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Reference Material for Five Years

Bachelor of Law (Hons.)

Code : 035

Semester – IV

FIMT Campus, Kapashera, New Delhi-110037, Phones : 011-25063208/09/10/11, 25066256/ 57/58/59/60
Fax : 011-250 63212 Mob. : 09312352942, 09811568155 E-mail : fimtoffice@gmail.com Website : www.fimt-ggsipu.org

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Bachelor of Law (Hons.)

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SUBJECT CODE: BBA LLB-202

SUBJECT: FAMILY LAW

UNIT I

1. What are the various schools of Hindu Law? Differentiate between Mitakshara and Dayabhaga Schools?

Answer

INTRODUCION:- As we know that Hindu Law is two types :

1. Codified Hindu Law

2. Un-codified Hindu Law.

1. The codified Hindu law applies to all Hindu equally whereas the un-codified Hindu Law the situation is different. The application of Un-codified Hindu Law depends upon the context of different schools. As per the context of schools, Hindu Law is of two types :-

1. MITAKSHARA SCHOOL

2. DAYABHAGA SCHOOL

The Mitakshara school has further the following sub schools :

a) Banaras or Varanasi sub school.

b) Mithila Sub school.

c) Maharashtra or Mumbai sub school.

d) Dravid or Madras sub school.

e) Punjab sub school.

SCHOOLS OF HINDU LAW

Case : Collector of Madrai v/s Mottaramlingam 1868: It was said that, " There is only one remote source among the various schools of Hindu Law, but due to different beliefs of Digest and its commentaries several schools and sub schools of Hindu Law have developed."There are mainly two causes to differentiate between several schools of Hindu Law :-1 .Different Customs and Usages prevail in different parts of the country.2. These different areas are governed by different Digest and Commentaries.

MIKAKSHARA SCHOOL

The name of this school came from the Digest Mitakshara of Vigyaneshwa. The area of its application is whole India excluding the Assam State. Case : Rohan v/s Laksman – 1976. It was held that the effect of mitakshara school is so strong that it also applies to even undescribed subjects in Bengal and Assam.

Sub-Schools of Mitakshara

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

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

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

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

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

DAYALBHAGA SCHOOL

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

2. What are the difference between Mitakshara and Dayabhaga schools?

Answer

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

1. INHERITANCE

2. JOINT FAMIY & COPARCENARY.

1.MITAKSHARA SCHOOL: i) :- I) Inheritance in Mitakashaara is based on relation by blood. 2. A relative by blood receives succession in property which is the basic principle of Hindu succession law. 3. Women have been excluded in succession. 4. Agnates supersedes the cognates.5.The area of its application is whole India except Assam State. The coparcenary evolves with the birth of a son. Property over which all coparceners have similar ownership.

5. No coparcenary can say before partition that he is the owner of that particular property. Coparcenary has been recognised by this school.

2. DAYABHAGA SCHOOL :- i) 1. The succession of property in Dayabhaga school based on spiritual principles. 2. In this school successor of property is such person who earns maximum peace and religious profit for the soul of deceased by performing 'Pindadaan' & religious rituals etc. 3. This law is liberal because few women and cognates can also receive property in succession, but after passing of Hindu Succession Act this has been ceased. 4 The coparcenary evolves after the death of the father. In Dayabhaga school the son has no right during the lifetime of the father.5. On the death of a Hindu Person his property shall devolve among his heirs on the basis of succession.6. Coparcenary has been recognised by this school.

3. Who is karta. Can minor be a karta?

Answer

The head of the Hindu Joint Family also called the Karta or manager of the joint family occupies a unique position unlike any other member of the family. The senior most male member of the Hindu joint family is usually the Karta or head of the family. Often Karta is called Manager of the joint family, this is when there exists a family business or if it is a trading family, there has to be a manager to take care of the proper functioning and supervision of the business. The Karta has innumerable rights and powers. He can exercise these rights in any manner he thinks fit as long as it's for the greater good of the family. Along with such great power he has a number of liabilities such as maintenance of family members and keeping proper accounts.

The manager of the joint family is called the karta.

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

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

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

Minor as a karta –

As regards, junior male members, as long as a senior member is present they cannot become Karta, unless all the coparceners agree to the junior member occupying managerial position. This was re-affirmed by the Narendra Kumar v.CIT. If it turns out that a minor is the only one left to be manager, he can as long as a capable guardian represents him. Section 21 of the Guardians and Wards Act, 1890 recognises the competence of minors to occupy managerial position in an undivided family. 3 Father as karta :-If the manager or the karta is the father, he has certain additional powers of alienation under the Hindu law and in exercise of those powers, he can alienate joint family property so as to bind the interests of his minor sons in such property.

4. What are the position of karta?

Answer

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

represents his joint family on all matters, whether they are religious, social or legal in character.

Legal position of the Karta

a. The karta can file suits or take other legal proceedings to safeguard the interest of the family and its properties and business.

b. He can represent the family effectively in a proceeding even if he has not been named as such.

c. Where a transaction purports to have been entered into by two or more persons described as kartas or managers of the joint family, they must all join as plaintiffss in the suit. However, it is not necessary that all members of the joint family should join in the suit.

d. The manager as the head of the family has control over the income and expenditure, and he is the custodian of the surplus, if any. Besides the expenses of management, realization and protection of the family estate, the family purposes are ordinarily maintenance, residence, education, marriage, sraddha and religious ceremonies of the coparceners and their families. The expenses of each coparcener or his branch cannot in law, in the absence of usage, be debited to the particular coparcener. If he spends more than the other members approve, their remedy is to demand a partition

e. Position regarding debts He can acknowledge liability to pay debts due and payable by the family, to give discharge for debt; to pay interest on money borrowed etc. due and payable by the family. If the manager revives a time barred debt by passing a promissory note, he alone is liable for the debt. If a decree is passed against the karta or manager of the joint Hindu family in respect of a liability properly incurred for the necessities of the family, the binding character of this decree upon the interest of the other members depends, not upon their having or not having been parties to the suit but on the authority of the manager to incur the liability.

f. Position regarding business If the family has ancestral business the karta has a right to carry on the business with or without the help of the other family members and for that purpose to do all acts and things required to be done to carry on the business such as buying and selling or manufacturing goods, engaging employees, to enter into contracts for sale and

purchase of goods, to borrow money, etc. He can carrying on any ancestral business. The power of a manager to carry on a family busalso enter into partnerships with any other person or persons when the family itself is iness necessarily implies a power to mortgage or sell the family property for a legitimate and proper purpose of the business. The manager can make contracts, give receipts and compromise or discharge claims incidental to the business.

5. How can a Karta use power of alienation?

Answer

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

The formulation of Vijnaneshwara has undergone modification in two respects: - # The power cannot be exercised by any member except the karta.

The joint family property can only be alienated for three purposes: -

(a) Apatkale (Legal Necessity)

(b) Kutumbarthe (Benefit of Estate)

(c) Dharmamarthe (Religious obligations)

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

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

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

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

6. How can Father use the power of Alienation?

Answer

A father possesses more power even than Karta as there are situations in which only the father has the authority to make alienation. The two cases are dealt with below-

Gifts of love and affection –

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

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

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

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

1 The debt is antecedent .

2 The debt should not be Avyavaharik i.e. for unethical or immoral purposes.

UNIT – II

7. What are the properties/subject matters which included at the time of partition?

Answer

The Partition as a subject under the following heads :

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

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

(c) how partition is effected and mode of partition;

(d) rules relating to the allotment of shares;

(e) reopening of partition; and reunion.

As a general rule, the entire joint family property is, and the separate property of coparceners is not, subject of partition. A plaintiff seeking partition must prove the existence of joint family property. But where existence of joint family is not disputed, every coparcener is entitled to equal share. However, some properties may be held jointly by two or more coparceners, such as when there exists a coparcenary within a coparcenaries', and if a general partition takes place, these properties may also be divided among such coparceners, though other coparceners might claim a share in them. If the joint family is in possession of property

held by it as a permanent lease, such property is also available for partition even though lease may be liable to cancellation in certain circumstances. The impartibly estates which constitute joint family property are not liable to partition.

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

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

a. Some of these properties may be enjoyed by coparceners jointly, or by turns, (under this head will fall properties like wells and bridges, temples and idols),

b. Some of these properties may be allotted to the share of coparcener and its value adjusted with the other property allotted to other coparceners, or

c. Some of these properties may be sold and sale proceeds distributed among the coparceners. We may discuss the subject with particular reference to :

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

(b) the staircases and wells.

Dwelling house—The Smritikars were of the view that the dwelling house should not be partitioned. It was understandable in a predominantly agricultural society. It is understandable even in our modern times when the dwelling house is too small. But the modern law does not consider the rule as sacrosanct.' Ordinarily, in a partition, the court will, if possible, try to effect an arrangement which will leave the dwelling house entirely in the hands of one or more coparceners. If no arrangement which is agreeable to the parties, or which is equitable can be possibly made, the dwelling house may be sold and sale proceeds divided among the coparceners. This alternative is available with respect to any property, the division of which cannot be made equitably and coparceners fail to arrive at a satisfactory arrangement among themselves. This has been facilitated by the Partition Act, 1893.

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

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

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

Staircases, wells, etc.—Staircases,4 courtyards, wells, tanks, pastures, roads, right of way and the like things are species of property which are, by their nature, incapable of division or valuation. In respect of them, an arrangement has to be devised so that they remain in the common use of all coparceners. Yajmans cannot be said to be property much less movable property, hence it cannot be partitioned.

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

(1) Debts,

(2) Maintenance,

(3) Marriage expenses of daughters, and

(4) Performance of certain ceremonies and rites.

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

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

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

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

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

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

(c) unmarried sisters till they are married; and

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

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

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

8. Which coparcener has right to ask partition?

Answer

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

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

Father.—The father has not merely a right to partition between himself and his sons but he has also the power to effect a partition among the sons inter Se, This seems to be the last survival of father's absolute powers. The Mitakshara expressly confers this power on the father in respect of not only father's separate property (every person has the power to distribute or give away one's own property as one wishes to do) but also in respect of joint

family property.1 No other person has this power. In the exercise of this power, the consent or dissent of sons is immaterial. The father can impose even a partition, partial or total, between his minor sons and himself. However, it is necessary that the father must act bona fide. He should not be unfair to anyone. If the division of property made by the father is unequal, or fraudulent, or vitiated by favouritism, the partition can be re-opened. The father cannot exercise this power by will except with the consent of his sons. An unequal partition made by the father may be binding on sons as family arrangement if A acquiesced in by them, Son, grandson and great-grandson.— Under the Dayabhaga school, there is no coparcenary consisting of the father and his lineal male descendants and, therefore, sons, grandsons or great- grandsons have no right to partition. On the other hand, under the Mitakshara school, son, son's son and son's son's son have a right to partition. If the father is not joint with anyone of the aforesaid relations, sons have a right of partition against their father.

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

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

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

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

provision could be marshalled to establish equality between the adopted son and the aurasa son in partition also.

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

Illegitimate son,—Illegitimate sons fall under two categories : (a) The Dasiputra, or a son born to a concubine (avarudha dasi) exclusively and permanently kept by a Hindu, and (b) an illegitimate son born of a woman who is not a dasi. Their position is as under

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

(2) Among the Sudras, the dasiputra has a somewhat superior position. The Mitakshara states the position thus : "A dasiputra obtains a share by the father's choice or at his pleasure, but after (the

death of) the father, if there be sons of wedded wife, let these brothers allow dasiputra to participate for half a share, that is let them give him half [as much as is the amount of one brother's allotment.

Minor coparcener.—Hindu law makes no distinction between a major coparcener and a minor coparcener in respect of their rights in the joint family property. As in other matters so in partition, the right of the minor coparceners is precisely the same as those of major coparceners. The minor coparcener has also a right of partition. A suit for partition may be filed on behalf of the minor by his next friend or guardian. It is here that some distinction is

made. A minor is a person of immature intellect, and the court acting as parens patriae has the duty to protect a minor's interest. Thus, if a Karta is squandering the joint family property to the prejudice of the minor coparcener, if he is ill-treating him or discriminating him, or is, on the whole, unfavourably disposed towards the minor, the minor's guardian may deem it proper to effect a partition on behalf of the minor. When the guardian or the next friend files a suit for partition on behalf of the minor, the court has to be satisfied that the partition will be for the benefit of the minor. If the court comes to the finding that the proposed partition is not for the benefit of the minor, the partition will not be allowed.

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

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

9. Which are the family members entitled to take a share if partition takes place?

Answer

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

Father's wife.—If a partition takes place between her husband and his son, the father's wife is entitled to a share equal to the share of a son. She can hold it and enjoy it separately from her husband. If there are more than one wife, each wife is entitled to a share equal to the

share of a son. It is immaterial that a wife has no son of her own.' If no share is allotted to her she can get the partition re-opened, Under the Dayabhaga school, she has no such right

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

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

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

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

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

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

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

right to partition. If a partition takes place among the brothers, after the death of the brother, his widow is entitled to a share.

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

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

10. How partition effected?

Answer

A partition can be effected by the father even during his lifetime among his sons. A partition could also take place by- (i) agreement, (ii) institution of a suit to that effect, (iii) arbitration. It is not necessary for partition that the joint family property is divided by every bit of it. The severance in the joint status could be brought about by any of the above mode and some property could be used by the coparceners as joint tenants.

The following modes of partition are important:—

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

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

b. Partition by Will: Partition may be effected by a coparcener by making a will containing a clear and unequivocal intimation to the other coparceners of his desire to sever himself from joint family or containing an assertion of his right to separate. In Potti Laxmi v. Potti Krishnamma, The Supreme Court observed, "Where there is nothing in the will executed by a member of Hindu coparcenary to unmistakably show that the intention of the testator was to separate from the joint family, the will does not effect severance of status."

c. Conversion to another Faith: Conversion of a coparcener to any other religion or faith operates as partition of the joint status as between him and other members of the family. The coparcener, who has converted, no longer possesses the right of survivorship as he ceases to be a coparcener from the moment of his conversion and he takes his share in the family property as it stood at the date of his conversion. Reconversion of the convert to Hinduism does not ipso facto bring about his coparcenary relationship in absence of subsequent act or transactions pointing out to a reunion.

d. Marriage under Special Marriage Act, 1954: Marriage of a Hindu under the Special Marriage Act, 1954 causes severance of joint status.

e. Partition by Agreement: An unequivocal expression of the desire to use the joint family property in certain defined shares may lead the members of joint family to enter an agreement to effect a partition. The two ideas, the severance of joint status and a de facto division of property are distinct. As partition under the Mitakshara law is effected on severance of joint status, the allotment of shares may be done later. Once the members of joint family or heads of different branches of the coparcenary agree to specification of shares, the same can be treated to result in severance of joint status though the division by metes and bounds may take place later on.

f. Partition by Arbitration: An agreement between the members of joint family whereby they appoint an arbitrator to arbitrate and divide the property, operates as a partition from the date thereof. The mere fact that no award has been made is no evidence of a renunciation of the intention to separate. Where all the coparceners jointly have referred the matter relating to the partition of their shares in the joint family to an arbitrator, this very fact expressly indicates their intention to separate from joint status. In such cases even if award is not given, their intention is not dissipated.

g. Partition by Father: The father may cause a severance of sons even without their consent. It is the remnant of the ancient doctrine of 'Patria Potestas'. The father during his lifetime is competent to effect such partition under Hindu law and it would be binding on his sons. It would be binding on the sons not because they have assented to it but because the father has got the power to do so, although this power is subject to certain limitations on the basis of its utility and general interest of the family. It has to be considered as to whether it is lawful in accordance with the spirit of Hindu law or not.

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

11. Discuss the concept of reunion with the help of cases?

Answer

To constitute a reunion, there must be an intention of the parties to reunite in estate and interest. It is implicit in the concept of a reunion that there shall be an agreement between the parties to reunite in estate with an intention to revert to their former status. No writing is

necessary for a reunion. Persons who were parties to a registered partition deed may reunite by an oral agreement.' Since an agreement to reunite is necessary, coparcener cannot be deemed to be reunited by the mere withdrawal of the unilateral declaration of the intention to separate which had resulted in the division of status. When a reunion is attempted to be established by implied agreement, the conduct must be of an incontrovertible character and the burden lies heavily on the person who asserts reunion.'° The mere fact that parties who have separated, live together or trade together after the partition, is not enough to establish reunion.'

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

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

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

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

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

UNIT – III

12. Discuss stridhan with cases?

Section 14 provides that any property possessed by a Hindu female, whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as limited owner sub-section (1) explains further that 'property' in this sub- section includes both movable and immovable property acquired by her by inheritance, partition, gift or will or acquired in lieu of maintenance or arrears of maintenance or acquired by her own skill or exertion or by purchase or by prescription or any other manner whatsoever , and also any property held by her as stridhana immediately before the commencement of the said Act. It is immaterial whether it be obtained by inheritance of the deceased husband's separate property or of his share in coparcenary property by virtue of the proviso to section 6of the Act, or by devise of her deceased husband or gift from a relative or any other person, and whether before, at or after her marriage. But, as expressly provided by sub section (2) of this section , a Hindu female shall not be entitled to hold any property as an absolute owner if she has acquired the same by way of gift , or under a will or any other instrument , or under a decree or order of a civil court or under an award ,where the terms of the gift , will or other instrument or the decree order or award prescribe a restricted estate in such property .

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

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

Stridhan And Woman's Estate

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

Kinds of Woman's Property

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

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

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

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

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

e. Property purchased under a compromise- When a person acquires property under a compromise; what estate he will take in it, depends upon the compromise deed. In Hindu Law there is no presumption that a woman who obtains property under a compromise takes it as a limited estate. Property obtained by a woman under a compromise where under she gives up her rights, will be her stridhan. When she obtains some property under a family arrangement, whether she gets a stridhan or woman's estate will depend upon the terms of the family arrangement.

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

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

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

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

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

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

the non-saudayika- all other types of stridhan such as gifts from stranger, peoperty acquired by self-exertion or mechanical

Powers

A. Power of Management- like the Karta of a Hindu joint family she has full power of management. The Karta is merely a co-owner of the joint family, there being other coparceners, but she is the sole owner. She alone is entitled to the possession of the entire estate and its income. Her power of spending the income is absolute. She need not save and if she saves, it will be her stridhan. She alone can sue on behalf of the estate and she alone can be sued in respect of it.4 Any alienation made by her proper or improper is valid and binding so long as she lives. She continues to be its owner until the forfeiture of estate by her re-marriage, adoption, death or surrender.

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

C. Legal necessity (that is, for her own need and for the need of the dependants of the last owner) For the benefit of estate, and For the discharge of indispensable duties (such as marriage of daughters, funeral rites of her husband, his shrada and gifts to brahmans for the salvation of his soul; that is, she can alienate her estate for the spiritual benefit of the last owner, but not for her own spiritual benefit.)Under the first two heads her powers are more or less the same as that of the Karta. Restrictions on her powers of alienation are an incident of the estate and not for the benefit of the reversioners. As to the power of alienation under

the third head, a distinction is made between the indispensable duties for which the entire property could be alienated, and the pious and charitable purposes for which only small portion of property can be alienated. She can make alienation for religious acts, which are not essential or obligatory but are still pious observances which conduce to the bliss of her deceased husbands soul.

D. Surrender- means renunciation of estate by the female owner. She has the power of renouncing the estate in favour of the nearest reversioner. This means that by a voluntary act she can accelerate the estate of the reversioner by conveying absolutely the estate thereby destroying her own estate. This is an act of self-effacement on her part and operates as her civil death. For a valid surrender, the first condition is that it must be of the entire estate, though she may retain a small portion of her maintenance9. The second condition is that it must be in favour of the nearest reversioner or reversioners, in case there are more than one of the same category. Surrender can be made in favour of female reversioners also. The third condition is that the surrender must be bonafide and not a device of dividing the estate with the reversioners.

E. Reversioners- On the death of the female owner the estate reverts to the heir or the heirs of the last owner as if the latter died when the limited estate ceased. Such heirs may be male or female known as reversioners. So long as the estate endures there are no reversioners though there is always a presumptive reversioner who has only a spes successionis11 (an exception). The property of the female devolves on the reversioners when her estate terminates on her death, but it can terminate even during her lifetime by surrender

13. What are the principles of male inheritance under Hindu law?

Answer

Succession of A Hindu Male Dying Intestate Under The Hindu Succession Act:

Sections 8 to 13 of the Hindu Succession Act, 1956 lay down the general rules as to the order of succession when a Hindu male dies intestate. Section 8 lays down certain rules of succession of property of a Hindu male who dies intestate after the commencement of the Act. These rules are to be read along with the Schedule as well as other Sections pertaining to the same (Sections 9 to 13).

a. Section 8 lays down as follows: •Section 8: General rules of succession in the case of males. - The property of a male Hindu dying intestate shall devolve according to the rules set out in this chapter: (a) firstly, upon the preferential heirs, being the relatives specified in Class I of the Schedule; (b) secondly, if there is no preferential heir of Class I, then upon the preferential heirs being the relatives specified in class II of the Schedule; (c) thirdly, if there is no preferential heir of any of the two classes, then upon his relatives being the agnates specified in Section 12; and (d) lastly, if there is no agnate, then upon his relatives being the cognates specified in Section 13.

b. Thus, Section 8 groups the heirs of a male intestate into four groups and lays down that the property first devolves upon the heirs of Class I of the Schedule. They are the son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son and widow of a predeceased son of a predeceased son. All these heirs inherit simultaneously. If heirs of Class I are not available, the property goes to the enumerated heirs specified in Class II of the Schedule, wherein an heir in a higher entry is preferred over an heir in a lower entry.

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

d. Section 10. Distribution of property among heirs in Class I of the Schedule.- The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules: Rule 1- The intestate's widow, or if there are more

widows than one, all the widows together, shall take one share. Rule 2- The surviving sons and daughters and the mother of the intestate shall each take one share. Rule 3- The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share. Rule 4- The distribution of the share referred to in Rule 3-

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

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

Answer

a. Heirs In Class I:

- The adopted children (sons or daughters) are also to be counted as heirs.
- The children born out of void or voidable marriages are considered to be legitimate by virtue of Section 16, and hence they are entitled to succession.
- The widow is also entitled to property along with the other heirs and in case there is more than one widow, they will inherit jointly one share of the deceased's property, which is to be divided equally among them.
- The widow is entitled to inherit from her deceased husband's property even if she remarries after his death.
- The widow of the predeceased son will inherit with the other heirs. However, her right along with rights of the children of the predeceased son will exist to the extent of the share of

the predeceased son, had he been alive. However, if she remarries before the death of the intestate, then she is not entitled to the property.

• The daughter inherits simultaneously along with the other heirs in her individual capacity. Moreover, even if she is married, she is entitled to such property. vii. The mother also succeeds to her share along with other heirs by virtue of Section 14. It has been held in Jayalakshmi v. Ganesh Iyer that the unchastity of the mother is no bar as to her inheriting from her son. Even if she is divorced or remarried, she is entitled to inherit from her son. Here the term mother also includes an adoptive mother. Moreover, if there is an adoptive mother, the natural mother has no right to succeed to the property of the intestate. A mother is also entitled to inherit the property of her illegitimate son by virtue of Section 3(i)(j).

b. Heirs In Class II: All heirs in Class II take cumulatively and not simultaneously, i.e. they succeed in the order of Entries I to IX, as held in the case of Kumuraswami v. Nanjappa . An heir in the higher entry excludes all the heirs in the lower entries. ii. The father in Entry I includes an adoptive father. However, a father is not entitled to any property from the illegitimate son as opposed to the mother. However, he is entitled to share from children born out of void or voidable marriage under Section 16. Also, a step mother is not entitled to inherit from the step son. iii. All brothers and sisters inherit simultaneously. Here the term 'brother' includes both a full and a half brother. However, a full brother is always preferred to a half brother (according to Section 18). Uterine brother is not entitled to the intestate's property. However, when the intestate and his brother are illegitimate children of their mother, they are related to each other as brothers under this entry.

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

relationship does not distinguish between male and female heirs. There is also no distinction between those related by full and half blood. However, uterine relationship is not recognized.

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

15. What are the rules of Succession if A Hindu Female Dying Intestate Under The Hindu Succession Act?

Answer

The great ancient law givers Manu and Baudhyana had described the good woman as a profoundly non-autonomous self, ruled by father in childhood, by husband in youth, by son in old age. In the 19th century debates, on the contrary, she came to be re-envisaged as a person with a core of inviolate autonomy, possessing a cluster of entitlements and immunities, even when the family, the community or religion refused to accept them. The demand for the new laws stemmed from an understanding about Indian a necessary, autonomous core of female personhood that the state must underwrite. Under the Hindu law in operation prior to the coming into force of the Act, a woman's ownership of property was hedged in by certain delimitations on her right of disposal and also on her testamentary power in respect of that property. Doctrinal diversity existed on that subject. Divergent authorities only added to the difficulties surrounding the meaning of a term to which it sought to give technical significance. Women were supposed to, it was held and believed, not have power of absolute alienation of property. The restrictions imposed by the Hindu law on the proprietary rights of

women depended upon her status as a maiden, as a married woman and as a widow. They also depended upon the source and nature of property. Thought there were some fragmented legislation upon the subject (regard being made to the Hindu Woman's Right to Property Act, 1937), the settled law was still short of granting a status to woman where she could acquire, retain and dispose off the property as similar to a Hindu male. The Hindu Succession Act, 1956 and particularly Section 14 brought substantial change, thus, upon the aspect of a right of a Hindu female over her property and thereby settled the conflict.

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

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

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

Secondly, upon the heirs of the husband ;

Thirdly, upon the mother and father;

Fourthly, upon the heirs of the father; and

Lastly, upon the heirs of the mother .

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

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

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

This Section propounds a definite and uniform scheme of succession in the property of a female Hindu who dies intestate after the commencement of the Act. The rules laid down under this

Section are to be read with Section 16. This Section groups the heirs of a female intestate into five categories as laid in sub-Section (1).

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

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

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

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

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

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

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

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

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

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

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

Section 16. Order of succession and manner of distribution among heirs of a female Hindu.- The order of succession among the heirs referred to in Section 15 shall be and the distribution of the intestate's property among those heirs shall take place according , to the following rules, namely:

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

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

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

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

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

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

16. What is testamentary succession?

Answer

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

The origin and growth of Will amongst the Hindus is unknown. However Wills were well known to the Mohammedans and contact with them during the Mohammedan rule, and later on with the European countries, was probably responsible for the practice of substituting informal written or oral testamentary instruments with formal testamentary instruments. The Indian Succession Act, 1925, consolidating the laws of intestate (with certain exceptions) and testamentary succession supersedes the earlier Acts, and is applicable to all the Wills and codicils of Hindus, Buddhists, Sikhs and Jainas throughout India. The Indian Succession Act, 1925, does not govern Mohammedans and they can dispose their property according to Muslim Law.

17. What are the rules of succession under Muslim law?

Answer

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

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

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

b. Females were excluded from inheritance; so were cognates.

c. The descendants were preferred over ascendants, and ascendants over collaterals. Eg,in the presence of a son father could not succeed. Similarly in the presence of father, brother could not inherit.

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

Islamic or Koranic Principles of Succession

Principles of customary law of succession:

the husband or wife was made an heir

females and cognates were made competent to inherit

parents and ascendants were given the right to inherit even when there were male descendants and The newly created heirs are given specific shares.

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

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

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

Koranic principles of customary law of inheritance has led to divergence of opinions among the shias and the sunnis.

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

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

Doctrine of Representation

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

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

Hanafi law or sunni law does not recognize the doctrine of representation.

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

Sunni law

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

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

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

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

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

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

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

Under the Hanafi law the general rule of distribution of the estate is per capita and not per stirpes.

1. Who are the heirs of the deceased?

2. What share are the heirs entitled to? Categories of Heirs

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

1. The sharers

2. The residuaries

3. The distant kindered

Distribution of Assets among Sharers and Residuaries

- Among the heirs, the sharers are to be given share first.

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

Distribution of Assets among Distant Kindred

- When among the claimants there are descendants, ascendants and collaterals then descendants distant kindred are preferred over ascendants and collateral.
- When only descendants are claimants then one having fewer degrees of descent will be preferred.

UNIT – IV

18. What is gift? How a mulsim person can gift the property? What are the condition of valid gift?

Answer

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

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

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

c. Express Declaration: The declaration must be made in clear words. A declaration of gift in ambiguous words is void. That is to say, the declaration must expressly suggest that the donor is relinquishing his ownership completely. In Maimuna Bibi v. Rasool Mian, The Patna High Court has held that while oral gift is permissible under Muslim law, to constitute a valid gift it is necessary that donor should divest himself completely of all ownership and dominion over subject (i.e., property) of gift.

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

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

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

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

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

19. Discuss Muslim will with the help of cases.

Answer

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

1. payment of funeral expenses
2. payment of his/her debts
3. execution his/her will
4. distribution of the remaining estate amongst the heirs
5. The Islamic will is called al-wasiyya.
6. A will is a transaction which comes into operation after the testator's death. The will is executed after payment of funeral expenses and any outstanding debts.
7. The one who makes a will (wasiyya) is called a testator (al-musi).

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

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

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

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

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

Muslim Law of will and the Indian Succession Act, 1925

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

Importance of the Wassiyat

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

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

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

Requisites of a valid will

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

1. The testator must be competent to make the will.

2. The legatee must be competent to take the legacy or bequeath.

3. The subject of the bequeath must be a valid one.

4. The bequeath must be within the limits imposed on the testamentary power of a Muslim.

5. Appointment of the Executer of the Will.

Testator & his competence

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

- According to the Indian Majority Act the minority terminates at the age of 18 years, but if the minor is one whose guardian has been appointed by the court, the minority will terminate at the age of 21 years. Thus a person of 18 years or 21 years, as the case may be, is competent to make a will.

- Under Sunni Law the will of a person committing suicide is valid. Under Shia Law a will made by a person who has done any act towards the commission of suicide is not valid, but if the will is made before the doing of any act towards the commission of suicide, it is valid.

Legatee & his competence

- Any person capable of holding property, may be the legatee under a will. Thus sex, age, creed or religion are no bar to the taking of a legacy.

- The legatee must be capable of owning the bequeath.

- No one can be made the beneficiary owner of the estate against his will. Therefore, the title to the subject of the bequeath can only be completed with the express or implied assent of the legatee after the death of the testator.

- Acceptance or rejection of a bequeath by the legatee is only relevant after the death of the testator and not before. Generally speaking once a legatee has accepted or rejected a bequeath he cannot change his mind subsequently.

Types of bequeath

- Bequeath may be made for the benefit of an Institution.

- Bequeath can be made in favour of a non-muslim.

- According to Sunni Law a bequeath to a person who has caused the death of the testator whether intentionally or unintentionally is invalid. According to Shia Law it is valid if the death is unintentionally caused or accidently caused.

- Under Sunni law a child who is in womb but born within 6 months of the date of making the will is treated as a legatee in existence and hence is competent to take the legacy.

But under the Shia law a bequeath to a child in womb is valid if it is born in the longest period of gestation i.e 10 months.

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

Subject of Will & its validity

The following are the requisites of a valid will:-

1. The property must be capable of being transferred

2. The property must be in existence at the time of the testator's death. It is not necessary that it should be in existence at the time of the making of the will

3. The testator must be the owner of the property to be disposed by will.

Testamentary Power and its limitations

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

- Limitation as regards the person

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

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

- Limitation as regards the property

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

Appointment of the Executor of the Will

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

Revocation of will

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

1. Express revocation; or
2. Implied revocation

20. Discuss the concept of Wakf with cases.

Answer

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

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

Essentials of a valid Wakf

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

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

The subject of Wakf can be any tangible property (mal) which can used without being consumed. In Abdul Sakur vs Abu Bakkar 1930, it was held that there are no restrictions as long as the property can be used without being consumed and thus, a valid Wakf can be created not only of immovable property but also of movable property such as shares of a company or even money. Some subjects that Hanafi law recognizes are immovable property, accessories to immovable property, or books.

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

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

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

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

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

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

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

Creation of Wakf

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

a. By an act of a living person (inter vivos) - when a person declares his dedication of his property for Wakf. This can also be done while the person is on death bed (marj ul maut), in which case, he cannot dedicate more than 1/3 of his property for Wakf.

b. By will - when a person leaves a will in which he dedicates his property after his death. Earlier it was thought that Shia cannot create Wakf by will but now it has been approved.

c. By Usage - when a property has been in use for charitable or religious purpose for time immemorial, it is deemed to belong to Wakf. No declaration is necessary and Wakf is inferred.

Kinds of Wakfs

A Wakf can be classified into two types - Public and Private. As the name suggests, a public Wakf is for the general religious and charitable purposes while a private Wakf is for the creators own family and descendants and is technically calledWakf alal aulad. It was earlier considered that to constitute a valid wakf there must be a complete dedication of the property to God and thus private wakf was not at all possible. However, this view is not tenable now and a private wakf can be created subject to certain limitation after Wakf Validating Act 1913. This acts allows a private wakf to be created for one's descendants provided that the ultimate benefits are reserved for charity. Muslim Law treats both public and private wakfs alike. Both types of wakf are created in perpetuity and the property becomes inalienable.

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

Wakf on one's children and thereafter on the poor is a valid wakf according to all the Muslim Schools of Jurisprudence. This is because, under the Mohammedan Law, the word charity has a much wider meaning and includes provisions made for one's own children and descendants. Charity to one's kith and kin is a high act of merit and a provision for one's family or descendants, to prevent their falling into indigence, is also an act of charity. The special features of wakf-alal- aulad is that only the members of the wakif's family should be supported out of the income and revenue of the wakf property. Like other wakfs, wakf alal-aulad is governed by Muhammadan Law, which makes no distinction between the wakfs either in point of sanctity or the legal incidents that follow on their creation. Wakf alal aulad is, in the eye of the law, Divine property and when the rights of the wakif are extinguished, it becomes the property of God and the advantage accrues to His creatures. Like the public

wakf, a wakf-alal-aulad can under no circumstances fail, and when the line of descendant becomes extinct, the entire corpus goes to charity.

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

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

Quasi public Wakf

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

Contingent Wakf

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

In Khaliluddin vs Shri Ram 1934, a muslim executed a deed for creating a wakf, which contained a direction that until payment of specified debt by him, no proceeding under the wakfnama shall be enforceable. It was held that it does not impose any condition on the creation of the wakf and so it is valid.

