over the years, I have had extensive discussions with him on this subject, and benefitted a great deal from his keen insights. Both the papers which we have co-authored have been on affirmative action. It is an honor

for me to contribute to this festschrift, as it gives me an opportunity to pay tribute to his exemplary scholarship by exploring this theme, which is close to his heart.

Affirmative action means taking positive steps to improve the material status of the less advantaged in society, usually through the provision of educational or economic benefits. In the United States, affirmative action usually takes place through the provision of government or private benefits in education, employment, or contracting. Affirmative action is controversial, particularly when the beneficiaries are women or people of color.

Affirmative action can take many forms—ranging from rigid quotas to targeted outreach meant to encourage minorities to apply—but all have in common the effort to increase the number of minorities in educational institutions, in the workplace, or in receiving contracts. Affirmative action programs differ in terms of how much weight they give to race as a factor in decision making and the extent to which they require results. For example, rigid quotas or set-asides that mandate that a certain percentage of beneficiaries be members of designated racial groups are very different from programs that use race as one factor among many in decision making. Likewise, there is a significant difference between the government's setting targets or goals and the government's mandating that there be specific results.

PROS AND CONS

Several justifications can be offered for affirmative action. Because, by definition, affirmative action involves working to assist society's less-advantaged members, one reason to promote affirmative action policies is to remedy the effects of past discrimination. This remedial justification of affirmative action recognizes that wrongs have been committed in the past and acknowledges a moral obligation to set things right. Opponents of affirmative action do not contest the moral obligation to remediate past harm. Their objection to remedial policies is frequently centered on the claim that specific affirmative action policies will not help those who have in fact been harmed, but will sweep too broadly and provide benefits to those who do not deserve them. Sometimes opponents of affirmative action argue that the harm to be remediated did not occur, or if it did occur—as in the case of racial discrimination in the United States—the harm has dissipated so that remedial measures are no longer necessary.

Another important justification for affirmative action is the so-called diversity rationale. Advocates for the diversity rationale argue that society as a whole benefits when affirmative action is used to maintain diverse schools, workplaces, and businesses. According to this argument, people from different backgrounds, cultures, and genders bring complementary skills that collectively enrich the

places where they work and learn. Some affirmative action opponents reject the diversity argument outright. They claim there is no inherent social benefit to diverse work-places or schools. Others accept the assertion that diversity is a social benefit, but express doubt over whether racial or gender characteristics provide a meaningful basis on which to assess diversity's social benefit.

This latter claim is related to what is arguably the most important objection to affirmative action. Opponents of affirmative action argue that it is wrong to allocate social benefits on the basis of immutable characteristics, such as race or gender. They claim that affirmative action is itself a form of racial/gender discrimination that discriminates against white males, contrary to historic forms of discrimination that were targeted against women and people of color. Thus the charge is often made that affirmative action is in fact "reverse discrimination." Supporters of affirmative action argue that the claim that affirmative action is discriminatory is overly formalistic. Although admitting that affirmative action does discriminate in a technical sense, supporters claim affirmative action is morally justified because its goal is not to harm the white majority, but to provide social justice for those who have been deprived of opportunity in the past.

THE ORIGINS OF AFFIRMATIVE ACTION

The concept of affirmative action can be traced to efforts after the Civil War to remedy the devastating effects of slavery. Government efforts, such as the creation of the Freeman's Bureau, unquestionably were forms of affirmative action in that they provided benefits to racial minorities. The term *affirmative action* apparently was first used in the National Labor Relations Act (29 U.S.C. §§151–169), adopted in 1935. The context was not race, but rather the affirmative duty of employers to remedy discrimination against union members and union organizers. Employers found to have engaged in such discrimination were required to remedy this by taking steps to ensure that the employers were in the same position in which they would have been had there been no discrimination.

The term apparently was first used in the race context by President John F. Kennedy. In 1961, three years prior to the enactment of the first major post-Reconstruction civil rights law, President Kennedy issued an executive order preventing race discrimination by federal agencies. Executive Order 10,925, promulgated in 1961, mandated "affirmative action to ensure that the applicants are employed, and that employees are treated during employment without regard to race, color, creed, or national origin." President Lyndon Johnson extended this policy, though without using the phase affirmative action, when he issued Executive Order 11,246, demanding that all executive

departments and agencies “shall establish and maintain a positive program of equal employment opportunity.”

The 1964 Civil Rights Act (42 U.S.C. §2000) implemented this prohibition of race discrimination by statute. Title II of the 1964 act prohibited places of public accommodation, such as restaurants or hotels, from discriminating based on race. Title VII prohibited employers from discriminating on the basis of race, gender, or religion. The act did not speak directly to affirmative action, but it did prohibit discrimination and open the door to claims that affirmative action was essential to meet the statutory prohibition against discrimination. It was quickly realized that prohibiting discrimination is not enough to achieve equality. Positive steps toward remedying the legacy of discrimination and enhancing diversity are essential. Thus affirmative action programs of all sorts began to proliferate and flourish in the 1970s

Ethical Business Practices in India: In order to be sustainable, businesses need to recognize and effectively address the complex relationship of good corporate performance, social development, and environmental protection. Good corporate governance is now being recognized as a key risk management tool and a tool for socio-economic development to enhance economic efficiency, growth, and stakeholder confidence.

The paradigm shift in the global business environment has led to the Indian government promoting inclusive growth and CSR as a policy among corporates in India. However, a lot more needs to be done in this direction. Very limited India-centric studies and activities have been undertaken on this subject.

TERI in association with National Foundation for Corporate Governance (NFCG) is jointly working towards adopting good governance practices and uptake of sustainability reporting.

Objectives:

- Understand the current status of Corporate Governance and Sustainability Reporting initiatives in India
- Assess the needs, challenges, and opportunities to adopt good governance practices and uptake of sustainability reporting, and
- Identify best practices undertaken in the industry, if any

Outcomes:

- A report stating current status of Corporate Governance and Sustainability Reporting in India
- Inculcating latest thinking/global practices on Governance and Sustainability suited to the Indian context

- Increased uptake of quality reporting of Companies' sustainability performance.

HUMAN RESORCE MANAGEMENT (215)

Unit-I: Introduction

Human Resource Management: Concept and Definition

Human Resource Management has come to be recognized as an inherent part of management, which is concerned with the human resources of an organization. Its objective is the maintenance of better human relations in the organization by the development, application and evaluation of policies, procedures and programmes relating to human resources to optimize their contribution towards the realization of organizational objectives.

In other words, HRM is concerned with getting better results with the collaboration of people. It is an integral but distinctive part of management, concerned with people at work and their relationships within the enterprise. HRM helps in attaining maximum individual development, desirable working relationship between employees and employers, employees and employees, and effective modeling of human resources as contrasted with physical resources. It is the recruitment, selection, development, utilization, compensation and motivation of human resources by the organization.

Nature

Human Resource Management is a process of bringing people and organizations together so that the goals of each are met. The various features of HRM include:

•It is pervasive in nature as it is present in all enterprises.

•Its focus is on results rather than on rules.

•It tries to help employees develop their potential fully.

•It encourages employees to give their best to the organization.

•It is all about people at work, both as individuals and groups.

•It tries to put people on assigned jobs in order to produce good results.

•It helps an organization meet its goals in the future by providing for competent and well-motivated employees.

• It tries to build and maintain cordial relations between people working at various levels in the organization.

• It is a multidisciplinary activity, utilizing knowledge and inputs drawn from psychology, economics, etc.

Human Resource Management: Scope

The scope of HRM is very wide:

1. Personnel aspect - This is concerned with manpower planning, recruitment, selection, placement, transfer, promotion, training and development, layoff and retrenchment, remuneration, incentives, productivity etc. 2. Welfare aspect-It deals with working conditions and amenities such as canteens, crèches, rest and lunch rooms, housing, transport, medical assistance, education, health and safety, recreation facilities, etc. 3. Industrial relations aspect-This covers union-management relations, joint consultation, collective bargaining, grievance and disciplinary procedures, settlement of disputes, etc.

FEATURE OF HUMAN RESOURCE MANAGEMENT

1) Part of Management - Human resource management is an integral part of the management process. It is inherent in all organizations because people comprise an essential part in every organization. 2) Pervasive Function -Human resource management is a function that is performed by all managers at all levels of the organization. It is an essential part of the job of every manager. Every manager has to deal with his subordinates to get things done. Therefore, human resource management is required in all functional areas such as finance, marketing, production etc

3) Concerned with people - Human Resource management is concerned with people at work and their relationships. It deals with employees as individual and as groups.
4) Wide Scope -The scope of human resource management is very wide. It includes a broad spectrum of activities like recruitment, selection, placement, training, transfer, promotion, appraisal and compensation of employees.

Human Resource Management: Objectives

•To help the organization reach its goals.

• To ensure effective utilization and maximum development of human resources.

• To ensure respect for human beings. To identify and satisfy the needs of individuals.

• To ensure reconciliation of individual goals with those of the organization.

• To achieve and maintain high morale among employees.

• To provide the organization with well-trained and well-motivated employees.

• To increase to the fullest the employee's job satisfaction and self-actualization.

• To develop and maintain a quality of work

Importance of Human Resource Management

The main purpose of human resource management is to accomplish the organizational goals. Therefore, the resources are mobilized to achieve such goals. Some importance and objectives of human resource management are as follows:

1. Effective Utilization of Resources

Human resource management ensures the effective utilization of resources. HRM teaches how to utilize human and non-human resources so that the goals can be achieved. Organization aiming to utilize their resources efficiently invites the HR department to formulate required objectives and policies.

2. Organizational Structure

Organizational structure defines the working relationship between employees and management. It defines and assigns the task for each employee working in the organization. The task is to be performed within the given constraints. It also defines positions, rights and duties, accountability and responsibility, and other working

relationships. The human resource management system provides required information to timely and accurately. Hence, human resource management helps to maintain organizational structure.

3. Development of Human Resources

Human resource management provides favorable environment for employees so that people working in organization can work creatively. This ultimately helps them to develop their creative knowledge, ability and skill. To develop personality of employees, human resource management organizes training and development campaigns which provide an opportunity for employees to enhance their caliber to work.

4. Respect for Human Beings

Another importance of human resource management is to provide a respectful environment for each employee. Human resource management provides with required means and facilitates employee along with an appropriate respect because the dominating tendency develops that will result organizational crisis. Hence, all of them should get proper respect at work. Human resource management focuses on developing good working relationships among workers and managers in organization. So, good human resource management system helps for respecting the employees.

5. Goal Harmony

Human resource management bridges the gap between individual goal and organizational goal-thereby resulting into a good harmony. If goal difference occurs, the employees will not be willing to perform well. Hence, a proper match between individual goal and organizational goal should be there in order to utilize organizational resources effectively and efficiently.

6. Employee Satisfaction

Human resource management provides a series of facilities and opportunities to employees for their career development. This leads to job satisfaction and commitment. When the employees are provided with every kind of facilities and opportunities, they will be satisfied with their work performance.

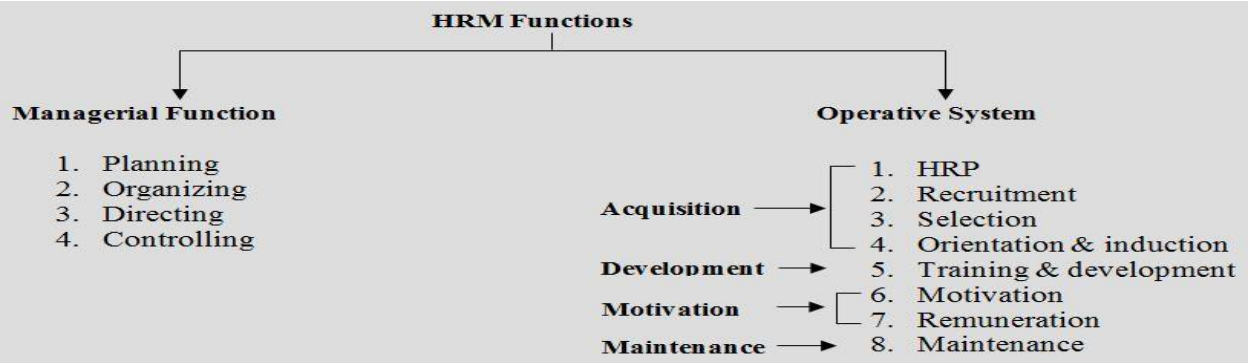
7. Employee Discipline and Moral

Human resource management tries to promote employee discipline and moral through performance based incentives. It creates a healthy and friendly working environment through appropriate work design and assignment of jobs.

