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# FAIRFIELD

# Institute of Management & Technology

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## Reference Material for Five Years

## Bachelor of Law (Hons.)

## Code : 035

## Semester – VI

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# Five Years

# Bachelor of Law (Hons.)

## Code : 035

## Semester – VI

# JURISPRUDENCE (PAPER CODE: 302)

## UNIT 1

### 1. What is the Meaning and Scope of Jurisprudence?

**Ans.** Introduction to Jurisprudence

The history of the concept of the law reveals that jurisprudence had its evolutionary beginning from the classical Greek period to 21st-century modern jurisprudence with numerous changes in its nature in various stages of its evolution. Jurisprudence is a concept to bring theory and life into focus. It deals with the fundamental principles on which rests the superstructure of law.

The concept of jurisprudence basically helps in cultivating one's own ideas in relation to a particular theory. In abstract jurisprudence is a subject whose knowledge is the basis and the foundation of the whole legal studies. Jurisprudence is a name given to a certain type of investigation into a law, where we are concerned to reflect on the nature of legal rules and on the underlying meaning of legal concepts and on the essential features of the legal system.

Jurisprudence is both an intellectual and idealistic abstraction as well as a behavioural study of man in society. In jurisprudence, we ask what it is for a rule to be a legal rule and what distinguishes law from morality, etiquette and other related phenomena.

Meaning

The term jurisprudence has been derived from the Latin word 'jurisprudentia' which means 'skill or knowledge of law'.

In the early decades of the 19$^{th}$ century with the theories propounded by Bentham and Austin, the term 'jurisprudence' acquired a definite meaning. Bentham is known as Father of Jurisprudence was the first one to analyze what is law. He divided his study into two parts:

I Examination of Law 'as it is' i.e. **Expositorial Approach**– Command of Sovereign.

II Examination of Law 'as it ought to be' i.e. **Censorial Approach**– Morality of Law.

However, Austin concerned himself mainly with the formal analysis of the English law and its related concept, which still continues to be the basic concept. Austin's ideology that '**law is the command of the sovereign**' became the structure of English Legal System, which remained with the formal analysis of law as 'it is' (Expositorial) and never became 'as it ought to be' (Censorial).



Juristic approach

**Ulpian –** The Roman jurist defined jurisprudence as the observation of things, human and divine, the knowledge of the just and the unjust.

**Austin**– He calls jurisprudence as the 'philosophy of positive law'. The term 'positive law' connotes 'jus positivum' which means law lay down by a political superior for commanding obedience from his subjects. He preferred to divide his concept into two parts:

i. **General Jurisprudence**– It includes such subjects or ends of law as are common to all system.

ii. **Particular Jurisprudence**– It is the science of any actual system of law or any portion of it.

Basically, **in essence, they are the same but in scope they are different**.

**Salmond's Criticism of Austin**

He said that for a concept to fall into the category of 'General Jurisprudence', it should be common in various systems of law. This is not always true as there could be concepts that fall in neither of the two categories.



**Holland's Criticism of Austin**

He said that it is only the material which is particular and not the science itself.

**Holland's Definition**– Jurisprudence means **the 'formal science of positive laws'**. It is an analytical science rather than a material science.

i. He defined the term positive law. He said that Positive Law means **the general rule of external human action enforced by a sovereign political authority**.

ii. We can see that, he simply added the word '**formal**' in Austin's definition. Formal here means that **we study only the form and not the essence**. We study only the external features and do not go into the intricacies of the subject. According to him, how a positive law is applied and how it is particular is not the concern of Jurisprudence.

iii. The reason for using the word **'Formal Science'** is that it describes only the form or the external sight of the subject and not its internal contents. According to Holland, Jurisprudence is not concerned with the actual material contents of law but only with its fundamental conceptions. **Therefore, Jurisprudence is a Formal Science**.

iv. This definition has been criticized by Gray and Dr Jenks. According to them, Jurisprudence is a formal science because it is concerned with the form, conditions, social life, human relations that have grown up in the society and to which society attaches legal significance.

v. Holland said that Jurisprudence is a science because **it is a systematized and properly co-ordinate knowledge of the subject of intellectual inquiry**. The term positive law confines the inquiry to these social relations which are regulated by the rules imposed by the States and enforced by the Courts of law. Therefore, it is a formal science of positive law.

**Salmond**– He said that **Jurisprudence is Science of Law**. By law, he meant **law of the land or civil law**. He divided Jurisprudence into two parts:

i. **Generic**– This includes the entire body of legal doctrines.

ii. **Specific**– This deals with the particular department or any portion of the doctrines.