Conditional Wakf

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

depends upon the wakif to revoke the illegal condition and to make the wakf valid, otherwise it would remain invalid.

Completion of wakf

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

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

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

Shia law -

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

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

Legal Consequences (Legal Incidents) of Wakf

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

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

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

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

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

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

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

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

Revocation of Wakf

In India, once a valid wakf is created it cannot be revoked because no body has the power to divest God of His ownership of a property. It can neither be given back to the wakif nor can it be sold to someone else, without court's permission.

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

Mutawalli

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

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

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

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

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

A. Founder

B. executor of founder

C. mutawalli on his death bed

D. the court, which should follow the guidelines -

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

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

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

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

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

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

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

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

Removal of a mutawalli -

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

By court -

if he misappropriates wakf property.

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

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

he becomes insolvent.

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

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

Thank you

and

Best of luck

CONSTITUTIONAL LAW-204

Question 1: Discuss the General Characteristics of the Fundamental Rights provided in part III of the Constitution ?

Answer: **General Characteristics of Fundamental Rights**

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

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

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

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

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

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

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

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

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

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

The general characteristic of the fundamental rights are as follows :

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

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

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

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

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

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

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

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

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

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

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

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

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

Question 2: **Define the word 'State' as used in context of Fundamental Rights in part III of the Constitution ?**

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

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

(iii) All local authorities; and

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

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

Here three important terms need to be interpreted:

1. **Territory of India:** Territory of India should be taken to mean territory of India as defined in Article 1(3). According to Article 1(3) the territory of India shall comprise the territories of the States, the Union Territories specified in the first schedule and such other territories as may be acquired.
2. **Authorities ;** 'Authority' means a person, or body exercising power to command. Thus in the context of Article 12 the word 'authority' means the person or body, having the power to make laws, orders, regulation, bye- laws, notification etc which have the force of law and have the power to enforce those laws.
3. **Local Authority:** according to sub-section (31) of Section 3 of the General Clauses Act, 1897 "Local Authority" shall mean a municipal committee, district board, body of commissioner or other authority legally entitled to or entrusted by the Government within the control or management of a municipal or local fund. According to Entry 5 of the List II of 7th Schedule ' local government' includes municipal corporation, improvement trust, district boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration. Village panchayat is also included within the meaning of the term local authority. In **Mohammad Yasin v. Town Area Committee** , the Supreme Court held that the Bye-laws of a Municipal Committee charging a prescribed fee on the wholesale dealer was an order by the State Authority contravened Article 19(1) (g). These bye-laws in effect and in substance have brought about a total stoppage of the wholesale dealers' business in the commercial sense. The Supreme Court has ruled that to be characterized as a 'local authority' the authority concerned must have separate legal existence as a corporate body, it must not be a mere government agency but must be legally an independent entity; it must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. It must also enjoy a certain degree of autonomy either complete or partial, must be entrusted by statute with such governmental functions and duties as are usually entrusted to locally like health and education, water and sewerage, town planning and development roads, markets, transportation, social welfare services, etc. Finally, such body must have the power to raise funds for furtherance of its activities and fulfilment of its objectives by levying taxes, rates, charges or fees.

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

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

In the case of **University of Madras v. Santa Bai,** the Madras High Court held that 'other authorities' could only indicate authorities of like nature, i.e., ejusdem generis. So construed it could only mean authorities exercising governmental or sovereign functions. It cannot include persons, natural or juristic. Such as, a university unless it is 'maintained by the State'.

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

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

commerce does not, therefore give any indication that the 'Board" must be excluded from the scope of the word 'State' is used in Article 12.

The next important case relating to the interpretation of the term 'other authorities' is, **Sukhdev Singh V. Bhagatram**, The Supreme Court, following the test laid down in *Electricity Board Rajasthan's Case* by 4:1 majority has stated that the three statutory bodies viz., LIC, ONCG & FCI were held to be 'authorities' and thus fall within the term 'State' in Article 12. These corporations were created by the statutes, had the statutory power to make binding rules & regulations and were subject to the pervasive governmental control. These corporations do have independent personalities in the eyes of law, but that does not mean that "they are not subject to the control of the government or they are not instrumentalities of the government. The employees of these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. The employees are entitled to claim protection of Articles 14 and 16 against the corporations. Mathew, J., in a separate but concurring judgement, held that the Public Corporations is a new type of institution which sprang from the new social and economic functions of the government, and instead of classifying it into old legal category, it should be adopted to the changing time and conditions. The State being an abstract entity, could undertake trade or business as envisaged under Article 298 through an agency, instrumentality or juristic person. He preferred a broader test that if the functions of the Corporation are of public importance and closely related to governmental functions it should be treated an agency or instrumentality of government and hence a 'State' within the ambit of Article 12 of the Constitution.

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

The approach in **Sukhdev Singh case**, was reiterated with approval in **R D Shetty V. International Airport Authority Bhagwati, J.,** speaking for the Court, pointed out the corporations acting as instrumentality or agency of government would obviously be subject to the same limitation in the field of constitutional or administrative as the government itself, though in the eye of the law they would be distinct and independent legal entities. If the

government acting through its officers is subject to certain constitutional and public law limitations, it must follow *a fortiori*, that government acting through the instrumentality or agency of corporations should equally be subject to the same limitations.

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

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

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

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

This line of approach to the meaning of other authorities has been finally confirmed in **Som Prakash Rekhi V. Union of India**. Applying the criteria laid down in the International Airport Authority case, the Supreme Court reached the conclusion that there is enough material to hold that the Bharat Petroleum Corporation registered as a company under the Companies Act, is State within the enlarged meaning of Art. 12. Consequent upon takeover of Burmah Shell under the Burmah Shell (Acquisition of Undetakings in India) Act, 1976, the right, title and interest of the company stood transferred and vested in the Government of India. Thereafter, the Central Government took necessary steps for vesting the undertaking in the BPC Ltd. which became the statutory successor of the petitioner employer. **Krishna Iyer, J.,** speaking for himself and **Chinnapa Reddy. J., Pathak, J.** concurring, observed that the various provisions of the Act of 1976 have transformed the corporation into an instrumentality of the Central Government with a strong statutory flavour super-added are clear indicia of power to make it an 'authority'. Although registered as a company under the Companies Act, the BPC is clearly a creature of the statute, a limb of government, an agency of the State and is recognized and clothed with rights and duties by the Statute.

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

Following the law laid down in the **Ajay Hasia case, the Indian Statistical Institute, Indian Council of Agricultural Research, Sainik School Society U.P. State Cooperative Land Development Bank Ltd.,** all societies registered under the Societies Registration Act; Project and Equipment Corporation of India Ltd., a Government of India Undertaking; Food Corporation of India, a statutory corporation; the Steel Authority of India Ltd., a public limited company owned, controlled and supervised by the Central Government the Indian Oil Corporation, a company registered under the Companies Act of 2013, a State-aided school, whose employees enjoy statutory protection and which is subject to regulations made by the State education department a medical college run by a municipal corporation several electricity boards created on the lines of Rajasthan Electricity Board; Central Government and two State Governments; a Government Company constituted as a development authority under a State town Planning Act; regional rural banks established under the Regional Rural Banks Act, 1976; port trusts created under the Major Port Trusts Act, 1889 or 1963 have been held to be "other authorities" within the meaning of Article 12.

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

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

The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the government. Such control must be particular to the body in question and

must be pervasive. If this is found then the body is a state within Article 12. On the other hand, when control is merely regulatory whether under statute or otherwise it would not serve to make the body a state.

IS JUDICIARY INCLUDED IN THE WORD 'STATE'?

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

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

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

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

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

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

Question 3: how can you say that the fundamental rights have been guaranteed in the constitution? What is the difference between pre – constitution laws and post constitution laws ?

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

1. **Law inconsistent with or in derogation of the Fundamental Rights are Constitutionally void – Validity of pre- Constitutional Laws –** Article 13(1) lays down that all in force in the territory of India immediately before the commencement of this Constitution, i.e. 26th January 1950 in so far as they are inconsistent with the provision of part III shall to extent of such inconsistency be void. No retrospective effect- Article 13 (1) is prospective in nature. All inconsistent existing laws become void only after the commencement of Constitution. They are not void ab initio. Such laws exist for all past acts, transaction ,etc and for enforcing all rights and liabilities accrued before the date of the Constitution. However , nobody can claim his rights and liabilities to be enforced under a particular procedure (in respect of pending proceeding) which becomes inconsistent with fundamental rights.

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

Difference between Pre Constitution Laws and Post Constitution Laws –

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

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

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

Does the doctrine of eclipse apply to post -constitution law : Art. 13(2) deals with **post -constitution** or future laws [while clause (1) deals with post -constitution or existing laws]. It is to be noted that in both cl.(1) and (2) of Art. 13 a declaration by the court of their invalidity will be necessary , to make the laws invalid.

In Deep Chand vs State of U.P AIR 1959 and Mahendra Lal Jain Case AIR 1963 held that the doctrine of eclipse applies only to **pre -constitution law**, not to post -constitution law, because void ness of letter is from its very inception and such a law cannot exist for any purpose. But in **State of Gujrat vs Ambica Mills AIR** 1974 held that a post -constitution law which is inconsistent with fundamental rights is not nullity or non – existent in all cases and for all purposes. It will be operative as regards to non – citizen because fundamental rights are not available to them . **In Dulare Lodh vs Additional District Judge , Kanpur case AIR 1984** the court applied the doctrine of eclipse to post – constitution even against citizen. A 'void' statue can be revived by constitutional Amendment.

Question 4: Is making of classification contrary to guarantee of 'Right of equality" under Article 14 of the Constitution? Discuss fully with the help of decided cases.?

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

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

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

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

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

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

such aspect being that there should be an absence of any privilege or a person being above the law.

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

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

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

Dicey had given three meanings to this term:

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

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

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

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

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

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

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

Equal Protection of Laws

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

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

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

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

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

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

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

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

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

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

The New Concept of Equality

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

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

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

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

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

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

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

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

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

The new dimensions of Article 14 have been developed by the judiciary and the main purpose of Article 14 is to remove any arbitrariness which may exist in the actions of the State and thus this Article has a much wider scope in the present time as compared to its

scope at the time of enactment of the Constitution. Thus, the scope of this article has been enlarged by various judicial pronouncements.

Question 5 Discuss the importance of the freedom of speech and expression. Does the constitution permits its curtailment ? if so on what ground and to what extent ?

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

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

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

- This is important because democracy works well only if the people have the right to express their opinions about the government and criticise it if needed.
- The voice of the people must be heard and their grievances be satisfied.
- Not just in the political sphere, even in other spheres like social, cultural and economic, the people must have their voices heard in a true democracy.

- In the absence of the above freedoms, democracy is threatened. The government will become all-too-powerful and start serving the interests of a few rather than the general public.
- Heavy clampdown on the right to free speech and free press will create a fear-factor under which people would endure tyranny silently. In such a scenario, people would feel stifled and would rather suffer than express their opinions.
- Freedom of the press is also an important factor in the freedom of speech and expression.
- In the Indian context, the significance of this freedom can be understood from the fact that the Preamble itself ensures to all citizens the liberty of thought, expression, belief, faith and worship.
- Liberal democracies, especially in the West, have a very wide interpretation of the freedom of speech and expression. There is plenty of leeway for people to express dissent freely.
- However, most countries (including liberal democracies) have some sort of censorship in place, most of which are related to defamation, hate speech, etc.
- The idea behind censorship is generally to prevent law and order issues in the country.

The Need to Protect Freedom of Speech

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

1. For the discovery of truth by open discussion.
2. It is an aspect of self-fulfilment and development.
3. To express beliefs and political attitudes.
4. To actively participate in a democracy.

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

his right of making a choice, free and general discussion of public matter is absolutely essential.

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

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

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

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

In communist Party of India vs Bharat Kumar and others AIR 1998 it has been held by a three judge Bench of the Supreme Court that calling for and holding of **" Bundh**" by a political party or organisation is unconstitutional and therefore illegal as it violates the

Fundamental Rights of the citizen guaranteed by Articles 19 (1) (a) and 21 of the constitution and in addition to it causes nation loss.

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

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

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

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

In K.A Abbas vs UOI AIR 1971 it has been held that the Pre – Censorship of films is justified under Article 19(2) on the ground that films have to be treated differently from other forms of art and expression because of its instant effect on persons who watch it particularly on adolescents.

Right to Information – UOI vs Association for Democratic Reforms AIR 2002, a three judge Bench of the apex court directed the election Commission to issue a notification making it obligatory for those who contest election to make available information about their education, assets, liabilities and criminal antecedents for the benefit of voters. The court said that the voters have rights to know about the antecedents of the candidates before giving their votes. This right implicit under Article 19(1) (a).

What is Restriction on Freedom of Speech and Expression :

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

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

1. Decency or Morality

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

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

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

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

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

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

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

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

Question6 : what do you mean by life and what are the Protection of Life and Liberty given context in Article 21 ?

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

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

In its true sense, Right to life means a way of living which empowers every individual to enlighten his or her inner and outer contents, to enjoy dignified and humane life, to get pleasure of fundamental freedoms, etc. Every civilized state is bound to protect individuals" right to life.

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

By doing so, the courts recognized even those fundamental rights which were not explicitly mentioned in the Constitution of India. The Indian judiciary widely interpreted and gave progressive meanings to the words of „life", „personal liberty", and „procedure established by law" for protecting individuals" fundamental rights. Hence, the right to life under Article

21 of the Indian Constitution includes Right to education, Right to clean environment, Right to reputation, Right to food, Right to shelter, Right against exploitation, Right to dignified living, right to release and rehabilitation of bonded labourers , right to legal aid, and the right to know, Right to go abroad, Right to privacy, Right against solitary confinement etc.

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

Right to life is not an absolute right. State can impose reasonable restrictions by adopting some procedure. But the expression "**procedure established by law**" in Article 21 does not mean any arbitrary law rather it should be reasonable, fair and just. Justice H.R. Khanna rightly observed that sanctity of life and liberty was existed and was prevailing in the civilized societies even before the commencement of the Indian Constitution. In that sense, the Indian Constitution adopted the idea and spirit of life and liberty, and freedom from arbitrary authority of law. Despite of it being most precious fundamental right, it is submitted that, the term ‚life" has not been defined anywhere in the Constitution of India. Therefore, we will have to analyse various Indian judicial pronouncements for its interpretation. Furthermore, it is pertinent to mention here that the United States" judicial decisions also guided Indian courts at many fronts for defining the term **"life"** and "personal **liberty".**

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

Right to life with human dignity :In **Kharak Singh v State of UP**, the word "life" in Article 21 does mean and acknowledged that the observation rightly explained the meaning of right to life and personal liberty. Such observations were again approved by the Hon"ble Supreme Court of India in Sunil Batra v Delhi Administration. It has been observed that the inspired courts started giving new dimensions to the „right to life" under Article 21 of the Indian Constitution. The Supreme Court of India in Francis Coralie Mullin v Union Territory of

Delhi observed Right to life includes the right to live with human dignity. It further includes the basic necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. Therefore, this was the time in India when the real soul of "right to life" took rebirth in the form of "right to live with human dignity". The Hon'ble Supreme Court again in **Samatha v State of U.P.**

Interpretation of Article 21

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

A few important cases concerned with Article 21:

1. **AK Gopalan Case (1950):** Until the 1950s, Article 21 had a bit of a narrow scope. In this case, the SC held that the expression 'procedure established by law', the Constitution has embodied the British concept of personal liberty rather than the American 'due process'.
2. **Maneka Gandhi vs. Union of India Case** (1978): This case overturned the Gopalan case judgement. Here, the SC said that Articles 19 and 21 are not watertight compartments. The idea of personal liberty in Article 21 has a wide scope including many rights, some of which are embodied under Article 19, thus giving them 'additional protection'. The court also held that a law that comes under Article 21 must satisfy the requirements under Article 19 as well. That means any procedure under law for the deprivation of life or liberty of a person must not be unfair, unreasonable or arbitrary.
3. **Francis Coralie Mullin vs. Union Territory of Delhi (1981**): In this case, the court held that any procedure for the deprivation of life or liberty of a person must be reasonable, fair and just and not arbitrary, whimsical or fanciful.
4. **Olga Tellis vs. Bombay Municipal Corporation** (1985): This case reiterated the stand taken earlier that any procedure that would deprive a person's fundamental rights should conform to the norms of fair play and justice.
5. **Unni Krishnan vs. State of Andhra Pradesh** (1993): In this case, the SC upheld the expanded interpretation of the right to life. The Court gave a list of rights that Article 21 covers based on earlier judgements. Some of them are:

1. Right to privacy
2. Right to go abroad
3. Right to shelter
4. Right against solitary confinement
5. Right to social justice and economic empowerment
6. Right against handcuffing
7. Right against custodial death
8. Right against delayed execution
9. Doctors' assistance
10. Right against public hanging
11. Protection of cultural heritage
12. Right to pollution-free water and air
13. Right of every child to a full development
14. Right to health and medical aid
15. Right to education
16. Protection of under-trials

Right to Life and Suicide:

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

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

said Code endorsed an individual's right to live with human dignity, and observed that the life becomes meaningful only when an individual enjoys the social, cultural and intellectual life etc.

Arguments in favour of decriminalising suicide:

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

Right to Life and Euthanasia

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

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

There are various types of euthanasia: Passive and Active.

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

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

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

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

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

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

International Position on Euthanasia:

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

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

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

Euthanasia in India

Passive euthanasia has been made legal in India.

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

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

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

Right to Live in Healthy Environment is part of Right to Life and Personal Liberty

Courts in India have recognised sustainable development and environmental rights by

liberally interpreting Articles 21, 48, 48A and 51A of the Constitution. Directions have been issued from time to time to foster an effective administrative set up for preventing environmental degradation resulting from developmental activities.40 The apex court of India applied the doctrine of "Sustainable Development" in **Vellore Citizen Welfare Forum v Union of India**. The Court considered various constitutional provisions including Articles 47, 48A, 51-A(g). The court concluded that the State is bound to protect and preserve the ecology, as every person has a right to live in a pollution free atmosphere. The court further held that the doctrines like precautionary principle and polluter pays principle are indispensable parts of the environmental law of India. The court also held that reparation of the damaged environment is a part of „Sustainable Development" and, binds the polluter to pay the cost to the sufferers as well as the cost of reversing the damaged environment.

The Supreme Court, in many other cases, endeavoured to keep the balance between ecology and development.

In Rural Litigation and Entitlement Kendra Dehradun v. State of Uttar Pradesh, also known as **Doon valley case**, the Supreme Court had to deal with a dispute involving mining in the hilly areas. After proper investigation, the Supreme Court ordered to stop the mining work. The court also ordered to pay the price to the sufferers in order to protect and safeguard the right of the people to live in healthy environment. The court also showed its great concern to the local inhabitants" cattle, homes and agricultural land. In Intellectuals Forum, **Tirupathi v. State of A.P.** the Supreme Court made the government responsible for protecting the historical tanks while expanding the scope of concept of „sustainable development" and the „public trust doctrine". The principle of "Inter Generational Equity" was also recognised as part of sustainable development. The same principle was reiterated in several cases including A.P. Pollution Control Board .**In T. N. Godavaraman Thirumulpad v Union of India,** the Supreme Court again reminded the governments to make coherent policies on intergenerational equity. Recently in **M.C. Mehta v Union of India**, Decided on 8 May, 2009, the Supreme Court has suspended all mining operations in the Aravalli Hill Range falling in the State of Haryana till Reclamation Plan. The said Plan has to take initiatives for the rehabilitation of the area.

Question7 :what are the rights of a Arrested Person ?

Answer: Rights of An Arrested Person are as follows :

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

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

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

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

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

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

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

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

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

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

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

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

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

Question 8: what is 86th Amendment and Right to Education in this context?

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

What are the Changes implies in Fundamental Rights :

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

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

What are Changes held in DPSP ;

Article 45 which originally stated:

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

Was substituted as

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

Change in Fundamental Duties

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

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

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

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

Children from Disadvantaged Group:

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

- Belongs to SC & ST
- Socially backward class
- Geographical, Linguistic

- Gender or such other matters
- Is differentially abled

  The Right to Education Act 2009 did not initially talk about “Physically disabled” children. To enable such provisions, the Right of Children to Free & Compulsory Education (Amendment) Bill 2010 was introduced in the Rajya Sabha on April 16, 2010. This bill was later referred to a to a standing committee on Human Resource Development. The bill was passed in both the houses of the parliament by May 2012 thus expanding the definition of “Child belonging to disadvantaged group”. Now this group shall also include the children with disability. Disability means blind, leprosy cured, hearing impaired, locomotor disabled and mentally ill. It also includes autism, cerebral palsy, mental retardation & multiple disabilities. These children have the same right as of other children. Please note that Right to Education of persons with disabilities until 18 years of age is laid down under a separate legislation- the Persons with Disabilities Act. A number of other provisions regarding improvement of school infrastructure, teacher-student ratio and faculty are made in the Act.
- Teachers: This act provides that the states will ensure that no non-teaching work is given to the teachers. The act recommends quality teachers and mandates that untrained teachers will have to upgrade themselves in 5 years.
- Schools: The act has listed minimum infrastructure requirements as a part of the schools and mandates the states to ensure that schools have these requirements. The schools which don’t conform to the quality standards as mentioned in the act, will upgrade themselves in 3 years or face derecognition.
- Reservation: The act mandates 25% reservation for disadvantage sections of the society as defined by the act.
- Management Committees: The act mandates that parents are to constitute the 75% members in the management committees. The School management committees are to have 50% women members.
- Screening: This act makes the screening of students / parents unlawful. It invites fine up to ` 25000 in the first instance and double in every successive violations.
- Examinations: No child can be put through any exam, not even class V & Class VIII board examinations.

- Monitoring: The act states that National & State Commissions for protection of Child rights would monitor the effective implementation of measures in this act and inquire into complaints.
- National Advisory Council: The act provides that the central Government shall constitute a National Advisory Council of maximum 15 members which shall advise the central government on implementation of the various provisions of the act.

Question 9: what are Constitutional Protections Against Ex Post Facto Laws ?

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

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

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

Protection Against Ex Post Facto Laws: International Scenario :

The essence of non-retroactivity principle is that a person should never be convicted or punished except in accordance with previously declared offence governing the conduct in question. This principle is to be found in Article 11(2) of the Universal Declaration of Human

Rights etc. There is universal acceptance of the legality principle as a result of the international human rights movement after 1945. Article 15 Constitution of Maryland (1776) contained the first explicit prohibition against ex post facto laws, which later found its way into Article 1 (90)(3) of the Constitution of the United States of America. The British Parliament occasionally enacted ex post facto criminal laws well into the 19th century. It was only in 1973 the House of Lords abolished the doctrine of residual judicial discretion to create common law crimes. However, the Scottish judiciary still claims this power, as a part of dynamic system of common law which must be adapted to deal with changing social circumstances.

Historical Development : Article 20 (1)

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

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

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

Constitutional Protection Against Ex Post Facto Laws:

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

regarded as inequitable and abhorrent to the notions of justice and, therefore, there are constitutional safeguards against such laws.

Scope and Effect of Prohibition Against Ex Post Facto Laws

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

Immunity Restricted To Criminal Offences/Liability :

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

Offence Should Be Committed According To 'Law In Force'

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

Applicable To Law Enhancing The Criminal Liability :

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

Prohibition Not Applicable To Trial/Court/Procedure

There is no fundamental right available to a person accused of the commission of an offence, to be tried by a particular court or by a particular procedure, unless there is involvement of

any constitutional objection by way of discrimination or the violation of any other fundamental right. Retrospective change in the venue of trial does not attract the application of Art. 20 (1). A statute cannot be said to be retrospective because a part of the requisites for its actions is drawn from a time antecedent to its passing.

Question 10. What are Protections available in Double Jeopardy ?

International Scenario :

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

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

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

Constitutional Protection Against Double Jeopardy Under Article 20(2)

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

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

It is based upon the principle of 'double jeopardy' clause and lays down that no person should be put in jeopardy of his life or liberty more than once. Article 20 (2) uses the word 'and' in conjunctive sense and it is only where the accused has been both prosecuted and

punished for the same offence, a second trial is barred.25 Article 20 (2) can be invoked, if the following two requisites are fulfilled - (i) The person must be accused of an "offence"

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

Extent and Scope of Article 20 (2)

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

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

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

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

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

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

Effect of Prosecution and Conviction in Foreign Country :

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

Question 12: what are the Protection available Against Self Incrimination ?

International Scenario :

Right to Silence is implicit in protection against self incrimination. Some of the aspects relating to right to silence have been embodied in Art. 11.1, the Universal Declaration of Human Rights, 1948; Art. 14(3)(g), the International Covenant on Civil and Political Rights, 1966 and Art. 6(1) & 6(2), and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to refusal to answer questions that may incriminate a person is a procedural safeguard which has gradually evolved in common law and bears a close relation to the “right to fair trial”. Under the English Law, a witness is protected from

answering questions which may lead to criminal prosecution or any other penalty or forfeiture. The Fifth Amendment of the United States Constitution provides that no person shall be compelled in any criminal case, to be a witness against himself. This privilege is also available to the witnesses besides the accused.

Historical Development :

The Drafting Committee considered clause 26 of the Constitutional Adviser's Draft Constitution on November 1, 1947, and held that the intention of the second part of sub-clause (2) was only to prohibit compulsion of an accused to be a witness against himself. The Committee split up sub-clause (2) into two independent clauses. The amended provision appeared in the Draft Constitution as Article 14 (3): "(3) No person accused of any offence shall be compelled to be witness against himself.

Constitutional Protection Against Self Incrimination

This constitutional privilege has been given to the accused in order to safeguard his right to privacy and to ensure the civilized standards in the enforcement of criminal justice. In the absence of such protection there is likelihood of the accused being subjected to the third degree treatment so as to 'entrap him into fatal contradictions'. "The right against selfin crimination" is viewed as an essential safeguard in criminal procedure. The "rule against involuntary confessions" is to ensure that the testimony considered during trial is reliable and ruling out the chances of miscarriage of justice.

Art. 20 (3) has exalted status in our Constitution. Article 20 (3)- No person accused of any offence shall be compelled to be a witness against himself.

The right is protected by Articles 20(3) and 21 of the Constitution and Sections 161 (2), 313 (3) and 315 of the Cr.P.C., 1973. The Constitution and the Code are coterminous in the protective area. Art. 20 (3) embodies in its import the right to silence and has various facets which emanate from canons of criminal justice as follows:

(i) Burden is on the State/the prosecution to prove the guilt of the accused.

(ii) Accused is presumed to be innocent until proved to be guilty beyond any reasonable doubt.

(iii) Right of the accused against self incrimination, namely, the right to be silent and that he cannot be compelled to incriminate himself.

Extent and Scope of Article 20 (3)

Article 20(3) confers guarantee against "testimonial compulsion". The judicial interpretation of 'immunity against self incrimination/right to silence' has been widened keeping up with the exigencies and the dynamism of law and the trends in criminal jurisprudence. An analysis of Art.20 (3) brings out three essential components of the immunity contained in our Constitution, namely:

(i) it is a right pertaining to a person accused of an offence;

(ii) it is a protection against compulsion to be a witness; and

(iii) it is a protection against such compulsion resulting in his giving evidence against himself. If any of these ingredients do not exist, Article 20(3) cannot be invoked.

Accused of an offence :

For the invocation of Art. 20 (3), the first requisite is that the person claiming the protection should be "accused of an offence" at the time he makes the statements but can not avail the privilege if he becomes accused after making such statement. It does not refer to a hypothetical person who may in future be discovered to have been guilty of some offence. There should be formal accusation levelled, in the form of First Information Report or complaint relating to the commission of an offence before a magistrate competent to try the offence. The privilege under this Article is available not only to an individual, but even to an incorporated body, if "accused of an offence".

Mere issue of notice or pendency of contempt proceedings do not attract Article 20(3) of the Constitution. The contemners do no stand in the position of a "person accused of an offence" merely on account of issue of notice of contempt by this Court.

To be a witness' –Protection against Testimonial Compulsion not confined to the Courts

The accused person has a constitutional right not to be subjected to "testimonial compulsion" and the right to protection from being compelled to be a witness against himself as provided by Art.20 (3). The confession should appear to have been made voluntarily and the police officer recording the confession should satisfy himself that the same was being made voluntarily by the maker of the statement. The protection afforded to an accused in respect of 'testimonial compulsion' is not limited to the stage of trial in the court room but may well extend to compelled testimony previously obtained from him outside the court. Forcible administration of scientific techniques/tests like narco analysis, Brain Electrical Activation Profile (BEAP) test and Polygraph test, during the course of investigation would be an unjustified intrusion into mental privacy and would be violative of the "right against self-incrimination". However, mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion and the right This prohibition is not attracted where any object or document is searched or seized from the possession of the accused as per the provisions of the Cr. P. C. Compulsion in the context of Art.20 (3) must proceed from other person or authority. If a person voluntarily gives evidence in his defence, he cannot be said to be compelled to be a witness. A passive submission to search cannot be regarded as a compulsion on the accused and if anything is recovered during such search which may provide incriminating evidence against the accused it cannot be styled as compelled testimony.

Not Applicable to Civil Proceedings /Administrative Proceedings :

The protective sweep of Art.20(3) does not extend to the parties and witnesses in civil or any other proceedings.

Conclusion

Art. 20 is a compendium of protective rights provided by the Constitution to a person who is accused of an offence and is going to or is facing a criminal trial. Due to the serious ramifications of the criminal proceedings against a person, the protection against ex post facto laws, double jeopardy and self-incrimination have been provided as constitutional

safeguards in the administration of criminal justice. These protections flow from the presumption of innocence of the accused until the guilt is proved.

Summary

The three important safeguards enshrined under Article 20 of the Constitution of India provide constitutional protection against application of any criminal law retrospectively, against a person being convicted again for the same offence and also against being compelled to give evidence that is self-incriminating. For the protection against retroactive legislation, the act in question should be innocent when done, as per the law in force at the time of commission of the act. The second protection under Article 20 is confined only to the previous conviction. If the person has been previously tried and acquitted, the protection against double jeopardy is not available. The third and the last protection provided under this Article is against testimonial compulsion. No person can be compelled to give evidence adversely affecting his own interest. The ambit of these protections has been widened by judicial interpretation to ensure fair trial. These fundamental rights of the accused cannot be suspended even during emergency. These immunities reflect the natural justice principles in the administration of criminal justice.

Question 12. How does the constitution guarantee the right against exploitation ?

Or

Question 12: what provisions are incorporated in the constitution against forced labour and employment of children in factories.

Answer : Right against exploitation(Articles 23 and 24) : the constitution of India prohibits traffic in human beings and beggar and other forms of forced labour. Art 23 and 24 guarantee the right against exploitation. Art. 23 prohibits traffic in human beings, beggars and similar forms of forced labour. Art 24 prohibits employment of children under the age of 14 years in factories and mines or in any other hazardous employment. The protection of Art 23 and 24 is available to citizen of India and non -citizen alike.

Article 23 embodies two declaration : first that traffic in human being , beggar and other similar forms of forced labour are prohibited and secondly that any contravention of the prohibition shall be an offence punishable in accordance with law.

Section 370 and 371 of the Indian Penal Code provide the punishment against buying and selling of person and slaves and section 374 punishes forced labour, while 372 punishes the selling of a minor for Prostitution or immoral purposes. Section 373 punishes buying of a minor for such purposes. Thus Art. 23 confers a fundamental right against a certain form of exploitation. The provision of the Indian Penal Code referred to above provides the punishment for such exploitation and Art 23 gives to such punishment a constitutional sanction.

Prohibition of traffic in human beings and forced labour :

Article 23(1): Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law.

Article 23(2): Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

- Exploitation implies the misuse of others' services by force and/or labour without payment.
- There were many marginalised communities in India who were forced to engage in manual and agricultural labour without any payment.
- Labour without payment is known as begar.
- Article 23 forbids any form of exploitation.
- Also, one cannot be forced to engage in labour against his/her will even if remuneration is given.
- Forced labour is forbidden by the Constitution. It is considered forced labour if the less-than-minimum wage is paid.
- This article also makes 'bonded labour' unconstitutional.
- Bonded labour is when a person is forced to offer services out of a loan/debt that cannot be repaid.
- The Constitution makes coercion of any kind unconstitutional. Thus, forcing landless persons into labour and forcing helpless women into prostitution is unconstitutional.

- The Article also makes trafficking unconstitutional.
- Trafficking involves the buying and selling of men and women for illegal and immoral activities.
- Even though the Constitution does not explicitly ban 'slavery', Article 23 has a wide scope because of the inclusion of the terms 'forced labour' and 'traffic'.
- **Article 23 protects citizens not only against the State but also from private citizens.**
- The State is obliged to protect citizens from these evils by taking punitive action against perpetrators of these acts (which are considered crimes), and also take positive actions to abolish these evils from society.
- Under Article 35 of the Constitution, the Parliament is authorized to enact laws to punish acts prohibited by Article 23.
- Clause 2 implies that compulsory services for public purposes (such as conscription to the armed forces) are not unconstitutional.
- Laws passed by the Parliament in pursuance of Article 23:
    - Suppression of Immoral Traffic in Women and Girls Act, 1956
    - Bonded Labour System (Abolition) Act, 1976

Prohibition of employment of children in factories, etc.

Article 24 says that "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."

- This Article forbids the employment of children below the age of 14 in any hazardous industry or factories or mines, without exception.
- However, the employment of children in non-hazardous work is allowed.

Art 24 says that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment . obviously the provision is in the interest of health and strength of young person and keeping the view the directive principle of state policy embodied in Art 39(1) of the constitution.

Laws that were passed in pursuance of Article 24 in India:

- **The Factories Act, 1948**

- This was the first act passed after independence to set a minimum age limit for the employment of children in factories. The Act set a minimum age of 14 years. In 1954, this Act was amended to provide that children below the age of 17 could not be employed at night.
- **The Mines Act of 1952**
- This Act prohibits the employment of people under the age of 18 years in mines.
- **The Child Labour (Prohibition and Regulation) Act, 1986**
- This was a landmark law enacted to curb the menace of child labour prevalent in India. It described where and how children could be employed and where and how this was forbidden. This Act designates a child as a person who has not completed his/her 14th year of age. The 1986 Act prohibits the employment of children in 13 occupations and 57 processes.
- **Child Labour (Prohibition & Regulation) Amendment Act, 2016**
- This Act completely forbids the employment of children below 14 years of age. It also bans the employment of people between the ages of 14 and 18 in hazardous occupations and processes. Punishments to violators of this law were made stricter by this amendment act. This Act allows children to be employed in certain family occupations and also as artists.
- **Child Labour (Prohibition and Regulation) Amendment Rules, 2017**
- The government notified the above Rules in 2017 in order to provide a broad and specific framework for prevention, prohibition, rescue and rehabilitation of child and adolescent workers. The Rules clarified on issues concerning the employment of family enterprises and also provides safeguards for artists in that the working hours and conditions are specified.