8. Organizational Productivity

Human resource management focuses on achieving higher production and most effective utilization of

available resources. This leads to an enhancement in organizational goals and objectives.



Evolution:

Human Resource management is considered as one of the crucial task of any organization in today's competitive environment. But the history about how this concept of HRM is evolved or gained its importance is very interesting. Let us discuss the evolution of HRM here.

In starting of 19th century there was a boom in industrialization which influences the need of personal management. But there was no separate department to take care of labour problems except welfare officers that too who care about women & children only.

1914-39

During the 1st world was there was a expected growth for Personnel Management. The welfare officers were increased. During this period the women were recruited in large numbers as most of the men were joint the militaries. The first phase of labour management came in 1920 in factories to handle absenteeism etc

In mid of 1920's to 1930's there were employer who care their employees well being by themselves e.g. Tata steel in Jamshedpur. In between 2nd world war the personnel management faced an improving stage because the government has to produce large war material then personnel department worked in full time basis.

After independence the Role of Personnel management becomes inevitable in Industries it played functions like Collective Bargaining, Industrial Relations, and HR Policies etc

In 1930's the HRM started due to various reason like

1. View Point about doing works
2. Legislative frame work
3. Government policies
4. Trade unions.
5. Concepts in management
6. Change in economy

In 1990 government of various countries liberalized their policy due to which the human started moving from one nation to another. So the need for HRM evolved as cross culture took place. Due to this the recruitment becomes more specific were in selection is based on talent regardless of nationality.

Evolution of HRM in India

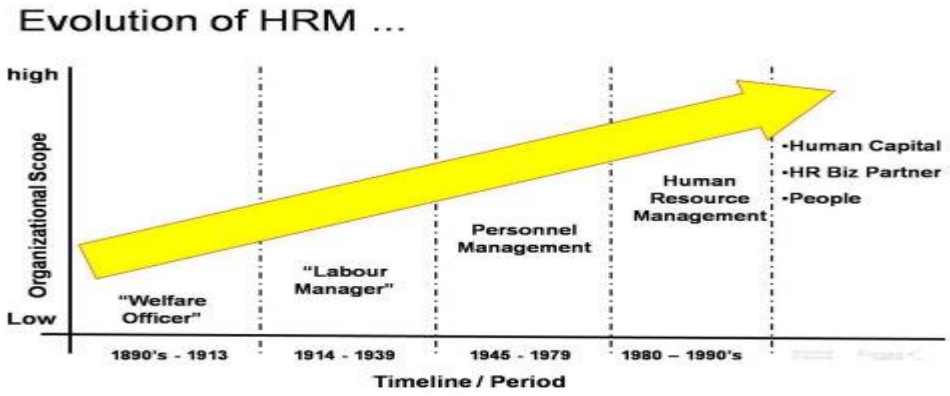
The Evolution of human resource management in India can be summarized as

Period	**Development Status**	**Emphasis on**	**Status**
1920 – 1930	Beginning	Statutory Welfare	Clerical
1940 – 1960	Struggling for recognition	Introduction of Techniques	Administrative
1970 – 1980	Achieving Superiority	Regulatory Conforming Imposition of std on other functions	Managerial
1990s	Promising	Human Values	Executive

Apart from this it could be said that HRM had to cross various phases before reaching to this responsible position like Industrial Revolution Era – Scientific Management Era – Paternalistic Era – Industrial Psychology Era –Human Relations Era – Behavioural Science Era –Personnel Specialists Era –Welfare Era etc.

There are many people in the field of management who were contributed to the development of HRM by the various researches conducted by them or theory proposed by them to name few FW Taylor, Robert Owen ,

Hugo Munsterberg , Maslow, Herzberg, Elton Mayo etc.



HRM Policies

Human resource management policies are vital for organizations that are serious about resolving personnel issues and finding hr solutions. HRM policies are intended to help maximize the effectiveness of your Human Resources function.

• HR should ensure that HRM policy you have consistent, well-written & legal policies and procedures.

• HRM policy should provide hr advices for the organizations needing help with specific HR-related issues

• Individuals and organizations who are serious about human resources should understand the bottom-line importance of job evaluation, job descriptions and effective policies.

Types of HRM Policies:

• Attendance Policy Attendance Policy

• Recruitment Policy Recruitment Policy

• Leave of Absence Policy Leave of Absence Policy

• Performance Planning and Evaluation Performance

• Probationary Period

• Compensation

• Compensatory Leave

• Overtime Leave

• Annual Leave

• Educational Leave, etc

Challenges of HRM

1. **Workplace diversity**. This may consist of issues involving age, education, ethnicity, gender, income,

marital status, physical limitations, religion, sexual orientation, or any number of other things. Understanding the challenges that may be faced by the interaction of any of these diverse groups, as well as the required openness of the company toward such groups, will help HR personnel provide assistance in training employees to work with those they may consider "different," accept that such workers may be present in the business, and agree to treat each other respectfully, even if they never come to agree with each other over various issues.

2. **Change management.** This is another challenge that more and more HR departments are facing. Being able to deal with their own changing roles in corporate society, in addition to the changes to other jobs, the overlapping responsibilities, and more. Understanding that change is required is the first step toward accepting the change.

3. **Compensation and benefits**. With a slow economy and tightening corporate purse-strings, the issue of compensation and employee benefits is one that almost every business must deal with. The key is to present mandatory changes in such a way that employees can accept, if not necessarily agree with them while providing non-monetary morale boosting incentives whenever possible to make the changes less traumatic.

4. **Recruiting skilled employees**. In an era of rising unemployment, it would seem that finding qualified workers would be easier than ever. But that's seldom the case. Many industries are facing dire needs for employees with acceptable skills and the required training or degree. This applies not only to health care, but also to technology and other fields as well, causing many employers to search outside their local marketplace for workers who can do the jobs they need filled.

5. **Training and development**. This is another challenge that HR managers and personnel must deal with more frequently. With the need to cut training costs, training itself often suffers. Yet the skills an employee needs must still be taught. Many companies are meeting this challenge by providing eLearning opportunities that allow employees to receive the training they need without the expenses associated with travel, on-site trainers, hours away from their jobs and high-priced materials.

6. Increasing cut-throat competition: - Currently, organizations are facing increasing internal and external competitions. Due to this, product life cycles are getting shorter. It one starts to produce a new product, in no time, the same kind of product, produced by another company will be found in the market. Beside this, the size and complexity of organizations are increasing day by day. To face these growing challenges of competition, innovative human resource management and practices are needed.

7. Globalization: - Globalization: - HR managers have to deal with Growing internationalization, more

heterogeneous functions and involvement in employee's personal life.

8. **Corporate Re-organizations:-** It is the role of HRM to deal with the anxiety, uncertainties, insecurities and fears during the dynamic trends of Reorganization that relates to mergers and acquisitions, joint ventures, take over, internal restructuring of organizations.

These are only a few of the many challenges an HR department must be prepared to deal with. Knowing in advance what type situation might arise will help you to be better equipped in the event that it does. After all, it's always best to hope for the best, but to be prepared for the worst. Just in case.

Personnel Management (PM) VS Human Resources Management (HRM)

1. Personnel mean employed persons of an organization. Management of these people is personnel management (PM). Human resource management (HRM) is the management of employees' knowledge, aptitudes, abilities, talents, creative abilities and skills/competencies.

2. PM is traditional, routine, maintenance-oriented, administrative function whereas HRM is continuous, on-going development function aimed at improving human processes.

3. PM is an independent function with independent sub-functions. HRM follows the systems thinking approach. It is not considered in isolation from the larger organization and must take into account the linkages and interfaces.

4. PM is treated like a less important auxiliary function whereas HRM is considered a strategic management function.

5. PM is reactive, responding to demands as and when they arise. HRM is proactive, anticipating, planning and advancing continuously.

6. PM is the exclusive responsibility of the personnel department. HRM is a concern for all managers in the organization and aims at developing the capabilities of all line managers to carry out the human resource related functions.

7. The scope of PM is relatively narrow with a focus on administering people. The scope of HRM views the organization as a whole and lays emphasis on building a dynamic culture.

8. PM is primarily concerned with recruitment, selection and administration of manpower. HRM takes efforts

to satisfy the human needs of the people at work that helps to motivate people to make their best contribution.

9. Important motivators in PM are compensation, rewards, job simplification and so on. HRM considers work groups, challenges and creativity on the job as motivators.

10. In PM improved satisfaction is considered to be the cause for improved performance but in HRM it is the other way round (performance is the cause and satisfaction is the result).

11. In PM, employee is treated as an economic unit as his services are exchanged for wages/salary. Employee in HRM is treated not only as economic unit but also a social and psychological entity.

12. PM treats employee as a commodity or a tool or like equipment that can be bought and used. Employee is treated as a resource and as a human being.

Traditional HRM vs. Strategic HRM

Point of distinction	Traditional HR	Strategic HR
Focus	Employee relations	Partnerships with internal and external customers
Role of HR	Transactional change, follower and respondent	Transformational change leader and initiator
Initiatives	Slow, reactive fragmented	Fast proactive and integrated
Time horizon	Short term	Short , medium and long (as required)
Control	Bureaucratic roles, policies procedures	Organic flexible whatever is necessary to succeed

Job Design	Tight division of labor, independence specialization	Broad flexible cross training teams.
Key investments	Capital products	People knowledge
Accountability	Cost center	Investment center
Responsibility for HR	Staff specialists	Line managers

New Trends in HRM

1. Globalization and its implications

Business today doesn't have national boundaries – it reaches around the world. The rise of multinational corporations places new requirements on human resource managers. The HR department needs to ensure that the appropriate mix of employees in terms of knowledge, skills and cultural adaptability is available to handle global assignments. In order to meet this goal, the organizations must train individuals to meet the challenges of globalization. The employees must have working knowledge of the language and culture (in terms of values, morals, customs and laws) of the host country.

Human Resource Management (HRM) must also develop mechanisms that will help multicultural individuals work together. As background, language, custom or age differences become more prevalent, there are indications that employee conflict will increase. HRM would be required to train management to be more flexible in its practices. Because tomorrow's workers will come in different colors, nationalities and so on, managers will be required to change their ways. This will necessitate managers being trained to recognize differences in workers and to appreciate and even celebrate these differences.

2. Work-force Diversity

In the past HRM was considerably simpler because our work force was strikingly homogeneous. Today's work force comprises of people of different gender, age, social class sexual orientation, values, personality characteristics, ethnicity, religion, education, language, physical appearance, martial status, lifestyle, beliefs, ideologies and background characteristics such as geographic origin, tenure with the organization, and economic status and the list could go on. Diversity is critically linked to the organization's strategic direction. Where diversity flourishes, the potential benefits from better creativity and decision making and greater innovation can be accrued to help increase organization's competitiveness.

3. Changing skill requirements

Recruiting and developing skilled labor is important for any company concerned about competitiveness, productivity, quality and managing a diverse work force effectively. Skill deficiencies translate into significant

losses for the organization in terms of poor-quality work and lower productivity, increase in employee accidents and customer complaints. Since a growing number of jobs will require more education and higher levels of language than current ones, HRM practitioners and specialists will have to communicate this to educators and community leaders etc. Strategic human resource planning will have to carefully weigh the skill deficiencies and shortages. HRM department will have to devise suitable training and short term programmes to bridge the skill gaps & deficiencies.