'Specific' is further divided into three parts:

i. **Analytical, Expository or Systematic**– it deals with the contents of an actual legal system existing at any time, past or the present.

ii. **Legal History**– it is concerned with the legal system in its process of historical development.

iii. **The science of Legislation-** the purpose of it is to set forth law as it ought to be. It deals with the ideal future of the legal system and the purpose which it may serve.

**Criticism of Salmond**– Critics says that it is not an accurate definition. Salmond only gave the structure and failed to provide any clarity of thought.

**Keeton-** according to him "jurisprudence is the study and scientific synthesis of the essential principle of law." The definition seeks to explain the distinction between public and private law.

**Roscoe Pound**– He described J**urisprudence as "the science of law** using the term **'law'** in **the juridical sense** as denoting the body of principles recognized or enforced by public and regular tribunals in the Administration of Justice."

**Dias and Hughes**– They believed **Jurisprudence as any thought or writing about law rather than a technical exposition of a branch of law itself**.

Scope of Jurisprudence

The scope of jurisprudence has widened considerably over the years. Commenting on the scope of jurisprudence **Justice P.B.Mukherjee** observed, "Jurisprudence is both an intellectual and idealistic abstraction as well as the behavioural study of man in society. It includes political, social, economic and cultural ideas. It covers the study of man in relation to society."

This makes the distinction between law and jurisprudence amply clear. It, therefore, follows that jurisprudence comprises the philosophy of law and its object is not to discover new rules but to reflect on the rules already known.

Whereas, Austin was the only one who tried to limit the scope of jurisprudence. He tried to segregate morals and theology from the study of jurisprudence.

Approaches to the study of Jurisprudence

**There are two ways to study it-**

i. **Empirical**– Facts to Generalization.

ii. **A Priori**– Start with Generalization in light of which the facts are examined.

**Significance and Utility of the Study of Jurisprudence**

i. This subject has its own intrinsic interest and value because this is a subject of serious scholarship and research; researchers in Jurisprudence contribute to the development of society by having repercussions in the whole legal, political and social school of thoughts. One of the tasks of this subject is to construct and elucidate concepts serving to render the complexities of law more manageable and more rational. It is the belief of this subject that the theory can help to improve practice.

ii. Jurisprudence also has an educational value. It helps in the logical analysis of the legal concepts and it sharpens the logical techniques of the lawyer. The study of jurisprudence helps to combat the lawyer's occupational view of formalism which leads to excessive concentration on legal rules for their own sake and disregard of the social function of the law.

iii. The study of jurisprudence helps to put the law in its proper context by considering the needs of the society and by taking note of the advances in related and relevant disciplines.

iv. Jurisprudence can teach the people to look if not forward, at least sideways and around them and realize that answers to a new legal problem must be found by a consideration of present social needs and not in the wisdom of the past.

v. Jurisprudence is the eye of law and the grammar of law because it throws light on basic ideas and fundamental principles of law. Therefore, by understanding the nature of law, its concepts and distinctions, a lawyer can find out the actual **rule of law**. It also helps in knowing the language, grammar, the basis of treatment and assumptions upon which the subject rests. Therefore, some logical training is necessary for a lawyer which he can find from the study of Jurisprudence. It trains the critical faculties of the mind of the students so that they can dictate fallacies and use accurate legal terminology and expression.

vi. It helps a lawyer in his practical work. A lawyer always has to tackle new problems every day. This he can handle through his knowledge of Jurisprudence which trains his mind to find alternative legal channels of thought.

vii. Jurisprudence helps the judges and lawyers in ascertaining the true meaning of the laws passed by the legislators by providing the rules of interpretation. Therefore, the study of jurisprudence should not be confined to the study of positive laws but also must include normative study i.e. **that study should deal with the improvement of law in the context of prevailing socio-economic and political philosophies of time, place and circumstances**.

viii. Professor Dias said that *"the study of jurisprudence is an opportunity for the lawyer to bring theory and life into focus, for it concerns human thought in relation to social existence."*

**2. All the social sciences have a relation with Jurisprudence and have impact on it. Explain the given statement.**

**Ans.** Jurisprudence is closely inter-related with other social sciences since all of them are concerned with human behaviour in society and many jurists also believe so.

Paton "observed modern jurisprudence trenches on the field of social science and of philosophy; it digs into the historical past and attempts to create symmetry of a garden out of the luxuriant chaos of conflicting legal system."