Unlike the child labour clause in American Constitution Art 24 does not impose a complete ban on employment of children below the age of 14 years.

In M.C Mehta vs State of Tamil Nadu AIR 1997 the Supreme court held that children below the age group of 14 years cannot be employed in ant hazardous industry, mine or similar other work and laid down some guidelines for State authorities to protect social, economical and humanitarian rights of million of children working illegally in private and public sectors and to rehabilitate them by raising funds for their education from their employers and so on.

Question 13 : : What are the remedies available in the Constitution against infringement of Fundamental Right.

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

Right to constitutional remedies

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

What is WRIT?

A precept in writing, couched in the form of a letter, running in the name of the king, president, or state, issuing from a court of justice, and sealed with its seal, addressed to a sheriff or other officer of the law, or directly to the person whose action the court desires to command, either as the commencement of a suit or other proceeding or as incidental to Its progress, and requiring the performance of a specified act, or giving authority

and commission to have it done. For the names and description of various particular writs, see the following titles.

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

Comparative Analysis of Article 32 & 226

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

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

Types of WRITS

- **Habeas Corpus:**

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

How a Writ of Habeas Corpus is filed?

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

Habeas Corpus is not issued in certain cases

1. Where the person who is detained or against whom the writ is issued is not within the jurisdiction of the Court.

2. To save the release of a person who has been imprisoned by a Court for a criminal charge.
3. To interfere with a proceeding for contempt by a Court of record or by Parliament.

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

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

.Notable Cases for Writ of Habeas Corpus:

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

Mandamus

- **Meaning:** "A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act." It is used for enforcement of various rights of the public or to compel the public statutory authorities to discharge their duties and to act within the bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties.
- **The rule of Locus Standi:** is strictly followed in while issuing writ of mandamus. The petitioner has to prove that he has a right to enforce public duty in his

favour. The *mandamus* is "neither a writ of course nor a writ of right but that it will be granted if the duty is in nature of public duty and it especially affects the right of an individual, provided there is no more appropriate remedy."

Conditions for Issue of Writ of Mandamus

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

- **Exceptions & Limitations (Mandamus)**

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

- The courts are unwilling to issue writ of mandamus against high dignitaries like the President and the Governors. In the case of **S.P. Gupta v. Union of India**, judges were of the view that writ cannot be issued against the President of India for fixing the number of judges in High Courts and filling vacancies.
- In **C.G. Govindan v. State of Gujarat**, it was refused by the court to issue the writ of mandamus against the governor to approve the fixation of salaries of the court staff by the Chief Justice of High Court under Article 229. Hence, it is submitted that the Governor or the President means the state or the Union and therefore issuance of mandamus cannot take place.

Prohibition

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

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

Certiorari

- **Meaning:** The writ of certiorari issued to quash a decision after the decision is taken by a lower tribunal while prohibition is issuable before the proceedings are completed. The law has always been, that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi-judicial body conferred with power to determine question affecting the rights of subjects and obliged to act judicially.

- **The Purpose:** of the writ of certiorari is not only negative in the sense that it is used to quash an action but it contains affirmative action as well. It is preventive as

well as curative in nature. The power of judicial review is not restricted where glaring injustice demands affirmative action.

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

Quo Warranto

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

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

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

1. The office must be public and it must be created by a statute or by the constitution itself. In the case of **Jamalpur Arya Samaj v. Dr D. Ram** , the writ was denied on the ground that writ of quo warranto cannot lie against an office of a private nature. And also, it is necessary that office must be of substantive character.
2. The office must be a substantive one and not merely the function or employment of a servant at the will and during the pleasure of another.
3. There has been a contravention of the Constitution or a statute or statutory instrument, in appointing such person to that office.

4. The claim should be asserted on the office by the public servant i.e. respondent.

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

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

Conclusion

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

Question 14 : **Distinction Between Article 32 And 226 ?**

Answer : It is to be noted that under Article 226, the High Courts have also been given the power of issuing writs in the nature of habeas corpus etc. Therefore, in the matter of enforcement of fundamental rights, the High Courts under Art. 226 and the Supreme Court under Article 32, enjoy concurrent jurisdiction. The difference in the phraseology of Arts. 32 and 226 brings out the marked difference in the nature and purpose of the right conferred by these Articles. Whereas the right guaranteed by Art.32 can be exercised for the enforcement of fundamental rights only, the right conferred by Art.226 can be exercised not only for the enforcement of fundamental rights but for "any other purpose". Thus, the power of the High Court is wider than the power to issue writs not only for the enforcement of fundamental rights, but for the enforcement of rights other than fundamental rights, whereas Art. 32 can be invoked only for the enforcement of fundamental rights and for no other purpose. It may be emphasized that a PIL writ petition can be filed in the Supreme Court under Art. 32 only if a question concerning the enforcement of a Fundamental Right is involved whereas under Art. 226, a writ petition can be filed in a High Court whether or not a Fundamental Right is

involved. A question has been raised whether a petitioner seeking to enforce his fundamental rights can go straight to the Supreme Court under Art.32, or should he first go to a High Court under Art.226. As early as 1950, in Romesh Thapar, the Supreme Court ruled that such a petitioner can come straight to the Supreme Court without going to the High Court first. The Court stated that unlike Art.226, Art.32 confers a fundamental right on the individual and imposes an obligation on the Supreme Court which it must discharge when a person complains of the infringement of a Fundamental Right. Article 32 provides a guaranteed remedy for the enforcement of the Fundamental Rights and constitutes the Supreme Court as the "guarantor and protector of fundamental rights". This proposition has been reiterated by the Supreme Court in a number of cases.65 This continued to be the position till 1987 when a two Judge Bench of the Supreme Court ruled in Kanubhai66, that a petitioner complaining of infraction of his fundamental right should approach the High Court first rather than the Supreme Court in the first instance. The reason given for this view was that there was a huge backlog of cases pending before the Supreme Court. Since, it is a view expressed by a two Judge Bench, it cannot be considered to be an authoritative pronouncement on an important constitutional issue, viz., inter-relationship between Arts.32 and 226. Such a vital pronouncement could be made only by a Constitution Bench consisting of at least 5 Judges, especially, when the long established position is sought to be overturned. The ruling in **Kanubhai** seeks to negate what the Supreme Court has itself said in a number of cases during the last four decades emphasizing upon the significance of Art.32, and the role assigned to it thereunder.67 In practice, it seems that the Kanubhai announcememnt has had no effect on the existing practice and the writ petitions continue to be filed in the Supreme Court under Art. 32 without going to the High Court under Art.226.

Res Judicata

When a writ petition under Art. 226 has been dismissed by the High Court, another writ petition under Art. 32 cannot be moved in the Supreme Court, to seek redress in the same matter.69 The principal of res judicata envisages that if a judgment has been pronounced by a Court of competent jurisdiction, it is binding between the parties unless it is reversed or modified in appeal, revision or other procedure prescribed by law.70 According to the Supreme Court, the jurisdiction of a High Court in dealing with a writ petition under Art. 226

is substantially the same as that of the Supreme Court under Art. 32. The scope of the writs under both the Articles being concurrent, res judicata applies. The High Court's decision can be attacked in an appeal to the Supreme Court but not through a writ petition.

Question 15: It is the heart and soul of the Constitution, To which Article Ambedkar said this this line ?

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

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

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

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

The scope of Article 32

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

How Article 32 is different from the Article 226

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

What are the similarities between Article 32 and Article 226?

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

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

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

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

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

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

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

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

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

Conclusion

Article 32 is a fundamental right which empowers the Supreme court to issue direction, order, and writs. Article 226 is the constitutional right which empowers High court to issue a direction, order, and writs for enforcement of fundamental rights and other legal rights. The writs in form of Habeas Corpus, Mandamus, Quo Warranto. Prohibition, Certiorari can be issued under Article 32 and Article 226. It is concluded that the scope of Article 226 is wide than the Article 32. Unlike 32, Article 226 cannot be suspended during the period of the emergency.

Question 16 : Critically analyse the Judicial Review system of India.

Answer : Introduction

The term judicial review in general, means the power of a court to review and potentially strike down an act of legislature as unconstitutional and invalid. The courts power of judicial review has been culled out from the principle of checks and balances. The system of checks and balances between the legislature and the executive on the one hand and the judiciary on the other hand provides the means by which mistakes committed by one are corrected by the other and vice versa.

For every civilised and democratic society, it becomes necessary that all the three organs of the State are working in a complete harmony. Each organ is bound to act within its own domain. And all of their actions have to be tested on the Constitutional and democratic principles. In its wider connotation, judicial review means not merely a power of the courts to set aside legislative actions but also covers the power of judicial review of executive or administrative actions.

Furthermore, Superior courts have power to review the acts, decisions and omissions of public authorities in order to determine whether they have exceeded or abused their powers. Judicial review is different from right of appeal. An appeal is a statutory right. An appellate body receives power from a statute to decide the whole case again. An appellate body can change the lower court's verdict and give its own decision over the issue. Contrary to this, in case of judicial review, the courts have limited powers. The courts do not act as an appellate authority while doing judicial review. In case of judicial review, the courts inquire how the decision was reached. The superior court scrutinises the whole decision-making process and checks whether the decision was made lawfully or not. If the superior court finds the decision unlawful, it cannot make a fresh decision but sends the matter back to the decision-making authority. **Judicial Review in India** : In the early Vedic times, there is no specific evidence of any settled judicial procedure. However, in general, Kings had their own judges to administer justice. The current administration of justice and laws in India are the outcome of initiatives taken during the British rule in India. The four law commissions and other

committees were appointed during the years 1834 to 1947 to give proper structure to then justice system in India.

In India, the judiciary is the guardian of the Indian Constitution, the democratic atmosphere and individuals‟ fundamental rights. An independent and impartial judiciary fights against legislative and executive arbitrariness. Indian judiciary is empowered with power of judicial review. The courts have power to review all legislative enactments executive and administrative actions. The Indian Constitution explicitly provides for judicial review through articles 13, 32, 131-136, 143, 226 and 246. In contrast to the judicial review of legislative action, the courts in India use the power of Judicial review more against the excesses of administrative action.

Dr. B. R. Ambedkar defended the provisions of judicial review and said that it is necessary for our legal system. According to Dr. Ambedkar, the provisions for judicial review, in particular the writ jurisdiction would provide quick relief to the individuals against the abridgment of fundamental rights. **In A.K.Gopalan v State of Madras** the court held that the Constitution is supreme and every statute has to be in conformity with the constitutional requirements. Moreover, it is the binding duty of the courts to decide whether any law or statute is constitutional or not. The Supreme Court stated that the Indian Constitution provides express provisions for judicial review of legislation.

The Court further declared that it is the most important duty of the court to determine the constitutionality of an impugned statute. Justifying judicial review, in **S.S. Bola v B. D. Sardana Sharma**, **Justice Ramaswami** held that the founding fathers wisely added the provision of judicial review for maintaining federalism, protecting fundamental rights, and strengthening the concept of liberty and equality in India. Judicial review is a basic feature of the Indian Constitution. Judicial Review cannot be abrogated by the Parliament since it is essential feature of the Indian Constitution. Without the provision of judicial review, the enforcement of fundamental rights would be meaningless. In **Minerva Mills case**, Chandrachud, C.J speaking on behalf of majority stated that fundamental rights would become a mere a piece of decoration. A controlled constitution will be under no control. In the same case, Bhagwati, J observed that without power of judicial review there will be no Government of laws and the rule of law would become an illusion.

The Supreme Court in **L. Chandra Kumar v Union of India** held that High Court's jurisdictional power under Art. 226/227, and Supreme Court's power under Art. 32 are basic structure of the Indian Constitution. Therefore, the Supreme Court declared clause 2(d) of Art. 323A and clause 3(d) of Art. 323B unconstitutional to the extent they excluded the jurisdiction of High Court and Supreme Court under Art. 226, 227, and 32 of the Indian Constitution.

Furthermore, the Supreme Court in **State of West Bengal v Committee for Protection of Democratic Rights** again reiterated that the power of judicial review of the High Courts and Supreme Court under Article 226 and Article 32 respectively is the basic structure of the Indian Constitution and cannot be abolished by an act of Parliament. The court again viewed that judicial review gives the practical shape to the objectives of the Indian Constitution. The Court said that the Supreme Court and High Courts can invalidate a legislative action which violates federal structure of our nation.

More importantly, in the **Golak Nath case** Chief Justice Subba Rao upheld the law making role of the judiciary. He said that Articles 32, 141 and 142 of the Indian Constitution enable the Supreme Court to formulate legal principles to reach the ends of justice. Therefore, all such constitutional provisions strengthen the Indian Judiciary, which in consequence attracts people's trust.

Judicial Review of Legislative Action in India Article 13 lays down the procedure for judicial review in India. It enables the courts to examine the constitutional validity of laws passed by the Parliament and the state legislatures. In India, Judicial review of legislative action is being done by using some basic principles of Constitutional Law i.e. doctrines of Pith and Substance, Colourable Legislation, Severability, Liberal Interpretation, Limitations of Stare Decisis, Unconstitutionality and Eclipse, and Waiver. Doctrine of Basic Structure is one of the most reliable grounds for judicial review. Article 13 deals with statute law and not with the law declared by the courts, or with the directions or orders made by the Supreme Court under Art. 142.

Article 13 of the Indian Constitution

Laws inconsistent with or in derogation of the fundamental rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions this Part, shall, to the extent of such inconsistency, be void.

(2) The states shall not make any law which takes away or abridges rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

The Constitution has distributed the legislative powers between the centre and the states. Both of them have to exercise their powers within their assigned domain. They cannot interfere with the powers of each other. The courts decide whether a legislature or an executive has acted beyond its jurisdiction or against the constitutional requirements or not. Article 13 provides that fundamental rights will prevail over all laws in force before the commencement of the Constitution. It also prohibits the making of any law, rule, regulation, etc that violates or diminishes the fundamental rights. However, this provision does not impose restriction on the process of constitutional amendment. Parliament may amend any Constitutional provision while exercising of its constituent power in accordance with the procedure mentioned under Article 368 of the Indian Constitution.

In **Golaknath v Punjab** the Supreme Court of India categorically held that the Parliament cannot amend the fundamental rights. The Court held that the procedure laid down for the constitutional amendments in Article 368 was law within the meaning of Article 13. In this whole confrontation, the Supreme Court of India gave a very revolutionary pronouncement. In **Kesavananda Bharti v State of Kerala** the Supreme Court said that the Parliament is allowed to amend the Constitution but is not authorised to amend the basic structure of the Indian Constitution. In this case, the Supreme Court ruled that the 24th, 25th, and 29th Amendments were unconstitutional to the extent that they violate the basic structure of the Constitution.

In doing so the court overruled the majority opinion of Golaknath's case. Again, in order to prevent any kind of chaos the Supreme Court applied doctrine of prospective overruling.

Summary

The doctrine of judicial review, in its modern sense, has been originated in the United States of America. Moreover, practices of the doctrine in United States also influenced many countries in the whole world. The courts examine the actions of public bodies and protect the will of Parliament. The courts check whether the bodies are functioning within the powers they have been given. If bodies act outside those powers, the courts consider it void as it is against the intention of the Parliament. The Indian Constitution explicitly provides for judicial review through articles 13, 32, 131-136, 143, 226 and 246. In contrast to the judicial review of legislative action, the courts in India use the power of Judicial review more against the excesses of administrative action.

Question 17 : What are the directive principles of state policy under the constitution of India?

Answer : Part IV (Arts. 36 to 51) of the Constitution of India contain the 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 State in the governance of the country. The idea to have such principles in the Constitution has been borrowed from the Irish Constitution.1 The Directive Principles are the ideals which the Government must keep in mind while it formulates policy or pass any law. They lay down certain social, economic and political principles, suitable to peculiar conditions prevailing in India.2 They embody the aims and objectives of a welfare State.

Need For Directives:

The main objective behind enactment of the Directive Principles appears to have been to set standards of achievements before the Legislature and the Executive, the local and other authorities, by which their success or failure can be judged. There was a time, known as the laissez faire era, when the state was mainly concerned with the maintenance of law and order and defence of the country against external aggression. Such a restrictive concept of the state no longer remains valid. Today, we are living in an era of 'welfare state' which seeks to promote the prosperity and well – being of the people. The makers of the Constitution had

realized that in a poor country like India, political democracy would be useless without economic democracy. Accordingly, they incorporated a few provisions in the Constitution with view to achieve amelioration of the socio-economic condition of the masses.3 Therefore, the Directive Principles of State Policy strengthen and promote this concept by seeking to lay down some socio-economic goals which the various governments in India, both at the Centre and in the States, have to strive to achieve.

Features of Directive Principles of State Policy (DPSP)

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

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

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

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

Classification of Directive Principles of State Policy (DPSP)

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

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

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

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

Criticism of Directive principles of State Policy.

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

1. It has no legal force
2. It is illogically arranged
3. It is conservative in nature
4. It may produce constitutional conflict between centre and state

What is the conflict between fundamental rights and Dpsp ?

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

Champakam Dorairajan Case (1951)

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

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

Golaknath Case (1967)

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

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

No law which seeks to implement the socialistic Directive Principles specified in Article 39 (b)22 and (c)23 shall be void on the ground of contravention of the Fundamental Rights conferred by Article 14 (equality before law and equal protection of laws), Article 19 (protection of six rights in respect of speech, assembly, movement, etc) or Article 31 (right to property).

No law containing a declaration for giving effect to such policy shall be questioned in any court on the ground that it does not give effect to such a policy.

Kesavananda Bharti Case (1973)

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

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

Minerva Mills Case (1980)

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

Supreme Court's rulings following the case were:

- Fundamental Rights & DPSPs constitute the core of the commitment to social revolution.
- The harmony and balance between Fundamental Rights and Directive Principles of State Policy is an **essential feature of the basic structure** of the Constitution.

- The goals set out by the Directive Principles have to be achieved without the abrogation of the means provided by the Fundamental Rights.

Conclusion:

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

Question 18 : What are the fundamental duties granted to Indian Citizens, Are they justiciable in nature.

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

The Following are the Duties in Our Constitution:

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

b) To cherish and follow the noble ideals which inspired our national struggle for freedom- The citizens of India must cherish and follow the noble ideals which inspired the national struggle for freedom. These ideals were those of building a just society and a united nation with freedom, equality, non violence, brotherhood and world peace. If the citizens of India

remain conscious of and committed to these ideals, we will be able to rise above the various separatist tendencies raising their ugly heads now and then, here and there.

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

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

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

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

g) To protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures – these natural reserves are the most valued assets of our country hence it is the duty of every citizen to protect it. Rising pollution, large scale degradation of forests is causing immense harm to all the human lives on earth. Increasing natural calamities is a proof to it. It is also reinforced in other constitutional

provision under article 48A i.e. Directive Principles of State Policy which states that, to protect and improve the environment and safeguard the forests and wildlife

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

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

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

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

Criticism of Fundamental Duties:

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

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

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

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

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

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

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

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

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

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

Question 19 : what are the relation between fundamental right and directive principle of state policy?

Ans.: **Introduction**

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

Fundamental rights and DPSP as cherished in the Constitution of India together comprises the human rights of an individual. The Constitution expresses fundamental rights as an idea which appeared in India in 1928 itself. The Motilal Committee Report of 1928 clearly shows

inalienable rights derived from the Bill of Rights enshrined in the American Constitution to be given to the individual. These rights were preserved in Part III of the Indian Constitution. of India.

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

Relationship between Fundamental Rights and DPSP

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

The difference between DPSP and FR are:

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

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

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

In **Champak Dorairajan vs. the State of Madras**, the Supreme Court held that DPSP cannot override the provisions of Part III of the Constitution of India i.e. the Fundamental Rights. Now DPSP has to run subsidiary to the Fundamental rights and have to confirm them and this was very important judgement the parliament responded by amending various fundamental rights which were coming in conflict with DPSP.

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

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

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

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

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

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

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

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

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

In Dalmia Cement vs. Union of India**,** the Supreme Court said that Fundamental rights and DPSP are supplementary and complementary to each other and the preamble to the

constitution which gives an introduction, fundamental rights, DPSP are conscience of the Constitution.

In Ashok Kumar Thakur Vs. Union of India, 2008**,** the Supreme Court said that no difference can be made between the 2 sets of rights. Fundamental rights deal with Civil and political rights whereas DPSP deals with social and economic rights. DPSP are not enforceable in a court of law doesn't mean it is subordinate.

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

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

Conclusion:

It can be concluded by saying that the basic feature of the constitution is to maintain harmony between fundamental rights and DPSP. They are complementary and supplementary to each other. The theme of fundamental rights must be made in light to DPSP.

Question 20. What are Legal provisions for the enforcement of fundamental duties ?

Answer : Following are some of the legal provisions already available in regard to enforcement of Fundamental Duties:

In order to ensure that no disrespect is shown to the National Flag, Constitution of India and the National anthem, the Prevention of Insults to National Honour Act, 1971 was enacted. The Emblems and Names (Prevention of Improper Use) Act 1950 was enacted soon after

independence, inter alia, to prevent improper use of the National Flag and the National Anthem.

In order to ensure that the correct usage regarding the display of the National Flag is well understood, the instructions issued from time to time on the subject have been embodied in Flag Code of India, which has been made available to all the State Governments, and Union territory Administration (UTs).

There are a number of provisions in the existing criminal laws to ensure that the activities which encourage enmity between different groups of people on grounds of religion, race, place of birth, residence, language, etc. are adequately punished. Writings, speeches, gestures, activities, exercise, drills, etc. aimed at creating a feeling of insecurity or ill-will among the members of other communities, etc. have been prohibited under Section 153A of the Indian Penal Code (IPC).

Imputations and assertions prejudicial to the national integration constitute a punishable offence under Section 153 B of the IPC.

A Communal organization can be declared unlawful association under the provisions of Unlawful Activities (Prevention) Act 1967.

Offences related to religion are covered in Sections 295-298 of the IPC (Chapter XV). Provisions of the Protection of Civil Rights Act, 1955 (earlier the Untouchability (Offences) Act, 1955) Sections 123(3) and 123(3A) of the Representation of People Act, 1951 declares that soliciting of vote on the ground of religion and the promotion or attempt to promote feelings of enmity or hatred between different classes of citizens of India on the grounds of religion, race, caste, community or language is a corrupt practice. A person indulging in a corrupt practice can be disqualified for being a Member of Parliament or a State Legislature under Section 8A of the Representation of People Act, 1951.

Prevention of Cruelty to Animal Act, 1960

Right of Children to Free and Compulsory Education Act, 2009.

Water (Prevention and Control of Pollution) Act, 1974, Air (Prevention and Control of Pollution) Act, 1981, The Environment (Protection) Act, 1986. It must be noted that in pursuant to various judgments of the hon'ble Supreme Court relating to environment issues and having regard to the complex issues of fact of science and technology which arise in environmental litigation and in particular in the elimination of pollution in air and water, in September 2003, the Law Commission of India, in its 186th Report, made a proposal to constitute "multifaceted" Environmental Court with judicial and technical/scientific inputs.

SUBJECT: LAW OF CRIMES

COURSE: BBALLB 209

UNIT I

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

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

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

CULPABLE HOMICIDE UNDER SEC.299 OF IPC-

Whoever causes death by doing any act :-

(i) With the intention of causing death

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

(iii) With the knowledge that he is likely, by such act, to cause death commits the offence of culpable homicide.

ILLUSTRATION

'A' knows that Z is behind a bush, B does not know it. A intending to cause or knowing that is likely to cause Z's death induces B to fire at the bush. B fires and kills Z. Here B may be guilty of no offence, but A has committed the offence of culpable homicide. Here is the three explanations of this section which are as under :-

Explanation No. 1 :- A person who causes bodily injury to another who is labouring under disorder decease, or bodily infirmity and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation No. 2 : Where death is caused by bodily injury the person who causes such bodily injury shall be deemed to have caused death, although by resorting to proper remedy and skilful treatment, the death might have been prevented.

Explanation No. 3 : The causing of death of a child in the mother's womb is not homicide, but it may amount to culpable homicide to cause the death of a living child if any part of that

child has been brought forth, though the child may not have breathed or been completely born.

Case: Kedar Parsad V/s State 1992: It was held by the court that the first accused was liable U/s 304 and the other U/s 324 for causing hurt by dangerous weapon & the third U/s 323 for causing simple hurt only.

Case:- Ghanssham V/s State of Maharashtra 1996 : The accused husband stabbed his wife on chest resulting in her death on her refusal to have sexual intercourse with him. It was held that the act was done in sheer frustration and anger and so his liability was based on sec. 299(2) of IPC.

Case: Sarabjeet Singh V/s St ate 1994. The accused did not have good relation with complainant on account of sale transaction of piece of land. He went to the house and assaulted the complainant and his wife. He also picked up the infant child of the complainant and threw him down on the ground with force as a result of which the child died some time later. The accused was held guilty under sec. 304 Part-II. When culpable homicide amounts to murder : According to sec.300 of IPC except the exceptions culpable homicide is murder, it the act by which death is caused:

1. It is done with the intention of causing death or
2. It is done with the intention of causing such bodily injury as the offender knows that it is to be likely to cause the death of the person to whom the harm is caused.
3. If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient ordinary cause of nature to cause death
4. If the person committed the act knows that it is so imminently dangerous that it must in all probability, cause death or such bodily injury as is like to cause death; and commits such act without any excuse for incurring death or such injury as said above.

ILLUSTRATION:

A. A shoots Z with intention of killing him, Z dies in consequence, A commits murder.

B. A knowing that Z is labouring under such disease that a blow is likely to cause his death, strike him with the intention of causing bodily injury, Z dies in consequences of blow. A is guilty of murder.

C. A intention gives Z a sword cut sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequences. Here A is guilty of murder although he may not have intended to cause Z's death.

D. ' A' without any excuse fires a loaded cannon in to a crowd of persons and kills one of them. A is guilty of murder although he may not have had a pre-meditated design to kill any particular individual.

Cases:-

Sridharan Sathesan V/s State of Keral :-

There was a dispute between the accused and the deceased regarding the payment of money. The accused who was a driver caused serious injuries by his mini bus and hit the deceased with great speed in he middle portion of the body. Tyre marks were also found on

the thighs of the deceased. It was held that it was an intentional killing and Sec.300 (1) was applicable.

State V/s Sadanand :-

Accused caused the first injury on the stomach of the deceased by Rampuri Knife with a blade of more than six inches long. While the deceased started running away from the place to save himself, the accused gave another blow by the same knife on his back. The injuries caused his death. The SC held that the accused was guilty of murder and Sec.300 (3) was applicable.

Lakha Singh V/s state of Rajasthan: The accused was held guilty on the basis of cause (3) of section 300 of IPC.

Dulal Hazara V/s State: The accused tied the mouth and throat and hands of the deceased causing her death by asphyxiation due to throttling, he was held guilty of murder. He knew that his act was so imminently dangerous as to cause death probability.

Thus except the exceptions cases culpable homicide is murder, if the circumstances described above any of the four clauses are present. In other words, only these four classes of culpable homicide are murder and any other kind of culpable homicide continues to be culpable homicides and does not become murder.

Question No.2. Every murder is a culpable homicide, but every culpable homicide is not murder. Discuss.

Answer: Every murder is a culpable homicide, but every culpable homicide is not murder. There are certain exception which presents when culable homicide is not murder

Five exceptions have been provided u/s 300 wherein causing death does not amount to murder. If any of these exceptions is held to be applicable in a case, the conviction of the accused in that case would be for culpable homicide not amounting to murder. In this sense, therefore, these five exceptions are partial defences to murder thus following are the exceptions:-

1. Grave and sudden provocation: Culpable homicide is not murder if the offended, who deprived of the self control by grave and sudden provocation, causes the death of a person, who gave the provocation or causes the death of any other person by mistake or accident. Thus for the first exception following things are necessary :-

a) There must be provocation.

b) Provocation must be grave and sudden.

c) By reason of such provocation the offender have been deprived of the power of self control.

d) The death must be of that person who gave the provocation or any other person by mistake or accident.

ILLUSTRATION: Y gives grave and sudden provocation to A. A on this sudden provocation fires a pistol at Y, neither intending nor knowing himself to be likely to kill Z who is near him but out of sight. A kills Z here, A has not committed murder but merely culpable homicide.

Ajit Singh v/s State l991 : In this case the accused found his wife and a neighbours in a compromising position and shot both of them dead. It was held that he was acting under provocation and is liable for sudden provocation.

2. RIGHT OF PRIVATE DEFENCE;- For the application of this exception the following conditions must be fulfilled :-

A. Act must be done in good health.

B. Act must be done in exercise of the right of private defence of person or property.

C. The person doing the act must have exceeded in his right given to him by law and thereby caused death.

D. The act must be done without premeditation and without any intention of causing more harm then was necessary for the purpose of such defence.

ILLUSTRATION:- Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. A believing in good faith that he can by no other mean, prevent himself from being horsewhipped shoots Z and kills. A has not committed murder but culpable homicide.

Bahadur Singh v/s State 1993 :The complainant party assaulted the accused person who were also armed with sharp weapons like Gandasa by the use of which death caused. It was held they had excluded their right of private defence in good faith and so exception N's was available to them.

3. OFFENCE BY PUBLIC SERVANT OR PERSON AIDING PUBLIC SERVANT.

Culpable homicide is not murder if the following conditions are there :-

a. Offence must be committed by public servant or by some other person acting in the aid of a public servant in advancement of public justice,

b. Public servant or such person must have exceeded the power given to him by law.

c. Death must be caused by doing an act which he, in good faith, believes to be lawful & necessary for discharge of his duty.

d. The act must have been done without any malafide intention towards the person whose death is caused.

Case : Dakhi Singh V/s State 1955.: It was held by the Court that he was entitled to have the benefit of this exception and so he was liable only for culpable homicide not amounting to murder.

4 Death caused by sudden fight. For the application of this exception

The following conditions must be ful-filled :-

a. Death must be caused by sudden fight.

b. Fight must be without any pre-meditation.

c. It must be occur in the heat of passion upon a sudden quarrel.

d. It must be committed without the offender's having taken undue advantage or acted in a cruel or unusual manner.

Explanation :- It is immaterial in such cases where party offers the provocation or commits the first assault.

Case :- State v/s Jodha Singh : A quarrel between accused and the deceased parties changed in to a sudden fight in which weapon were used by both parties resulting in injuries on both sides and death of the deceased. This exception was held to be applicable.

5. Death caused with the consent: Culpable homicide is not murder when the person whose death is caused being above the age of eighteen years suffers death or takes the risk of death with his own consent.

Illustration :- 'A' by instigation, voluntarily caused Z, (a person under l8 years of age) to commit suicide. Here on account of Z's death (he was incapable of giving consent to his own death). A has, therefore abetted murder.

Case :- Dashrath Paswan V/s State : The accused could not passed the Xth Class examination for three years in a row and become frustrated and decided to commit suicide and informed his wife who asked him to kill her first which he did, the exception was held to apply.

QuestionNo.3. Discuss the difference between SECTION 299 AND 300 OF IPC in reference to Reg. V/s. Govinda.

Answer: One of the most complex matters under the code is to distinguish between culpable homicide and murder. The first real attempt in this regard was made in the case :-

Justice Melwell in Govinda's case held that if death is the likely result it is culpable homicide. But if death is most likely or certain it amounts to murder. Hence in culpable homicide, death is the probable result but in murder, it is the most probable result.

Case : Reg. V/s. Govinda 1876 (Bom): In this case the accused kicked his wife who was 15 years old and gave her a few blow on the body with the result she fell down on the ground. Then he put one knee on her chest and struck her a few more blow resulting in her death. The lower court convicted him of murder. There were different opinions amongst the two judges of the High Court and consequently the matter was referred to a third Judge,

Justice Melvil, who held the accused guilty under clause (2) of sec.299 for culpable homicide and sentenced him u/s 304 part I on the grounds that the death was caused with the intention on the part of the accused to cause such bodily injury as was likely to cause death. Justice Melvil discussed the two sections clause by clause and attempted to bring out the difference between the two offence clearly in following manner :--:

Section 299 deals with Culpable homicide. (Homicide means killing of human by a human being . Culpable means Killing of a person. punishable in nature, is culpable homicide. Section. 300 deals with murder Culpable homicide includes :

(i) Causing death:

a) with the intention of causing death, or

b) With the intention of causing such bodily injury causing such bodily injury as is likely to cause death or, With the knowledge that the act is likely to cause death. which the offender knows to be likely to cause death or

c) With the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death, or

d) With the knowledge that the act is so imminently dangerous that it must in all probability cause death.

Murder includes:

(i) Killing another person:

a) with the intention of causing death, or

b) With the intention of causing such bodily injury which the offender knows to be likely to cause death or

c) With the intention of causing such bodily injury as is sufficient in the ordinary course of nature to cause death, or

d) With the knowledge that the act is so imminently dangerous that it must in all probability cause death.

The leading cases are :

i) R.V. Gorachand Gopi

ii) Rajwant Singh V State of Kerala

iii) R.V. Govinda iv) R .V. Beg

vi) Harinder singhV Delhi

v) Vjra Singh's case

i) R.V. Gorachand Gopi: The accused struck his wife a blow on her head with a ploughshare. She fell down. The accused thought that she was dead. He hanged her with a rope to create an impression that she has committed suicide. In fact, she died due to strangulation. He was tried for murder. The court made a distinction between culpable homicide and murder. Held accused was not guilty of murder or culpable homicide but was guilty of grievous hurt.

ii) R.V. Govinda: The accused knocked down his wife, and put his knee on her chest and dealt on her face with two or three violent blows with his fist and in consequence she died. Mehvell J made a distinction between culpable homicide and murder, and held, the accused was guilty of culpable homicide not amounting to murder.

iii) In Vira singh's case, the accused had pierced a spear with such force that 3 coils of abdoman of D had come out. Held murder under "thirdly" in Sn 300. See Sn 300

iv) In Harinder singh's case the accused had knifed D who had come to rescue his brother B. D died. Held culpable Homicide.