4. Corporate downsizing

Whenever an organization attempts to delayer, it is attempting to create greater efficiency. The premise of downsizing is to reduce the number of workers employed by the organization. HRM department has a very important role to play in downsizing. HRM people must ensure that proper communication must take place during this time. They must minimize the negative effects of rumors and ensure that individuals are kept informed with factual data. HRM must also deal with actual layoff. HRM dept is key to the downsizing discussions that have to take place.

5. Continuous improvement programs

Continuous improvement programs focus on the long term well being of the organization. It is a process whereby an organization focuses on quality and builds a better foundation to serve its customers. This often involves a companywide initiative to improve quality and productivity. The company changes its operations to focus on the customer and to involve workers in matters affecting them. Companies strive to improve everything that they do, from hiring quality people, to administrative paper processing, to meeting customer needs.

6. Re-engineering work processes for improved productivity

Although continuous improvement initiatives are positive starts in many of our organizations, they typically focus on ongoing incremental change. Such action is intuitively appealing – the constant and permanent search to make things better. Yet many companies function in an environment that is dynamic- facing rapid and constant change. As a result continuous improvement programs may not be in the best interest of the organization. The problem with them is that they may provide a false sense of security. Ongoing incremental change avoids facing up to the possibility that what the organization may really need is radical or quantum change. Such drastic change results in the re-engineering of the organization.

8. Contingent workforce

A very substantial part of the modern day workforce is the contingent workers. Contingent workers are individuals who are typically hired for shorter periods of time. They perform specific tasks that often require special job skills and are employed when an organization is experiencing significant deviations in its

workflow. When an organization makes its strategic decision to employ a sizable portion of its workforce from the contingency ranks, several HRM issues come to the forefront. These include being able to have these virtual employees available when needed, providing scheduling options that meet their needs and making decisions about whether or not benefits will be offered to the contingent work force.

9. Decentralized work sites

Work sites are getting more and more decentralized. Telecommuting capabilities that exist today have made it possible for the employees to be located anywhere on the globe. With this potential, the employers no longer have to consider locating a business near its work force. Telecommuting also offers an opportunity for a business tin a high cost area to have its work done in an area where lower wages prevail.

Decentralized work sites also offer opportunities that may meet the needs of the diversified workforce. Those who have family responsibilities like child care, or those who have disabilities may prefer to work in their homes rather than travel to the organization's facility. For HRM, decentralized work sites present a challenge. Much of that challenge revolves around training managers in how to establish and ensure appropriate work quality and on-time completion. Work at home may also require HRM to rethink its compensation policy. Will it pay by the hour, on a salary basis, or by the job performed. Also, because employees in decentralized work sites are full time employees of the organization as opposed to contingent workers, it will be organization's responsibility to ensure health and safety of the decentralized work force.

10. Employee involvement

For today's organization's to be successful there are a number of employee involvement concepts that appear to be accepted. These are delegation, participative management, work teams, goal setting, employee training and empowering of employees. HRM has a significant role to play in employee involvement. What are needed are demonstrated leadership as well as supportive management. Employees need to be trained and that's where human resource management has a significant role to play. Employees expected to delegate, to have decisions participatively handled, to work in teams, or to set goals cannot do so unless they know and understand what it is that they are to do. Empowering employees requires extensive training in all aspects of the job. Workers may need to understand how new job design processes. They may need training in interpersonal skills to make participative and work teams function properly.

UNIT 2 Human Resource Planning

Human Resource Planning: HR planning refers to classic HR administrative functions, and the evaluation and identification of human resources requirements for meeting organizational goals. It also requires an assessment of the availability of the qualified resources that will be needed. To ensure their competitive

advantage in the marketplace and anticipate staffing needs, organizations must implement innovative strategies that are designed to enhance their employee retention rate and recruit fresh talent into their companies. Human resources planning is one way to help a company develop strategies and predict company needs in order to keep their competitive edge.

Definition:

A job analysis is the process used to collect information about the duties, responsibilities, necessary skills, outcomes, and work environment of a particular job. You need as much data as possible to put together a job description, which is the frequent outcome of the job analysis. Additional outcomes include recruiting plans, position postings and advertisements, and performance development planning within your performance management system.

The job analysis may include these activities

- Reviewing the job responsibilities of current employees,
- Doing Internet research and viewing sample job descriptions online or offline highlighting similar jobs,
- Analyzing the work duties, tasks, and responsibilities that need to be accomplished by the employee filling the position,
- Researching and sharing with other companies that have similar jobs, and
- Articulation of the most important outcomes or contributions needed from the position.

Job Description and Specification

Job descriptions describe the job and not the individual who fills the job. They are the result of job analysis within a given organization and are essential to the selection and evaluation of employees. Job advertisements or postings are based on the job description.

The character of the organization is the basis for the description of positions. Information about the organization might include

Name of Company
Main Product(s) and/or Service(s)
Location
Number of Employees
Company Structure
Names of Officers
Hours of Work

Job Analysis

Job analysis is the systematic assembly of all the facts about a job. The purpose is to study the individual elements and duties. All information related to the salary and benefits, working hours and conditions, typical tasks and responsibilities are required for the job analysis. The results of job analysis are job description and job specification. Is the systematic assembly of all the facts about a job. The purpose is to study the individual elements and duties. All information related to the salary and benefits, working hours and conditions, typical tasks and responsibilities are required for the job analysis. The results of job analysis are job description and job specification.

Job Description

Job description is a written statement that defines the duties, relationships and results expected of anyone in the job. It is an overall view of what is to be done in the job. Typically it includes is a written statement that defines the duties, relationships and results expected of anyone in the job. It is an overall view of what is to be done in the job. Typically it includes

Job Title

Date

Title of immediate supervisor

Statement of the Purpose of the Job

Primary Responsibilities

List of Typical Duties and Responsibilities

General Information related to the job

Training requirements

Tool use

Transportation

Signature of the person who has prepared the job description

Job Specification

Job Specification is an analysis of the kind of person it takes to do the job, that is to say, it lists the qualifications. Normally, this would include is an analysis of the kind of person it takes to do the job, that is to say, it lists the qualifications. Typically this would include

Degree of education

Desirable amount of previous experience in similar work

Specific Skills required

Health Considerations

The recruitment and selection is the major function of the human resource department and recruitment process

is the first step towards creating the competitive strength and the strategic advantage for the organizations. Recruitment process involves a systematic procedure from sourcing the candidates to arranging and conducting the interviews and requires many resources and time.

Job design (also referred to as **work design** or **task design**) is the specification of contents, methods and relationship of jobs in order to satisfy technological and organizational requirements as well as the social and personal requirements of the job holder.

Job design means to decide the contents of a job. It fixes the duties and responsibilities of the job, the methods of doing the job and the relationships between the job holder (manager) and his superiors, subordinates and colleagues

Job Simplification

Job simplification is a design method whereby jobs are divided into smaller components and subsequently assigned to workers as whole jobs.

Simplification of work requires that jobs be broken down into their smallest units and then analyzed. Each resulting sub-unit typically consists of relatively few operations. These subunits are then assigned to the workers as their total job.

There appears to be two major advantages in using job simplification. First, since the job requires very little training, they can be completed by less costly unskilled labour. Second, job speed increases because each worker is performing only a small portion of the previously large job and thus is able to master a smaller, less complicated job unit.

On the negative side, job simplification results in workers experiencing boredom, frustration, alienation, lack of motivation and low job satisfaction. This, in turn, leads to lower productivity and increased cost.

Job Enlargement

Job enlargement expands job horizontally. It increases job scope; that is, it increases the number of different operations required in a job and the frequency with which the job cycle is repeated. By increasing the number of tasks an individual performs, job enlargement, increases the job scope, or job diversity. Instead of only sorting the incoming mail by department, for instance, a mail sorter's job could be enlarged to include physically delivering the mail to the various departments or running outgoing letters through the postage

meter.

Efforts at job enlargement have met with less than enthusiastic results. As one employee who experienced such a redesign on his job remarked, " Before I had one lousy job. Now, through enlargement, I have three!". So while job enlargement attacks the lack of diversity in overspecialized jobs, it has done little to provide challenge or meaningfulness to a workers' activities.

Job Rotation

Job rotation refers to the movement of an employee from one job to another. Jobs themselves are not actually changed, only the employees are rotated among various jobs. An employee who works on a routine job moves to work on another job for some hours/days/months and returns back to the first job. This measure relieves the employee from the boredom and monotony, improves the employee's skills regarding various jobs and prepares worker's self-image and provides personal growth. However, frequent job rotations are not advisable in view of their negative impact on the organization and the employee.

Job Enrichment

Job enrichment, as it is currently practiced in industry, is a direct outgrowth of Herzberg's Two Factor Theory of motivation. It is, therefore, based on the assumption that in order to motivate personnel, the job itself must provide opportunities for achievement recognition, responsibility, advancement and growth. The basic idea is to restore to jobs the elements of interest that were taken away under intensive specialization. At this stage it may be necessary to draw a distinction between job rotation, job enlargement and job enrichment. Job enrichment tries to embellish the job with factors that Herzberg characterized as motivators: achievement, recognition, increased responsibilities, opportunities for growth, advancement and increased competence. There is an attempt to build into jobs a higher sense of challenge and achievement, through vertical job loading.

Vertical job loading entails redesigning jobs to give:

1. Greater responsibility,

2. Greater autonomy,

3. More immediate feedback to the individual or group. This might include transferring some of the superior's activities to subordinates.

Horizontal job loading might be applied by having workers perform some of the steps that precedes and follow them in the work flow. A single operator might fit on all four fenders, be responsible for the car's entire front end, or do both rough and finished painting.

A general R**ecruitment process** is as follows:

Identifying the vacancy:

The recruitment process begins with the human resource department receiving requisitions for recruitment from any department of the company. These contain:

Posts to be filled

• Number of persons

• Duties to be performed

• Qualifications required

Preparing the job description and person specification.

Locating and developing the sources of required number and type of employees

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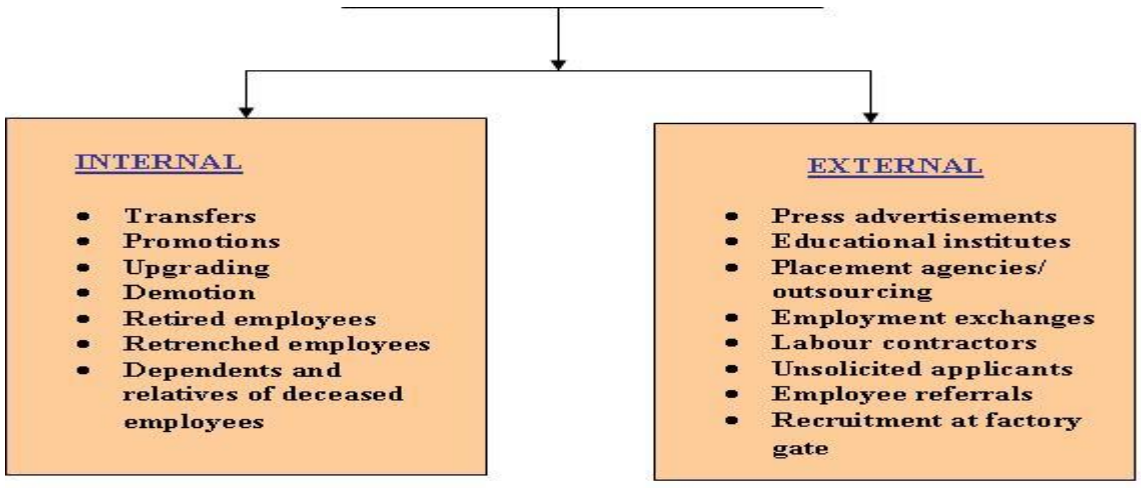
SOURCES OF RECRUITMENT



Employee **Selection** is the process of putting right men on right job. It is a procedure of matching organizational requirements with the skills and qualifications of people. Effective selection can be done only when there is effective matching. By selecting best candidate for the required job, the organization will get quality performance of employees. Moreover, organization will face less of absenteeism and employee turnover problems. By selecting right candidate for the required job, organization will also save time and money. Proper screening of candidates takes place during selection procedure. All the potential candidates

who apply for the given job are tested.