Dean Roscoe Pound who propounded the theory of law as a 'social engineering' pointed out that jurisprudence is closely interlinked with ethics, economics, politics, and sociology which though distinct enough as the core, are shade into each other. All other social sciences must co-ordinate with jurisprudence to make it a functional branch of knowledge.

Sociology and Jurisprudence

This branch is based on social theories. It is essentially concerned with the influence of law on the society at large particularly when we talk about social welfare. G.W. Paton gave 3 obvious reasons as a relation between law and sociology:

- It enables a better understanding of the evolution and development of law;

- It provides great substream for an identity of law commensurate with human needs and social interests;
- and provides objectivity to legal interpretation which is need of the hour.

Jurisprudence and Psychology

No human science can be described properly without a thorough knowledge of Human Mind. Hence, Psychology has a close connection with Jurisprudence. Relationship of Psychology and Law is established in the branch of Criminological Jurisprudence. Both psychology and jurisprudence are interested in solving questions such as the motive behind a crime, criminal personality, reasons for crime etc.

Jurisprudence and Ethics

Ethics has been defined as the science of Human Conduct. It strives for ideal Human Behavior. This is how Ethics and Jurisprudence are interconnected:

- Ideal Moral Code– This could be found in relation to Natural Law.
- Positive Moral Code– This could be found in relation to Law as the Command of the Sovereign.

Ethics is concerned with good human conduct in the light of the public opinion. Jurisprudence is related to Positive Morality in so far as the law is the instrument to assert positive ethics. Jurisprudence believes that Legislations must be based on ethical principles. It is not to be divorced from Human principles. Ethics believes that No law is good unless it is based on sound principles of human value. A Jurist should be adept in this science because unless he studies ethics, he won't be able to criticize the law. However, Austin disagreed with this relationship.

Jurisprudence and Economics

Economics studies man's efforts in satisfying his wants and producing and distributing wealth. Both Jurisprudence and Economics are sciences and both aim to regulate the lives of the people. Both of them try to develop th` e society and improve the life of an individual. Karl Marx was a pioneer in this regard.

Jurisprudence and History

History studies past events. Development of Law for the administration of justice becomes sound if we know the history and background of legislation and the way law has evolved. The branch is known as Historical Jurisprudence.

Jurisprudence and Politics

In a politically organized society, there are regulations and laws which lay down authoritatively what a man may and may not do. Thus, there is a deep connection between politics and Jurisprudence.

**3. What do you understand by Pure Theory of Law?**

Ans. Pure Theory of Law was propounded by Kelson and he was not in favors of widening the scope of jurisprudence by co-relating it with other social sciences. He insisted on separation of Law from politics, sociology, metaphysics and all other extra-legal disciplines. Kelson tried to rescue jurisprudence from vague mysticism and in a way revival of John Austin's 19th century analytical jurisprudence. Kelson wished to create a pure science of law devoid of all moral and sociological considerations. He rejected Austin's definition of law as a command because it introduces subjective considerations whereas he wanted legal theory to be objective. He defines 'science' as a system of knowledge or a 'totally of cognitions' systematically arranged according to logical principles. Keelson's Grundnorm is analogous to Austin's concept of sovereign without which, law cannot be obligatory and binding. Keslon's theory being a theory of positive law is based on normative order eliminating all extra- legal and non-legal elements from it. He believed that a theory of law should be uniform. The theory of Hans Kelson, says Dias, has represented a development in two different directions; on the one hand, it marks the highest development to date of analytical positivism. On the other hand, it marks a reaction against the welter of different approaches that characterized the close of the 19th century and the beginning of the 20th century. For Kelson and his followers any such legal idealism is unscientific. He claimed that his pure theory was applicable to all places and at all times. He wanted it to be free from ethics, politics, sociology, history, etc. though he did not deny the value of these branches of knowledge.

LAWS AS NORMATIVE SCIENCE

Kelson described law as a 'normative science' as distinguished from natural sciences which are based on cause and effect such as law of gravitation. The laws of natural science are capable of being accurately described, determined and discovered in the form of 'is'(das seen) which is an essential characteristics of all natural sciences. But the science of law is knowledge of what law ought to be (das sollen). It is the 'ought to' character which provides normative character to law. For instance, if 'A' commits a theft he ought to be punished. Like Austin, Kelson also considers sanction as an essential element of law but he prefers to call it 'norm'. Kelson argues his science of law as 'pure' and time and again, insists that law 'properly so-called' must be put unspotted from elements which merely confuse and contaminate it. It should not be mixed with politics, ethics, sociology and history. By 'pure theory of law', he meant it is concerned solely with that part of knowledge that deals with law, excluding from such knowledge everything which does not belong to subject matter of law. He attempts to free the science of law from all foreign elements. It is called positive law because it is concerned only with actual and not with ideal law. For Kelson, legal order is the hierarchy of norms having sanction and jurisprudence is the study of these norms which comprise legal order.