Q4. Culpable homicide is not murder in the following five circumstances:

Answer: Culpable homicide is not murder, if the offender being deprived of his self control by grave and sudden provocation causes the death of that person, or any other person by mistake or accident.

Ex : A, under grave and sudden provocation given by Z kills Z's child intentionally. This is murder and not culpable homicide.

Exception : a) The provocation should not have been made voluntarily by the accused himself. If he does so it will he murder.

b) It is not a provocation if it is caused to the accused as a result of a public servant exercising lawful powers over the accused. Ex.: A is arrested by P. a Police Officer. This excited A to grave provocation and kills P. This is murder and not culpable homicide.

c) The provocation is not given by anything done in private defense.

Ex : i) A, attempts to pull Z's nose. Z in private defence holds A. A, is moved to sudden passion and kills Z. This is murder.

ii) Nanavathi case : N's wife admitted before N adultery, with one Ahuja. Then, N, went to his office took his revolver, went to Ahuja's house and killed him. Defense was 'grave and sudden provocation'. There was sufficient time between the provocation and the act of killing. The court held that this was murder and not culpable homicide.

iii) Balku's case : A and B were sleeping together outside the house. Sometime in the night B got up, went inside the house and had illegal connection wish A's wife. A saw this through an aperture. B returned and slept in his place. Thereupon A stabbed B several times and killed him. Held : Culpable homicide.

3. Culpable homicide is not murder if the offender being a public servant exceeds his legal power and causes death in good faith. The act must be lawful and necessary. There must be-no malafide intention.

4. Culpable homicide is not murder if it is committed by a person without any premeditation but in sudden fight in the heat of passion and without taking undue advantage over the other person. This is culpable homicide and not murder.

In Raju Ghosh case : There was a pitched qurrel and sudden fight between A and B. While fighting A chanced on a heavy piece of wood. He took it and hit hard B, B died. Held; this is culpable homicide and not murder.

5. Culpable homicide is not murder, when the deceased being above the age of eighteen. suffers death with his own consent. Ex : A instigates Z below 18 commit suicide stating that life, was useless. A has abetted murder.

Other leading case for when C.H is not murder-

(i) Madhavan V. St. of Kerala

(ii) Akhtar V. State

(iii) Chamru Budhwa V. St.. of M. P

(iv) Jagrup V. St. of Haryana

(v) St. of M. P. V. Ram prasad.

Question 5. Discuss law relating to homicide by rash and negligent driving.

Answer: Section 304A, IPC deals with homicide by rash and negligent act. It provides punishment for those cases which under English law are termed manslaughter by negligence. The original Penal Code had no provision for punishment in those cases where a person causes death of another by negligence. That is to say, liability for causing death was limited only to those cases of murder and culpable homicide not amounting to murder. To fill in the gap, section 304A was inserted in the Penal Code (Amendment) Act 27 of 1870 to cover those cases wherein a person causes death of another by such acts as are rash or negligent but there is no intention to cause death or no knowledge that the act will cause death.
Section 304-A of The Indian Penal Code Causing death by negligence.
Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.
Essential Ingredients – To bring a case of homicide under section 304A, IPC the following conditions must exist, viz.,

1. There must be death of the person in question;
2. The accused must have caused such death; and
3. That such act of accused was rash or negligent and that it did not amount to culpable homicide.

This section applies where there is direct nexus between the death of a person and the rash or negligent act. The act must be causa causans, *it is not enough that it may have been the* causa sine qua non *Rash Act*
A rash act is primarily an overhasty act and is opposed to a deliberate act; even if it is partly deliberate, it is done without due thought and action. An illegal "omission" if negligent, may come under this section. Negligence, on the other hand, is a breach of duty imposed by law.
Contributory negligence
The doctrine of contributory negligence does not apply to the criminal liability.

Medical Negligence

A great care should be taken before imputing criminal negligence to a professional man acting in the course of his profession. A doctor is not criminally responsible for a patient's death unless his negligence shows such regard for life and safety as to amount to a crime against the State.

In Juggan Khan vs State of Madhya Pradesh, Where the accused who was a Homeopath, administered to the patient suffering from guinea worm, 24 drops of mother tincture **Stramonium** and a leaf of *Dhatura* without studying its effect and the patient died of poisoning. It was held that the accused was guilty under Section 304A.

In the case of State of Rajasthan vs Hari Singh The mere fact that a fatal motor run-over accident took place would not be itself, be enough to make the driver liable under Section 304A. In order to impose criminal liability on the accused, it must be found as a fact that a collision was entirely or at least mainly due to rashness or negligence on the part of the driver. It is not sufficient if it is only found that the accused was driving the vehicle at a fast speed.

In Jagdish Chander vs State , the appellant suddenly turned his auto-scooter rickshaw to the right without paying proper heed to the truck coming from the opposite and stuck it. He then lost control of his scooter-rickshaw and crashed into a tree under which a woman was standing with her baby in her arms. As a result, she received simple injuries and the child received fatal injuries. The trial court and the High Court found the appellant guilty under section 304A. In appeal, the Supreme Court held that as the appellant suddenly turned to the right without paying proper heed to the truck coming from the opposite direction, in doing so he was rash and negligent.

UNIT II

Question 6.: Define "Hurt" and "Grievous Hurt". What are its essential element's? Distinguish between the two.

Answer :- Hurt generally means injury on the body of a person. It is such an injury which causes bodily pain or disease or infirmity or fracture or disfigurement of face etc.

KINDS OF HURT: There are two kinds of Hurt:-

1. Hurt.
2. Grievous Hurt.

Hurt :- simple hurt is defined under section 319 of IPC whereas the grievous hurt has been defined under section 320. Simple hurt causes simple injury with simple bodily pain, while grievous hurt causes serious injury and serious pain in the body too.

Section 319 l.P.C. defines hurt. Hurt means causing bodily pain, disease, infirmity to any person. Pulling a woman by hair is hurt. This is also 'trespass to the person. Voluntarily causing hurt is punishable. In case of Amis Beg's Case ,Court held was guilty of hurt, when he pulled out of a house, D to whom the court decree was not applicable Infirmity may be permanent or temporary.

Section 319 contains the following ingredients:-

a) Bodily Pain:- The words show that there must be some pain in the body of a person. It means mental paid does not come under bodily pain. Any such injury which causes pain on any external part of body comes under simple hurt.

b) Disease : Disease means any illness. By such act which creates weakness and if a man comes into contract of any disease then it will come under simple hurt.

c) Infirmity:- Infirmity means by illness. By such act which creates weakness in the body, comes under simple hurt.

d) To any other Person : The hurt must be caused to any other person not to himself. In this way, in a simple hurt there is no need of physical contact. A hurt may be caused by any mean or method. Such hurt must cause bodily pain or disease or infirmity. Such hurt must be caused to another person and not to himself.

e) Section 319 does not show that there must be direct physical contact with another person for committing simple hurt.

Grievous Hurt : There are various kinds of grievous hurt which have been defined in section 320 in IPC. Thus a hurt is more than a slightly causing harm as defined in section 95 of IPC and less the culpable homicide. If the hurt results into death land fulfils the conditions of section 299 then it becomes culpable homicide, otherwise it grievous hurt.

Grievous hurt : Under section 320 l.P.C. the following are declared as grievous :

a.) Emasculation : The destruction of private organ of a human being is known as emasculation. Any injury which makes a person incapable for functioning of the private organ, person comes under grievous hurt.

b.) Permanent privation of the sight of either eye if there is privation or separation or destruction either eye of a person, is grievous hurt.

c.) Permanent privation of the hearing of either ear. Similarly the destruction or separation of either ear is grievous hurt. Here the power of hearing must be affected. The eye and ears are the main functional organs of a human being. They have is an important role in the life.

d.) Privation of any member or joint: Privation of any member or joint also comes under grievous hurt.

e.) Destruction or permanent loss of the power of any member or joint:- If there is destruction of any member of joint of the body then it is also a grievous hurt or if any member or joint fails to work properly then also it will comes under grievous hurt.

f.) Permanent disfiguration of the head or face :- Permanent disfiguration of the head or face means to cause such an injury on the head or face that they look bad or head becomes crucial.

g.) Fracture or dislocation of Bone or tooth:- When any bone or tooth is dislocated it means they loss their original place. Fracture of any bones comes under grievous hurt.

h.) When there is an such hurt which endangers to life or which causes paid continuously for a period of 20 days.

Endanger to life mean there must be death from such hurt. If the death is caused by grievous then it will not be culpable homicide or murder because there is no intention to cause death. So any hurt to create danger to life is also called grievous hurt. Mere

hospitalization for twenty days will not make the hurt grievous. That person must not be in a position to attend his day to day work for twenty days. This is the test adopted by the courts.

ILLUSTRATION: i) A with an intention to disfigure Z: s face hits him. Z suffer.-. for more than twenty days in the hospital. There is grievous hurt.

ii) A hits-hard with his fist on the left ear of B, with an intention to cause hurt, but B lost his hearing permanently. Held A is guilty of Grievous hurt. Hurt becomes grievous, when it endangers life.

In the case of Panduranga V. State , A blow on the head of B with an axe, which made a deep half inch wound was likely to endanger life in Voluntarily Causing hurt is punishable under Sn. 321. Voluntarily causing grievous hurt is punishable under Section 323 to 336

In the case of Palani Goudon v/s Emperor Madras. It was held by a full bench of the Madras High Court that the accused was guilty of either murder or culpable homicide not amounting to murder. However Their Lordship held that on the facts found the accused could not be convicted either of murder or culpable homicide, he could of course be punished both of his original assault on his wife and for his attempt to create false evidence by hanging her. He was convicted under section 326 Of IPC.

Following are the difference between Hurt and Grievous Hurt:

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HURT	GRIEVOUS HURT
Simple hurt is defined in Section. 319	Grievous hurt defined in sec.320
In simple hurt injury is committed on the external part of The body causing bodily pain.	There may be injury of external or internal part of the body.
Simple hurt is a form of simple Injury.	Grievous hurt is a serious form of hurt
The types of injury are bodily Pain, disease, infirmity etc	Important organs of the body like eye Ear, joints, face dislocation or broken
Punishment is of one year or Fine.	Punishment is of seven years with fine

Punishment for hurt & grievous hurt:

Section 323 : Punishment for voluntarily causing hurt is one year or fine or with both.
Section 325: For voluntarily causing grievous hurt, the punishment is 7 years with fine.
Section 326: Whoever except the case provided for by sec.335 voluntarily causes grievous hurt by means or any instrument for shooting or cut or any instrument which is used as a weapon of offence is likely to cause death or by means of fire. Punishment imprisonment of life, it is ten years with fine.

Question 7.what do you mean by Wrongful restraint and wrongful confinement? Distinguish between the two.

Answer: The expression "wrongful restraint" implies keeping a man out of a place where he wishes. Wrongful restraint and wrongful confinement is given Sn339, and 340 The fundamental rule is that 'every man's person is sacred and law visits penalties on the accused who violates this rule and molests the person in his free movement. Wrongful restraint and wrongful confinement are two offences according to the I.P.C. under Sn. 339" and 340, which punish individuals for violation of a person's movements.

Wrongful restraint : A person who voluntarily obstructs another so as to prevent him from proceeding in any direction in which that person had a right to go, is guilty of wrongful restraint. Exception: A person who, in good faith, believes that he has a right to pass.

1) A obstructs Z of his way 'A's intentions are not in good faith. Z is prevented from passing. This is wrongful restraint.

2) A removed the ladder and prevented B from getting down the roof of a house.

3) A builds a wall across a path along which B had a right to pass.

4) A threatens to set his savage dog at Z, to prevent Z from passing along the road where he had a right to pass.

5) B and his family were living in a house. A put a lock in thetemporary absence of the family. Ahad locked without any good faith. in all these cases thee accused is guilty of wrongful restraint.

Wrongful confinement: A person who wrongfully restraints any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits is guilty of wrongful confinement.

eg. a) A causes Z to go within a walled space and locks Z in. Z is thereby prevented from proceeding in any direction beyond the circumscribing line of the wall. A is guilty.

b) A keeps his men with guns and warns Z that if he ever tries to leave the building they would kill him. A is guilty. Punishment: This depends on how many days a person is confined by the accused. In Shamlal's case, a police constable detained some persons for several days as suspects; it was held that he was guilty under this section.

Following are the difference between Wrongful Confinement & Wrongful Restraint.

WRONGFUL CONFINEMENT	WRONGUL RESTRAINT
Wrongful confinement is a Form of wrongful restraint It is keeping a man within Limits out	Wrongful restraint is keeping a man Out of a place where he wishes to go and has a right

of which he wishes to go and has a right to go	to be.
A person is restrained from moving Beyond a certain area within Which he is confined	He is free to move anywhere other than to proceed in a particular Direction. In other words there is
Full restraint in the movement	Only partial restraint in the movement
It is a more serious offence In as much it prescribes Punishment with imprisonment Simple or rigorous extending to with both One year or fine up to Rs.1000/- or both	This offence is also punishable with simple imprisonment upto one month or with fine of Rs.500/- or

Question: 8. Discuss the essential element of force, criminal force and Assault. How criminal force and assault related to each other.

Answer: Section. 349 define force and Section. 350 defines criminal force.

1) Force : A is said to use force to B, if A causes motion or change of motion to B, or if A causes with any substance such motion or change of motion so as to make that substance come in contact with the body of B or anything he is carrying so as to affect his sense of feeling. The means adopted may be ^

a) By A, with his own bodily power or

b) By setting the substance in motion without further acting on it.

c) By inducing an animal to move

ii) Using criminal force is an offence punishable under l.P.C. Any person who intentionally uses 'force' to another without his consent with a view to commit an offence or knowingly uses force to cause injury, fear or annoyance to him, is guilty of using criminal force.

E.g. 1) Z is sitting on a boat that is moored. A to cause fear and annoyance to Z, releases the mooring. The boat sets out down the stream. A is guilty, of using criminal force.

2) A intentionally pulls the veil (purdha) of a woman without her consent to annoy her. A is guilty under this section.

3) A incites his dog to spring upon Z without Z's consent. This annoys Z. A is guilty.

4) Z is carrying a pot of water. A, without Z's consent, intentionally to annoy Z, hits the pot with a stone. The stone makes a hole and water rushes out causing annoyance to Z. A is guilty.

5) A is riding a chariot. B lashes the house, without A's consent, to frighten or annoy A. B is guilty.

6) A is on the palanquin on a visit to a place. Z holds the pole to rob A. Z has used force there is use of criminal force. If A, the accused forcibly breaks open the lock of B' house &. enters, there is no criminal force, as force should be against a person as defined in Sn. 349.

Section 351 of IPC provides Assault: Any person who intentionally or knowingly makes any gesture or preparation to apprehend another with a preparation to use criminal force is guilty of assault. Mere words do not amount to assault. But the words with the use of gestures or preparations bring such a meaning that criminal force is about to be applied.

Eg. 1) A shakes his fist at Z, and moves towards Z in such a manner that Z believes that criminal force is about to be used on him. This is assault.

2) A begins to let loose a ferocious dog to cause fear and annoyance to Z. This is assault.

3) A takes up a stick saying to Z '! will give you a good beating'. These words will not amount to assault. But, if A with gestures moves towards Z to beat him, this becomes assault. Actual beating is not necessary .

Q. No. 9: What do mean by kidnapping? Elaborate the provision of the two.

Answer :-: Kidnapping and abduction are particular types of offences under the law of crime. Under these offences, a person is taken away secretly or forcible without his consent or without the consent of authorised guardian. Under kidnapping a person is kidnapped from lawful custody. Under section 359 of IPC, there are two types of kidnapping :-

1. Kidnapping from India.
2. Kidnapping from lawful guardianship.

Section 360 : defines that kidnapping from India and section 361 defines that kidnapping from lawful guardian ship. The offence of abduction is defined under section 362 of IPC.

1. KIDNAPPING FROM INDIA:

Section 360 says that whoever conveys any person beyond the limit of India without the consent of that person or of any person legally authorised to consent on behalf of that person, is said to kidnap that person from India. Age limit is immaterial. This has two essentials :

(i) Convey any person beyond the limits of India.

(ii) Such conveying must be without the consent of that person or of the person legally authorised to give consent on behalf of that person.

2. KIDNAPPING FROM LAWFUL GUARDIANSHIP : SEC.361

Sec. 361 says that whoever takes or entices any minor under sixteen years of age if a male or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardianship of such minor or person of unsound mind, without the consent of such guardian is said to kidnap such minor or person from lawful guardianship. The word

lawful guardian here mans any person lawfully interested with care or custody of such minor or other person.

3. EXCEPTIONS :- There is one exception of this section, this section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith, believes himself to be entitled the lawful custody of such child unless such act is committed for an immoral or unlawful purpose.

Take or entice away:- Take away or entice away means to induce a person for going to another place. The object of this Sec. Is to protect minor children from being reduced (to corrupt) for improper purpose.

Guardians consent:- The kidnapping must be without the consent of the guardian. The consent may be expressed or implied. Thus, to attract this sec. there must be taking or enticing away any minor or unsound mind person out of lawful guardianship.

ABDUCTION: Section 362 says that whoever by force compels or by any deceitful induces any person to go from any place, is said to abduct that person. This section may read with section 364, 365 and 360.

This section contains two essentials for the offence of abduction :-

1. Forcible compulsion or inducement by deceitful means.
2. The object of such compulsion or inducement must be going of a person from any place. Thus abduction is an offence under sec.362. If by force a person compels or even by fraudulent means induce any other person to go from any place taken is called abduction.

Punishment for kidnapping under sec363 :

Whoever kidnaps any person from India or from Lawful guardianship shall be punished with imprisonment or either description for a term which may extend to seven years and shall be liable to fine.

Question10. What are the difference between Kidnapping and Abduction?

Answer: following are the Difference between Kidnapping and Abduction

	KIDNAPPING	ABDUCTION
1.	It is committed only in respect of A minor under 16 years of age if, A male and 18 years of age if a Female, or a person of unsound mind.	1.) It is committed in respect of any person of any age
2.	In kidnapping consent of the Person enticed is immaterial	2.) Consent of the person removed, if Freely and voluntarily given Condones the offence.
3.	In kidnapping the intention of The offender is irrelevant	3.) In abduction intention is a very Important factor.
4.	It is not a continuing offence The Offence is completed as soon as person is being abducted both The	4.)It is a continuing offence A when he is first taken from one Place to and also when he is Removed from one place to Another.

minor is removed from the Custody of his or her guardian	

UNITIII

Question No. 11 What is bigamy? Under what circumstances would a woman, who in the life-time of one husband marries another, not be guilty of bigamy?

Answer: Offences Relating To Marriage:- The following are the provisions in the Indian Penal Code dealing with the offences relating to marriage.

Under section 494 defines the offence of bigamy as under: "Whoever having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

In Bigamy case, the second marriage as a fact, that is to say, the essential ceremonies constituting it must be proved. Admission of marriage by the accused is not the evidence of it in bigamy case. Under section 494 and 109 of IPC the evidence of witness called to prove the marriage ceremonies showed that the essential ceremonies had not been performed. On admission of the accused in a written statement that the parties married after the first marriage was dissolved & was not justified, In a case Kanwal Ram v/s Himachal Pradesh Administration 1966.

An another case of Shanti Dev Barma v/s Kanchan Prava Devi 1991 Orissa,"it was held that No plea was raised that the second marriage was performed as per custom which dispensed with 'saptapadi' oral evidence was adduced that the accused and his alleged second wife were living as husband and wife. It was not found sufficient to draw an inference as to performance of ceremonies essential for valid marriage. The accused was entitled to be acquitted.

Cohabitation caused by a man deceitfully inducing a belief of lawful marriage. Dishonestly or fraudulently going through a marriage ceremony knowing that no lawful marriage is hereby created Bigamy i.e. marriage again during the lifetime of the husband or wife where such marriage is void. If the former marriage is concealed from the person with whom the subsequent marriage is contracted, the punishment is ten years or fine or both.

The exception to section 494 provides the circumstances where a woman in the life-time of one husband or vice versa can marry another without incurring the offence of bigamy. It provides that section 494 does not extend :-

a) To any person whose marriage with such husband or wife has been declared void by a court of competent jurisdiction.

b) To any person who contracts a marriage during the life of a former husband or wife, it such husband or wife at the time of the subsequent marriage shall have been continually

absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, such marriage can takes place.

Question No. 12 What is the law relating to cruelty by husband or relatives of the husband of the woman? How is it punishable?

Answer: Chapter XXA comprising Section 498-A which punishes cruelty by the husband or relatives of the husband to the woman has been inserted by the Criminal Law(Second Amendment)Act 1983, in Act No. 46 of 1983 it received the assent of the President on 25th.December,1983 and the same was published in the Gazette of India Extraordinary, dated 26.12.1983.

The new provision seeks to curb atrocities on women including those arising out of dowry demands. The extremer reticence of Indian women to expose the bestiality and cruelty perpetrated on them led the crusading members to raise the matter in the Parliament which led to the passing of the Criminal Law (First and Second) Amendments, 1983 Section 498-A. Therefore envisages that if a husband or the relatives of the husband of a woman subjects such woman to cruelty, he shall be liable to punishment for three years and fine.

Husband or relative of husband of a woman subjecting her to cruelty :-

Whoever being the husband or the relative of the husband of a woman subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three year and shall also be liable for fine.

EXPLANATION IN THIS REGARD:-

To define the word cruelty according to this section :-

(a) Any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life or health(whether mental or physical) to the woman.

(b) Harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

Question No.13:-Define Adultery and distinguish it from rape?

Answer :- INTRODUCTION :- Adultery is an act which requires the consent of both the parties. The male offender alone is liable to punishment and the married woman is not liable even as an abettor.

DEFINITION OF ADULTERY

Under Section 497 of IPC it is defines that," whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery.

The offence under the act 497 of IPC is limited to adultery committed with a married woman. It does not constitute an offence of adultery if one has sexual intercourse with a widow or an unmarried woman. Even in the case of a married woman the adulterer is not liable if the husband consents to it.

Distinguish between Adultery & Rape: Adultery is altogether differs from rape in several ways, which are described as under :-

ADULTERY	RAPE
Adultery is an act which requires The consent of both the parties	In case of rape the consent of woman Is essential.
Woman must be married woman i.e. the wife of another man	It can be committed on any woman Married woman or widow
Adultery cannot be committed By a husband with his own wife	Rape can be committed by a husband. if she is below fifteen years of age
Adultery is an offence relating To marriage	Rape is an offence against the person Of the woman
The aggrieved party is the Husband	In the rape the woman is aggrieved party
the wife having Consented to the act	It is against the will of the women
Adultery is not so serious an Offence as rape	And rape is a serious offence

Question 14. What is Rape? What is its kind? Discuss the changes in the law of rape till date.

Answer: The word rape is derived from the Latin term *rapio*, which mean 'to seize'. Thus rape literally means a forcible seizure. It signifies in common terminology, "as the ravishment of a woman without her consent, by force, fear, or fraud" or "the carnal knowledge of a woman by force against her will." In other words, rape is violation with violence of the private person of a woman.
In the Indian Penal Code, **Section 375** defines rape, Justice Krishna Iyer in the case of Rafiq v. State of U.P made a remark that, **'A murderer kills the body, but a rapist kills the soul'.**

After the Nirbhaya Delhi Gang Rape case, 'The Criminal Law Amendment Act, 2013' came in to force w.e.f 3rd of Feb, 2013. Now this case was recorded as 'Rarest of Rare case' in the history of Indian Judiciary case laws. By this amendment act, our legislators introduced some new sections and make some amendments in Indian Penal Code, Criminal Procedure Code, Indian Evidence Act and Protection of children from sexual offences act

Some of the important changes brought about by the Act 43 of 1983 and Act 13 of the 2013 and other provisions are listed below:-

- Consent of woman of unsound mind or under intoxication is not to be considered valid defence.
- **Burden of Proof of innocence on accused** – Section 114A was inserted in The Indian Evidence Act, 1872 vide Criminal Law (Amendment) Act 43 of 1983.
- **Prohibition of disclosure of the identity of the victim**– Section 228A IPC added vide Criminal Law (Amendment) Act 43 of 1983.

- **Persistent Vegetative State**– A new section 376 A has been added vide Criminal Law (Amendment) Act 13 of 2013. When an injury caused to the victim results in death of the women or causes women to be in a persistent vegetative state, then the accused shall be liable for imprisonment for a term which cannot be less than 20 years or may extend to imprisonment of life or remainder of that persons natural life or till death.
- **Trial in Camera**– Section 327 CrPC,1973 has been amended vide Criminal Law (Amendment) Act 13 of 2013, to the effect that the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera.
- **Custodial Rape**– Section 376C, IPC comprise a group of sections that create a new category of offence, known as custodial rape which does not amount to rape because in such cases the consent of the victim is obtained under compelling circumstances. (Substituted by Criminal Law (Amendment) Act 13 of 2013)
- **Intercourse with wife during judicial separation**– Section 376 B IPC inserted vide Criminal Law (Amendment) Act 13 of 2013 makes sexual intercourse with one's own wife without her consent under a decree of separation punishable, with a minimum of 2 years that extend to 7 years.
- **Minimum punishment for Rape**– This provision has been made more stringent vide Criminal Law (Amendment) Act 13 of 2013.
- **Character assassination of prosecutrix prohibited**– A 'Proviso clause' to section 146 of the Indian Evidence Act, 1872 inserted vide Criminal Law (Amendment) Act 13 of 2013 has disallowed to put questions about prosecutrix character in cross-examination.

Analysis of the definition: The 2013 Act expands the definition of rape to include oral sex as well as the insertion of an object or any other body part into a woman's vagina, urethra or anus.A man is guilty of rape if he commits sexual intercourse with a woman either against her will or without her consent as enumerated under clauses firstly to seventhly under section 375.

Essential Ingredients of Rape: The crux of the offence of rape under section 375, IPC is sexual intercourse by a man with a woman against her will and without her consent under any one of the seven circumstances mentioned below.

- Against her will.
- Without her consent.
- With consent obtained by putting her or any other person in whom she is interested in fear of death or of hurt,
- With consent but given under the misconception of fact that the man was her husband,
- Consent given by reason of unsoundness of mind, or under influence of intoxication or any stupefying or unwholesome substance,
- Women under eighteen with or without consent.
- When women is unable to communicate consent.

In order to bring home the charge of rape against a man, it is necessary to establish that the 'sexual intercourse' complained of was either against the will or without her consent. Where the consent is obtained under the circumstances enumerated under clauses firstly to seventhly, the same would also amount to rape.

In Deelip Singh vs. State of Bihar**,** the Supreme Court observed that "though will and consent often interlace, an act done against the will of the person can be said to be an act done without consent, the Indian Penal Code categorizes these two expressions under separate heads in order to as comprehensive as possible."

The absence of injury on male organ of accused where a prosecutrix is a minor girl suffering from pain due to ruptured hymen and bleeding vagina depicts same, minor contradictions in her statements they are not of much value. Also, the absence of any injury on male organ of accused is no valid ground for the innocence of accused, a conviction under section 375 IPC was held proper; Mohd. Zuber Noor Mohammed Changwadia vs State of Gujarat.[6]

Penetration: The mere absence of spermatozoa cannot cast a doubt on the correctness of the prosecution case Prithi Chand vs State of Himachal Pradesh.

Rape or Consensual Sex: Intercourse under promise to marry constitutes rape only from initial stage accused had no intention to keep the promise. An accused can be convicted for rape only if the court reaches the conclusion that the intention of the accused was malafide, and that he had clandestine motives. Deepak Gulati vs State of Haryana.

Exception to Section 375:

'Exception 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault.'

Since child marriage in India is not yet void and is only voidable, such a check was necessary to restrain men from taking advantage of their marital rights prematurely. No man can be guilty of rape on his own wife when she is over 15 years of age on account of the matrimonial consent that she has given.

In Bishnudayal vs. State of Bihar, where the prosecutrix, a girl of 13 or 14, who was sent by her father to accompany the relatives of his elder daughter's husband to look after her elder sister for some time, was forcibly 'married' to the appellant and had sexual intercourse with her, the accused was held liable for rape under section 376.

However, under section 376 B, IPC sexual intercourse with one's own wife without her consent under a decree of judicial separation is punishable by 2 to 7 years imprisonment.

Punishment of rape: It states that if the rape is committed by persons listed below, they shall be punished with rigorous punishment of not less than 10 years, but can extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine**.**

- Police officer within the limits of the police station.
- A police officer in the premises of any station house.
- A police officer on a woman in the police officer's custody.
- Public servant on a woman's in his custody.
- Member of the armed forces.
- Any person in the management of the jail, remand home etc. on inmate of such place.
- Staff/management of a hospital on a woman in that hospital.
- By a person who is in a position trust or authority or control or dominance towards a woman on such woman.
- During communal or sectarian violence.
- On a pregnant woman
- On a woman less than 16 years of age
- On a woman incapable of giving consent
- On a mentally or physically disabled woman
- Who causes grievous bodily harms or endangers the life of a woman.
- Who commits rape repeatedly on the same woman

If any other person commits rape on any woman, he shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

Section 376-A of the IPC – Punishment for causing death or resulting in persistent vegetative state of victim: It says if a person commits an offence which is punishable under section 376 which causes the death of the women or causes the women to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than 20 years, but may extend to imprisonment for life or with death.

Section 376-B of the IPC – Sexual intercourse by husband upon his wife during separation: Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation.—In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of Section 375.

Section 376-C of the IPC– Sexual intercourse by a person in authority

Whoever, being— 1. in a position of authority or in a fiduciary relationship; or

2. a public servant; or

3. superintendent or manager of a jail, remand home or other places of custody established by or under any law for the time being in force, or a women's or children's institution; or

4. on the management of a hospital or being on the staff of a hospital,

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than five years, but which may extend to ten years, and shall also be liable to fine.

Section 376-D of the IPC– Gang rape: It prescribes punishment for gang rape and says where a woman is raped by a group of persons, then they shall be punishable with rigorous punishment of not less than 20 years, but may extend to life imprisonment, and with fine.

Note: Such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim. Also, any fine imposed under this section shall be paid to the victim.

Section 376-E of the IPC– Punishment for repeat offenders: Whoever has been previously convicted of an offence punishable under Section 376 or Section 376-A or Section 376-D and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.'

UNIT-IV

Question No.15:- Discuss the ingredients of theft with the help of decided case? Also distinguish between theft and extortion.

Answer :- Theft is an offence in which moveable property of a person is taken away without his consent. Such property must be taken away dishonesty. Thus in theft there would be a moveable property. It should be taken dishonestly and without the consent of the owner. Theft has been defined in Section 378 of IPC. Simultaneously the punishment for the commitment of act of theft has also been defined in Section 379 of IPC.

DEFINITION OF THEFT U/S 378 OF IPC

" Whoever intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking is said to commit theft."

INGREDIENTS OF DEFINITION

1. There must be a dishonest intention of a person to take the property.
2. Removal of movable property.
3. Such movable property must be taken away.
4. The property must be taken away from the possession of a person. In other words there must be a possession of that property.
5. Such property must be taken away without the consent of such person.

A. Dishonest Intention:- It is also called as malafied intention which can be representation in the form of mensrea. This mensrea is the base of the theft. The petitioner must prove that a thing was taken away with the dishonest intention.

However intention is a mental element which is difficult to prove but circumstantial evidences are considered for this purpose. The main measurement of dishonest intention is to make a wrongful loss to another person then such act is considered to be done with dishonest intention.

B. Movable Property:- The subject of theft is movable property. Immovable property cannot be stolen. A movable property is a property which is able to move easily or which is not immovable. It means the thing permanently attached to the earth is immovable property, is not the subject of theft. It becomes capable of being the subject of theft when it is severed from the earth.

C. Be taken away out of Possession of another Person:- The property must be in the possession of another person from where it is removed. There is no theft of wild animals, birds or fish while at a large but there is a theft of tamed animals.

ILLUSTRATION :- 'A' finds a ring lying on the road which was in the possession of any person. A by taking it commits no theft, though he may commit criminal misappropriation of property.

D. It should be taken without consent of that person:- The consent may be express or implied and may be given either of the person in possession, or by any person having for that purpose express or implied authority.

PUNISHMENT FOR THE OFFENCE OF THEFT

The punishment for committing theft in Indian Penal Code under section 379 for offence of theft is an imprisonment which may extend to three years or with fine or both.

Question 16. What do you mean by Extortion? How it is different from theft and Robbery? Discuss.

Answer: :- The chief elements of extortion are the intentional putting of a person in fear of injury to himself or another and dishonestly inducing the person so put in fear to deliver to any person any property or valuable security.

DEFINITION OF EXTORTION

Whoever intentionally puts any person in fear or any injury to that person, or to any other, and thereby dishonesty induces the person so put in fear to deliver any person any property or

valuable security or anything signed or sealed which may be converted into a valuable security, commits 'Extortion' under section 383 of IPC.

According to Section 383 of IPC," Whoever intestinally puts any person in fear of any injury to that person or to any other and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security, or anything signed or sealed which may be converted into valuable security commits, "Extortion"

ESSENTIALS OF EXTORTION:

According to section 383 of IPC the following are the essentials of extortion :-

1. There must be a show of force or threat.
2. Such force or threat should be in the form of fear of injury.
3. Such injury may be for the person who is put under the fear or for any other persons in which the former person has interest.
4. Such force should be shown with a view take a thing or property or valuable security or sign or seal or a document.
5. There must be a dishonest intention.

Thus if the above elements are present then it is an offence of Extortion dishonest intention is also an essential element of extortion.

DISHONEST INTENTION IS MEASURED FROM THE CIRCUMSTANCES AND FACTS OF EACH CASE.

Any thing taken from a person at the point of pistol is an example of extortion.

ILLUSTRATIONS :-

I) 'A' threatens to publish a defamatory libel concerning Z unless Z gives him money. He thus induces Z to give him money. 'A' has committed extortion.

II) 'A' threatens Z that he will keep Z's child in wrongful confinement unless Z will sign and deliver to A a promissory note binding Z to pay money to 'A'. Z signs and delivers the note. 'A' has committed the offence of extortion

PUNISHMENT FOR EXTORTION U/S 384 IPC: Whoever commits the offence of extortion, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both.