The Employee S**election Process** takes place in following order-

Preliminary Interviews- It is used to eliminate those candidates who do not meet the minimum eligiblity criteria laid down by the organization. The skills, academic and family background, competencies and interests of the candidate are examined during preliminary interview. Preliminary interviews are less formalized and planned than the final interviews. The candidates are given a brief up about the company and the job profile; and it is also examined how much the candidate knows about the company. Preliminary interviews are also called screening interviews.

Application blanks- The candidates who clear the preliminary interview are required to fill application blank. It contains data record of the candidates such as details about age, qualifications, reason for leaving previous job, experience, etc.

Written Tests- Various written tests conducted during selection procedure are aptitude test, intelligence test, reasoning test, personality test, etc. These tests are used to objectively assess the potential candidate. They should not be biased.

Employment Interviews- It is a one to one interaction between the interviewer and the potential candidate. It is used to find whether the candidate is best suited for the required job or not. But such interviews consume time and money both. Moreover the competencies of the candidate cannot be judged. Such interviews may be biased at times. Such interviews should be conducted properly. No distractions should be there in room. There should be an honest communication between candidate and interviewer.

Medical examination- Medical tests are conducted to ensure physical fitness of the potential employee. It will decrease chances of employee absenteeism.

Appointment Letter- A reference check is made about the candidate selected and then finally he is appointed by giving a formal appointment letter.

Selection: Tests

Personality Tests: Selection procedures measure the personality characteristics of applicants that are related to future job performance. Personality tests typically measure one or more of five personality dimensions: extroversion, emotional stability, agreeableness, conscientiousness, and openness to experience.

Advantages

- It can result in lower turnover due if applicants are selected for traits that are highly correlated with employees who have high longevity within the organization
- It can reveal more information about applicant's abilities and interests
- It can identify interpersonal traits that may be needed for certain jobs

Disadvantages

- There is difficult to measure personality traits that may not be well defined
- The applicant's training and experience may have greater impact on job performance than applicant's personality
- The responses by applicant may may be altered by applicant's desire to respond in a way they feel would result in their selection
- There is lack of diversity if all selected applicants have same personality traits
- The cost may be prohibitive for both the test and interpretation of results
- There is lack of evidence to support validity of use of personality tests.

Types of Personality Tests

Personal Attribute Inventory: An interpersonal assessment instrument which consists of 50 positive and 50 negative adjectives from Gough's Adjective Check List. The subject is to select 30 which are most descriptive of the target group or person in question. This instrument was specifically designed to tap affective reactions and may be used in either assessing attitudes toward others or as a self-concept scale.

Personality Adjective Checklist: A comprehensive, objective measure of eight personality styles. These eight personality styles are: introversive, inhibited, cooperative, sociable, confident, forceful, respectful, and sensitive. This instrument is designed for use with non psychiatric patients and normal adults who read minimally at the eighth grade level. Test reports are computer-generated and are intended for use by qualified professionals only. Interpretive statements are based on empirical data and theoretical inference. They are considered probabilistic in nature and cannot be considered definitive.

Cross-Cultural Adaptability Inventory: Self-scoring six-point rating scale is a training instrument designed to provide feedback to individuals about their potential for cross-cultural effectiveness. It is most effective when used as part of a training program. It can also be used as a team-building tool for culturally diverse work

groups and as a counseling tool for people in the process of cross-cultural adjustment. The inventory contains 50 items, distributed among 4 subscales: emotional resilience, flexibility/openness, perceptual acuity, personal autonomy. Materials:

California Psychological Inventory: Multipurpose questionnaire designed to assess normal personality characteristics important in everyday life that individuals make use of to understand, classify, and predict their own behaviors and that of others. In this revision, two new scales, empathy and independence, have been added; semantic changes were made in 29 items; and 18 items were eliminated. The inventory is applicable for use in a variety of settings, including business and industry, schools and colleges, clinics and counseling agencies, and for cross cultural and other research. It may be used to advise employees/applicants about their vocational plans.

Achievement or Performance test: - These tests measure the applicants' ability to do the work. Applicants is simply asked to demonstrate his ability like typing test for the job of typist of making Programme in particular computer language for the job of software development.

Intelligence test/ Aptitude test: - This test tries to measure the intelligence of the applicant. It includes verbal comprehension, reasoning memory test, visualization word fluency etc. These tests are designed for the different age groups. Organization tries to select intelligent people so that they can learn easily during training and learning process.

Interests Test: - Interest tests are designed to discover a person's area of interest and identifying the jobs that will satisfy him. It generally measures interest in outdoor activities mechanical computational artistic musical clerical etc.

Advantages of selection tests:

1. Selection test can be used to weed out the large number of candidates who may not be considered for the employment. Normally organization receives a large number of applications so these tests help to find out the suitable candidates having required characteristics for the position. Selection test will provide cut off point above which candidates may be called for the interview.
2. Selection test can provide the information about the qualities and potential of the prospective employees which cannot be known through other methods including personal interviews. These tests also help for the promotion of the potential candidates.
3. Selection tests are standardized and unbiased method of selecting the candidate. Thus a person who is not selected on the basis of test cannot argue for the partiality in selection process. Impartiality is very important for organizations like public sector.

Selection: Interviews

Interviews: A selection procedure designed to predict future job performance on the basis of applicants' oral responses to oral inquiries.

Advantages

- It is useful for determining if the applicant has requisite communicative or social skills which may be necessary for the job
- The interviewer can obtain supplementary information used to appraise candidates' verbal fluency
- It can assess the applicant's job knowledge
- It can be used for selection among equally qualified applicants
- It enables the supervisor and/or co-workers to determine if there is compatibility between the applicant and the employees
- It allows the applicant to ask questions that may reveal additional information useful for making a selection decision
- The interview may be modified as needed to gather important information

Disadvantages

- The subjective evaluations are made
- The decisions tend to be made within the first few minutes of the interview with the remainder of the interview used to validate or justify the original decision
- The interviewers form stereotypes concerning the characteristics required for success on the job
- The research has shown disproportionate rates of selection between minority and non-minority members using interviews
- The negative information seems to be given more weight
- Not much evidence of validity of the selection procedure not as reliable as tests.

There are two primary types of interviews used by companies: screening interviews, and selection interviews. Every company's hiring process is different. Some companies may require only two interviews while others may require three or more. It is also not uncommon to see a company conduct testing (personality, skills based, aptitude, etc.) as an intermediate step in the hiring process. Here is an overview of the major types of interviews and tips on how to handle them:

Screening Interview: Your first interview with a company will often be a screening interview. The purpose of a screening interview is to ensure that prospective candidates meet the basic qualifications for a given position. It may take place in person or on the telephone. If you meet the basic qualifications, express interest

in the position, and make a positive impression on the interviewer, you will likely be selected for a selection interview.

Selection Interview:

Selection interviews are typically conducted onsite at the hiring company. The purpose of a selection interview is to determine whether a candidate will be selected for the position he or she is interviewing for. A selection interview is typically more rigorous than a screening interview. At this point, a company is trying to decide whether or not you should either be moved to the next step in the hiring process or an offer is going to be extended, so there will be more scrutiny than with a screening interview. The company wants to know - Are you qualified for the job? Are you a good cultural fit? Can you make an immediate impact, or will you need extensive training? Questions will be more specific and your answers will need to be more detailed.

Selection interviews can come in several forms:

Panel Interview

A panel interview is an interview that consists of two or more interviewers. Typically, the interviewers will both ask questions. The purpose of a panel interview is to gain multiple perspectives on a prospective candidate. The key to a panel interview is to keep all interviewers involved. Make eye contact with all interviewers even when answering a question for a specific individual.

One-on-One Interview

A one-on-one interview is an interview with a single interviewer. The key to a one-on-one interview is to build rapport with the interviewer. Smile. Be friendly. Try to match your interviewer's energy level. Typically, you will have a short period of time to make an impact. Know the position and the key attributes the company is seeking, and emphasize those things.

Stress Interview

A stress interview is designed to test your responses in a stressful environment. The interviewer may try to intimidate you, and the purpose is to weed out candidates who don't deal well with adversity. The interviewer will make deliberate attempts to see how you handle yourself using methods such as sarcasm, argumentative style questions, or long awkward silences. The key to a stress interview is to recognize that you are in a stress interview. Don't take it personally. Stay calm, focused, and don't allow yourself to be rushed. Ask for clarification if you need it. Know how to push back. Ask an interviewer for a couple of problems they are currently facing, and propose solutions.

Difference between Recruitment and Selection

Recruitment	**Selection**

1. Recruitment refers to the process of identifying and encouraging prospective employees to apply for jobs. 2. Recruitment is said to be positive in its approach as it seeks to attract as many candidates as possible.	1. Selection is concerned with picking up the right candidates from a pool of applicants. 2. Selection on the other hand is negative in its application in as much as it seeks to eliminate as many unqualified applicants as possible in order to identify the right candidates.

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Placement is a process of assigning a specific job to each of the selected candidates. It involves assigning a specific rank and responsibility to an individual. It implies matching the requirements of a job with the qualifications of the candidate.

The significances of placement are as follows: -

* It improves employee morale.
* It helps in reducing employee turnover.
* It helps in reducing absenteeism.
* It helps in reducing accident rates.
* It avoids misfit between the candidate and the job.
* It helps the candidate to work as per the predetermined objectives of the organization.

Induction

Once an employee is selected and placed on an appropriate job, the process of familiarizing him with the job and the organization is known as induction. Induction is the process of receiving and welcoming an employee when he first joins the company and giving him basic information he needs to settle down quickly and happily and stars work.

The objectives of Induction

Induction is designed to achieve following objectives: -

* To help the new comer to overcome his shyness and overcome his shyness nervousness in meeting new people in a new environment.
* To give new comer necessary information such as location of a café, rest period etc.
* To build new employee confidence in the organization.
* It helps in reducing labor turnover and absenteeism.

* It reduces confusion and develops healthy relations in the organization.
* To ensure that the new comer do not form false impression and negative attitude towards the organization.
* To develop among the new comer a sense of belonging and loyalty to the organization.

The advantages of Formal induction

* Induction helps to build up a two-way channel of communication between management and workers.
* Proper induction facilitates informal relation and team work among employee.
* Effective induction helps to integrate the new employee into the organization and to develop a sense of belonging.
* Induction helps to develop good relation.
* A formal induction programme proves that the company is taking interest in getting him off to good start.
* Proper induction reduces employee grievances, absenteeism and labor turnover.
* Induction is helpful in supplying information concerning the organization, the job and employee welfare facilities.

The contents of Induction programme

* Brief history and operations of the company.
* The company's organization structure.
* Policies and procedure of the company.
* Products and services of the company.
* Location of department and employee facilities.
* Safety measures.
* Grievances procedures.
* Benefits and services of employee.
* Standing orders and disciplinary procedures.
* Opportunities for training, promotions, transfer etc.
* Suggestion schemes.
* Rules and regulations.

Job Changes

Mobility of employees from one job to another through transfer, promotion and demotion is internal mobility and some employees leave the organization due to resignation, retirement and termination is called external mobility. Taking internal and external together makes job change.

Purpose of Job Change

- To maximize employee efficiency.
- To improve organizational effectiveness.
- To ensure discipline.
- To cope up with change in operation.

Transfer

A transfer refers to a horizontal or lateral movement of an employee from one job to another in the same organization without any significant change in status or pay. It has been defined as "a lateral shift causing movement of individuals from one position to another usually without involving any marked change in duties, responsibilities, skills needed or compensation."