THE GRUNDNORM

The basis of Kelson's pure theory of law is on pyramid cal structure of hierarchy of norms which derives its validity from the basic norm i.e. 'Grundnorm'. Thus it determines the content and gives validity to other norms derived from it. He was unable to tell as to from where the Grundnorm or basic norm derives its validity. But when all norms derive their validity from basic norm its validity cannot be tested. Kelson considers it as a fiction rather than a hypothesis. According to Kelson it is not necessary that the Grundnorm or the basic norm should be the same in every legal system. But there will be always a Grundnorm of some kind whether in the form of a written constitution or the will of a dictator. In England there is no conflict between the authority of the king in Parliament and of judicial precedent, as the former precedes the latter.

For example, In England, the whole legal system is traceable to the propositions that the enactments of the crown in Parliament and Judicial precedents ought to be treated as 'law' with immemorial custom as a possible third. Keelson says that system of law cannot be grounded on two conflicting Grundnorms. The only task of legal theory for Kelson is

to clarify the relation between the fundamental and all lower norms, but he doesn't go to say whether this fundamental norm is good or bad. This is the task of political science or ethics or of religion. Kelson further states that no fundamental norm is recognizable if it does not have a minimum of effectiveness, e.g. which does not command a certain amount of obedience. Producing the desired result is the necessary condition for the validity of every single norm of the order. His theory ceases to be pure as it cannot tell as to how this minimum effectiveness is to be measured. Effectiveness of the Grundnorm depends on the very sociological and political questions, which he excluded from the purview of his theory of law.

Pyramid of Norms

Kelson considers legal science as a pyramid of norms with Grundnorm at the top. The basic norm (grundnorm) is independent of any other norm at the top. Norms which are superior to the subordinate norms control them. He defines 'Concretization' as the process through which one norm derives its power from the norm superior to it, until it reaches the Grundnorm. Thus the system of norms proceeds from bottom to top and stops when it reaches to the top i.e. 'Grundnorm'. The Grundnorm is said to be a norm creating organ and the creation of it cannot be demonstrated scientifically nor is it required to be validated by any other norm. Thus a statute or law is valid because they receive their legal authority from the legislative body and the legislative body derives its authority from a norm i.e. the constitution. According to him the basic norm is the result of social, economic, political and other conditions and it is supposed to be valid by itself.13There is a difference between propositions of law and propositions of science. Propositions of science are observed to occur and necessarily do occur as a matter of cause and effect. Whenever, a new fact which is found not to comply to a scientific law it is so modified to include it. On the other hand propositions of law deal with what ought to occur e.g. if 'A' commits theft, he ought to be punished.

**4. Explain the relation between Law and Morality.**

**Ans.** Ever since the revival of the scientific study of jurisprudence the connection of law and morality has much discussed, but the question is not yet, and perhaps never will be settled. Every variety of opinion has been entertained, from the extreme doctrine held by Austin that for the purpose of the jurist, law is absolutely independent of morality, almost to the opposite positions, held by every Oriental cadi, that morality and law are one. The

question is an important one, and upon the answer which is given to it depends upon the answer which is consequences. The problem is an intensely practical one.

The popular conception of the connection between law and morality is that in some way the law exists to promote morality, to preserve those conditions which make the moral life possible, and than to enable men to lead sober and industrious lives. The average man regards law as justice systematized, and justice itself as a somewhat chaotic mass of moral principles. On this view, the positive law is conceived of as a code of rules, corresponding to the code of moral laws, deriving its authority from the obligatory character of those moral laws, and being just or unjust according as it agrees with, or differs from them. This, like all other popular conceptions, is inadequate for scientific purposes, and the jurist, so for at least as he is also a scientist, is compelled to abandon it. For it is contradicted by the fact's. positive laws do not rest upon moral laws and common notions of justice furnish no court of appeal from the decrees of the State. The average man confounds law and morality, and identifies the rules of law with the principles of abstract justice.

There are some who assert that even if law and morals are distinguishable it remains true that morality is in some way an integral part of law or of legal development, that morality is "secreted in the interstices" of the legal system, and to that extent is inseparable from it.