Following are the difference between Theft & Extortion-

THEFT	EXTORTION
The offender's intention is to Take away something without The owner's consent	Consent is obtained by putting the person, in possession of property In fear of injury to himself or to any Other person, i.e. there is wrongful Obtaining of consent
Theft is limited only to moveable property	Both movable and immovable .Property may be the subject of the Offence of extortion
There is no element of force In theft	There is the element of force, for Property is obtained by putting a Person in fear of injury

	to that Person, or to any other.
The offender takes the Property without the owner Ship's consent and hence There is no delivery by the Owner.	Delivery of property as distinct from taking away property is of its essence.

Question 17. Define Robbery and Dacoity. What is the difference between robbery and Dacoity. Discuss

Answer: Section 390 of the Indian Penal Code, 1860 says that in all robbery there is either extortion or theft. The Black law's dictionary defines robbery as the felonious act of taking the personal property of another from a person or immediate presence against his will accomplished by using force and fear, with the intention of permanently depriving the owner of the thing.

Causing Death, Hurt or Wrongful Restraint or Fear : Death, hurt, wrongful restraint or fear can be caused when theft is a robbery or when extortion is robbery. These two are explained below with the help of illustrations.

When theft is robbery:

Theft is a robbery when in order to commit theft, the offender voluntarily causes or attempts to cause to any person death, subject him to wrongful restraint, cause hurt or induce fear of instant death, instant wrongful restraint or cause instant hurt. Theft can be called as a robbery when the conditions given below are satisfied:

- When the offender voluntarily attempts to cause death;
- wrongful restraint;
- fear of instant death;
- instant wrongful restraint;
- instant hurt.

And the above acts are done: while committing the theft,While carrying away the property acquired by theft, or While attempting to carry away property.

For example, if A holds B down and fraudulently takes B's money from B's clothes without B's consent. Here A has committed theft and by committing theft he has voluntarily caused wrongful restraint to B. Therefore, A has committed robbery.

When extortion becomes robbery: Extortion becomes robbery when the person committing the offence of extortion put the other person in fear and commits extortion by putting that

person in fear of death, instant wrongful restraint to that person or to some other person and by doing so induces the person so put in fear then and there deliver the thing that has been extorted.

For example, if A meets B and B's child is on a road. A takes the child and threatens to fling it down a height unless B delivers his purse. B delivers his purse. Here A has extorted the purse from B by causing B to be in fear of instant hurt to the child who is present. A has therefore robbed B. However if A obtains the property by saying that your child is in my hand of my gang and he/she will be put to death unless you send us ten lakh rupees. This will amount to extortion, and punishable as such, but it would not be considered as robbery unless B is put in fear of instant death of his child.

Possession of Stolen Property: Property is an important part of the law. Section 410 to Section 414 of the India Penal Code talks about the concept of stolen property. Section 410 of the Indian Penal code defines it as when a person transfers his/her property to another person. It can happen by way of theft, extortion or robbery. It includes all kinds of properties which a person can misappropriate for criminal breach of trust.

These kinds of instances related to property are known as stolen properties. Section 410 of the Indian Penal Code also says that if a person transfers the property by using any of the means given below that will be considered as stolen property. These means are:

- Theft;
- Extortion;
- Robbery;
- Criminal misappropriation;
- Criminal breach of trust.

Section 411 of the Indian Penal Code says that any person who dishonestly possess or retains the property will be punished with at least 3 years of imprisonment, fine or both.

Punishment for Robbery: Indian Penal Code, 1860 deals with all kinds of punishments related to criminal law. Under Section 392 of this code, the punishment for robbery is defined. This section says that any person who commits robbery shall be punished with imprisonment which may be extended up to ten years and shall also be liable for fine.

Further, this section says that if a person commits a robbery on a highway then the term for imprisonment will be of 14 (fourteen) years. Section 393 of the Indian Penal Code defines the punishment for an attempt to commit robbery. The punishment for this is imprisonment for up to 7 years and also liable for fine.

Following are the distinction between Robbery and Dacoity are:

No	Robbery	Dacoity
1	**Definition** : Section 390 of the Indian Penal Code defines Robbery — In all robbery there is either theft or extortion. **When theft is robbery –** Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. **When extortion is robbery –** Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person, so put in fear then and there to deliver up the thing extorted.	**Definition :** Section 391 of the Indian Penal Code defines Dacoity — "When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".
2	Robbery can be committed by even one accused.	In Dacoity there must be five or more persons.
3	Robbery is not as serious as Dacoity	Dacoity is an aggravated and more serious form of robbery.
4	**Punishment –** Section 392 of the Indian Penal Code prescribes the punishment for robbery – Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend	**Punishment –** Section 395 of the Indian Penal Code prescribes the Punishment for dacoity – Whoever commits dacoity shall be punished with imprisonment for life, or with rigorous

	to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.	imprisonment for a term which may extend to ten years, and shall also be liable to fine.
5	Cognizable, non-bailable, non-compoundable and triable by Magistrate of the first class.	Cognizable, non-bailable, non-compoundable and triable by Court of session.

Question18: when does extortion amount to Robbery?

Answer: Under section 390 of IPC Extortion is 'robbery' if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, or instant hurt, or of instant wrongful restraint to that person, or to some other person, and by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

To describe in short, "robbery" is :-

1. Theft plus violence causing or attempting to cause death, hurt or wrongful restraint or fear of instant violence.
2. Extortion plus offender present plus fear of instant violence plus immediate delivery of the thing is extorted.

ILLUSTRATION:- 'A' holds Z down, and fraudulently takes Z's money and jewels from Z clothes without Z's consent. Here A has committed theft, and in order to committing of that theft has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

Punishment For Robbery: Imprisonment up to ten years and also fine. But if robbery committed on the highway between sunset and sunrise then up to 14 years

Question 19. What are the essential of criminal misappropriation of property? distinguish criminal misappropriation from criminal breach of trust.

Answer: Introduction : Section 403 and Section 404 of the Indian Penal Code, 1860 deals with Criminal Misappropriation of Property. Section 403 of the Indian Penal code defines criminal misappropriation and prescribes the punishment for the offence. Section 404 of the Indian Penal Code deals with dishonest misappropriation of a deceased persons property.

Meaning of Misappropriation of Property : The word misappropriation means a dishonest appropriation, and use of another's property for ones own use.

Section 403 of the Indian Penal Code 1860 says that, whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with

imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Ingredients :

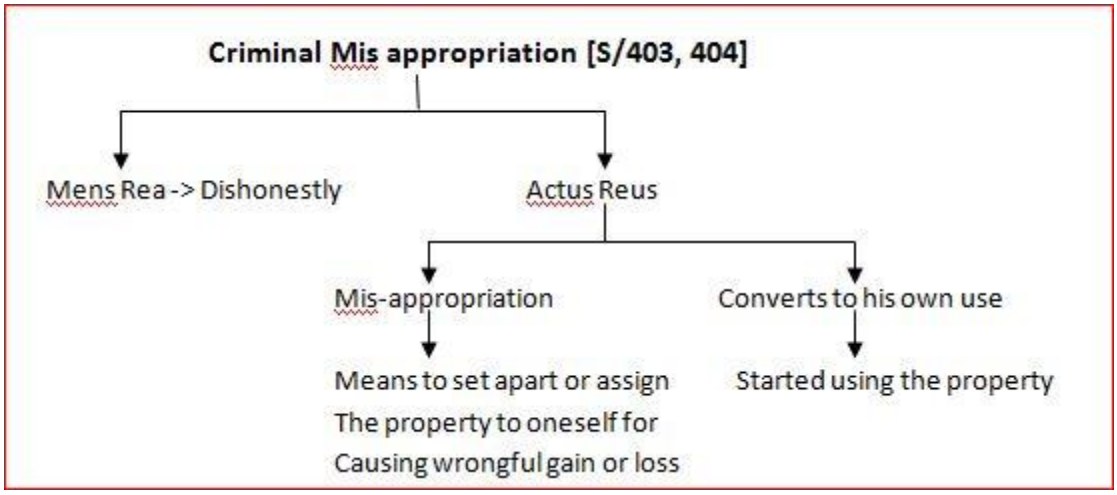
To constitute the offence of misappropriation following ingredients must be satisfied:

(i) The accused misappropriated property and converted the same to his own use.

(ii) He dose does so dishonestly.

(iii) The property is movable; and

(iv) the movable property belonged to complainant



Illustrations

(a) A takes property belonging to Z out of Z's possession in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft; but if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(b) A, being on friendly terms with Z, goes into Z's library in Z's absence and takes away a book without Z's express consent. Here, if A was under the impression that he had Z's implied consent to take the book for the purpose of reading it, A has not committed theft. But, if A afterwards sells the book for his own benefit, he is guilty of an offence under this section.

Section 404: Dishonest misappropriation of property possessed by deceased person at the time of his death:

Section 404 of the Indian Penal Code says that, whoever dishonestly misappropriates or converts to his own use property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine, and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant A, before the money comes into the possession of any person entitled to such possession, dishonestly misappropriates it. A has committed the offence defined in this section.

Section 404 of the code is an aggravated form of Criminal Misappropriation and prescribes a punishment of three years of imprisonment which may simple or rigorous and fine.

Ingredients :
To invoke Section 404 of the Indian Penal Code following ingredients are to be satisfied.
(i) The property must be movable property
ii) Such property was in possession of the deceased at the time of his death ;
(iii) The accused misappropriated it or converted it to his own use; and
(iv) The accused did so dishonestly.

Offence under this Section is non-cognizable, bailable, non-compoundable, and triable by Magistrate of the First class.

Sl .no.	Criminal Misappropriation	Criminal breach of Trust
1	**Definition :** Section 403 of the Indian Penal Code defines Criminal misappropriation and prescribes the punishment for the offence - "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".	**Definition :** Section 405 of the Indian Penal Code defines Criminal breach of trust - "Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".
	Ingredients : To constitute the offence of	**Ingredients:** To constitute criminal breach of trust

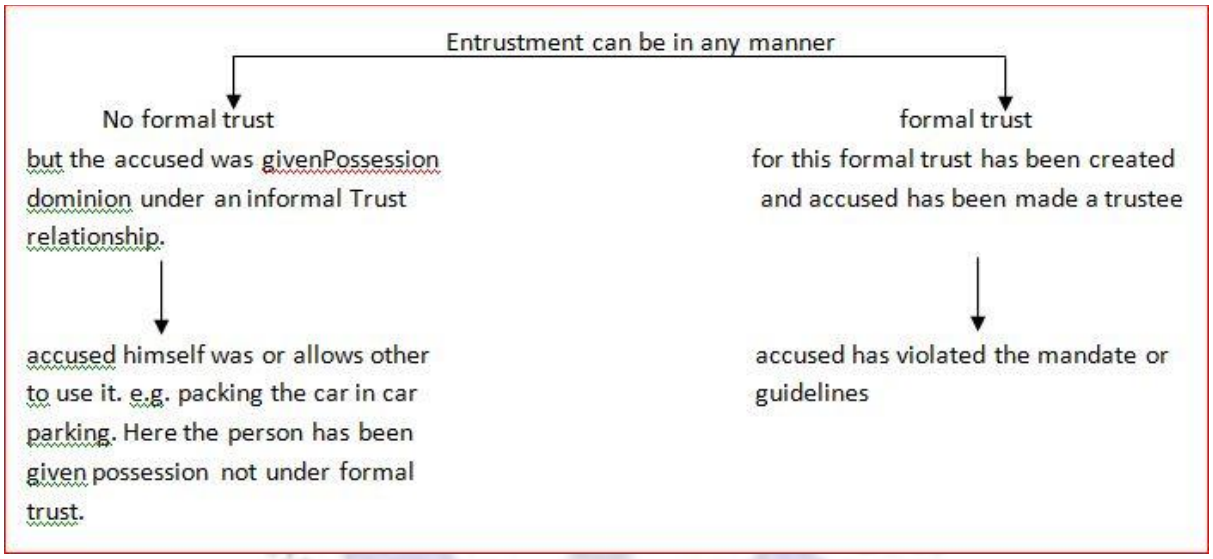
2	misappropriation the following ingredients must be present – 1) The accused misappropriated that property and converted the same to his own use dishonestly 2) The movable property belonged to that complainant.	following ingredients must be present. 1) The accused must be entrusted with property or with dominion over property; 2) The person who entrusted must – i) dishonestly misappropriate or convert to his use that property or ii) dishonestly use or dispose of that property or willfully suffer any other person to do so a) in violation of any directions of law prescribing the mode in which such property is to be discharged \. b) any legal contract made touching discharge of such trust.
3	The property comes into the possession of the accused in some natural manner.	The property comes into possession of the accused either by an express entrustment or by some process. There is conversion of property held by a person in fiduciary capacity.
4	It can be only movable property	It can be of any movable as well as immovable property.
5	There is no contractual relationship	There is contractual relationship
6	Non-cognizable, bailable, compoundable with permission of Court and triable by any Magistrate.	Non-cognizable, bailable, non-compoundable and triable by the Magistrate of the First Class

Question 20. What do you mean by criminal breach of trust? Discuss with relevant case laws.

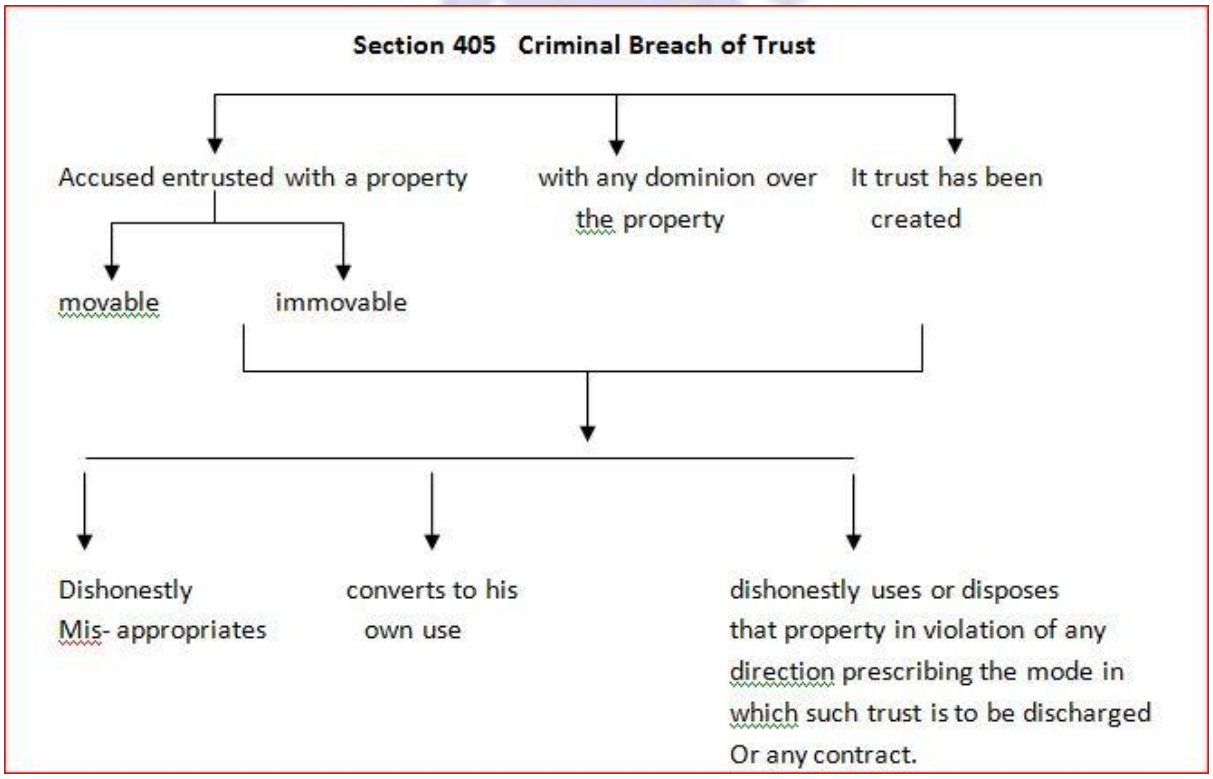
Answer: *Criminal breach of trust is defined under* ***Section 405 of the Indian Penal Code, 1860****. The section, in a nutshell, reads as 'dishonest misappropriation' or 'conversion to own use' another person's property. Criminal breach of trust and criminal misappropriation (under* ***Section 403****) is distinguished from each other in terms of the fact that in criminal*

breach of trust, the accused is entrusted with property or with dominion or control over the property.

The language of this section has been structured in a manner that it has a wide ambit, however 'entrustment' of the property is an essential element for an offense to be penalized under S.405 of IPC.



The essential ingredients of the offense of criminal breach of trust are;



(1) The accused must be entrusted with the property or with dominion over it,

(2) The person so entrusted must use that property, or;

(3) The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation,-

(a) of any direction of law prescribing the mode in which such trust is to be discharged, or;

(b) of any legal contract made touching the discharge of such trust.

The provision for Criminal Breach of Trust is mentioned in Chapter XVII under Section 405 of Indian Penal Code. Section 405, of Indian Penal Code, states:

'Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust.'

Criminal Breach of Trust mean section 405 of IPC, is similar to the offense of 'embezzlement' under the English law. A reading of the section suggests that the gist of the offense of criminal breach of trust is 'dishonest misappropriation' or 'conversion to own use' another's property, which is nothing but the offense of criminal misappropriation defined u/s 403.

The only difference between the two is that in respect of criminal breach of trust, the accused is entrusted with property or with dominion or control over the property. As the title to the offense itself suggests, entrustment or property is an essential requirement before any offense under this section takes place. The language of the section is very wide. The words used are 'in any manner entrusted with property'. So, it extends to entrustments of all kinds-whether to clerks, servants, business partners or other persons, provided they are holding a position of trust. "The term "entrusted" found in Section 405, IPC governs not only the words "with the property" immediately following it but also the words "or with any dominion over the property."

Entrustment: As the title to the offense itself suggests, entrustment of a property is an essential requirement before any offense in this section takes place. The language of this section is very wide. The words used are, 'in any manner entrusted with property'. So it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of 'trust'.

The word entrust is not a term of art. In common parlance, it embraces all cases in which a thing handed over by one person to another for a specific purpose. The term 'entrusted' is

wide enough to include in its ambit all cases in which property is voluntarily handed over for a specific purpose and is dishonestly disposed of contrary to terms on which possession has been handed over.[vii] Entrustment need not be expressed, it can be implied.

The definition in the section does not restrict the property to movables or immoveable alone. In ***R K Dalmia vs Delhi Administration***, the Supreme Court held that the word 'property' is used in the Code in a much wider sense than the expression 'moveable property'. There is no good reason to restrict the meaning of the word 'property' to moveable property only when it is used without any qualification in Section 405.

Whether the offense defined in a particular section of IPC can be committed in respect of any particular kind of property, will depend not on the interpretation of the word 'property' but on the fact whether that particular kind of property can be subject to the acts covered by that section.

The word 'dominion' connotes control over the property. In ***Shivnatrayan vs State of Maharashtra***, it was held that a director of a company was in the position of a trustee and being a trustee of the assets, which has come into his hand, he had dominion and control over the same. However, in respect of partnership firms, it has been held[xii] that though every partner has dominion over property by virtue of being a partner, it is not a dominion which satisfies the requirement of s 405, as there is no 'entrustment of dominion, unless there is a special agreement between partners making such entrustment.

Explanations (1) and (2) to the section provide that an employer of an establishment who deducts employee's contribution from the wages payable to the employee to the credit of a provident fund or family pension fund or employees state insurance fund, shall be deemed to be entrusted with the amount of the contribution deducted and default in payment will amount of the contribution deducted and default in payment will amount to dishonest use of the amount and hence, will constitute an offense of criminal breach of trust.

In ***Employees State Insurance Corporation vs S K Aggarwal,*** the Supreme Court held that the definition of principal employer under the Employees State Insurance Act means the owner or occupier. Under the circumstances, in respect of a company, it is the company itself which owns the factory and the directors of the company will not come under the definition of 'employer.' Consequently, the order of the High Court quashing the criminal proceedings initiated u/ss 405 and 406, IPC was upheld by the Supreme Court.

Misappropriation: Dishonest misappropriation is the essence of this section. Dishonesty is as defined in **Sec.24, IPC,** causing wrongful gain or wrongful loss to a person. The meaning of wrongful gain and wrongful loss is defined in **Sec. 23, IPC**. In order to constitute an offense, it is not enough to establish that the money has not been accounted for or mismanaged. It has to be established that the accused has dishonestly put the property to his

own use or to some unauthorized use. Dishonest intention to misappropriate is a crucial fact to be proved to bring home the charge of criminal breach of trust.

Proof of intention, which is always a question of the guilty mind of the person, is difficult to establish by way of direct evidence. In ***Krishan Kumar V Union of India***, the accused was employed as an assistant storekeeper in the Central Tractor Organization (CTO) at Delhi. Amongst other duties, his duty was the taking of delivery of consignment of goods received by rail for CTO. The accused had taken delivery of a particular wagonload of iron and steel from Tata Iron and Steel Co, Tatanagar, and the goods were removed from the railway depot but did not reach the CTO. When questioned, the accused gave a false explanation that the goods had been cleared, but later stated that he had removed the goods to another railway siding, but the goods were not there.

Similarly, in ***Jaikrishnadas Manohardas Desai vs State of Bombay***, it was held that dishonest misappropriation or conversion may not ordinarily be a matter of direct proof, but when it is established that property, is entrusted to a person or he had dominion over it and he has rendered a false explanation for his failure to account for it, then an inference of misappropriation with dishonest intent may readily be made.

In ***Surendra Prasad Verma vs State of Bihar,*** the accused was in possession of the keys to a safe. It was held that the accused was liable because he alone had the keys and nobody could have access to the safe, unless he could establish that he parted with the keys to the safe. As seen in the case of criminal misappropriation, even a temporary misappropriation could be sufficient to warrant conviction under this section.

In ***Superintendent and Remembrancer of Legal Affairs v SK Roy,*** the accused, a public servant in his capacity in Pakistan unit of Hindustan Co-operative Insurance Society in Calcutta which was a unit of LIC, although not authorized to do so directly realized premiums in cash of some Pakistani policyholders and misappropriated the amounts after making false entries in the relevant registers.

To constitute an offense of Criminal Breach of trust by a public servant punishable under Section 409 IPC, the acquisition of dominion or control over the property must also be in the capacity of a public servant. The question before the court was whether the taking of money directly from policyholders, which was admittedly unauthorized, would amount to acting in his capacity as a public servant.

In order to sustain the conviction under Section 409, it is required to prove:

1. Entrustment of a property of which accused is duty bound to account for;
2. Commission of Criminal Breach of Trust.

The prosecution dealing with cases of criminal breach of trust by a public servant is required to prove not only that the accused was a public servant but also was in a capacity entrusted with property or with domination over the same and he committed breach of trust in respect of that property.

It is not necessary that the property entrusted to a public servant should be of government. But what is important is that the property should have been entrusted to a person in his capacity as a public servant.

In ***State of Gujarat vs Jaswantlal Nathalal[,*** the government sold cement to the accused only on the condition that it will be used for construction work. However, a portion of the cement purchased was diverted to a godown. The accused was sought to be prosecuted for criminal breach of trust. The Supreme Court held that the expression 'entrustment' carries with it the implication that the person handing over any property or on whose behalf that property is handed over to another, continues to be its owner.

In ***Jaswant Rai Manilal Akhaney vs State of Bombay,*** it was held that when securities are pledged with a bank for specific purpose on specified conditions, it would amount to entrustment. Similarly, properties entrusted to directors of a company would amount to entrustment, because directors are to some extent in a position of trustee. However, when money was paid as illegal gratification, there was no question of entrustment.

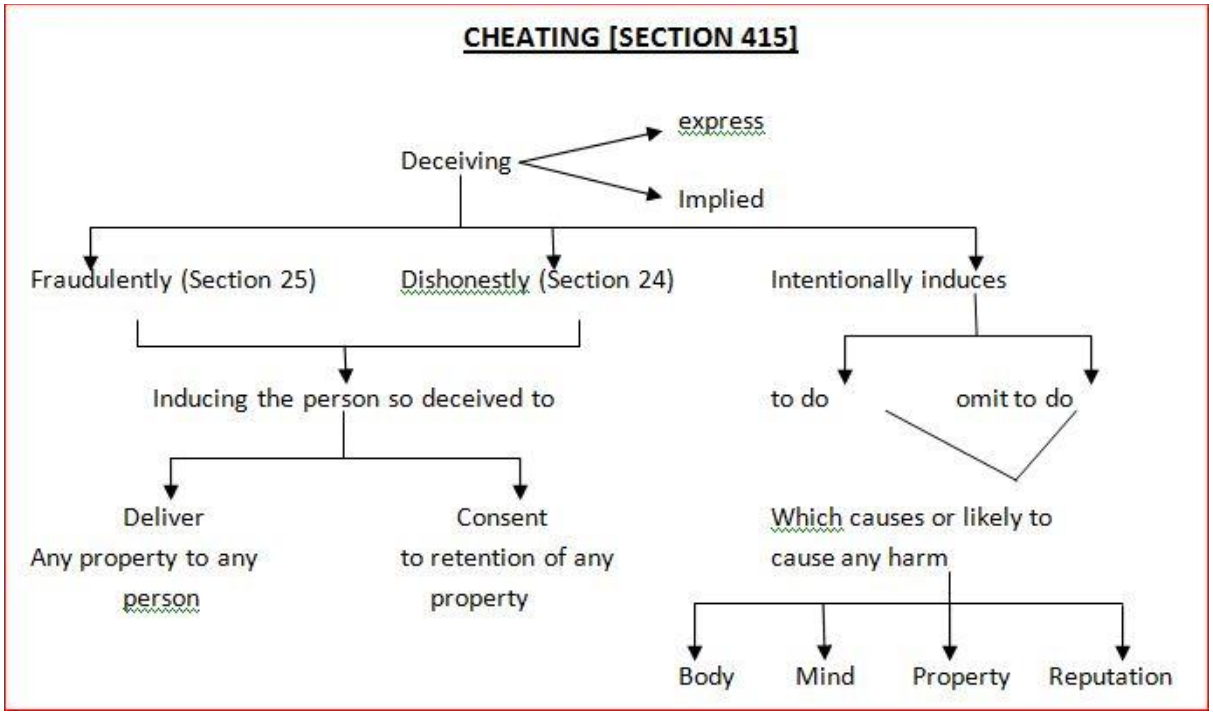
In State of UP vs Babu Ram, the accused, a sub-inspector (SI) of police, had gone to investigate a theft case in a village. In the evening, he saw one person named Tika Ram coming from the side of the canal and hurriedly going towards a field. He appeared to be carrying something in his dhoti folds. The accused searched him and found a bundle containing currency notes. The accused took the bundle and later returned it.

In ***Rashmi Kumar vs Mahesh Kumar Bhada***, the Supreme Court held that when the wife entrusts her stridhana property with the dominion over that property to her husband or any other member of the family and the husband or such other member of the family dishonestly misappropriates or converts to his own use that property, or willfully suffers any other person to do so, he commits criminal breach of trust.

Question 20. What essentials constitute 'Cheating'. Illustrate

Answer: Section 415 Cheating: Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.



Ingredients for Cheating

1. Deception of any person
2. Fraudulently or dishonestly inducing that person; and
3. Delivery of any property to any person

This section covers only simple cases of cheating when there is a delivery of any property or destruction of any valuable security section 420 IPC is attracted.

In **K. Krishnamurthy vs State of Andhra Pradesh, AIR 1965 SC 333**, the Supreme Court held that the offence of cheating by personation under section 416 and 419 IPC was committed when the accused making the false representation as to his name and qualification for a post in an application made to the public service commission and the government-appointed into the post on the Recommendation of the commission.

Deception of the statutory body Public Service Commission and the government which is the appointing authority is completed when he got an appointment and the payment of a salary to the appellant for the post. It amounted to the delivery of property within the meaning of section 415 IPC.

II. Section 416 in The Indian Penal Code – Cheating by personation

A person is said to "cheat by personation" if he cheats by pretending to be some other person, or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is.

Explanation.—The offense is committed whether the individual personated is a real or imaginary person.

The offense under this section consists of cheating by personation. The offense of cheating by false representation is an aggravated form of cheating. False personation consists of personating another or by knowingly substituting another person and pretending to be that other person and representing that other person.

Personation by itself is no offense but when a person fraudulently and dishonestly does a fraudulent act and represents as if he is himself that other person, section 416 IPC will be attracted

In **Baboo Khan vs State of Uttar Pradesh,** the accused, who pretended to be a certain well-known eye specialist and induced the complainant to allow him to perform an operation on the eye of his 12-year-old son was found guilty under the section.

III. Section 417, IPC – Punishment for cheating.
Whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

IV. Section 418, IPC – Cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect.
Whoever cheats with the knowledge that he is likely thereby to cause wrongful loss to a person whose interest in the transaction to which the cheating relates, he was bound, either by law, or by a legal contract, to protect, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

This section prescribes the punishment for cheating by a person standing in a fiduciary capacity to the person cheated such a relationship exists between a Banker and customer, the principal and an agent, Guardian and Ward, director of a company and the shareholder, etc.

Ingredients

1. The accused cheated a person whose interests he was under a legal obligation to protect;
2. The accused knew that he was likely to cause wrongful loss to such a person.

The offense is non-cognizable, bailable and compoundable with the permission of the court.

V. Section 419 , IPC – Punishment for cheating by personation: Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.
VI. Section 420 , IPC – Cheating and dishonestly inducing delivery of property: Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security,

shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.
This section is an aggravated form of cheating and provides enhanced punishment which may extend to 7 years of imprisonment (simple or rigorous) and fine. The section applies to those cases of cheating which involves the delivery of property or destruction of valuable security.

VII. The offence of cheating is established when the following ingredients are proved, namely**,**

1. That the representation made by the accused was false;
2. That the accused knew the representation was false at the very time when he made it;
3. That the accused made the false representation with the dishonest intention of deceiving the person to whom it was made; and
4. That the accused thereby induced that person to deliver any property or to do or to omit to do something which he would otherwise not have done or omitted.

Section 420 requires the delivery of property in addition to deception and inducement as required under section 415 The deception must be with a dishonest and fraudulent intent without which no offense under section 420 can be said to be committed.
A person can be said to have done a thing dishonestly if he does so with the intention of causing wrongful gain to one person and wrongful loss to another. Therefore, a dishonest act is necessary to establish for the purpose of Section 420.

Difference between section 415 and section 420
The difference between section 415 and section 420 is that wherein pursuance of deception knows property passes but inducement generated in the mind the fence comes under section 415 that is (simple cheating). But where in pursuance of the deception property is delivered the offenses punishable under section 420.

Section 415 deals with cheating but section 420 deals with the species of cheating which involves the delivery of property or destruction of valuable security. Punishment for the offense under section 415 is one year (section 417), while under section 420 up to 7 years imprisonment.

CASES: ON CHEATING**:** 1. Ramnath V state: A, the accused told B that he would double currency notes, which B doubted. But, B gave currency notes for the purpose. Held, there 'was no cheating as B knew that doubling was false. A was convicted of attempt to cheat.

2. Arab Mihan V. state: A, accused, advertised for "gupta mantra" which would solve all problems if certain instructions are followed. B took the instruction by paying. One condition was gazing at the moon for 15 minutes .with- out winking. Held, this was almost an impossible condition. & hence there was cheating .

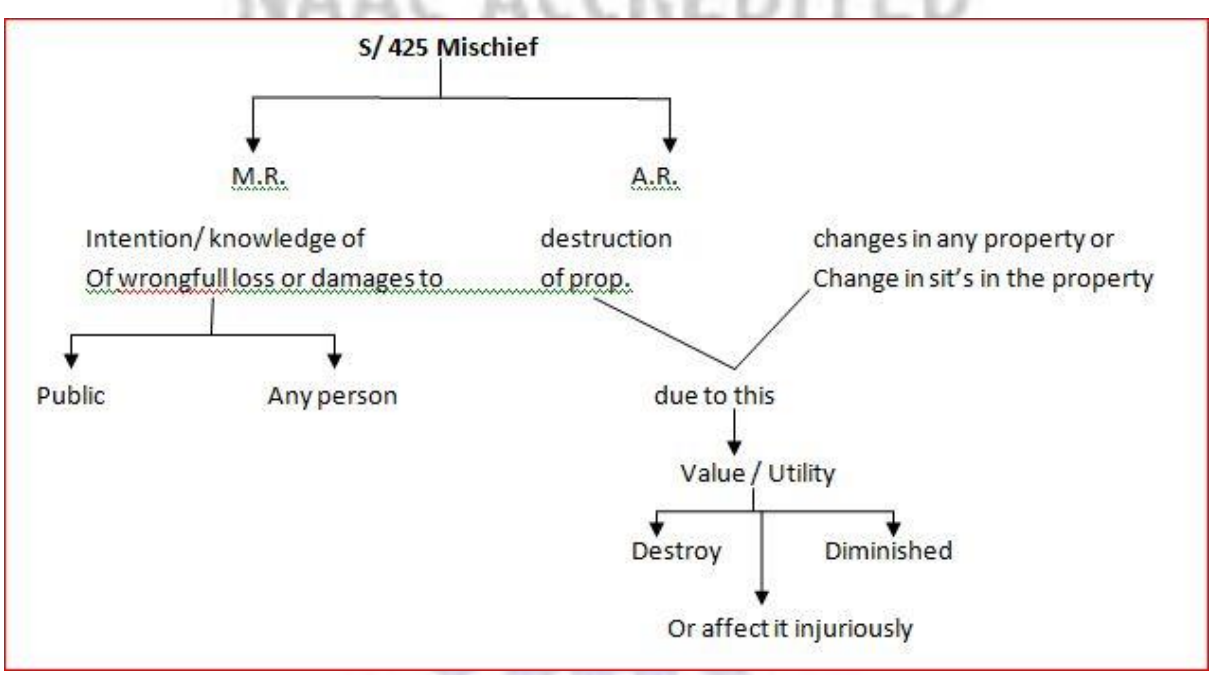
3.A, a doctor certified that the life of B to be insured was first class. The company believing the certificate insured B. B had a bad health record & died within a few days A cheats.

Leading cases:

i. Tulsi Ram V. St. of U..P
ii. Mahadev Prasad V. St. of W. B

Question 20. What do you mean by Mischief? Discuss the legal provision related toMischief.