Purposes of transfer

- To meet organizational needs.
- To adjust the work force.
- To better utilize employees.
- To enhance job skills, knowledge and aptitude.
- To make employee more versatile.
- To satisfy employee needs.
- To punish non-performers.

Promotions

Promotion refers to advancement of an employee to a higher post carrying greater responsibility, higher status and better salary. It is the upward movement of an employee in the organization's hierarchy, to another job commanding greater authority, higher status and better working conditions.

Advantages of Promotion

- To retain skilled and talented employees.
- To boost the morale and sense of belonging of employees.
- To utilize more effectively the knowledge and skills of employees.
- To attract competent internal source of employees for higher level jobs.
- To develop a competitive spirit among employees for acquiring knowledge and skills required by higher level jobs.

Demotions

Demotion is “reverse” of promotion. Demotion is the lowering of a rank, reduction in salary, status and responsibilities. It may be defined as the assignment of an individual to a job of lower rank and pay usually involving lower level of authority and responsibility. Demotion is normally used as a punishment for breach of discipline. It brings bad name to the employee. The juniors supersede a person which brings humiliation. Even the reduction of pay will adversely affect the budget of an employee.

Causes of Demotion:

Demotion may take place due to the following reasons:

1. Breach of Discipline: A breach of discipline may attract demotion as a punishment. An organization can work only if proper discipline is maintained. A punitive action for such breach may be necessary so that people do not flout rules, regulation etc. of the company.

2. Inadequacy of Knowledge: A person may not be competent to perform his job properly. He may not be able to meet job requirements. In such a situation demotion becomes necessary.

3. Unable to Cope With Change: Now-a-days, there is a rapid change in technology and methods of work. The existing employees may not be able to adjust themselves as per the new requirements. It may be due to lack of education, technical skill, ill health, old age or other personal reasons. Under these circumstances new persons may be needed to take up such jobs.

4. Organizational Re-Organization: Sometimes there may be organizational changes. It may be necessitated by either combining the departments or closing of some sections or departments. In such situations the number of positions is reduced and some employees may be posted at the lower positions until normality is restored. Such demotions are not due to any fault of the employees.

Separation

Separated employees include employees who retire. Employee separation, in some instances, is a relatively neutral way to describe the end of the employment relationship. Separation can occur when the employee doesn't necessarily want to leave, but does so anyway for reasons other than leaving the company for a better opportunity or embarking upon a new career path. Employee separation is a phrase also used to describe the end of the employment relationship due to death.

Unit-III: Training and Development

Concept of Training:

What is meant by training? Training is the process of teaching the new and/or present employees the basic skills they need to effectively perform their jobs. Alternatively speaking, training is the act of increasing the knowledge and skill of an employee for doing his/her job.

Thus, training refers to the teaching and learning activities carried on for the primary purpose of helping members of an organization to acquire and also to apply the required knowledge, skill and attitudes to perform their jobs effectively.

According to Edwin B. Flippo, "training is the act of increasing the knowledge and skills of an employee for doing a particular job."

Michael Armstrong points "training is the systematic modification of behaviour through learning which occurs as a result of education, instruction, development and planned experience".

In the opinion of Michael J. Jucious, "training is any process by which the attitudes, skills and abilities of employees to perform specific jobs are improved."

Thus, it can be concluded that training is a process that tries to improve skills, or add to the existing level of knowledge so that the employee is better equipped to do his present job, or to mould him to be fit for a higher job involving higher responsibilities. In other words, training is a learning experience that seeks a relatively permanent change in an individual that will improve his/her ability to perform his job.

Importance of training:

The following two Chinese proverbs highlight the importance of the employee training:

"Give a man a fish, and you have given him meal. Teach man to fish, and you have given him livelihood."

"If you wish to plan for a year sow seeds, if you wish to plan for ten years plant trees, if you plan for life-time develop men."

The importance of employee training can best be appreciated with the help of various advantages it offers to both employees and employers.

These are explained under the following heads:

1. Better Performance:

Training improves employee's ability and skills and, in turn, improves employee's performance both in quantity and quality. Better or increased employee performance directly leads to increased operational productivity and increased organisational profits. Improvements in employee performance/productivity in developed countries' lend support to this statement.

2. Improved Quality:

In formal training programmes, the best methods of performing jobs are standardised and then taught to employees. This offers two-fold benefits. Firstly, uniformity in work performance helps improve the quality of work or service. Secondly, better informed, or say, trained workers are less likely to make operational mistakes.

3. Less Supervision:

A trained worker is self-reliant. He knows his work and way to perform it well. Therefore, his work requires less supervision. The supervisor can devote his time on more urgent works.

4. Less Learning Period:

A well planned and systematically organised training programme reduces the time and cost involved in learning. Training enables to avoid waste of time and efforts in learning through trial and error method'.

5. High Morale:

Training not only improves the ability and skill of employees, but also changes employee attitude toward positive. Higher performance, job satisfaction, job security and avenues for internal promotion lead to high morale among the employees. High morale, in turn, makes employees' lore loyal to the organisation.

6. Personal Growth:

Training improves employee's ability, knowledge and skills and, thus, prevents employee's obsolescence. This makes employees growth-oriented.

7. Favourable organisational climate:

The aforesaid advantages combined lead to an improved and favourable organizational climate characterized by better industrial relations and disciplines, reduced resistance to change, reduced absenteeism and turnover of employees, and improved stability of organisation.

Thus, it may be observed that the importance of training can be imbued with multiplicity of justifications. In fact, a systematic and effective training is an invaluable investment in the human resources of an organisation.

Therefore, no organisation can choose whether or not to train employees.

Types of Training:

Various types of training can be given to the employees such as induction training, refresher training, on the job training, vestibule training, and training for promotions.

Some of the commonly used training programs are listed below:

1. Induction training:

Also known as orientation training given for the new recruits in order to make them familiarize with the internal environment of an organization. It helps the employees to understand the procedures, code of conduct, policies existing in that organization.

2. Job instruction training:

This training provides an overview about the job and experienced trainers demonstrates the entire job. Addition training is offered to employees after evaluating their performance if necessary.

3. Vestibule training:

It is the training on actual work to be done by an employee but conducted away from the work place.

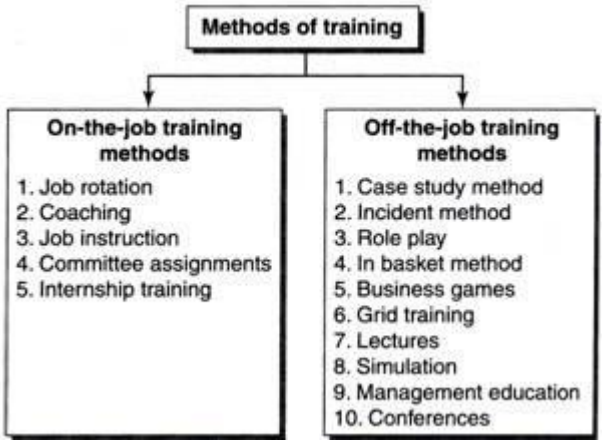
4. Refresher training:

This type of training is offered in order to incorporate the latest development in a particular field. This training is imparted to upgrade the skills of employees. This training can also be used for promoting an employee.

5. Apprenticeship training:

Apprentice is a worker who spends a prescribed period of time under a supervisor.

Training Methods: On Job Training and off the Job Training Methods



A large variety of methods of training are used in business. Even within one organization different methods are used for training different people. All the methods are divided into two classifications for:

A. On-the-job Training Methods:

1. Coaching
2. Mentoring
3. Job Rotation
4. Job Instruction Technology
5. Apprenticeship
6. Understudy

B. Off-the-Job Training Methods:

1. Lectures and Conferences
2. Vestibule Training
3. Simulation Exercises
4. Sensitivity Training
5. Transactional Training

A. On-the-job training Methods:

Under these methods new or inexperienced employees learn through observing peers or managers performing the job and trying to imitate their behaviour. These methods do not cost much and are less disruptive as employees are always on the job, training is given on the same machines and experience would be on already approved standards, and above all the trainee is learning while earning. Some of the commonly used methods are:

1. Coaching:

Coaching is a one-to-one training. It helps in quickly identifying the weak areas and tries to focus on them. It also offers the benefit of transferring theory learning to practice. The biggest problem is that it perpetrates the existing practices and styles. In India most of the scooter mechanics are trained only through this method.

2. Mentoring:

The focus in this training is on the development of attitude. It is used for managerial employees. Mentoring is always done by a senior inside person. It is also one-to- one interaction, like coaching.

3. Job Rotation:

It is the process of training employees by rotating them through a series of related jobs. Rotation not only makes a person well acquainted with different jobs, but it also alleviates boredom and allows to develop rapport with a number of people. Rotation must be logical.

4. Job Instructional Technique (JIT):

It is a Step by step (structured) on the job training method in which a suitable trainer (a) prepares a trainee with an overview of the job, its purpose, and the results desired, (b) demonstrates the task or the skill to the trainee, (c) allows the trainee to show the demonstration on his or her own, and (d) follows up to provide feedback and help. The trainees are presented the learning material in written or by learning machines through a series called ‘frames’. This method is a valuable tool for all educators (teachers and trainers). It helps us:

a. To deliver step-by-step instruction

b. To know when the learner has learned

c. To be due diligent (in many work-place environments)

5. Apprenticeship:

Apprenticeship is a system of training a new generation of practitioners of a skill. This method of training is in vogue in those trades, crafts and technical fields in which a long period is required for gaining proficiency. The trainees serve as apprentices to experts for long periods. They have to work in direct association with and also under the direct supervision of their masters.

The object of such training is to make the trainees all-round craftsmen. It is an expensive method of training.

Also, there is no guarantee that the trained worker will continue to work in the same organisation after securing training. The apprentices are paid remuneration according the apprenticeship agreements.

6. Understudy:

In this method, a superior gives training to a subordinate as his understudy like an assistant to a manager or director (in a film). The subordinate learns through experience and observation by participating in handling day to day problems. Basic purpose is to prepare subordinate for assuming the full responsibilities and duties.

B. Off-the-job Training Methods:

Off-the-job training methods are conducted in separate from the job environment, study material is supplied, there is full concentration on learning rather than performing, and there is freedom of expression. Important methods include:

1. Lectures and Conferences:

Lectures and conferences are the traditional and direct method of instruction. Every training programme starts with lecture and conference. It's a verbal presentation for a large audience. However, the lectures have to be motivating and creating interest among trainees. The speaker must have considerable depth in the subject. In the colleges and universities, lectures and seminars are the most common methods used for training.

2. Vestibule Training:

Vestibule Training is a term for near-the-job training, as it offers access to something new (learning). In vestibule training, the workers are trained in a prototype environment on specific jobs in a special part of the plant.

An attempt is made to create working condition similar to the actual workshop conditions. After training workers in such condition, the trained workers may be put on similar jobs in the actual workshop.

This enables the workers to secure training in the best methods to work and to get rid of initial nervousness. During the Second World War II, this method was used to train a large number of workers in a short period of time. It may also be used as a preliminary to on-the job training. Duration ranges from few days to few weeks. It prevents trainees to commit costly mistakes on the actual machines.

3. Simulation Exercises:

Simulation is any artificial environment exactly similar to the actual situation. There are four basic simulation

techniques used for imparting training: management games, case study, role playing, and in-basket training.

(a) Management Games:

Properly designed games help to ingrain thinking habits, analytical, logical and reasoning capabilities, importance of team work, time management, to make decisions lacking complete information, communication and leadership capabilities. Use of management games can encourage novel, innovative mechanisms for coping with stress.

Management games orient a candidate with practical applicability of the subject. These games help to appreciate management concepts in a practical way. Different games are used for training general managers and the middle management and functional heads – executive Games and functional heads.

(b) Case Study:

Case studies are complex examples which give an insight into the context of a problem as well as illustrating the main point. Case Studies are trainee centered activities based on topics that demonstrate theoretical concepts in an applied setting.