Answer: Mischief is an offence under Sn. 425 I.P.C. If a person with an intention to cause wrongful loss or damage to public or to any person, causes the destruction of the property or causes any change or situation as will destroy or diminish its value or utility, he is guilty of mischief



. The punishment is imprisonment for three months or fine or both. It is not essential that the offender should intend to cause los> or damage to the property. Suffice if he has the intention to cause wrongful loss or damage. A person commits mischief of his own property where, as joint owner, he causes damage to the property.

i) A throws a wrist watch of B voluntarily into a river intending to cause wrongful loss. A is guilty of mischief

ii) A burns a valuable security (pronote) belonging to B voluntarily with the intention to cause wrongful loss to him. A is guilty of mischief.

iii) A and B are joint owners of a horse. A shoots down the horse and kills it, with a view to cause wrongful loss to B. A is guilty under Sn. 425.

The mens-rea (bad intention) in mischief is to cause wrongful loss. The act done is the destruction of property.

Sukha Singh's case : S received a registered parcel. He took the parcel but tore up the acknowledgement form. Held, S is guilty of mischief

iv) A having insured a ship, voluntarily causes it to be cast away with a view to causing loss to insurance company. A is guilty.

v) A leds in a herd of cattle to the field of B where there was standing crop, intending to cause damage to B. A is guilty. Sns 426 to 440 provide for punishment for mischief of various descriptions. Maiming or killing of animal (428 & 429), injury to works of irrigation, water course (430), injury to public road, bridge, river or channel (431) destruction of house (436) vessel etc..

Question 21. Define Forgery. Discuss the law relating to forgery with relevant case laws.

Answer: There are two sections defining forgery. Sn 463 defines forgery. Section 464 defines "making a false document', which is one of the-essentials of forgery. Forgery: A person who makes a false document or part of it with an intention

i) to cause damage or injury to the public or to any person ,

ii) to support any claim or title

iii) to cause any person to part with property or enter into contract

iv) to commit fraud or that fraud may be committed - is guilty of forgery;

False Document: A person is said to make a false document in the following circumstances:

i) He must dishonestly or fraudulently, make, sign, seal or execute a document, with knowledge or an intention to make others believe that it was genuinely done by the concerned authority.

ii) The person, without lawful authority, dishonestly or fraudulently cancels, or alters the document made by himself or by any other (living or not).

iii) The person may cause any other person who is insane, or intoxicated or deceived, to sign or seal or execute or alter a document.

E.g. : 1) A without authority affixes the signature and seal of the controller of examinations to a marks-card and secures a seat in a Medical college. A is guilty of forgery.

2) A picks up a blank cheque duly signed by B. A without authority but dishonestly fills up and takes Rs. 8000/- from the Bank. A is guilty.

3) Z has written a will giving "the remaining property to A and B'. A dishonestly scratches B's name. This is forgery. A person may commit forgery of his own signature,

i) A money-order is received in the name of B, A person with the same name takes it dishonestly. He is guilty of forgery.

ii) "A picks up a bill of exchange payable to another person of the same name. A endorses the bill, intending to make others believe that it was done duly by A. A has committed forgery. Making of a false document in the name of a fictitious person or by a dead man may amount to forgery. A draws a bill of exchange in the name of a fictitious person He fraudulently accepts it, in that name with a view to negotiate it. A commits forgery.

Recent Supreme Court Decisions:

i) Rarn Narain V. State of Punjab. Accused had forged the signature of the drawer of cheque and encased dishonestly. Held: Guilty.

ii) Jagannath Prasad V. State of U.P. Producing a forged document before a tribunal to support a claim was held forgery under Sn. 463.

iii) Budhu Ram V. State of Rajasthan. Production of a Photostat copy of a forged document was held sufficient to commit forgery.

iv) Dr Vimal V Delhi: Dr Vimalpure J bought a car in her daughter's name: She claimed accident insurance by signing daughter's name. In the circumstance there was no fraud. Hence, not guilty of forgery.

v) Bansal V Delhi: Grandson of had signed the name of deceased Grandfather and claimed amounts of Govt. Securities. Guilty of forgery-

Subject: Administrative Law Code :LLB 208

Q.1 Explain the nature and scope of Administrative Law.

Ans: Administrative law deals with the powers and functions of the administrative authorities, the manner in which the powers are to be exercised and remedies which are available to the aggrieved persons when those powers are abused by the authorities.

According to Ivor Jennings "administrative law is the law relating to the administrative authorities".

This is the most widely accepted definition, but there are two difficulties in this definition.

(1) It is very wide definition, for the law which determines the power and functions of administrative authorities may also deal with the substantive aspects of such powers.

For example: - Legislation relation to public health services, houses, town and country planning etc.. But these are not included within the scope and ambit of administrative law, and

(2) It does not distinguish administrative law from constitution law.

It is impossible to attempt any precise definition of administrative law which can cover the entire range of administrative process. The American approach to administrative law is denoted by the definition by the definition of administrative law as propounded by Davis.

According to K. C. Davis, "Administrative law as the law concerns the powers and procedures of administrative agencies, including especially the law governing judicial review of administrative action".

According to Professor Wade any attempt to define administrative law will create a number of difficulties. But if the powers and authorities of the state are classified as legislative, administrative and judicial, then administrative law might be said "the law which concerns administrative authorities as opposed to the others".

There are some difficulties with this definition also. It fails to distinguish administrative law

from constitutional law Like Jennings definition mentioned above; this is also very wide definition. It includes the entire legal field except the legislature and the Judiciary. It also includes the law of local government. It is also said that it is not possible to divide completely and definitely the functions of legislative, executive and judiciary.

It is very difficult to say precisely where legislation ends and administrative begins. Though enacting a law is functioning of the legislature the administrative authorities, legislate under the powers delegated to them by the legislature and this delegated legislation is certainly a part of administrative law. Definitions of administrative law also depict nature and7 scope of administrative law.

Administrative law determines the organization, powers and duties of administrative authorities. The emphasis of Administrative Law is on procedures for formal judgment based on the principles of Natural Justice and for rule making. Administrative law also determines the nature and scope of the powers deliberated to the government official by the specific legislation. Through legislation, the Parliament delegate specific powers as well as duties to government officials to enable them to act on behalf of the government.

The concept of Administrative Law is founded on the following principles:

a) Power is conferred on the administration by law

b) No power is absolute or uncontrolled howsoever broad the nature of the same might be.

c) There should be reasonable restrictions on exercise of such powers depending on the situation.

The Administrative law deals with the structure, functions and powers of the Administrative structures. It also lays down the methods and procedures which are to be followed by them during the course of remedies which are available to the persons whose rights and other freedoms are damaged by their operations. Administrative law specifies the rights and liabilities of private individuals in their dealings with public officials and also specifies the procedures by which those rights and liabilities can be enforced by those private individuals. It provides accountability and responsibility in the administrative functioning. Also there are specified laws and rules and regulations that guide and direct the internal administration relations like hierarchy, division of labor etc.

Q.2 Write essay on Rule of Law and Administrative Law.

Ans: The expression 'Rule of Law' has been derived from the French phrase 'la principle de legalite', i.e. a Government based on the principles of law. It is implied by the State in the

administration of justice. According to Gamer, The Rule of law is used simply to describe the state le words, the term 'rule of law' indicates the state of affairs in a country where, in main, the law mules. Law may be taken to mean mainly a rule or principle which governs the external actions of the human beings and which is recognized and aloof affairs in a country where, in main, the law is observed and order is kept. It is an expression synonymous with law and order.

The basis of Administrative Law is the 'Doctrine of the Rule of Law'. It was expounded for the first time by Sri Edward Coke, and was developed by Prof. A.V.Dicey in his book 'The law of the Constitution' published in 1885. According Coke, in a battle against King, he should be under God and the Lank thereby the Supremacy of Law is established.

Dicey regarded rule of law as the bedrock of the British Legal System. His doctrine is accepted in the constitutions of U.S.A. and India.:According to Prof. Dicey, rules of law contain three principles:

The First meaning of the Rule of Law is that 'no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. It implies that a man may be punished for a breach of law but cannot be punished for anything else. No man can be punished except for a breach of law. An alleged offence is required to be proved before the ordinary courts in accordance with the ordinary procedure.

The Second meaning of the Rule of Law is that no man is above law. Every man whatever is his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

Prof. Dicey states that, there must be equality before the law or equal subjection of all classes to the ordinary law of the land. He criticized the French legal system of droit Administrative in which there were separate administrative tribunals for deciding the cases of State Officials and citizens separately. He criticizes such system as negation of law

The Third meaning of the rule of law is that the general principles of the constitution are the result of juridical decisions determining file rights of private persons in particular cases brought before the Court. The general principles of the British Constitution, especially the liberties and the rights of the people must come from traditions and customs of the people and be recognized by the courts in administration of justice from time to time.

Dicey states that many constitutions of the states (countries) guarantee their citizens certain

rights (fundamental or human or basic rights) such as right to personal liberty, freedom from arrest etc. According to him documentary guarantee of such rights is not enough. Such rights can be made available to the citizens only when they are properly enforceable in the Courts of law, For Instance, in England there is no written constitution and such rights are the result of judicial decision.

Application of the Doctrine in England: Though, there is no written constitution, the rule of law is applied in concrete cases. In England, the Courts are the guarantors of the individual rights. Rule of law establishes an effective control over the executive and administrative power.

However, Dicey's rule of law was not accepted in full in England. In those days, many statutes allowed priority of administrative power in many cases, and the same was not challenged better c the Courts. Further sovereign immunity existed on the ground of King can do no wrong'. The sovereign immunity was abolished by the 'Crown Proceedings Act, 1947. Prof. Dicey could not distinguish arbitrary power from discretionary power, and failed to understand the merits of French legal system.

Rule of Law under the Constitution of India: - The doctrine of Rule of Law has been adopted in Indian Constitution. The ideals of the Constitution, justice, liberty and equality are enshrined (embodied) in the preamble.

The Constitution of India has been made the supreme law of the country and other laws arc required to be in conformity with the Constitution. Any law which is found in violation of any provision of the Constitution is declared invalid.

Part III of the Constitution of India guarantees the Fundamental Rights. Article 13(l) of the Constitution makes it clear that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provision of Part ill dealing with the Fundamental Rights, shall, to the extent of such inconsistency, be void. Article 13(2) provides that the State should not make any law which takes away or abridges the fundamental rights and any law made in contravention of this clause shall, to the extent of the contravention, be void. The Constitution guarantees equality before law and equal protection of laws. Article 21 guarantees right to life and personal liberty. It provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 19 (1) (a) guarantees the third principle of rule of law (freedom of such and expression).

Article 19 guarantees six Fundamental Freedoms to the citizens of India -- freedom of speech and expression, freedom of assembly, freedom to form associations or unions, freedom to live in any part of the territory of India and freedom of profession, occupation, trade or business. The right to these freedoms is not absolute, but subject to the reasonable restrictions which may be imposed by the State.

Article 20(1) provides that no person shall he convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence not be subject to a penalty greater than that which might have been inflicted tinder the law in for cc at the time of the commission of the offence. According to Article 20(2), no person shall be prosecuted and punished for the same offence more than once. Article 20(3) makes it clear that no person accused of the offence shall be compelled to be witness against himself. In India, Constitution is supreme and the three organs of the Government viz. Legislature, Executive and judiciary are subordinate to it. The Constitution provided for encroachment of one organ (for instance Judiciary) upon another (for example Legislature) if its action is mala fide, as the citizen (individual) can challenge under Article 32 of the Constitution.

In India, the meaning of rule of law has been much expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. It's also regarded as a part of natural justice.

In *Kesavanda Bharti v. State of Kerala,* the Apex Court enunciated the rule of law as one of the most important aspects of the doctrine of basic structure. The Supreme Court in *Menaka Gandhi v. Union of India*, observed that Article 14 strikes against arbitrariness. In *Indira Gandhi Nehru v. Raj Narain*, Article 329-A was inserted in the Constitution under 39th amendment, which provided certain immunities to the election of office of Prime Minister from judicial review. The Supreme Court declared Article 329-A as invalid since it abridges the basic structure of the Constitution.

In *A.D.M Jabalpur v. Shivakant Shukla* (popularly known as Habeas Corpus Case), the question before Supreme Court of India was, whether there was any rule of law in India apart front Article 21 of the Constitution. The Supreme Court by majority held that there is no rule of law other than the constitutional rule of law. Article 21 is our rule of law. If it is suspended, there is not rule of law.

Q.3 Explain relevance of separation of Powers in India.

Ans: The foundations of theory of separation of powers were laid by the French Jurist Baron De Montesquieu in his great work Espirt De Lois (the spirit of Laws) published in 1748. The conclusions of Montesquieu are summarized in the following quoted passage. "When the legislative and executive powers are united in the same persons or body there can be no liberty because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to enforce them in a tyrannical manner...were the powers of judging joined with the legislature the life and liberty of the subject would be exposed to arbitrary control. For the judge would then be the legislator. Were it joined to the executive power, the judge might be have with all the violence of an oppressors" To obviate the danger of arbitrary government and tyranny Montesquieu advocated a separation of governmental functions. Separation of powers requires that the functions of legislations, administration and adjudications should not be placed in the hand of one body of persons but should be distributed among the district or separate bodies of persons.

Indian constitution is a very well built document. It assigns different roles to all the three wings of government the Legislature, Executive and the Judiciary. There is no ambiguity about each wings power, privilege and duties. Parliament has to enact law, Executive has to enforce them and the judiciary has to interpret them. There is supposed to be no overlapping or overstepping.

The judiciary versus the Executive or Legislative is a battle which is not new but in recent times, the confrontation is unprecedented with both the sides taking the demarcation of powers to a flash point. Justice Mukherjee observed, "it does not admit of any serious dispute that the doctrine of separation of powers has, strictly speaking no place in the system of Government that Indian has at the present day". The theory of checks and balance has been observed in the Indian constitution. There is no rigorous separation of powers. For instance, parliament has the judicial power of impeachment and punishing for contempt. The president has the legislative powers of ordinance making. Thus, the Indian constitution has not applied the doctrine of separation of powers in its strictest form.

Q.4 Explain the relation between constitutional law and Administrative Law.

Ans: Administrative law is categorized as public law since it governs the relationship between the government and the individual. The same can be said of constitutional law. Therefore, it is undeniable that these two areas of law, subject to their differences, also share some

common features. With the exception of the English experience, it has never been difficult to make a clear distinction between administrative law and constitutional law. However, so many administrative lawyers agree that administrative law cannot be fully comprehended without a basic knowledge of constitutional law. As Justice Gummov aptly observed ―The subject of administrative law cannot be understood or taught without attention to its constitutional foundation.

This is true because of the close relationship between these two laws. To the early English writers there was no difference between administrative and constitutional law. Therefore, Keith observed that it is logically impossible to distinguish administrative law from constitutional law and all attempts to do so are artificial.

However, in countries that have a written constitution, their difference is not so blurred as it is in England. One typical difference is related to their scope. While constitutional law deals, in general, with the power and structures of government, i.e. the legislative, the executive and the judiciary, administrative law in its scope of study is limited to the exercise of power by the executive branch of government. The legislative and the judicial branches are relevant for the study of administrative law only when they exercise their controlling function on administrative power.

Constitutional law, being the supreme law of the land, formulates fundamental rights which are inviolable and inalienable. Hence, it supersedes all other laws including administrative law. Administrative law does not provide rights. Its purpose is providing principles, rules and procedures and remedies to protect and safeguard fundamental rights. This point, although relevant to their differences, can also be taken as a common ground shared by constitutional and administrative law.

Administrative and constitutional law shares a common ground, and supplements each other in their mission to bring about administrative justice. Concern for the rights of the individual has been identified as a fundamental concern of administrative law. It ultimately tries to attain administrative justice. Sometimes, the constitution may clearly provide right to administrative justice. Recognition of the principles of administrative justice is given in few bills of rights or constitutional documents. Australia and South Africa may be mentioned in this respect.

Q.5 Write essay on Classification of Administrative law.

Ans: In modern times the administrative process as a by product of intensive form of

government cuts across the traditional classification of governmental powers and combines into one all the powers which were traditionally exercised by three different organs of the State. The administration is the meeting point of the three types of governmental functions, namely legislative, judicial and administrative. In the administrative process, all the three functions, which are traditionally vested in the three different organs of government are provided into one single authority.

Classification of administrative function can be divided into three categories:

1.When any administrative authority exercises the law-making power delegated to it by the legislature , it is known the rule-making action of the administration or quasi-legislative action. When an instrument of a legislative nature is made by an authority in exercise of power delegated or conferred by the legislature it is called 'subordinate legislation.

2.Nowadays, the bulk of the decisions which affect a private individual come not from courts but from administrative' agencies exercising adjudicatory powers. The reason seems to be that since administrative decision making is also a byproduct of the intensive form of government, the traditional judicial system cannot give to the people that quantity and quality of justice required in a welfare State.

Some functions of the administration which have been held to be quasi-judicial functions are following:

- Disciplinary proceedings against students.
- Disciplinary proceedings against an employee for misconduct.
- Confiscation of goods under the Sea Customs Act, 1878.
- Determination of citizenship.
- Cancellation, suspension, revocation or refusal to renew licence or permit by licensing authority.
- Determination of statutory disputes.
- Forfeiture of pensions and gratuity.
- Power to continue the detention or seizure of goods beyond a particular period.
- Grant of permit by Regional Transport Authority.

3. Administrative action is the residuary action which is neither legislative nor judicial. It is concerned with the treatment of a particular situation and is devoid of generality. It has no procedural obligations of collecting evidence and weighing argument, it is based on subjective satisfaction where decision is based on policy and expediency. It doesn't decide a

right though it may affect a right. However, it does not mean that the principles of natural justice can be ignored completely when the authority is exercising "administrative powers". Unless the statute provides otherwise, a minimum of principles of natural justice must always be observed depending on the fact situation of each case.

Some of the examples are following:

- Issuing directions to subordinate officers not having the force of law
- Making a reference to a tribunal for adjudication under the Industrial Disputes Act.
- Interment, externment and deportation.
- Requisition, acquisition and allotment.
- Entering names in the surveillance register of the police

Ministerial function is that function of agency which is taken as a matter of duty imposed upon it by the law devoid of any discretion or judgment. Therefore, a ministerial action involves the performance of a definite duty in respect of which there is no choice, no wish and no freedom. In this, the high authority dictates and lower authority carries out. Collection of revenue may be one such ministerial action. In addition, if the statute requires that the agency shall open a bank account in a particular bank or shall prepare the annual report to be placed on the table of the minister, such action of opening the bank account and the preparation of the annual report shall be classified as ministerial

When an administrative agency is acting ministerial it has no power to consult its own wishes but when it is acting administratively its standards are subjective and it follows its own wishes.

Administrative instruction means power to issue instruction flow from the general executive power of the administration. In any intensive form of government the desirability and efficacy of administrative instruction issued by the superior administrative authorities to their subordinates cannot be over emphasized. 'Administrative instruction' is a most efficacious technique for achieving some kind of uniformity in administrative discretion and to manipulate in an area which is new and dynamic. These instructions also give a desired flexibility to the administration devoid of technicalities of the rule-making process.

Administrative instruction may be specific or general and directory or mandatory. Its type depends largely on the provisions of the statute which authorizes the administrative agencies to issue instructions. The instructions which are generally issued not under any statutory authority but under the general power of administration are considered as directory and hence

are unenforceable not having the force of law.

If administrative instructions have no force of law but if these are consistently followed for a long time government cannot depart from it at its own sweet will without rational justification.

UNIT 2

Q1. Write notes on meaning and concept of Delegated Legislation.

Ans: Delegated legislation also referred to subordinate legislation or subsidiary legislation is law made by an executive authority under powers given to them by primary legislation in order to implement and administer the requirements of that primary legislation. It is law made by a person or body other than the legislature but with the legislature's authority. Often, a legislature passes statutes that set out broad outlines and principles, and delegates authority to an executive branch official to issue delegated legislation that flesh out the details (substantive regulations) and provide procedures for implementing the substantive provisions of the statute and substantive regulations (procedural regulations). Delegated legislation can also be changed faster than primary legislation so legislatures can delegate issues that may need to be fine-tuned through experience.

Legislation by the executive branch or a statutory authority or local or other body under the authority of the competent legislature is called Delegated legislation. It permits the bodies beneath parliament to pass their own legislation .It is legislation made by a person or body other than Parliament. Parliament, through an Act of Parliament, can permit another person or body to make legislation. An Act of Parliament creates the framework of a particular law and tends only to contain an outline of the purpose of the Act. By Parliament giving authority for legislation to be delegated it enables other persons or bodies to provide more detail to an Act of Parliament. Parliament thereby, through primary legislation (i.e. an Act of Parliament), permit others to make law and rules through delegated legislation.

The legislation created by delegated legislation must be made in accordance with the purposes laid down in the Act. The function of delegated legislation is it allows the Government to amend a law without having to wait for a new Act of Parliament to be passed. Further, delegated legislation can be used to make technical changes to the law, such as altering sanctions under a given statute. Also, by way of an example, a Local Authority have power given to them under certain statutes to allow them to make delegated legislation and to make law which suits their area. Delegated legislation provides a very important role in the making of law as there is more delegated legislation enacted each year than there are Acts of Parliament. In addition, delegated legislation has the same legal standing as the Act of Parliament from which it was created. There are several reasons why delegated legislation is important. Firstly, it avoids overloading the limited Parliamentary timetable as delegated legislation can be amended and/or made without having to pass an Act through Parliament, which can be time consuming.

Changes can therefore be made to the law without the need to have a new Act of Parliament and it further avoids Parliament having to spend a lot of their time on technical matters, such as the clarification of a specific part of the legislation. Secondly, delegated legislation allows law to be made by those who have the relevant expert knowledge. By way of illustration, a local authority can make law in accordance with what their locality needs as opposed to having one law across the board which may not suit their particular area. A particular Local Authority can make a law to suit local needs and that Local Authority will have the knowledge of what is best for the locality rather than Parliament.

Thirdly, delegated legislation can deal with an emergency situation as it arises without having to wait for an Act to be passed through Parliament to resolve the particular situation. Finally, delegated legislation can be used to cover a situation that Parliament had not anticipated at the time it enacted the piece of legislation, which makes it flexible and very useful to law-making. Delegated legislation is therefore able to meet the changing needs of society and also situations which Parliament had not anticipated when they enacted the Act of Parliament.

A portion of law-making power of the legislative is conferred or bestowed upon a subordinate authority. Rules & regulations which are to be framed by the latter constitutes an integral portion of the statute itself. It is within power of parliament when legislating within its legislative few, to confer suborbital administrative & legislative powers upon some other authority. Subordinate legislation, is the legislation made by an authority subordinate to the sovereign authority, namely, the legislature. According to Sir John Salmond, "Subordinate legislation is that which proceeds from any authority other than the sovereign power and is, therefore, dependent for its continued existence and validity on some superior or supreme authority." Most of the enactments provide for the powers for making rules, regulations, by-laws or other statutory instruments which are exercised by specified subordinate authorities. Such legislation is to be made within the framework of the powers so delegated by the legislature is, therefore, known as delegated legislation. Thus all law making which takes place outside the legislature expressed as rules, regulations, bye laws, orders, schemes, directions or notifications etc is termed as delegated legislation.

Q2. Write note on Constitutionality Delegated legislation.

Ans: In *Queen v. Burah* wherein the Privy Council had validated only Conditional Legislation and therefore as per its reasoning delegated legislation is not permitted. The administration of civil and criminal justice within the said territory was vested in such officers as the Lieutenant-Governor may from time to time appoint.

Again in *King v. Benoari Lal Sharma* Conditional legislation was again applied by the privy council wherein the validity of an emergency ordinance by the Governor-General of India was challenged inter alia on the ground that it provided for setting up of special criminal courts for particular kinds of offences, but the actual setting up of the courts was left to the Provincial Governments which were authorised to set them up at such time and place as they considered proper. The Judicial Committee held that "this is not delegated legislation at all. It is merely an example of the not uncommon legislative power by which the local application

of the provisions of a statute is determined by the judgment of a local administrative body as to its necessity." The privy council held that “Local application of the provision of a state is determined by the judgment of a local administrative body as to its necessity.”

As regards constitution of the delegation of legislative powers the Indian Legislature cannot be in the same position as the prominent British Parliament and how far delegation is permissible has got to be ascertained in India as a matter of construction from the express provisions of the Indian Constitution. It cannot be said that an unlimited right of delegation is inherent in the legislature power itself. This is not warranted by the provisions of the Constitution and the legitimacy of delegation depends entirely upon its being used as an ancillary measure which the legislature considers to be necessary for the purpose of exercising its legislative powers effectively and completely. The legislature must retain in its own hands the essential legislative functions which consist in declaring the legislative policy and laying down the standard which is to be enacted into a rule of law, and what can be delegated in the task of subordinate legislation which by its very nature is ancillary to the statute which delegates the power to make it. Provided the legislative policy is enunciated with sufficient clearness or a standard laid down the courts cannot and should not interfere with the discretion that undoubtedly rests with the legislature itself in determining the extent of delegation necessary in a particular case.

In the case of *Sikkim v. Surendra Sharma* it was held that ‘All Laws in force’ in sub clause (k) of Art. 371 F includes subordinate legislation.

Q.3 Write an essay on Sub-Delegation.

Ans: The basic principle in this respect is that the sub-delegate should not be given uncanalised and unguided legislative power. Like delegation, sub-delegation is also subject to the doctrine of excessive delegation. Where a statute itself authorizes an administrative authority to sub-delegate its powers, no difficulty arises as to its validity since such subdelegation is within the terms of the statute itself. Sub-Delegation of legislative powers When a statute confers some legislative powers on an executive authority and the further delegates those powers to another subordinate authority of agency, it is called 'subdelegation.' Thus, a chain of delegation gets created in which the origin of the power flows through the Parent Act. Sub-delegation is the further delegation of power by a delegate to another person or agency. The basic principle in this process is summarised by the maxim 'Delegatus Non Potest Delegare, Such sub-delegation can’t be made without the duly authorisation by the

parent statute under which the delegation has been taken place.

Q.4 Explain Procedural Control Over Delegated Legislation.

Ans: Procedural Control Over Delegated Legislation from the citizen's point of view, the most beneficial safeguard against the dangers of the misuse of delegated Legislation is the development of a procedure to be followed by the delegates while formulating rules and regulations. In England as in America the Legislature while delegating powers abstains from laying down elaborate procedure to be followed by the delegates. But certain acts do however provide for the consultation of interested bodies and sometimes of certain Advisory Committees which must be consulted before the formulation and application of rules and regulations. This method has largely been developed by the administration independent of statute or requirements. The object is to ensure the participation of affected interests so as to avoid various possible hardships. The method of consultation has the dual merits of providing as opportunity to the affected interests to present their own case and to enable the administration to have a first-hand idea of the problems and conditions of the field in which delegated legislation is being contemplated.

Another method is antecedent publicity of statutory rules to inform those likely to be affected by the proposed rules and regulations so as to enable them to make representation for consideration of the rule-making authority. The rules of Publication Act, 1893, sec.1.Provided for the use of this method. The Act provided that notice of proposed 'statutory rules' is given and the representations of suggestions by interested bodies be considered and acted upon if proper. But the Statutory Instruments Act, 1946 omitted this practice in spite of the omission, the Committee on Ministers Powers 1932, emphasized the advantages of such a practice.

Adequate publicity of delegated legislation is absolutely necessary to ensure that law may be ascertained with reasonable certainty by the affected persons. Further the rules and regulations should not come as a surprise and should not consequently bring hardships which would naturally result from such practice. If the law is not known a person cannot regulate his affairs to avoid a conflict with them and to avoid losses. The importance of these laws is realized in all countries and legislative enactments provide for adequate publicity.

Q5. Write essay on Judicial control of Delegated Legislation.

Ans: Judicial control over delegated legislation occupies an important place in the field of control mechanisms. Judicial control means assessment by the court of the legal validity of a piece of delegated legislation which the court may do first, with reference to the constitution

by applying the doctrine of ultra vires and secondly, with reference to the other recognized principles of law. It is the most effective method to keep the administration within legal boundaries. The interim constitution of Nepal 2063 the fundamental law of the land and all laws inconsistent with it shall be void. And can be so declared by the supreme court of Nepal. And stressing the importance and the judicial review supreme court has also stated, "If court were to close its door for the injured people whose legal and constitutional rights have been curtailed, then injured will always suffer injustice and the government and public officials will become more and more arbitrary and ultimately the constitutional aim of rule of law will not be achieved. It is the integral constitutional principle that forms a very important regulating mechanism of democratic government and for the protection of people's rights. It is not only a means to checking executive action but also an ultimate watchdog of the people's fundamental rights.

Judicial is adjective of the judiciary. It means 1) the power of a court to interpret statutes and to declare them when they violate the constitution. 2) A form of appeal from an administrative body to the courts for control of the agency's finding of fact or law.

The general theory of judicial control is called the doctrine of Ulta-vires. Administrative power derives from the statute. The limits are found in the statute itself or in the general principles of the construction by the courts. Judicial control, therefore, means control and is based on the fundamental principle of the legal system that powers can be validly exercised only within their true limits.

The scope of judicial control may be classified by the following principles.

- Breach of the principle of Natural justice
- Excess of power of "substantive" ultra vires.
- Errors of law
- Failure to perform a duty
- Bad faith or abuse of power

UNIT 3

Q1. Explain the Need for Devolution of Adjudicatory Authority on Administration.

Ans: In view of the rapid growth and expansion of industry, trade and commerce, ordinary law courts are not in a position to cope up with the work-load. Ordinary judges, brought up in the traditions of law and jurisprudence, are not capable enough to understand technical problems, which crop up in the wake of modern complex economic and social processes. A good number of situations are such that they require quick and firm action. Otherwise the interests of-the people may be jeopardized. According to Servai, 'the development of administrative law in a welfare state has made administrative tribunals a necessity'. Hence, a number of administrative tribunals have been established in the country, which can do the work more rapidly, more cheaply and more efficiently than the ordinary courts.

Q2. Explain the Problems of Administrative Decision-making.

Ans: The various administrative problems that are faced by the management in the process of decision-making are as follows:

1. Correctness of decision: Correctness of decision is a very important problem of management. Correctness depends on several factors such as sophistication of the decision-maker, accuracy of information and ability of the decision-maker to visualise all possible alternative courses of action available in a given situation.

2. The decision environment: The environment, organisational as well as physical that is prevailing in the enterprise, influences the nature of the decision taken. If the general environment is satisfactory, there will be mutual confidence among managers, and also wholehearted co-operation by the subordinates for implementing the decision effectively. Further, there will be great scope for conducting research and analysis of the factors that have a bearing on the decision. Again, a good environment encourages managers to take decisions with confidence instead of avoiding them.

3. Timing of decisions: In decision-making, timing is an important factor. The problem is not merely taking a decision, but when to take it. If the decisions are not taken at the right time, they will not serve any purpose. For example, if the management has to decide the time of introducing a new product in the market, and if the decision taken in his respect is not correct, it may lose the market to its competitors. Thus, timing of decision plays an important role.

4. Effective communication of decision: Another important administrative problem is the effective communication of decisions to those for whom they are meant. The decision should be communicated in a simple language and without any ambiguity, if the decisions are properly communicated, the implementation would not be difficult.

5. Participation in decision-making: Employees who are likely to be affected by a decision should be encouraged to take part in arriving at the final decision so that their wholehearted co-operation will be available for the effective implementation of decision. However, the extent of participation depends on the nature of organisation. If it is an authoritarian organisation in which the executives feel that decision-making is their monopoly, the extent of participation is at a minimum and if it is a "democratic organisation", the extent of participation is great.

6. Implementation of decision: After taking a decision, the problem that has to be faced is its effective implementation. For implementation, not merely effective communication but also good incentives and motivation of subordinates are essential. The management should create such an environment that would help the subordinates perform their jobs better and more easily.

Q3. Explain the distinction between courts and Administrative Tribunals in India.

Ans:

Courts	**Administrative Tribunal**
A Court of law is a part of the traditional judicial system.	The administrative tribunal is an agency created by a statue endowed with judicial powers.
A Court of law is vested with general jurisdiction over all the matters.	It deals with service matters and is vested with limited jurisdiction to decide a particular issue.
It is strictly bound by all the rules of evidence and by the procedure of the Code of Civil Procedure.	It is not bound by the rules of the Evidence Act and the CPC unless the statute which creates the tribunal imposes such an obligation.
It is presided over by an officer expert in the law.	It is not mandatory in every case that the members need to be trained and experts in law.

The decision of the court is objective in nature primarily based on the evidence and materials produced before the court.	The decision is subjective i.e. at times it may decide the matters taking into account the policy and expediency.
It is bound by precedents, the principle of res judicata and the principle of natural justice.	It is not obligatory to follow precedents and principle of res judicata but the principle of natural justice must be followed.
It can decide the validity of legislation.	It cannot decide the validity of legislation.
The courts do not follow investigatory or inquisition functions rather it decides the case on the basis of evidence.	Many tribunals perform investigatory functions as well along with its quasi-judicial functions.

Q4. Explain briefly Principles of Natural Justice.

Ans: In India there is no statute laying down the minimum procedure which administrative agencies must follow while exercising decision-making powers. This minimum fair procedure refers to the principles of natural justice Natural justice is a concept of common law and represents higher procedural principles developed by the courts, which every judicial, quasi-judicial and administrative agency must follow while taking any decision adversely affecting the rights of a private individual. Natural justice implies fairness, equity and equality. In a welfare state like India, the role and jurisdiction of administrative agencies is increasing at a rapid pace. The concept of Rule of Law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging these functions in a fair and just manner.

In India, the principles of natural justice are firmly grounded in Article 14 & 21 of the Constitution. With the introduction of concept of substantive and procedural due process in Article 21, all that fairness which is included in the principles of natural justice can be read into Art. 21. The violation of principles of natural justice results in arbitrariness; therefore, violation of natural justice is a violation of Equality clause of Art. 14.

The principle of natural justice encompasses following two rules: -

- *Nemo judex in causa sua*- No one should be made a judge in his own cause or the *rule against bias.*
- *Audi alteram partem* - Hear the other party or the rule of fair hearing or the rule that noone should be condemned unheard.

Q5. Write notes on Reasoned decisions or speaking orders.