A case study allows the application of theoretical concepts to be demonstrated, thus bridging the gap between theory and practice, encourage active learning, provides an opportunity for the development of key skills such as communication, group working and problem solving, and increases the trainees" enjoyment of the topic and hence their desire to learn.

(c) Role Playing:

Each trainee takes the role of a person affected by an issue and studies the impacts of the issues on human life and/or the effects of human activities on the world around us from the perspective of that person.

It emphasizes the "real- world" side of science and challenges students to deal with complex problems with no single "right" answer and to use a variety of skills beyond those employed in a typical research project.

In particular, role-playing presents the student a valuable opportunity to learn not just the course content, but other perspectives on it. The steps involved in role playing include defining objectives, choose context & roles, introducing the exercise, trainee preparation/research, the role-play, concluding discussion, and assessment. Types of role play may be multiple role play, single role play, role rotation, and spontaneous role play.

(d) In-basket training:

In-basket exercise, also known as in-tray training, consists of a set of business papers which may include e-mail SMSs, reports, memos, and other items. Now the trainer is asked to prioritise the decisions to be made immediately and the ones that can be delayed.

4. Sensitivity Training:

Sensitivity training is also known as laboratory or T-group training. This training is about making people understand about themselves and others reasonably, which is done by developing in them social sensitivity and behavioral flexibility. It is ability of an individual to sense what others feel and think from their own point of view.

It reveals information about his or her own personal qualities, concerns, emotional issues, and things that he or she has in common with other members of the group. It is the ability to behave suitably in light of understanding.

A group's trainer refrains from acting as a group leader or lecturer, attempting instead to clarify the group processes using incidents as examples to clarify general points or provide feedback. The group action, overall, is the goal as well as the process.

The Design of the Training Program can be undertaken only when a clear training objective has been produced. The training objective clears what goal has to be achieved by the end of training program i.e. what the trainees are expected to be able to do at the end of their training. **Training objectives** assist trainers to design the training program.

The trainer – Before starting a training program, a trainer analyzes his technical, interpersonal, judgmental skills in order to deliver quality content to trainers.

The trainees – A good **training design** requires close scrutiny of the **trainees** and their profiles. Age, experience, needs and expectations of the trainees are some of the important factors that affect training design.

Training climate – A good training climate comprises of ambience, tone, feelings, positive perception for training program, etc. Therefore, when the climate is favorable nothing goes wrong but when the

climate is unfavorable, almost everything goes wrong.

Trainees' learning style – the learning style, age, experience, educational background of trainees must be kept in mind in order to get the right pitch to the design of the program.

Training strategies – Once the training objective has been identified, the trainer translates it into specific training areas and modules. The trainer prepares the priority list of about what must be included, what could be included.

Training topics – After formulating a strategy, **trainer** decides upon the content to be delivered. Trainers break the content into headings, topics, ad modules. These topics and modules are then classified into information, knowledge, skills, and attitudes.

Sequence the contents – Contents are then sequenced in a following manner:

- From simple to complex
- Topics are arranged in terms of their relative importance
- From known to unknown
- From specific to general
- Dependent relationship

Training tactics – Once the objectives and the strategy of the training program becomes clear, trainer comes in the position to select most appropriate tactics or methods or techniques. The method selection depends on the following factors:

- Trainees' background
- Time allocated
- Style preference of trainer
- Level of competence of trainer
- Availability of facilities and resources, etc

Evaluation of Training Effectiveness

Donald Kirkpatrick, professor emeritus, university of Wisconsin began working on evaluating the effectiveness of training very early in his life. His early work on the same was published in the year 1959 in a

journal of American Society of Training Directors. He laid out four levels for evaluation of any training. This model is arguably the most widespread for evaluation in use. It is simple, very flexible and complete. The four levels as described by Kirkpatrick are as follows:

1. Reaction of the Trainee - thoughts and feelings of the participants about the training
2. Learning - the increase in knowledge or understanding as a result of the training
3. Behavior - extent of change in behavior, attitude or capability
4. Results - the effect on the bottom line of the company as a result of the training.

Reaction

Reaction implies how favorably the participants have responded to the training. This evaluation is primarily quantitative in nature and is a feedback to the training and the trainer. The most common collection tool is the questionnaire that analyses the content, methodology, facilities and the course content.

Learning

At the level of learning the evaluation is done on the basis of change in the ASK (Attitudes, skills and knowledge) of the trainees. The evaluation involves observation and analysis of the voice, behaviour, text. Other tools used apart from the observation are interviews, surveys, pre and post tests etc.

Behaviour

Behaviour evaluation analyses the transfer of learning from the training session to the work place. Here the primary tool for evaluation is predominantly the observation. Apart from the observation, a combination of questionnaires and 360 feedbacks are also used.

Results

The results stage makes evaluations towards the bottom line of the organization. Here the definition of the results depends upon the goal of the training program. The evaluation is done by using a control group allowing certain time for the results to be achieved.

Executive Development Programme

It means that executive development focuses more on the executive's personal growth. Thus, executive development consists of all the means that improve his/her performance and behaviour. Executive development helps understand cause and effect relationship, synthesizes from experience, visualizes relationships or thinks logically. That is why some behavioural scientists suggest that the executive development is predominantly an educational process rather than a training process.

Flippo has viewed that "executive/management development includes the process by which managers and executives acquire not only skills and competency in their present jobs but also capabilities for future managerial tasks of increasing difficulty and scope".

According to S.B. Budhiraja, former Managing Director of Indian Oil Corporation. "Any activity designed to improve the performance of existing managers and to provide for a planned growth of managers to meet future organisational requirements is called management development". It is now clear from the above definitions of executive/management development that it is based on certain assumptions.

Executive Development Programme: Process

Like any learning programme, executive development also involves a process consisting o) certain steps. Though sequencing these various steps in a chronological order is difficult, behavioural scientists have tried to list and sequence them in six steps as shown in figure 11.1

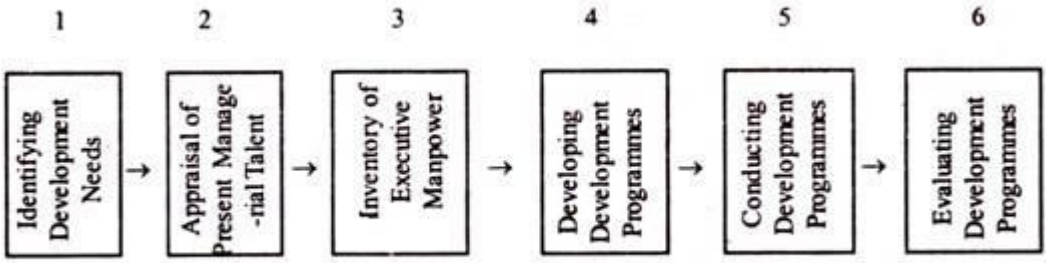


Fig. 11.1: Executive Development Process

These steps, also called the components of the executive development programme, have been- discussed in the succeeding paragraphs.

Identifying Development Needs:

Once the launching of an executive development programme (EDP) is decided, its implementation begins with identifying the developmental needs of the organisation concern. For this, first of all, the present and future developmental needs for executives/ managers ascertained by identifying how many and what type of executives will be required in the organisation at present and in future.

This needs to be seen in the context of organizational as well as individual, i.e. manager needs. While organisational needs may be identified by making organisational analysis in terms of organisation's growth plan, strategies, competitive environment, etc., individual needs to be identified by the individual career planning and appraisal.

Appraisal of Present Managerial Talent:

The second step is an appraisal of the present managerial talent for the organisation. For this purpose, a qualitative assessment of the existing executives/managers in the organisation is made. Then, the performance

of every executive is compared with the standard expected of him.

Inventory of Executive Manpower:

Based on information gathered from human resource planning, an inventory is prepared to have complete information about each executive in each position. Information on the executive's age, education, experience, health record, psychological test results, performance appraisal data, etc. is collected and the same is maintained on cards and replacement tables. An analysis of such inventory shows the strengths and also discloses the deficiencies and weaknesses of the executives in certain functions relative to the future needs of the concern organisation. From this executive inventory, we can begin the fourth step involved in the executive development process.

Developing Development Programmes:

Having delineated strengths and weaknesses of each executive, the development programmes are tailored to fill in the deficiencies of executives. Such tailor made programmes of development focus on individual needs such as skill development, changing attitudes, and knowledge acquisition.

Conducting Development Programmes:

At this stage, the manager actually participates in development programmes. It is worth mentioning that no single development programme can be adequate for all managers. The reason is that each manager has a unique set of physical, intellectual and emotional characteristics.

As such, there can be different development programmes to uniquely suit to the needs of an executive/ manager. These development programmes may be on-the-job or off-the-job programmes organised either by the organisation itself or by some outside agencies.

Executive Development Programme: Techniques

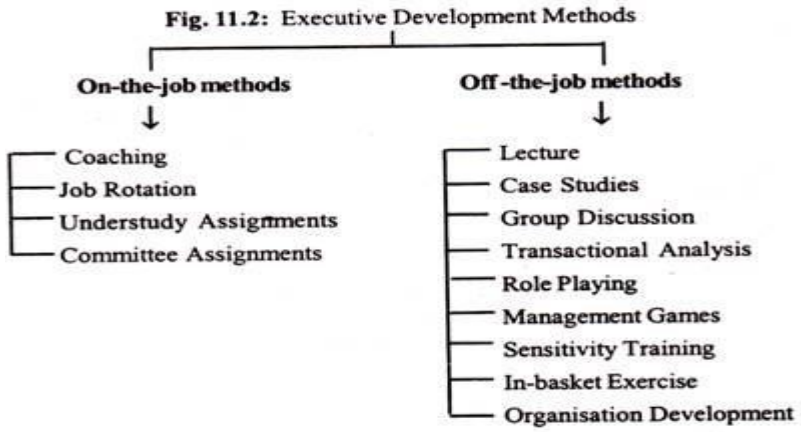


Fig. 11.2: Executive Development Methods

Career Planning and Development

- A Career has been defined as the sequence of a person's experiences on different jobs over the period of time.
- It is viewed as fundamentally a relationship between one or more organizations and the individual. To some a career is a carefully worked out plan for self advancement to others it is a calling-life role to others it is a voyage to self discovery and to still others it is life itself.
- A career is a sequence of positions/jobs held by a person during the course of his working life.
- According to Edwin B. Flippo," A career is a sequence of separate but related work activities that provide continuity, order and meaning to a person's life".
- According to Garry Dessler, "The occupational positions a person has had over many years". Many of today's employees have high expectations about their jobs. There has been a general increase in the concern of the quality of life. Workers expect more from their jobs than just income.
- A further impetus to career planning is the need for organizations to make the best possible use of their most valuable resources the people in a time of rapid technological growth and change
- Career development, both as a concept and a concern is of recent origin. The reason for this lack of concern regarding career development for a long time has been the careless, unrealistic assumption about employees functioning smoothly along the right lines, and the belief that the employees guide themselves in their careers.

OBJECTIVE OF CAREER PLANNING

- To attract and retain the right type of person in the organization
- To map out career of employees suitable to their ability and their willingness to be trained and developed for higher positions
- To have a more stable workforce by reducing labour turnover and absenteeism.
- It contributes to man power planning as well as organizational development and effective achievement of corporate goals
- To increasingly utilize the managerial talent available at all levels within the organization
- To improve employee morale and motivation by matching skills to job requirement and by providing opportunities for promotion
- It helps employee in thinking of long term involvement with the organisation
- To provide guidance and encourage employees to fulfill their potentials
- To achieve higher productivity and organizational development
- To ensure better use of human resource through more satisfied and productive employees
- To meet the immediate and future human resource needs of the organisation on the timely basis

NEED FOR CAREER PLANNING

- To desire to grow and scale new heights.
- Realize and achieve the goals.
- Performance measure.
- High employee turnover
- To educate the employees
- It motivates employees to grow.
- It motivates employees to avail training and development.
- It increases employee loyalty as they feel organization care's about them.

CAREER PLANNING AND DEVELOPMENT PROCESS

1. Identifying individual needs and aspirations: It's necessary to identify and communicate the career goals, aspiration and career anchors of every employee because most individuals may not have a clear idea about these. For this purpose, a human resource inventory of the organization and employee potential areas concerned

2. Analyzing career opportunities: The organizational set up, future plans and career system of the employees are analyzed to identify the career opportunities available within it. Career paths can be determined for each position. It can also necessary to analyze career demands in terms of knowledge, skill, experience, aptitude etc

3. Identifying match and mismatch: A mechanism to identifying congruence between individual current aspirations and organizational career system is developed to identify and compare specific areas of match and mismatch for different categories of employees

4. Formulating and implementing strategies: Alternative action plans and strategies for dealing with the match and mismatch are formulated and implemented

5. Reviewing career plans: A periodic review of the career plan is necessary to know whether the plan is contributing to effective utilization of human resources by matching employee objectives to job needs. Review will also indicate to employees in which direction the organization is moving, what changes are likely to take place and what skills are needed to adapt to the changing needs of the organization.

Performance Appraisal is the procedure done after the performance of the current year or by monthly basis also

Potential appraisal is done with the skills which are present in the individual eg:- Leadership qualities, Communication Skills etc.

POTENTIAL APPRAISAL

Potential Appraisal is the identification of the hidden talents and skills of a person. The person might or might not be aware of them.

Potential appraisal is a future – oriented appraisal whose main objective is to identify and evaluate the potential of the employees to assume higher positions and responsibilities in the organizational hierarchy. Many organization consider and use potential appraisal as a part of the performance appraisal processes.

Performance Appraisal is the systematic evaluation of the performance of employees and to understand the abilities of a person for further growth and development. Performance appraisal is generally done in systematic ways which are as follows:

1. The supervisors measure the pay of employees and compare it with targets and plans.
2. The supervisor analyses the factors behind work performances of employees.
3. The employers are in position to guide the employees for a better performance.

Objectives of Performance Appraisal

Performance Appraisal can be done with following objectives in mind:

1. To maintain records in order to determine compensation packages, wage structure, salaries raises, etc.
2. To identify the strengths and weaknesses of employees to place right men on right job.
3. To maintain and assess the potential present in a person for further growth and development.
4. To provide a feedback to employees regarding their performance and related status.
5. To provide a feedback to employees regarding their performance and related status.
6. It serves as a basis for influencing working habits of the employees.
7. To review and retain the promotional and other training programmes.

Performance Appraisal Methods

Traditional Methods

1. <u>Critical incident method</u>

This format of performance appraisal is a method which is involved identifying and describing specific incidents where employees did something really well or that needs improving during their performance period.

2. Weighted checklist method

In this style, performance appraisal is made under a method where the jobs being evaluated based on descriptive statements about effective and ineffective behavior on jobs.

3. Paired comparison analysis

This form of performance appraisal is a good way to make full use of the methods of options. There will be a list of relevant options. Each option is in comparison with the others in the list. The results will be calculated and then such option with highest score will be mostly chosen.

4. Graphic rating scales

This format is considered the oldest and most popular method to assess the employee's performance.

In this style of performance appraisal, the management just simply does checks on the performance levels of their staff.

5. Essay Evaluation method

In this style of performance appraisal, managers/ supervisors are required to figure out the strong and weak points of staff's behaviors. Essay evaluation method is a non-quantitative technique. It is often mixed with the method the graphic rating scale.

Modern Methods

6. Behaviorally anchored rating scales

This formatted performance appraisal is based on making rates on behaviors or sets of indicators to determine the effectiveness or ineffectiveness of working performance. The form is a mix of the rating scale and critical incident techniques to assess performance of the staff.

7. Performance ranking method

The performance appraisal of ranking is used to assess the working performance of employees from the highest to lowest levels.

Managers will make comparisons of an employee with the others, instead of making comparison of each employee with some certain standards.

8. Management By Objectives (MBO) method

MBO is a method of performance appraisal in which managers or employers set a list of objectives and make assessments on their performance on a regular basis, and finally make rewards based on the results achieved. This method mostly cares about the results achieved (goals) but not to the way how employees can fulfill them.

9. 360 degree performance appraisal

The style of 360 degree performance appraisal is a method that employees will give confidential and anonymous assessments on their colleagues. This post also information that can be used as references for such methods of performance assessments of 720, 540, 180…

10.Forced ranking (forced distribution)

In this style of performance appraisal, employees are ranked in terms of forced allocations.

For instance, it is vital that the proportions be shared in the way that 10 or 20 % will be the highest levels of performances, while 70 or 80% will be in the middle level and the rest will be in the lowest one.

11. Behavioral Observation Scales

The method based on the scales of observation on behaviors is the one in which important tasks that workers have performed during their working time will be assessed on a regular basis.

Limitations of performance appraisal methods

1. Halo Effect

The rater may base the full appraisal on the basis or one positive quality which was found out earlier. For e.g. If a person is evaluated on one quality i.e. emotional stability and if he scores very high in the case of emotional stability, then the rater may also give him high scores (marks or grades) for other qualities such as intelligence, creativity etc., even without judging these characteristics.

2. Problem of Leniency or Strictness

Many raters are too lenient (not strict) in their ratings. High scores may be given to all employees, even if they have no merit. Also a reverse situation may take place, where all employees are rated very strictly and very low scores are given.

3. Central Tendency

Sometimes a rater gives only middle range scores to all individuals. Extremely high or low scores are avoided. This is called Central Tendency.

4. Personal Bias

Performance appriasal is affected by personal bias of the rater. If the rater has good relations with the ratee (an employee who is getting rated), he may give higher scores to the ratee, even though the ratee does not deserve such high scores. So personal bias may lead to favoured treatment for some employees, and bad treatment to others.

5. Paper Work

Some supervisors complain that performance appraisal is pointless paper work. They complain because many times, performance appraisal reports are found only in the files. It does not serve any practical purpose. In other words, the performance appraisal reports are not used by some organisations. They are conducted just as a formality or for the name sake.

6. Fear of Spoiling Relations

Performance appraisal may also affect superior-subordinate relations. An appraisal makes the superior more of

a judge than a coach. So, the subordinate may have a feeling of suspicion and mistrust, about the superior.

7. Evaluate performance not person

The rater should evaluate the performance, i.e. output, new ideas, extraordinary efforts, etc. and not the person. In reality, the person is evaluated and not his performance. It should be noted that failure is an event and a not a person.

8. Horn Effect

Sometimes the raters may evaluate on the basis of one negative quality. This results in overall lower rating of the particular employee. For e.g. "He does not shave regularly. Therefore, he must be lazy at work."

9. Spillover Effect

In this case, the present performance appraisal is greatly influenced by past performance. A person who has not done a good job in the past is considered (assumed) to be bad for doing present work.

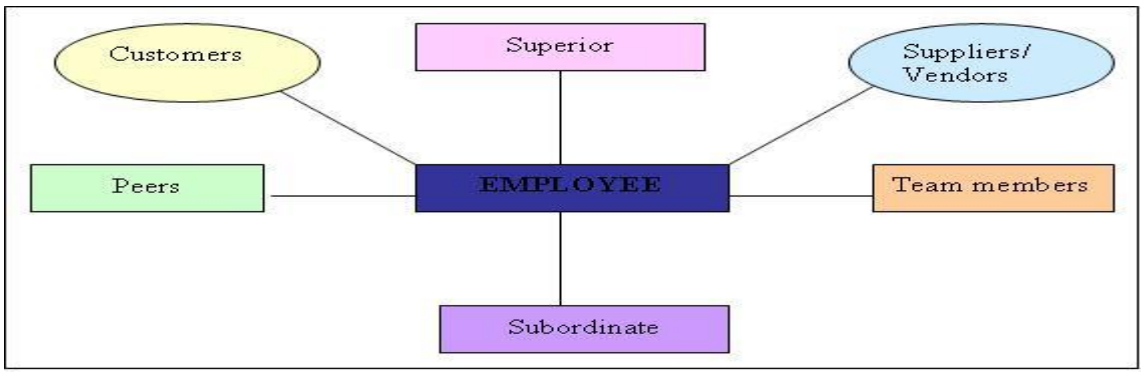
Introduction to Performance Management

Performance management is the process of creating a work environment or setting in which people are enabled to perform to the best of their abilities. It is the main vehicle by which managers communicate what is required from employees and give feedback on how well they are achieving job goals (CIPD, 2009). It brings together many of the elements that make up the practice of people management, including in particular learning and development. Performance management establishes shared understanding of what is to be achieved and provides an approach to leading and developing people that will ensure it is achieved; as such it is an essential element of your role and will support your relationship with individuals in your team.

360 degree feedback, also known as 'multi-rater feedback', is the most comprehensive appraisal where the feedback about the employees' performance comes from all the sources that come in contact with the employee on his job.

360 degree appraisal has four integral components:

1.Self appraisal
2. Superior's appraisal
3. Subordinate's appraisal
4. Peer appraisal.



360 degree performance appraisal is also a powerful developmental tool because when conducted at regular intervals (say yearly) it helps to keep a track of the changes others' perceptions about the employees. A 360 degree appraisal is generally found more suitable for the managers as it helps to assess their leadership and managing styles. This technique is being effectively used across the globe for performance appraisals. Some of the organizations following it are Wipro, Infosys, and Reliance Industries etc.

Management By Objectives (MBO) method

MBO is a method of performance appraisal in which managers or employers set a list of objectives and make assessments on their performance on a regular basis, and finally make rewards based on the results achieved. This method mostly cares about the results achieved (goals) but not to the way how employees can fulfill them.

Unit-IV: Compensation and Maintenance

Compensation:

Compensation is a systematic approach to providing monetary value to employees in exchange for work performed. Compensation may achieve several purposes assisting in recruitment, job performance, and job satisfaction.

Compensation is a tool used by management for a variety of purposes to further the existance of the company. Compensation may be adjusted according the the business needs, goals, and available resources.

Compensation may be used to:

•recruit and retain qualified employees.

•increase or maintain morale/satisfaction.

•reward and encourage peak performance.

•achieve internal and external equity.

•reduce turnover and encourage company loyalty.

•modify (through negotiations) practices of unions.

Components of Employee Remuneration: Base and Supplementary

1. Basic pay
2. Dearness allowance
3. House rental allowance
4. Medical allowance
5. City compensatory allowance
6. Conveyance allowances
7. Incentives
8. Fringe benefits

I. Basic Pay

It is the fixed & primary part of the pay-package.

For Blue-Collared employees, basic wage may be based upon the work done (i.e. piece wage system)

For White-Collared employees, basic wage is generally time bound (i.e. time wage system)

Factors which determine the basic wage/salary:-

1. Job-Evaluation
2. Demand for & supply of Labor
3. Prevailing wage-rate
4. Statutory requirements (minimum wage-rate)
5. Employer's ability to pay

II. Allowances/ Supplementary

These allowances ensure the retention and prolonged years of service of am employee in the same organization, as it provides job & salary satisfaction.

1. Dearness allowance- This allowance is given to deal with the pressure of inflation in the economy. It protects the real income (what we get in-hand) against inflation.

2. House rental allowance- Those employers who do not provide living accommodation to its employees, they provide HRA to its employees. It is calculated as a percentage of basic pay.

3. City compensatory allowance- This kind of allowance is generally paid to employees in Metropolitan Cities or other big cities where Cost of Living is comparatively higher than other cities.

4. Conveyance allowances- Some employers pay Travelling Allowance to their employees. It is usually fixed sum, which is paid to cover some part of travelling charges.

5. Incentives- Incentive Compensation is the Performance-Linked remuneration. It is paid with a view to inspire, encourage & motivate employees to work hard & do better. Incentives can be both Individual & Group- Based.

6. Fringe Benefits - These are the additional benefits that an employee gets in addition to the Basic Pay. This is usually paid to Executive-Class Employees.