Ans: In India, unless there is specific requirement of giving reasons under the statute, it is not mandatory for the administrative agencies to give reasons for their decisions. Reasons are the link between the order and mind of the maker. Any decision of the administrative authority affecting the rights of the people without assigning any reason tantamount to violation of principles of natural justice. The requirement of stating the reasons cannot be under emphasized as its serves the following purpose: -

1. It ensures that the administrative authority will apply its mind and objectively look at the facts and evidence of the case.
2. It ensures that all the relevant factors have been considered and that the irrelevant factors have been left out.
3. It satisfies the aggrieved party in the sense that his view point have been examined and considered prior to reaching a conclusion.
4. The appellate authorities and courts are in a better position to consider the appeals on the question of law.

In short, reasons reveal the rational nexus between the facts considered and the conclusions reached. However, mere recording of reasons serves no purpose unless the same are communicated either orally or in writing to the parties. In fact mere communication of reasons has no meaning unless the corrective machinery is in place. Whether the reasons should be recorded or not depends on the facts of the case. In *Tarachand v. Municipal Corporation*, an assistant teacher was dismissed on the ground of moral turpitude. The Enquiry fully established the charge. The Asst. Education Commissioner confirmed the report w/o giving reasons. The Apex Court held that where the disciplinary authority disagrees with the report of the enquiry officer, it must state the reasons. In other words, the sighting of reasons is not mandatory where the disciplinary authority merely agrees with the report of enquiry officer.

UNIT 4

Q1. Write notes on Administrative Discretion-Need and its relationship with rule of law.

Ans: In Layman's language, discretion means choosing from amongst the various available alternatives without reference to nay predetermined criterion, no matter how fanciful that choice may be. A person in his will has discretion to dispose his property in any manner, no matter how arbitrary and fanciful that may be. But when the word discretion is qualified by the word 'administrative' has somewhat different overtones. 'Discretion' in this sense means choosing from amongst the various available alternatives but with reference to the rules or reason and justice and not according to personal whims. Such exercise is not to be arbitrary, vague and fanciful but legal and regular.

The problem of administrative discretion is complex. It is true that in any intensive form of government cannot function without the exercise of some discretion by the officials. It is necessary not only for individualization of the administrative power but also because it is humanly impossible to lay down a rule for every conceivable eventuality in the complex art of modern government. But it is equally true that absolute discretion is a ruthless master. It is more destructive of freedom than any of man's other inventions. Hence, there has been a constant conflict between the claims of administration to an absolute discretion and the claims of subjects to a reasonable exercise of it.

Due to the complexity of socio-economic conditions which the administration in modern times has to contend with, it is realized that a government having only ministerial duties with no discretionary functions will be extremely rigid and unworkable and that, too some extent, officials must be allowed a choice as to when, how, and whether they will act. The reason for this attitude is that, more often than not, the administration is required to handle intricate problems which involve investigation of facts, making of choices and exercise of discretion before deciding what action has to be taken. Therefore, the modern tendency is to leave a large amount of discretion with various authorities. Statute books are now full of provisions giving discretion of one kind or the other to the government or officials for various purposes. The need for 'discretion' arises because of the necessity to individualize the exercise of power by the administration, i.e. the administration has to apply a vague or indefinite statutory provision from case to case.

Now the question arises how we can specify these general rule-of-law principles in the context of administrative governance. In what ways are these principles applied in our administrative law? In what way do they ground arguments for an account of that law? This Part takes on that task organized around the three dimensions of the rule of law just discussed.

1. AUTHORIZATION

Authorization is a central principle of the rule of law and also a central occupation of administrative law.

- *Decisional Allocation*. — One pillar of Professor Strauss's approach to public law is an insistence that decisional allocation—attention to which official has been vested with power—matters to the chances of government in accordance with law. To be clear, the critical issue is not what occurs when one agency exercises powers delegated to another agency.

- *Scope of Authority*. — But what is the scope of authority granted? Because agencies only have powers granted to them by statute, the rule of law clearly requires that an agency act within the scope of that delegated power. Indeed, this ultra vires principle—that only authorized action is valid—is, and could be nothing other than, a cornerstone of administrative law.While all agree that agencies can act only within the scope of their authorization, there is wide disagreement over how that scope is to be determined.

- *Conclusion.* — Viewing together these two principles of authorization—decisional allocation and deference as to scope—reveals an interesting commonality as to the value of independent legal judgment for administrative governance.

2. NOTICE

At the center of most accounts of the rule of law is a cluster of formal characteristics that assist law in guiding individuals' actions. Principles of publicity, clarity, consistency, prospectivity, and stability are among the most important. To the extent the law falls short of these principles, it is difficult to maintain that individuals have reasonable notice.

3. JUSTIFICATION

The demand for justification is a central feature of administrative law and the work of administrative agencies. The difficult question is the extent to which the proceduralization of these requirements ends up undermining the aspiration that the agency's justification for its actions follows from and responds to public participation.

Q2. Write notes on ground of Judicial Review of Administrative Action.

Ans: In India the administrative discretion may be reviewed by the court on the following grounds.

I. Abuse of Discretion

These days, the administrative authorities are conferred wide discretionary powers. There is a great need of their control so that they may not be misused. The discretionary power is required to be exercised according to law. When the mode of exercising a valid power is improper or unreasonable there is an abuse of power. **The abuse of the discretionary power is inferred in the following conditions: -**

i) **Use for improper purpose:** - The discretionary power is required to be used for the purpose for which it has been given. If it is given for one purpose and used for another purpose. It will amount to abuse of power.

ii) **Malafide or Bad faith**: - If the discretionary power is exercised by the authority with bad faith or dishonest intention, the action is quashed by the court. Malafide exercise of discretionary power is always bad and taken as abuse of discretion. Malafide may be taken to mean dishonest intention or corrupt motive. In relation to the exercise of statutory powers it may be said to comprise dishonesty (or fraud) and malice. A power is exercised fraudulently. If its repository intends to achieve an object other than that for which he believes the power to have been conferred. The intention may be to promote another public interest or private interest.

iii) **Irrelevant consideration**: - The decision of the administrative authority is declared void if it is not based on relevant and germane considerations. The considerations will be irrelevant if there is no reasonable connection between the facts and the grounds.

iv) **Leaving out relevant considerations**: - The administrative authority exercising the discretionary power is required to take into account all the relevant facts. If it leaves out relevant consideration, its action will be invalid.

Mixed consideration: - Sometimes the discretionary power is exercised by the authority on both relevant and irrelevant grounds. In such condition the court will examine whether or not the exclusion of the irrelevant or non-existent considerations would have affected the ultimate decision. If the court is satisfied that the exclusion of the irrelevant considerations would have affected the decision, the order passed by the authority in the exercise of the discretionary power will be declared invalid but if the court is satisfied that the exclusion of the irrelevant considerations would not be declared invalid.

vi) **Unreasonableness**: - The Discretionary power is required to be exercised by the authority reasonably. If it is exercised unreasonably it will be declared invalid by the court. Every authority is required to exercise its powers reasonably.

vii) **Colourable Exercise of Power**: - Where the discretionary power is exercised by the authority on which it has been conferred ostensibly for the purpose for which it has been given but in reality for some other purpose, it is taken as colorable exercise of the discretionary power and it is declared invalid.

viii) **Non-compliance with procedural requirements and principles of natural justice**: - If the procedural requirement laid down in the statute is mandatory and it is not complied, the exercise of power will be bad. Whether the procedural requirement is mandatory or directory is decided by the court. Principles of natural justice are also required to be observed.

ix) **Exceeding jurisdiction**: - The authority is required to exercise the power within the limits or the statute. Consequently, if the authority exceeds this limit, its action will be held to be *ultravires* and, therefore, void.

II. Failure to exercise Discretion

In the following condition the authority is taken to have failed to exercise its discretion and its decision or action will be bad.

i) **Non-application of mind**: - Where an authority is given discretionary powers it is required to exercise it by applying its mind to the facts and circumstances of the case in hand. If he does not do so it will be deemed to have failed to exercise its discretion and its action or decision will be bad.

ii) **Acting under Dictation**: - Where the authority exercises its discretionary power under the instructions or dictation from superior authority. It is taken, as non-exercise of power by the authority and its decision or action is bad. In such condition the authority purports to act on its own but in substance the power is not exercised by it but by the other authority. The authority entrusted with the powers does not take action on its own judgment and does not apply its mind.

iii) **Imposing fetters on the exercise of discretionary powers**: - If the authority imposes fetters on its discretion by announcing rules of policy to be applied by it rigidly to all cases coming before it for decision, its action or decision will be bad. The authority entrusted with the discretionary power is required to exercise it after considering the individual cases and if the authority imposes fetters on its discretion by adopting fixed rule of policy to be applied rigidly to all cases coming before it, it will be taken as failure to exercise discretion and its action or decision or order will be bad.

Q3. Write essay on Doctrine of legitimate expectation.

Ans: The concept of legitimate expectation in administrative law has nowadays, undoubtedly, gained sufficient importance. These days the courts resort to legitimate expectation for the review of administrative action and this creation takes its place besides such principles as the rules of natural justice, unreasonableness, the fiduciary duty of local authorities and in future, perhaps, the unreasonableness, the proportionality.

As the legitimate expectation doctrine gained acceptance, it was invoked in a wider range of cases, which can be conveniently summarised into four categories:

1.The first category was cases in which a person had relied upon a policy or norm of general application but was then subjected to a different policy or norm.

2. The second category, which was a slight variation on the first, included cases in which a policy or norm of general application existed and continued but was not applied to the case at hand.

3. A third category arose when an individual received a promise or representation which was not honoured due to a subsequent change to a policy or norm of general application.

4. A fourth category, which was a variation on the third, arose when an individual received a promise or representation which was subsequently dishonored, not because there had been a general change in policy, but rather because the decision maker had changed its mind in that instance.

The doctrine of legitimate expectation originated under the French Legal system, known as *droit administratif*. *Counseil d'Etat* applied the doctrine of legitimate expectation (*protectio de la confiance legitime*) in the FORTUNE CASE.

In this case, A wanted to appear at a competitive examination. He was not permitted to appear on the ground that his confidential file contained certain adverse remarks. In an action by A, *Conseil d'Etat* went through the records and called upon the Secretary to justify the order. The Secretary pleaded that it was an 'Act de Government' (Act of State) and that the Court had no jurisdiction to deal with the matter.

He did not produce any document. The Court passed an order to produce the entire file relating to the matter, went through it and quashed the order. In England, governed by the Rule of Law one cannot conceive of such a situation, for the ordinary courts of law have no right to interfere with any 'Act of State' or with ministerial discretion nor can they have access to secret documents.

It held that administration must be careful not to create a situation adversely affecting innocent persons by an unexpected change in the rules applied, or in its behavior unless such sudden change is necessitated by the public interest. The administration is entitled to change its decisions, but it must take appropriate steps to ensure that those likely to be affected are informed before-hand.

Q4. Write essay on Lokpal and Lokayukta.

Ans: Lokpal

A **Lokpal** *is an anti-corruption authority or body of ombudsman who represents the public interest in the Republic of India. The current Chairperson of Lokpal is Pinaki Chandra Ghose. The Lokpal has jurisdiction over central government to inquire into allegations of corruption against its* public functionaries and for matters connected to corruption. The Lokpal and Lokayuktas Act was passed in 2013 with amendments in parliament, following the Jan Lokpal movement led by Anna Hazare in 2011. The Lokpal is responsible for enquiring into corruption charges at the national level while the Lokayukta performs the same function at the state level. Minimum age of Lokpal (chairperson or member) on the date of assuming office as the chairperson or member should not be less than 45 years.

As of March 2019, and ever since the related Act of Parliament was passed in India. Retired Supreme Court judge Pinaki Chandra Ghose is appointed as the first Lokpal of India by a

committee consisting of Prime Minister Narendra Modi and Chief Justice of India Ranjan Gogoi and Lok Sabha speaker Sumitra Mahajan on 23 March 2019 whereas the members are appointed w.e.f 27 March 2019. It consists of a chair person and eight members, half of whom are judicial members who are or have been a Judge of the Supreme Court or a Chief Justice of a High Court and the other half being non-judicial members are people of impeccable integrity and outstanding ability having special knowledge and expertise of not less than twenty-five years in the matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking, law and management.

The term "Lokpal" was coined by Dr. L.M.Singhvi in 1963. The concept of a constitutional ombudsman was first proposed in parliament by Law Minister Ashoke Kumar Sen in the early 1960s. The first Jan Lokpal Bill was proposed by Adv Shanti Bhushan [4] in 1968 and passed in the 4th Lok Sabha in 1969, but did not pass through the Rajya Sabha.[5] Subsequently, 'lokpal bills' were introduced in 1971, 1977, 1985, again by Ashoke Kumar Sen, while serving as Law Minister in the Rajiv Gandhi cabinet, and again in 1989, 1996, 1998, 2001, 2005 and in 2008, yet they were never passed. Forty five years after its first introduction and after ten failed attempts, the Lokpal Bill was finally enacted in India on 18 December 2013.after the ten attempts

The Lokpal Bill provides for the filing, with the ombudsman, of complaints of corruption against the prime minister, other ministers, and MPs. The first Administrative Reforms Commission (ARC) recommended the enacting of the Office of a Lokpal, convinced that such an institution was justified, not only for removing the sense of injustice from the minds of citizens, but also to instill public confidence in the efficiency of the administrative machinery.

Following this, the Lokpal Bill was, for the first time, presented during the fourth Lok Sabha in 1968, and was passed there in 1969. However, while it was pending in the Rajya Sabha, the Lok Sabha was dissolved, and thus the bill lapsed.

Lokayuktas in the States

The **Lokayukta** (also **Lok Ayukta**) (*lokāyukta*, *"civil commissioner"*) is an anti-corruption ombudsman organization in the Indian states. Once appointed, Lokayukta can not be dismissed nor transferred by the government, and can only be removed by passing an impeachment motion by the state assembly. Naresh Kadyan moved public interest litigation before High Court and then contempt of court order petition for not appointing Lokayukta in Haryana. The Administrative Reforms Commission (ARC) headed by Morarji Desai submitted a special interim report on "Problems of Redressal of Citizen's Grievances" in 1966. In this report, the ARC recommended the setting up of two special authorities designated as 'Lokpal' and 'Lokayukta' for the redressal of citizens' grievances.

The Lokayukta, along with the Income Tax Department and the Anti Corruption Bureau, mainly helps people publicise corruption among the Politicians and Government Officials. Many acts of the LokAyukta have resulted in criminal or other consequences for those charged.

Maharashtra was the first state to introduce the institution of Lokayukta through *The Lokayukta and Upa-Lokayuktas Act in 1971*. This was followed by similar acts that were enacted by the states of Odisha, Rajasthan, Bihar, Uttar Pradesh, Karnataka, Madhya Pradesh, Andhra Pradesh, Gujarat, Kerala, Tamil Nadu and the union territory of Delhi.

The Maharashtra Lokayukta is considered the weakest Lokayukta due to lack of powers, staff, funds and an independent investigating agency. On the other hand, the Karnataka Lokayukta is considered the most powerful Lokayukta in the country.

There are no Lokayuktas in Jammu and Kashmir and Pondicherry. Lokayukta was established in Tamil Nadu On 9 July 2018, the Arunachal Pradesh assembly passed a Lokayukta bill. On 28 February 2019, the Mizoram assembly passed a Lokayukta Bill.
The power, function and jurisdiction of Lokayuktas are not uniform in the country. In some states it has been applicable to all the elected representatives including the CM. In some other states legislators have been deliberately kept out of his purview.
Lokayuktas have not been provided with their independent investigative machinery making them dependent on the government agencies, which leaves enough scope for the politicians and the bureaucrats to tinker with the processes of investigation.

Q5.Write notes on Central Bureau of Investigation and Central Vigilance Commission.

Ans: The Central Bureau of Investigation (CBI)

CBI is the premier investigating agency of India. Operating under the jurisdiction of the Ministry of Personnel, Public Grievances and Pensions, the CBI is headed by the Director. Originally set up to investigate bribery and governmental corruption, in 1965 it received expanded jurisdiction to investigate breaches of central laws enforceable by the Government of India, multi-state organised crime, multi-agency or international cases. The agency has been known to investigate several economic crimes, special crimes, cases of corruption and other high-profile cases. CBI is exempted from the provisions of the Right to Information Act. CBI is India's officially designated single point of contact for liaison with the Interpol.

The CBI headquarters are located in CGO Complex, near Jawaharlal Nehru Stadium in New Delhi.

Rishi Kumar Shukla is the current director of the CBI. Latest arrest made by CBI was on 21 August 2019 to the Former Finance and Home Minister P. Chidambaram who has been accused by CBI & ED in INX Media Case.

Central Vigilance Commission (CVC)

CVC is an apex Indian governmental body created in 1964 to address governmental corruption. In 2003, the Parliament enacted a law conferring statutory status on the CVC. It has the status of an autonomous body, free of control from any executive authority, charged with monitoring all vigilance activity under the Central Government of

India, advising various authorities in central Government organizations in planning, executing, reviewing and reforming their vigilance work.

It was set up by the Government of India Resolution on 11 February 1964, on the recommendations of the *Committee on Prevention of Corruption*, headed by Shri K. Santhanam Committee, to advise and guide Central Government agencies in the field of vigilance. Nittoor Srinivasa Rau, was selected as the first Chief Vigilance Commissioner of India.

The Annual Report of the CVC not only gives the details of the work done by it but also brings out the system failures which leads to corruption in various Departments/Organisations, system improvements, various preventive measures and cases in which the Commission's advises were ignored etc.The Commission shall consist of:

- A Central Vigilance Commissioner - Chairperson;
- Not more than two Vigilance Commissioners - Members.

Subject-Strategic Management

Subject Code-214

Q1 What do you understand by Strategic Management. Discuss the nature of Strategic Management.

Strategic management is the ongoing planning, monitoring, analysis and assessment of all that is necessary for an organization to meet its goals and objectives. Changes in the business environment require organizations to constantly assess their strategies for success. The strategic management process helps organizations take stock of their present situation, chalk out strategies, deploy them and analyze the effectiveness of the implemented management strategies.

The term 'strategic management' is used to denote a branch of management that is concerned with the development of strategic vision, setting out objectives, formulating and implementing strategies and introducing corrective measures for the deviations (if any) to reach the organization's strategic intent. It has two-fold objectives:

- To gain competitive advantage, with an aim of outperforming the competitors, to achieve dominance over the market.
- To act as a guide to the organization to help in surviving the changes in the business environment.

Nature of strategic management specifies its characteristics which are as follows:

1. Strategic Management as a Process:

Strategic management is basically a process. It has emerged out of management in other fields where the concept of management is taken as a process for achieving certain objectives of the organization. Thus, strategic management involves establishing a framework to perform various processes. The concept of strategic management must embody all general management principles and practices devoted to strategy formulation and implementation in the organization.

2.Top Management Function:

Strategic management is basically top management function. Thus, in order to ensure effective top management function, it is necessary that a distinction should be made between strategic management and operational management which emphasises day-to-day operations in the organization, so that top management can focus more attention on the strategic aspect rather than emphasising on operational management.

Since the environment of the organization is always changing providing new opportunities and threats, top management must spend more and more time on this aspect. Thus, there is a considerable change on the emphasis of top management functions in the organizations, particularly in large and complex organizations. The change is from operational management to strategic management.

3. General Management Approach:

Strategic management has general management approach. This approach has three characteristics – (i) This approach uses system frame of reference in dealing with wholeness of an organization. In this dealing, the emphasis is put on identifying tendencies of various phenomena in the organization and relationships among these tendencies, (ii) Decision criteria are based on overall betterment of the organization as a whole, not the criteria used by functional specialists, (iii) Attempt is made to achieve organizational equilibrium and generation of synergy. This may be even suboptimal for some departments or units of the organization.

4. Relating Organization to Environment:

The focus of strategic management is on relating the organization to its external environment. This emphasises that there is continuous interaction between the organization and its

environment taking an open systems approach. Thus, the organization must create adequate channel through which external information will pass to various points in the organization.

5.Long-Term Issues:

Strategic management deals primarily with long-term issues of the organization that may or may not have an immediate effect. For example, investment in research and development (R&D) may yield no immediate effect in terms of new product development. However, this investment may lead to development of new products and, therefore, enhanced profits.

6. Flexibility:

Strategic management has flexibility. This flexibility is required because strategic management works in the context of environment which is quite dynamic. As a result, many strategic actions planned maybe either left, postponed, or changed in the light of environmental requirements.

7. Innovation:

Strategic management puts emphasis on innovation which is the process of introducing new things or new ways of working. Innovation is achieved through new strategic actions which are quite different from the previous actions. Innovation is required to face environmental challenges effectively.

Q2. Explain the concept of Strategic Intent .Discuss all the key intents in detail.

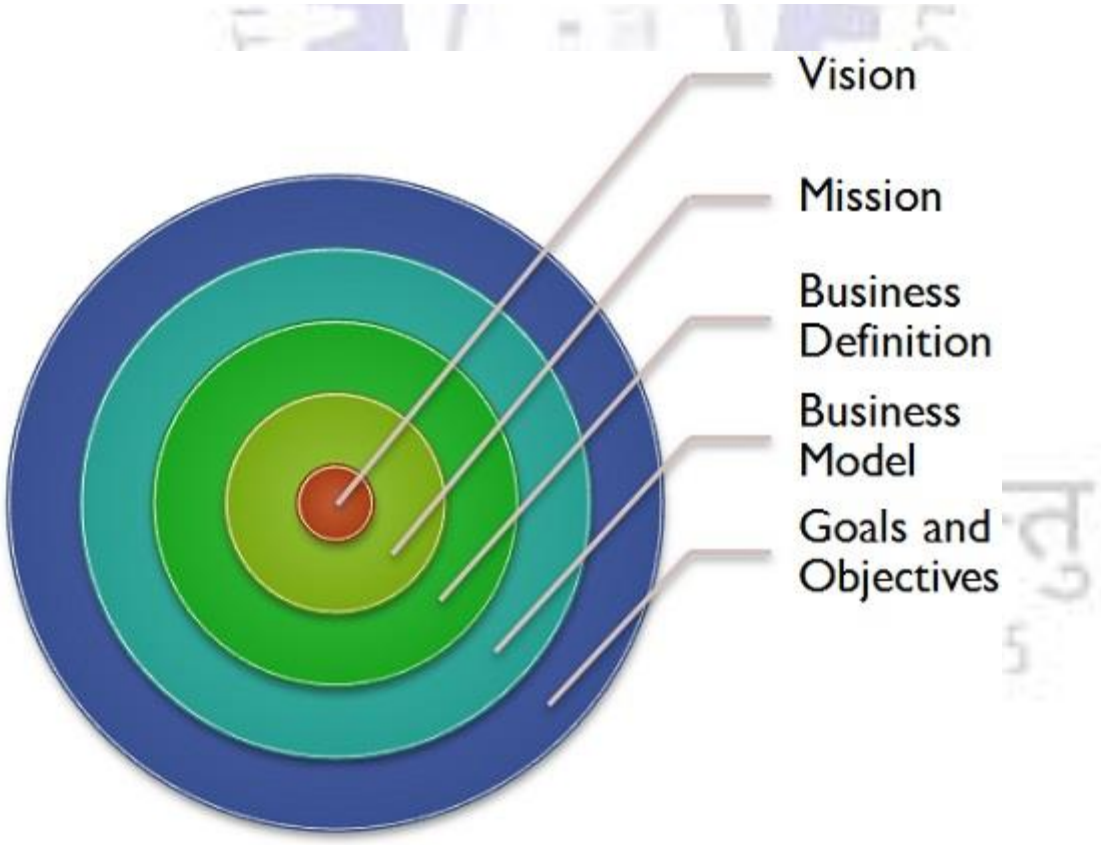
Strategic intent includes directing organization's attention on **the** need of winning; inspiring people by telling them that **the** targets are valuable; encouraging individual and team participation as well as contribution; and utilizing **intent** to direct allocation of resources.

Strategic Intent can be understood as the philosophical base of the strategic management process. It implies the purpose, which an organization endeavour of achieving. It is a

statement, that provides a perspective of the means, which will lead the organization, reach the vision in the long run.

Strategic intent gives an idea of what the organization desires to attain in future. It answers the question what the organization strives or stands for? It indicates the long-term market position, which the organization desires to create or occupy and the opportunity for exploring new possibilities.

Strategic Intent Hierarchy



1. **Vision**: Vision implies the blueprint of the company's future position. It describes where the organization wants to land. It is the dream of the business and inspiration, base for the planning process. It depicts the company's aspirations for the business and provides a peep of what the organization would like to become in future. Every single component of the organization is required to follow its vision.
2. **Mission**: Mission delineates the firm's business, its goals and ways to reach the goals. It explains the reason for the existence of the business. It is designed to help potential shareholders and investors understand the purpose of the company. A mission statement helps to identify, 'what business the company undertakes.' It defines the present capabilities, activities, customer focus and business makeup.
3. **Business Definition**: It seeks to explain the business undertaken by the firm, with respect to customer needs, target audience, and alternative technologies. With the help of business definition, one can ascertain the strategic business choices. The corporate restructuring also depends upon the business definition.
4. **Business Model**: Business model, as the name implies is a strategy for the effective operation of the business, ascertaining sources of income, desired customer base, and financing details. Rival firms, operating in the same industry relies on the different business model due to their strategic choice.
5. **Goals and Objectives**: These are the base of measurement. Goals are the end results, that the organization attempts to achieve. On the other hand, objectives are time-based measurable actions, which help in the accomplishment of goals. These are the end results which are to be attained with the help of an overall plan, over the particular period.

Q3 Explain the process or stages of Strategic Management.

The strategic management process means defining the organization's strategy. It is also defined as the process by which managers make a choice of a set of strategies for the organization that will enable it to achieve better performance.

Strategic management is a continuous process that appraises the business and industries in which the organization is involved; appraises it's competitors; and fixes goals to meet all the present and future competitor's and then reassesses each strategy.

Strategic management process has following four steps:

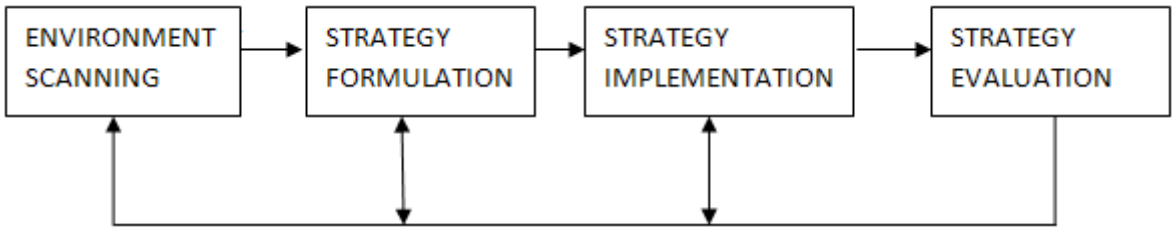
Environmental Scanning- Environmental scanning refers to a process of collecting, scrutinizing and providing information for strategic purposes. It helps in analyzing the internal and external factors influencing an organization. After executing the environmental analysis process, management should evaluate it on a continuous basis and strive to improve it.

Strategy Formulation- Strategy formulation is the process of deciding best course of action for accomplishing organizational objectives and hence achieving organizational purpose. After conducting environment scanning, managers formulate corporate, business and functional strategies.

Strategy Implementation- Strategy implementation implies making the strategy work as intended or putting the organization's chosen strategy into action. Strategy implementation includes designing the organization's structure, distributing resources, developing decision making process, and managing human resources.

Strategy Evaluation- Strategy evaluation is the final step of strategy management process. The key strategy evaluation activities are: appraising internal and external factors that are the root of present strategies, measuring performance, and taking remedial / corrective actions. Evaluation makes sure that the organizational strategy as well as it's implementation meets the organizational objectives

These components are steps that are carried, in chronological order, when creating a new strategic management plan. Present businesses that have already created a strategic management plan will revert to these steps as per the situation's requirement, so as to make essential changes.



Components of Strategic Management Process

Q4.Discuss the benefits of Strategic Management.

Strategic Management – Benefits

The important benefits of strategic management mentioned below highlight its relevance:

1. Strategic management helps to envision an organisation's future, formulate mission and make objectives clear. This is clear from the fact that determination of mission and objectives is the first step in the strategic management process. It may be noted that the new growth and competitive environment created by the liberalisation prompted many Indian companies to evaluate and modify their mission and objectives or to ponder over a mission for the company where one did not exist.

2. The articulation of the mission and objectives and the formulation of a strategy for their accomplishment help people in the organisation understand what the organisation stands for, what is the development path charted out, what are the planned results over a period of time, etc

3. It makes people realise what are they working for, what is expected of each SBU, division, functional department and, to some extent, individuals.

4. Strategic management facilitates better delegation, coordination, monitoring, performance evaluation and control.

5. The identification of the strengths and weaknesses may help an organisation to take measures to overcome/minimise the weaknesses and reinforce the strengths.

6. The SWOT analysis, which is a part of the strategic management, helps a company to adopt suitable strategies for exploiting opportunities and combating threats. It will also help

the company to drop those businesses where it would not be successful or which do not meet the objectives.

7. A company with strategic management will be constantly monitoring the environment and making modifications of the strategy as and when required so that the plans are made more realistic and effective.

8. Strategic management would enable a company to meet competition more effectively.

9. Strategic management makes the management dynamic, appropriate to the environment and result- and future-oriented.

Q5.Discuss the pitfalls of Strategic management.

Strategic Management – Pitfalls

Strategic management is not without Pitfalls. While strategic management has a number of benefits as pointed out above, it is also a fact that many firms fail despite adopting strategic management and many firms which do not have strategic management are successful. In short, strategic management by itself does not ensure unconditional success.

The important Pitfalls of strategic management are the following:

1. Strategic management is based on certain premises and if the premises do not hold valid, the strategy or plans based on them would not be realistic or effective. These points to the need for exercising due diligence in premising and to the importance of strategic control, particularly premise control.

2. SWOT analysis has a very important role in strategic management. Obviously, if the SWOT analysis is not right, the strategy based on it may go awry. SWOT analysis is an exercise which requires lot of expertise and information. When these two are lacking, the utility of the SWOT analysis is questionable and it could even lead to formulation of wrong or ineffective strategies.

3. Strategic management is a means to achieve the mission and objectives of the organisation. Hence, any lack of realism or other limitation of the mission/objectives would naturally get reflected in the strategy.

4. One of the criticisms against strategic management is that it sometimes makes the organisation over-ambitious and the resultant failure to reach the goals cause frustration. Unrealistic strategies may land companies in severe problems.

5. Another criticism advanced against strategic management is that it makes the future vision tunnelled that several opportunities may be overlooked. Against this criticism, it may be argued that the strategy is formulated after scanning all the opportunities. Further, a good strategic management also envisages modification of the strategy when changes in the environment call for it.

6. Yet another criticism which is very akin to the above is that it makes the whole approach very rigid. Against this, it may be pointed out that a good strategic management system provides for required flexibility and modifications. Strategic control and contingency planning impart the plans some amount of adaptability to the unforeseen developments.

7. An important limitation of the strategic management is that if the implementation of the strategy is not effective, even an excellent strategy would not produce expected results. Effective implementation demands many things – resource allocation, leadership implementation, right structure, and effective evaluation and control. The reason for the failure of many strategies is the implementation failure.

Q6 What is Strategy Formulation and discuss the steps of strategic Formulation.

Strategy formulation refers to the process of choosing the most appropriate course of action for the realization of organizational goals and objectives and thereby achieving the organizational vision. **The process of strategy formulation basically involves six main steps**. Though these steps do not follow a rigid chronological order, however they are very rational and can be easily followed in this order.

Setting Organizations' objectives - The key component of any strategy statement is to set the long-term objectives of the organization. It is known that strategy is generally a medium for realization of organizational objectives. Objectives stress the state of being there whereas

Strategy stresses upon the process of reaching there. Strategy includes both the fixation of objectives as well the medium to be used to realize those objectives. Thus, strategy is a wider term which believes in the manner of deployment of resources so as to achieve the objectives.While fixing the organizational objectives, it is essential that the factors which influence the selection of objectives must be analyzed before the selection of objectives. Once the objectives and the factors influencing strategic decisions have been determined, it is easy to take strategic decisions.

Evaluating the Organizational Environment - The next step is to evaluate the general economic and industrial environment in which the organization operates. This includes a review of the organizations competitive position. It is essential to conduct a qualitative and quantitative review of an organizations existing product line. The purpose of such a review is to make sure that the factors important for competitive success in the market can be discovered so that the management can identify their own strengths and weaknesses as well as their competitors' strengths and weaknesses.After identifying its strengths and weaknesses, an organization must keep a track of competitors' moves and actions so as to discover probable opportunities of threats to its market or supply sources.

Setting Quantitative Targets - In this step, an organization must practically fix the quantitative target values for some of the organizational objectives. The idea behind this is to compare with long term customers, so as to evaluate the contribution that might be made by various product zones or operating departments.

Aiming in context with the divisional plans - In this step, the contributions made by each department or division or product category within the organization is identified and accordingly strategic planning is done for each sub-unit. This requires a careful analysis of macroeconomic trends.

Performance Analysis - Performance analysis includes discovering and analyzing the gap between the planned or desired performance. A critical evaluation of the organizations past performance, present condition and the desired future conditions must be done by the organization. This critical evaluation identifies the degree of gap that persists between the actual reality and the long-term aspirations of the organization. An attempt is made by the organization to estimate its probable future condition if the current trends persist.

Choice of Strategy - This is the ultimate step in Strategy Formulation. The best course of action is actually chosen after considering organizational goals, organizational strengths, potential and limitations as well as the external opportunities.

Q7.Why Mission and Vision plays a important role in Strategic Planning.What are essentials for writing Mission statement.

Strategic planning is a key function of an organization's management that helps to set priorities, allocate resources, and ensure that everyone is working towards common goals and objectives. However, for strategic planning to be effective, there are two important tools that are needed – a vision and a mission statements. These serve as a guide for creating objectives and goals in the organization, thus providing a road-map that is to be followed by everyone.

Unfortunately, despite the importance of vision and mission statements, many organizations do not have them. In other cases, the two statements are lumped together as one or used interchangeably despite their distinctive differences. This creates a confusion in the organization that makes it harder to achieve the set objectives and goals

A vision statement is used to describe the **future state** of the organization, i.e., what the organization hopes to become in the future. It is, therefore, a long-term goal provides direction for the organization. It also communicates the purpose of the organization to the employees and other stakeholders and provides them with the inspiration to achieve that purpose.

A **mission statement** is a short **statement** of why an organization exists, what its overall goal is, identifying the goal of its operations: what kind of product or service it provides, its primary customers or market, and its geographical region of operation.