Job evaluation – concept, process and significance;

JOB EVALUATION

Job evaluation is a process of analyzing and assessing the various jobs systematically to ascertain their relative worth in an organization.

Jobs are evaluated on the basis of content, placed in order of importance. This establishes Job Hierarchies, which is a purpose of fixation of satisfactory wage differentials among various jobs.

Jobs are ranked (not jobholders)

Job Evaluation involves determination of relative worth of each job for the purpose of establishing wage and salary differentials. Relative worth is determined mainly on the basis of job description and job specification only. Job Evaluation helps to determine wages and salary grades for all jobs. Employees need to be compensated depending on the grades of jobs which they occupy.

Clearly remuneration must be based on the relative worth of each job.

SCOPE OF JOB EVALUATION

The job evaluation is done for the purpose of wage and salary differentials, demand for and supply of labour, ability to pay, industrial parity, collective bargaining etc

PROCESS OF JOB EVALUATION:

1. Defining objectives of job evaluation

i. Identify jobs to be evaluated (Benchmark jobs or all jobs)

ii. Who should evaluate job?

iii. What training do the evaluators need?

iv. How much time involved?

v. What are the criteria for evaluation?

vi. Methods of evaluation to be used

2. Wage Survey

3. Employee Classification

4. Establishing wage and salary differentials.

METHODS OF JOB EVALUATION

A. Analytical Methods

• Point Ranking Methods: Different factors are selected for different jobs with accompanying differences in degrees and points.

• Factor Comparison Method: The important factors are selected which can be assumed to be common to all jobs. Each of these factors are then ranked with other jobs. The worth of the job is then taken by adding together all the point values.

B. Non-Analytical Methods

• Ranking Method: Jobs are ranked on the basis of its title or contents. Job is not broken down into factors etc.

• Job Grading Method: It is based on the job as a whole and the differentiation is made on the basis of job classes and grades. In this method it is important to form a grade description to cover discernible differences in skills, responsibilities and other characteristics.

Significance Of Job Evaluation

1. Job evaluation helps to rate the job

Job evaluation is a technique which helps to rate the job in terms of complexities and importance. It rates the job but the job holder. This helps determining and fixing wages accordingly.

2. Job evaluation helps to determine pay structure

Job evaluation is a consistent and rational process of determining wages and salary structure for various level of jobs. Internal and external consistencies are analyzed in order to determine wage levels.

3. Job evaluation helps in bringing harmonious relation between labor and management

Job evaluation brings harmony and good labor relation through eliminating wage inequalities within the organization.

4. Job evaluation helps to minimize the cost of recruitment and selection

Job evaluation helps in keeping down the recruitment and selection costs as it assists in retaining employees. It means, job evaluation inspires for keeping down the labor turnover, as a result of which there will be less need of new recruitment. Moreover, due to systematic analysis of various aspects of jobs, recruitment and selection can be made by matching the qualification and candidate.

Maintenance

Overview of Employee Welfare, Health and Safety, Social security

Organizations provide welfare facilities to their employees to keep their motivation levels high. The employee welfare schemes can be classified into two categories viz. statutory and non-statutory welfare schemes. The statutory schemes are those schemes that are compulsory to provide by an organization as compliance to the laws governing employee health and safety. These include provisions provided in industrial acts like Factories Act 1948, Dock Workers Act (safety, health and welfare) 1986, Mines Act 1962. The non statutory schemes differ from organization to organization and from industry to industry.

STATUTORY WELFARE SCHEMES

The statutory welfare schemes include the following provisions:

Drinking Water: At all the working places safe hygienic drinking water should be provided.

Facilities for sitting: In every organization, especially factories, suitable seating arrangements are to be provided.

First aid appliances: First aid appliances are to be provided and should be readily assessable so that in case of any minor accident initial medication can be provided to the needed employee.

Latrines and Urinals: A sufficient number of latrines and urinals are to be provided in the office and factory premises and are also to be maintained in a neat and clean condition.

Canteen facilities: Cafeteria or canteens are to be provided by the employer so as to provide hygienic and nutritious food to the employees.

Spittoons: In every work place, such as ware houses, store places, in the dock area and office premises spittoons are to be provided in convenient places and same are to be maintained in a hygienic condition.

Lighting: Proper and sufficient lights are to be provided for employees so that they can work safely during the night shifts.

Washing places: Adequate washing places such as bathrooms, wash basins with tap and tap on the stand pipe are provided in the port area in the vicinity of the work places.

Changing rooms: Adequate changing rooms are to be provided for workers to change their cloth in the factory area and office premises. Adequate lockers are also provided to the workers to keep their clothes and belongings.

Rest rooms: Adequate numbers of restrooms are provided to the workers with provisions of water supply, wash basins, toilets, bathrooms, etc.

NON STATUTORY SCHEMES

Many non statutory welfare schemes may include the following schemes:

Personal Health Care (Regular medical check-ups): Some of the companies provide the facility for extensive health check-up

Flexi-time: The main objective of the flextime policy is to provide opportunity to employees to work with flexible working schedules. Flexible work schedules are initiated by employees and approved by management to meet business commitments while supporting employee personal life needs

Employee Assistance Programs: Various assistant programs are arranged like external counseling service so that employees or members of their immediate family can get counseling on various matters.

Harassment Policy: To protect an employee from harassments of any kind, guidelines are provided for proper action and also for protecting the aggrieved employee.

Maternity & Adoption Leave – Employees can avail maternity or adoption leaves. Paternity leave policies have also been introduced by various companies.

Medi-claim Insurance Scheme: This insurance scheme provides adequate insurance coverage of employees for

expenses related to hospitalization due to illness, disease or injury or pregnancy.

Employee Referral Scheme: In several companies employee referral scheme is implemented to encourage employees to refer friends and relatives for employment in the organization.

For smooth functioning of an organization, the employer has to ensure safety and security of his employees. **Health and safety** form an integral part of work environment. A work environment should enhance the well being of employees and thus should be accident free.

In organizations the responsibility of employee health and safety falls on the supervisors or HR manager. An HR manager can help in coordinating safety programs, making employees aware about the health and safety policy of the company, conduct formal safety training, etc. The supervisors and departmental heads are responsible for maintaining safe working conditions. Responsibilities of managers:

Monitor health and safety of employees

Coach employees to be safety conscious

Investigate accidents

Communicate about safety policy to employees

Responsibilities of supervisors/departmental heads:

Provide technical training regarding prevention of accidents

Coordinate health and safety programs

Train employees on handling facilities an equipments

Develop safety reporting systems

Maintaining safe working conditions

Social security is primarily a social insurance program providing social protection or protection against socially recognized conditions, including poverty, old age, disability, unemployment and others. Social security may refer to:

Social insurance, where people receive benefits or services in recognition of contributions to an insurance program. These services typically include provision for retirement pensions, disability insurance, survivor benefits and unemployment insurance.

Income maintenance, mainly the distribution of cash in the event of interruption of employment, including retirement, disability and unemployment

Services provided by administrations responsible for social security. In different countries this may include medical care, aspects of social work and even industrial relations.

More rarely, the term is also used to refer to basic security, a term roughly equivalent to access to basic necessities—things such as food, clothing, housing, education, money, and medical care.

Grievance Redressal Procedure

Grievances are but natural in organisations. However like disciplinary problems, grievances also benefit none. Hence, there is a need for handling or redressing grievances. For this, most large organisations in India have, therefore, evolved a formal grievance procedure which enables an organisation to handle grievances satisfactorily.

The procedure consists of the following stages:

Stage 1:

The worker fills in a grievance form and submits the same to the shift incharge for information and consideration.

Stage 2:

In case, he is not satisfied with the decision, he goes to the departmental head for the settlement of his grievance.

Stage 3:

If the aggrieved employee is still dissatisfied, he forwards it to the appropriate chairman of the zonal works committee (ZWC). Each zonal works committee consists of five management and five union representatives. Their decision is final and binding on both the parties. The individual grievances considered by the zonal committee pertain to promotion, suspension, discharge and dismissal.

Stage 4:

If the zonal committee either does not reach to a unanimous decision or the decision is not accepted by the employee, the grievance is, then, forwarded to the central works committee. This committee consists of representatives of top management and union officials. Here also, the unanimity of principle operators and the decision taken by the committee is binding on both the parties.

Stage 5:

If this committee also does not reach to an unanimous decision, the matter is referred to the Chairman of the company. His or her decision is final and is binding on both the parties.

The stage at which the grievance is settled indicates the climate or the spirit that prevails in the organisation.

Obviously, lower the level of settlement, the quicker the redressal of a grievance. The concerned officer, be the supervisor or manager, remains in a position to “give and take” at initial lower stages such as stage 1. Gradually, he or she comes under the glare of publicity; his or her position becomes harder at the subsequent stages. Viewed from an aggrieved employee’s point, the delay in the settlement of grievance would intensify his or her anxiety and dissatisfaction. Which, in turn would affect his or her morale and productivity. The colleagues would also get affected. For the organisation, the delay in settlement is a loss of goodwill and camaraderie that might have been built up over the period.

Employee participation

Employee participation is the process whereby employees are involved in decision making processes, rather than simply acting on orders. Employee participation is part of a process of empowerment in the workplace.

Employee participation is in part a response to the quality movement within organisations. Individual employees are encouraged to take responsibility for quality in terms of carrying out activities, which meet the requirements of their customers. The internal customer is someone within the organisation that receives the 'product of service' provided by their 'supplier' within the organisation. External customers are buyers and users outside of the organisation. Employee participation is also part of the move towards human resource development in modern organisations. Employees are trusted to make decisions for themselves and the organisation. This is a key motivational tool.

Employee participation is also referred to as employee involvement (EI)

Examples of employee participation include:

i. Project teams or quality circles in which employees work on projects or tasks with considerable responsibility being delegated to the team.

ii. Suggestion schemes - where employees are given channels whereby they can suggest new ideas to managers within the organisation. Often they will receive rewards for making appropriate suggestions.

iii. Consultation exercises and meetings whereby employees are encouraged to share ideas.

iv. Delegation of responsibility within the organisation. In modern organisations ground level employees have to be given considerable responsibility because they are dealing with customers on a day-to-day basis often in novel situations. Such employees need to be trusted to make decisions for themselves.

v. Multi-channel decision making processes. In such situations decisions are not only made in a downward direction, they also result from communications upwards, sideways, and in many other directions within the organisation.

Flexi-Time

Flexi time (or flextime, flexi-time, originally derived from the German word Gleitzeit which literally means "sliding time") is a variable work schedule, in contrast to traditional work arrangements requiring employees to work a standard 9 a.m. to 5 p.m. day. Its invention is usually credited to William Henning. Under flextime, there is typically a core period (of approximately 50% of total working time/working day) of the day, when employees are expected to be at work (for example, between 11 a.m. and 3 p.m.), while the rest of the working day is "flexi time", in which employees can choose when they work, subject to achieving total daily, weekly or monthly hours in the region of what the employer expects, and subject to the necessary work being done.

A flextime policy allows staff to determine when they will work, while a flex place policy allows staff to determine where they will work. Its practical realization can mainly be attributed to the entrepreneur Wilhelm Haller who founded Hengstler Gleitzeit, and later "Inter flex Datensysteme GmbH" in Southern Germany, where today a number of companies offer Flexi time (Gleitzeit) solutions which have grown out of his initiative

ESOP

An Employee Stock Ownership Plan (ESOP) is an employee benefit plan which makes the employees of company owners of stock in that company. Several features make ESOPs unique as compared to other employee benefit plans. First, only an ESOP is required by law to invest primarily in the securities of the sponsoring employer. Second, an ESOP is unique among qualified employee benefit plans in its ability to borrow money. As a result, "leveraged ESOPs" may be used as a technique of corporate finance.

The benefits for the company include increased cash flow, tax savings, and increased productivity from highly motivated workers. The main benefit for the employees is the ability to share in the company's success. Due to the tax benefits, the administration of ESOPs is regulated, and numerous restrictions apply. It is also called stock purchase plan.