A mission statement defines what line of business a company is in, and why it exists or what purpose it serves. Every company should have precise statement of purpose that gets people excited about what the company does and motivates them to become part of the organisation.

A mission statement describes the current state of an organization and its primary goals or objectives. It provides detailed information about what the organization does, how it does it,

and who it does it for. Unlike the vision statement, it is short-term in nature. However, it is related to the vision statement in that it outlines the primary goals that will help to achieve the future the organization desires (i.e, the vision)

Importance of vision and mission statement in an organization

Both the vision and mission statements play an important role in the organization.

1. The vision and mission statements **define the purpose** of the organization and in still a sense of belonging and identity to the employees. This motivates them to work harder in order to achieve success.
2. The mission statement acts as a **"North Star"**, where it provides the direction that is to be followed by the organization while the vision statement provides the goal (or the destination) to be reached by following this direction.
3. The vision and mission statements help to properly **align** the resources of an organization towards achieving a successful future.
4. The mission statement provides the organization with **a clear and effective guide for making decisions**, while the vision statement ensures that all the decision made are properly aligned with what the organization hopes to achieve.
5. The vision and mission statements provide a focal point that helps to align everyone with the organization, thus ensuring that everyone is working towards a single purpose. This helps to **increase efficiency and productivity** in the organization.

The vision and mission statements are important **tools of strategic planning**, and thus they help to shape the strategy that will be used by an organization to achieve the desired future.

Conclusion

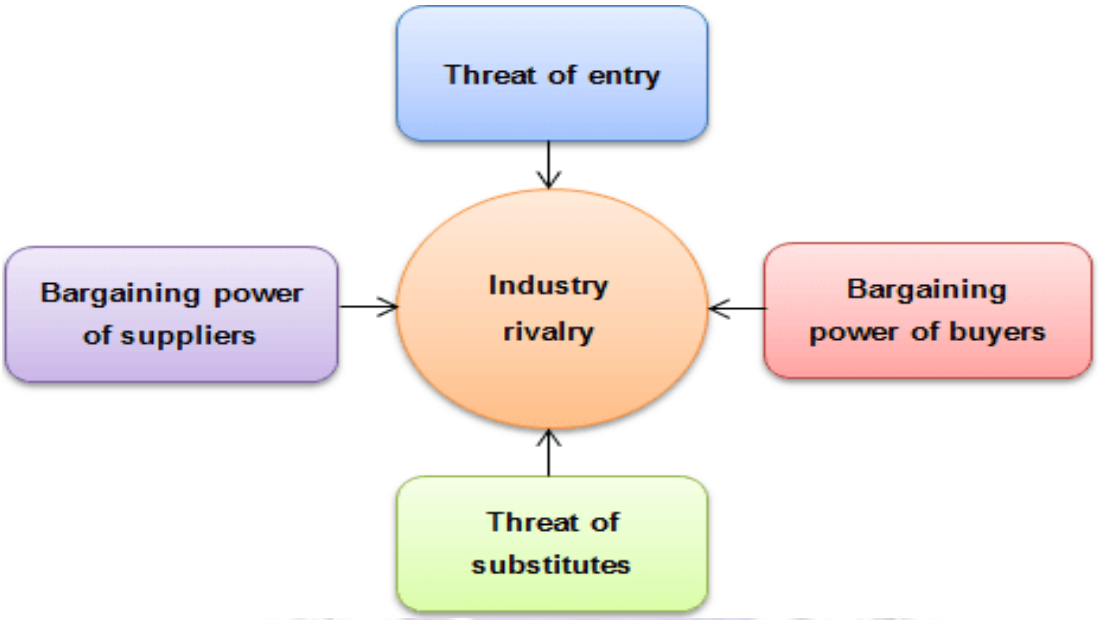
The mission and vision statements are very important and they can best be described as a compass and destination of the organization respectively. Therefore, every organization should **develop clear vision and mission statements**, as not doing so would be like going on a journey without knowing the direction you are to follow or the destination.

Tips for Creating an Effective Mission Statement

- Do keep it short and concise. Sum up the company's mission in just a few sentences.
- Don't write an essay. That is not the purpose of this brand building tool. You want the mission statement to be tethered to the brand and that means it must be memorable. Long drawn out prose is rarely memorable.
- Do think long-term. The mission statement is an investment in your company's future, so keep it open enough to reflect your long-term goals.
- Don't make it too limiting. We want to provide the best products ever to the town of Elmwood. Do you only see the business selling to the residents of one small town or do you hope to expand at some point?
- Do find out what your employees think of the mission statement. This is a tool designed with them in mind, too, so get their opinion. Ask how they would improve it and what they dislike about it.
- Don't be afraid to change it. Things change in the business world. If the mission statement no longer represents the company, it is time for a rewrite.

Q8 Explain Porter's five force model in detail.

Porter's five forces model is an analysis tool that uses five industry forces to determine the intensity of competition in an industry and its profitability level.Five forces model was created by M. Porter in 1979 to understand how five key competitive forces are affecting an industry. The five forces identified are:



These forces determine an industry structure and the level of competition in that industry. The stronger competitive forces in the industry are the less profitable it is. An industry with low barriers to enter, having few buyers and suppliers but many substitute products and competitors will be seen as very competitive and thus, not so attractive due to its low profitability.

Threat of new entrants. This force determines how easy (or not) it is to enter a particular industry. If an industry is profitable and there are few barriers to enter, rivalry soon intensifies. When more organizations compete for the same market share, profits start to fall. It is essential for existing organizations to create high barriers to enter to deter new entrants. Threat of new entrants is high when:

- Low amount of capital is required to enter a market;
- Existing companies can do little to retaliate;
- Existing firms do not possess patents, trademarks or do not have established brand reputation;
- There is no government regulation;
- Customer switching costs are low (it doesn't cost a lot of money for a firm to switch to other industries);
- There is low customer loyalty;
- Products are nearly identical;

- Economies of scale can be easily achieved.

Bargaining power of suppliers. Strong bargaining power allows suppliers to sell higher priced or low quality raw materials to their buyers. This directly affects the buying firms' profits because it has to pay more for materials. Suppliers have strong bargaining power when:

- There are few suppliers but many buyers;
- Suppliers are large and threaten to forward integrate;
- Few substitute raw materials exist;
- Suppliers hold scarce resources;
- Cost of switching raw materials is especially high.

Bargaining power of buyers. Buyers have the power to demand lower price or higher product quality from industry producers when their bargaining power is strong. Lower price means lower revenues for the producer, while higher quality products usually raise production costs. Both scenarios result in lower profits for producers. Buyers exert strong bargaining power when:

- Buying in large quantities or control many access points to the final customer;
- Only few buyers exist;
- Switching costs to other supplier are low;
- They threaten to backward integrate;
- There are many substitutes;
- Buyers are price sensitive.

Threat of substitutes. This force is especially threatening when buyers can easily find substitute products with attractive prices or better quality and when buyers can switch from one product or service to another with little cost. For example, to switch from coffee to tea doesn't cost anything, unlike switching from car to bicycle.

Rivalry among existing competitors. This force is the major determinant on how competitive and profitable an industry is. In competitive industry, firms have to compete

aggressively for a market share, which results in low profits. Rivalry among competitors is intense when:

- There are many competitors;
- Exit barriers are high;
- Industry of growth is slow or negative;
- Products are not differentiated and can be easily substituted;
- Competitors are of equal size;
- Low customer loyalty

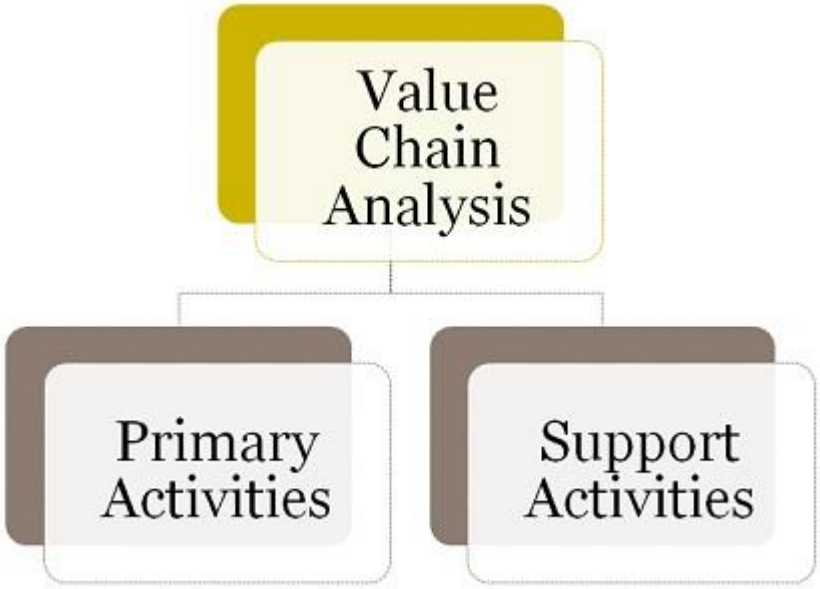
Q9. Explain Value Chain Analysis. Also discuss the importance of Value Chain Analysis.

A value chain is the full range of activities – including design, production, marketing and distribution – businesses conduct to bring a product or service from conception to delivery. For companies that produce goods, the value chain starts with the raw materials to make their products, and consists of everything added before the product is sold to consumers.

Value chain analysis is a process of dividing various activities of the business in primary and support activities and analyzing them, keeping in mind, their contribution towards value creation to the final product. And to do so, inputs consumed by the activity and outputs generated are studied, so as to decrease costs and increase differentiation. Value chain analysis is used as a tool for identifying activities, within and around the firm and relating these activities to an assessment of competitive strength.

Classification of Value Chain Analysis

Value Chain Analysis is grouped into primary or line activities, and support activities discussed as under:



Primary Activities: The functions which are directly concerned with the conversion of input into output and distribution activities are called primary activities. It includes:

- **Inbound Logistics**: It includes a range of activities like receiving, storing, distributing, etc. which make available goods and services for operational processes. Some of those activities are material handling, transportation, stock control, etc.
- **Operations**: The activity of transforming input raw material to final product ready for sale, is termed as operation. Machining, assembling, packaging are the activities covered under operations.
- **Outbound Logistics**: As the name suggests, the activities that help in collecting, storage and delivering the product to the customer is outbound logistics.
    - **Marketing and Sales**: All the activities like advertising, promotion, sales, marketing research, public relations, etc. performed to make the customer aware of the product or service and create demand for it, comes under marketing.
    - **Service**: Service means service provided to the customer so as to improve or maintain the value of the product. It includes financing service, after-sales service and so on.

Support Activities: Those activities which assist primary activities in accomplishment, are support activities. These are:

- **Procurement**: This activity serves the organization, by supplying all the necessary inputs like material, machinery or other consumable items, that required by the organization for performing primary activities.
    - **Technology Development**: At present, technology development requires heavy investment, which takes years for research and development. However, its benefits can be enjoyed for several years and by a multitude of users in the organization.
    - **Human Resource Management**: It is the most common plus important activity which excel all primary activities of the organization. It encompasses overseeing the selection, retention, promotion, transfer, appraisal and dismissal of staff.
    - **Infrastructure**: This is the management system, which provides, its services to the whole organization and includes planning, finance, information management, quality control, legal, government affairs, etc.

Importance of Value Analysis

1. Cuts delivery times

One advantage of value chain analysis is that the company can exploit it to reduce the amount of time it takes to deliver its products to wholesalers or retailers. This will help in fostering great relationship as the resellers will be better positioned to coordinate buying and selling. This will also benefit the end users who will have faster access to the products when all trade partners aim to move goods efficiently.

2. Optimize inventory

Reduced delivery times pave the way to inventory optimization as the retailers can collaborate with their suppliers to make smaller and more frequent orders. Ordering excess inventory is always stressful and expensive to handle as it might result into wastage. For this reason, the retailers have better trust that the manufacturers will deliver orders when needed eliminating possibility for shortages.

3. Enhances client relations

Through management of the preliminary value chain factors like inbound logistics, operations and outbound logistics, resellers increase their response times and reduce costs for their clientele. Most importantly, marketing, sales and service phases in the value chain help improve consumer relations. For instance, most businesses today have reward programs that increase customer loyalty and persuade them to purchase more products over a certain period.

4. Increases bottom line and profit

A key significance of value chain analysis is that it enhances the profit margins for the company. This is because with efficient logistics and distribution, goods reach the final user when they need them. Moreover, marketing and after sale services attract more consumers and persuade them to buy at higher prices like for Apple consumers. A combination of all the crucial activities in the value chain add more value to the product or service and offer the company the best possible revenue.

Q10 .Discuss the Internal and External Forces of Strategic formulation.

Organizational environment consists of both external and internal factors. Environment must be scanned so as to determine development and forecasts of factors that will influence organizational success. **Environmental scanning refers to possession and utilization of information about occasions, patterns, trends, and relationships within an organization's internal and external environment**. It helps the managers to decide the future path of the organization. Scanning must identify the threats and opportunities existing in the environment. While strategy formulation, an organization must take advantage of the opportunities and minimize the threats. A threat for one organization may be an opportunity for another.

Internal analysis of the environment is the first step of environment scanning. Organizations should observe the internal organizational environment. This includes employee interaction with other employees, employee interaction with management, manager interaction with other managers, and management interaction with shareholders, access to natural resources, brand awareness, organizational structure, main staff, operational potential, etc. Also, discussions, interviews, and surveys can be used to assess the internal environment.

Analysis of internal environment helps in identifying strengths and weaknesses of an organization.

As business becomes more competitive, and there are rapid changes in the external environment, information from external environment adds crucial elements to the effectiveness of long-term plans. As environment is dynamic, it becomes essential to identify competitors' moves and actions. Organizations have also to update the core competencies and internal environment as per external environment. Environmental factors are infinite, hence, organization should be agile and vigile to accept and adjust to the environmental changes. For instance - Monitoring might indicate that an original forecast of the prices of the raw materials that are involved in the product are no more credible, which could imply the requirement for more focused scanning, forecasting and analysis to create a more trustworthy prediction about the input costs. In a similar manner, there can be changes in factors such as competitor's activities, technology, market tastes and preferences.

While in **external analysis**, three correlated environment should be studied and analyzed —

- immediate / industry environment
- national environment
- broader socio-economic environment / macro-environment

Examining the **industry environment** needs an appraisal of the competitive structure of the organization's industry, including the competitive position of a particular organization and it's main rivals. Also, an assessment of the nature, stage, dynamics and history of the industry is essential. It also implies evaluating the effect of globalization on competition within the industry. Analyzing the **national environment** needs an appraisal of whether the national framework helps in achieving competitive advantage in the globalized environment. Analysis of **macro-environment** includes exploring macro-economic, social, government, legal, technological and international factors that may influence the environment. The analysis of organization's external environment reveals opportunities and threats for an organization.

Strategic managers must not only recognize the present state of the environment and their industry but also be able to predict its future positions.

Q-11. Describe the nature of Strategy Analysis and Choice.

- Strategy analysis and choice focuses on generating and evaluating alternative strategies, as well as on selecting strategies to pursue. Strategy analysis and choice seeks to determine alternative courses of action that could best enable the firm to achieve its mission and objectives.

- The firm's present strategies, objectives, and mission together with the external and internal audit information, provide a basis for generating and evaluating feasible alternative strategies. The alternative strategies represent incremental steps that move the firm from its current position to a desired future state

THE NATURE OF STRATEGY ANALYSIS AND CHOICE

A. Focus on establishing long-term objectives, generating alternative strategies, and selecting strategies to pursue.

B. The Process of Generating and Selecting Strategies

1. Strategists never consider all feasible alternatives that could benefit the firm, because there are an infinite number of possible actions and an infinite number of ways to implement those actions. Therefore, a manageable set of the most attractive alternative strategies must be developed.

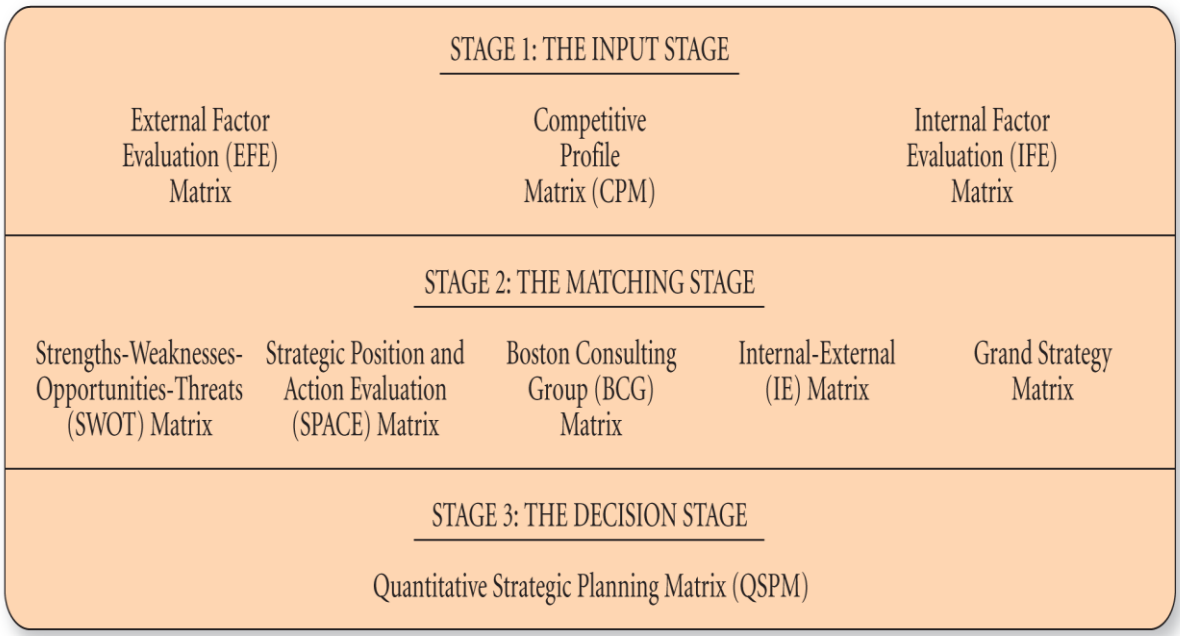
2. Identifying and evaluating alternative strategies should involve many of the managers and employees who earlier assembled the organizational mission statement, performed the external audit, and conducted the internal audit.

3. Alternative strategies proposed by participants should be considered and discussed in a meeting or series of meetings.

Q-12. Explain the The Strategy-Formulation Analytical Framework for strategy analysis and choice.

- Strategy-formulation techniques can be integrated into a three-stage decision-making framework.

- The tools presented in this framework are applicable to all sizes and types of organizations and can help strategists identify, evaluate, and select strategies.



- Stage one of the strategy formulation framework consists of the External Factor Evaluation (EFE) Matrix, the Internal Factor Evaluation (IFE) Matrix, and the Competitive Profile Matrix. This so-called input stage summarizes the basic input information needed to formulate strategies.

- Stage two, called the matching stage, focuses upon generating feasible strategies combining key strategic variables. This stage includes the following tools: SWOT Matrix, portfolio analysis that consists of the Boston Consulting Group (BCG) Matrix, and served as the starting point in the development of the GE Concept, as well as the ADL Matrix. Further analytical tools can be suggested such as Strategic Position and Action Evaluation (SPACE) Matrix, the Internal-External (IE) Matrix, and the Grand Strategy matrix.

- Stage three, called the decision stage, involves a single technique, the Quantitative Strategic Planning Matrix (QSPM). A QSPM uses input information from stage one to objectively evaluate feasible strategies identified in stage two. A QSPM reveals the relative attractiveness of proposed strategies and thus provides an objective basis for selecting the ultimate strategy.

Q-13. Write a short note on EFE and IFE Matrix.

External Factor Evaluation (EFE) Matrix

- EFE Matrix. When using the EFE matrix we identify the key external opportunities and threats that are affecting or might affect a company.
- The ratings in external matrix refer to how effectively company's current strategy responds to the opportunities and threats. The numbers range from 4 to 1, where 4 means a superior response, 3 – above average response, 2 – average response and 1 – poor response. Ratings, as well as weights, are assigned subjectively to each factor. In our example, we can see that the company's response to the opportunities is rather poor, because only one opportunity has received a rating of 3, while the rest have received the rating of 1. The company is better prepared to meet the threats, especially the first threat.

Internal Factor Evaluation (IFE) Matrix

- IFE Matrix. Strengths and weaknesses are used as the key internal factors in the evaluation. When looking for the strengths, ask what do you do better or have more valuable than your competitors have? In case of the weaknesses, ask which areas of your company you could improve and at least catch up with your competitors?
- The ratings in internal matrix refer to how strong or weak each factor is in a firm. The numbers range from 4 to 1, where 4 means a major strength, 3 – minor strength, 2 – minor weakness and 1 – major weakness. Strengths can only receive ratings 3 & 4, weaknesses – 2 & 1.

Q-14. What is SWOT Analysis, what are its advantages and disadvantages.

The SWOT Matrix is an important matching tool that helps managers develops four types of strategies:

a. SO strategies—use a firm's internal strengths to take advantage of external opportunities.

b. WO strategies—are aimed at improving internal weaknesses by taking advantage of external opportunities.

c. ST strategies—use a firm's strengths to avoid or reduce the impact of external threats.

d. WT strategies—are defensive tactics directed at reducing internal weaknesses and avoiding external threats.

Strengths of SWOT

- Can Be Applied to Any Company and Situation

The SWOT Analysis is so simple in its composition that it can be applied to any company in any industry. It can also be used among a wide range of situations and strategic initiatives.

- One Tool Can Tell Four Stories

While other evaluation tools may only be able to assess one scenario at a time, the SWOT process can tell a company four things at one time. This means leaders can have four comprehensive discussions about pertinent issues to the company at one time.

Limitations of SWOT

- Lack of Prioritization

A SWOT Analysis can be overwhelming if leaders are not clear on what they are going to prioritize. The tool itself does not do this automatically, so it can be difficult to decide what to address first. SWOT is designed to address pertinent issues, so leaders may feel pressed to handle everything at once.

- Lack of Clarity

What do leaders do if a factor is both a weakness and a strength? How can they manage this using SWOT? Unfortunately, the tool does not provide a reliable way to do this. Leaders have to attach their values to factors that show up twice and decide the best step for addressing them.

Q-15. Explain BCG Matrix in detail.

- The Boston Consulting group's product portfolio matrix (BCG matrix) is designed to help with long-term strategic planning, to help a business consider growth opportunities by reviewing its portfolio of products to decide where to invest, to discontinue or develop products. It's also known as the Growth/Share Matrix.
- The Matrix is divided into 4 quadrants based on an analysis of market growth and relative market share, as shown as :

1. Dogs: These are products with low growth or market share.

2. Question marks or Problem Child: Products in high growth markets with low market share.

3. Stars: Products in high growth markets with high market share.

4. Cash cows: Products in low growth markets with high market share

There are four quadrants into which firms brands are classified:

- Dogs. Dogs hold low market share compared to competitors and operate in a slowly growing market. In general, they are not worth investing in because they generate low or negative cash returns. But this is not always the truth. Some dogs may be profitable

for long period of time, they may provide synergies for other brands or SBUs or simple act as a defense to counter competitors moves. Therefore, it is always important to perform deeper analysis of each brand or SBU to make sure they are not worth investing in or have to be divested.
Strategic choices: Retrenchment, divestiture, liquidation

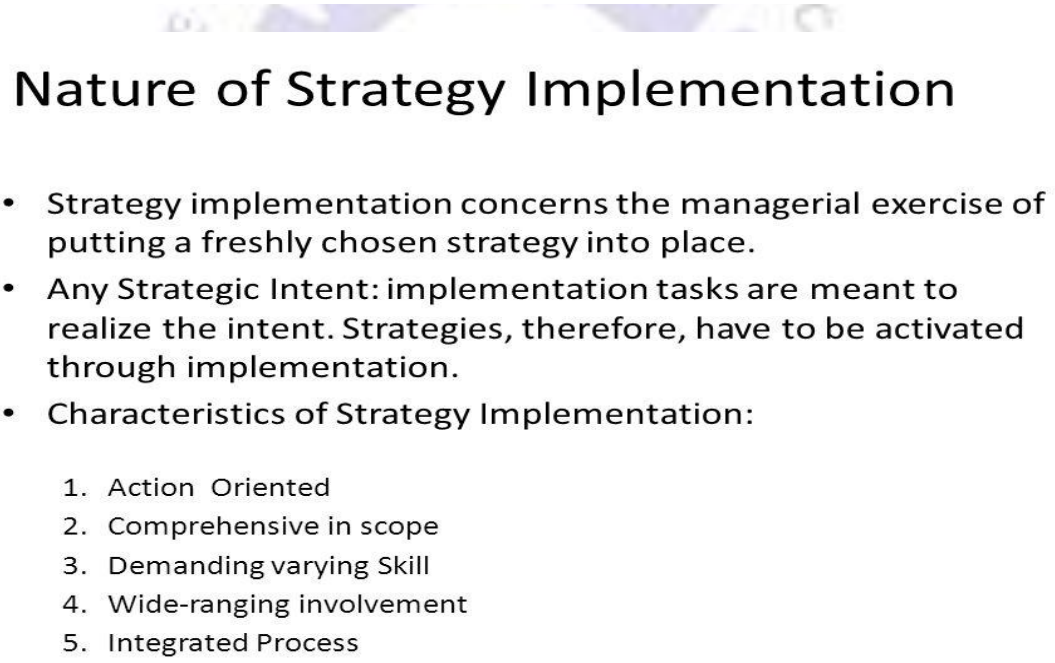
- Cash cows. Cash cows are the most profitable brands and should be "milked" to provide as much cash as possible. The cash gained from "cows" should be invested into stars to support their further growth. According to growth-share matrix, corporates should not invest into cash cows to induce growth but only to support them so they can maintain their current market share. Again, this is not always the truth. Cash cows are usually large corporations or SBUs that are capable of innovating new products or processes, which may become new stars. If there would be no support for cash cows, they would not be capable of such innovations.
  Strategic choices: Product development, diversification, divestiture, retrenchment

- Stars. Stars operate in high growth industries and maintain high market share. Stars are both cash generators and cash users. They are the primary units in which the company should invest its money, because stars are expected to become cash cows and generate positive cash flows. Yet, not all stars become cash flows. This is especially true in rapidly changing industries, where new innovative products can soon be outcompeted by new technological advancements, so a star instead of becoming a cash cow, becomes a dog.
  Strategic choices: Vertical integration, horizontal integration, market penetration, market development, product development

- Question marks. Question marks are the brands that require much closer consideration. They hold low market share in fast growing markets consuming large amount of cash and incurring losses. It has potential to gain market share and become a star, which would later become cash cow. Question marks do not always succeed and even after large amount of investments they struggle to gain market share and eventually become dogs. Therefore, they require very close consideration to decide if they are worth investing in or not.

Q-16. What is Strategy Implementation. Explain its nature and Process.

- Strategy Implementation refers to the **execution of the plans and strategies**, so as to accomplish the long-term goals of the organization. It converts the opted strategy into the moves and actions of the organisation to achieve the objectives.
- Strategy Implementation is the **fourth stage of the Strategic Management process**, the other three being a determination of strategic mission, vision and objectives, environmental and organizational analysis, and formulating the strategy. It is followed by Strategic Evaluation and Control.
- Strategy implementation is the time-taking part of the overall process, as it puts the formulated plans into actions and desired results.



Process of Strategy Implementation

1. Building an organization, that possess the capability to put the strategies into action successfully.
2. Supplying resources, in sufficient quantity, to strategy-essential activities.
3. Developing policies which encourage strategy.

4. Such policies and programs are employed which helps in continuous improvement.
5. Combining the reward structure, for achieving the results.
6. Using strategic leadership.

Q-17. "Resource allocation is a central management activity that allows for strategy execution." Elaborate.

- Resource allocation is a process and strategy involving a company deciding where scarce resources should be used in the production of goods or services. A resource can be considered any factor of production, which is something used to produce goods or services. Resources include such things as labor, real estate, machinery, tools and equipment, technology, and natural resources, as well as financial resources, such as money.
- Resource allocation is a central management activity that allows for strategy execution. The real value of any resource-allocation program lies in the resulting accomplishment of an organization's objectives.
- Resources can be evaluated from several different perspectives:

1. The most prevalent way of evaluating them is by functional areas:

   finance, research and development, human resources, operations, marketing.

2. A second way of evaluating resources is by type:

   financial, physical, human, and organizational.

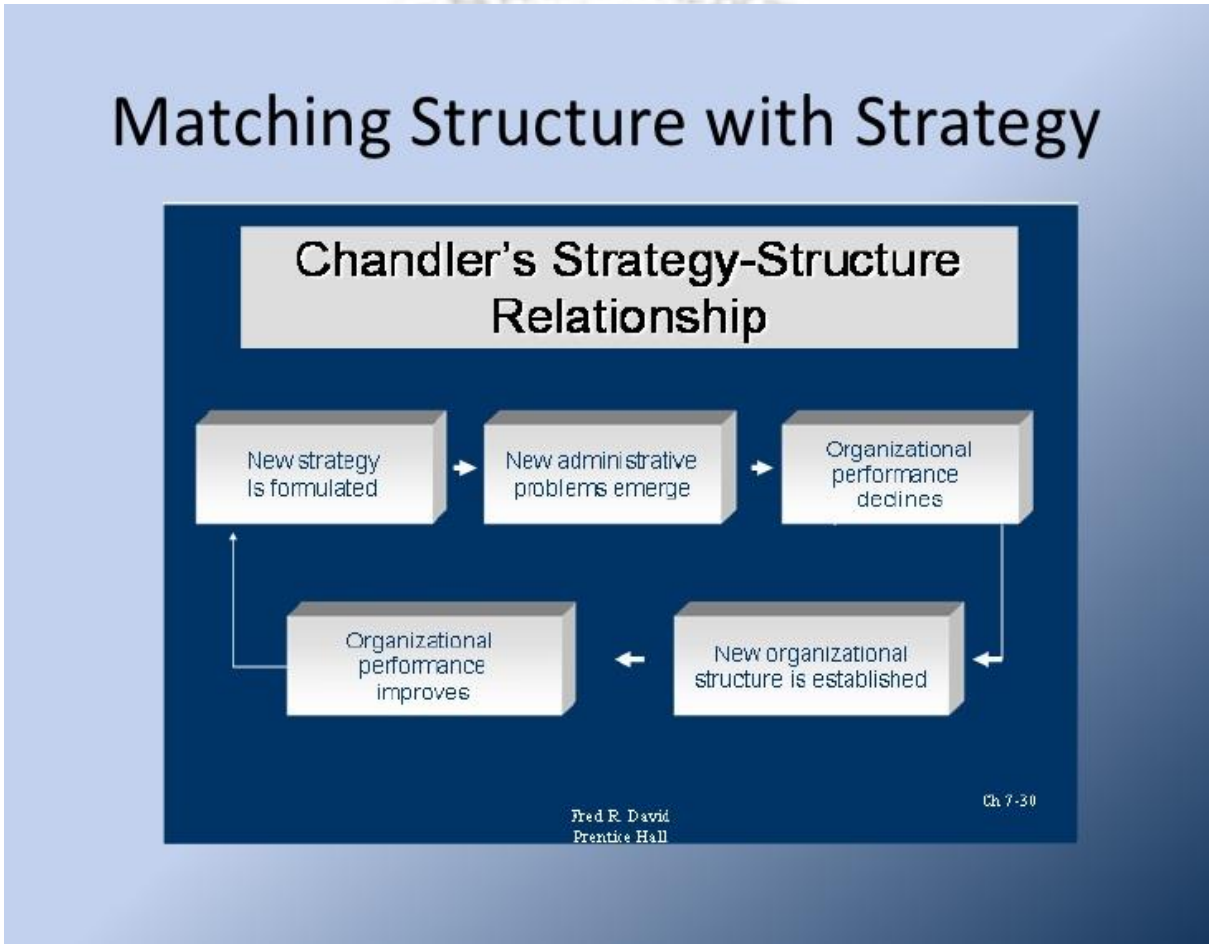
3. A third way of evaluating resources is in terms of their tangibility.Tangible resources (e.g., a plant or the number of employees) can be observed and measured. Less tangible resources (e.g., corporate name) are also important though their characteristics and importance are harder to evaluate

Q-18. Explain the connection between structure and strategy.

- Structure is not simply an organization chart. Structure is all the people, positions, procedures, processes, culture, technology and related elements that comprise the

organization. It defines how all the pieces, parts and processes work together . This structure must be totally aligned with strategy for the organization to achieve its mission and goals.

- If an organization changes its strategy, it must change its structure to support the new strategy. When it doesn't, the structure acts like a bungee cord and pulls the organization back to its old strategy. Structure supports strategy. What the organization does defines the strategy. Changing strategy means changing what everyone in the organization does.



The following five sequence procedure is a useful guide for fitting structure to strategy:

- Pinpoint the key functions and tasks necessary for successful strategy execution.
- Reflect on how strategy critical functions and organizational units relate to those that are routine and to those that provide staff support.

- Make strategy critical business units and functions the main organizational building blocks.
- Determine the degrees of authority needed to manage each organizational unit bearing in mind both the benefits and costs of decentralized decision making.
- Provide for coordination among the various organizational units.

Q-19. Write a short note on Managing Resistance to Change.

- Firstly, managers must be able to convince workers that the changes they are proposing are necessary. They should show how the workers and the organization itself will benefit from these changes.
- Secondly, the management can keep the following considerations in mind to implement changes smoothly Changes should not happen in one go because it is easier to implement them in stages.
- Changes should never cause security problems for the workers.
- Managers must consider the opinions of all employees on whom the proposed change will have an effect.
- If managers portray leadership by first adapting to the changes themselves, employees are less likely to resist.
- Sufficient prior training of employees can help them accept changes with confidence.

Q-20. Discuss Human Resources Concern when Implementing Strategy and also discuss the benefits of it.

- Companies are more likely to be successful when all teams are working towards the same objectives. Strategic HR carries out analysis of employees and determines the actions required to increase their value to the company. Strategic human resource management also uses the results of this analysis to develop HR techniques to address employee weaknesses.

The following are benefits of strategic human resource management:

- Increased job satisfaction.
- Better work culture.
- Improved rates of customer satisfaction.
- Efficient resource management.
- A proactive approach to managing employees.
- Boost productivity.