Thus it has been said that law in action is not a mere system of rules, but involves the use of certain principles, such as that of the equitable and the good (aequum et bonum). By the skilled application of these principles to legal rules the judicial process distills a moral content out of the legal order, though it is admitted that this does not permit the rules themselves to be rejected on the general found of their immorality. Another approach would go much further and confer upon the legal process an inherent power to reject immoral rules as essentially non-legal; this seems to resemble the classical natural law mode of thought, but it is urged, the difference is that according to the present doctrine it is a matter of the internal structure of the legal system, which treats immoral rules as inadmissible rather than as being annulled by an external law of nature. If value judgments such as moral factors, form an inevitable feature of the climate of legal development, as in generally admitted, it is difficult to see the justification for this exclusive attitude. Value judgment which enter into law will require consideration of

what would be a just rule or decision, even though not objective in the sense of being based on absolute truth, may, nevertheless, be relatively true, in the sense of corresponding to the existing moral standards of the community. Whether it is convenient or not to define law without reference to subjective factors, when we come to observe the phenomena with which law is concerned and to analyze the meaning and use of legal rules in relation to such phenomena, it will be found impossible to disregard the role of value judgments in legal activity, and we cannot exercise this functional role by stigmatizing such judgments as merely subjective or unscientific. The theory of knowledge attempts to clarify the nature of knowledge, the philosophy of logic examines the definition of logic, moral philosophy reflects on the nature and boundaries of morality and so on.
One finds philosophers who took the enquiry concerning the nature of law to be an attempt to define the meaning of the word "law". Traditionally those who adopted the linguistic approach concentrated on the word "law". However, it encountered the overwhelming problem that that word is used in a multiplicity of non-legal contexts. We have laws of nature and scientific laws, laws of God and thought, of logic and of language, etc. Clearly the explanation of "law" has to account for its use in all these contexts and equally clearly any explanation which is so wide and general can be of very little use to legal philosophers.

Only one assumption can the explanation of "law" hope to provide the answer to the legal philosopher's inquiry into the nature of law. That assumption is that the use of "law" in all its contexts but one is analogical or metaphorical or in some other way parasitical on its core meaning as displayed in its use in one type of context and that that core meaning is the one the legal philosopher has at the centre of his enquiry. Unfortunately, the assumption is mistaken. Its implausibility is best seen by examining the most thorough and systemic attempt to provide an analysis of "law" based on this assumption, that proposed by John Austin in The Province of Jurisprudence Determined.

In the modern world, morality and law are almost universally held to be unrelated fields and, where the term "legal ethics" is used, it is taken to refer to the professional honesty of lawyers or judges, but has nothing to do with the possible "rightness" or "wrongness" of particular laws themselves. This is a consequence of the loss of the sense of any "truth" about man, and of the banishment of the idea of the natural law. It undermines any sense

of true human rights, leaves the individual defenseless against unjust laws, and opens the way to different forms of totalitarianism. This should be easy enough to see for a person open to the truth; but many people's minds have set into superficial ways of thinking, and they will not react unless they have been led on, step by step, to deeper reflection and awareness.

**5. Draw a comparison between Bentham and Austin's concept of Law.**

Ans. English law as it existed at the end of the 18th century, when Bentham was still in his youth, had developed almost in a haphazard way as a result of customs or modes of thought which prevailed at different period. The laws which were then in existence were not enacted with any definite guiding principles behind them. The law of England, like that of most countries of contemporary Europe, had grown out of occasion and emergence. It is for this reason that it is often said that in England law had in fact grown, rather than been made.

Jeremy Bentham defined law "as an assemblage of signs declarative of a volition conceived or adopted by the Sovereign in a State, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power; such violation trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those conduct is in question".

Bentham's concept of law is imperative one i.e., law is an assembly of signs, declarations of violation conceived or adopted by Sovereign in a State. He believed that every law may be considered in the light of eight different aspects, viz. –

1. Source (law as the will of Sovereign).
2. Subjects (may be persons or things).
3. Objects (act, situation or forbearance).
4. Extent (law covers a portion of land on which acts have been done).
5. Aspect (may be directive or sanctional).
6. Force
7. Remedial State Appendages.
8. Expression.

**Austin**

Austin defined law as "a rule laid for the guidance of an intelligent being by an intelligent being having power over him." He divides law into two parts, namely, (1) Laws set by God for men, and (2) Human Law, that is laws made by men for men. He says that positive morality is not law properly so called but it is law by analogy. According to him the study and analysis of positive law alone is the appropriate subject – matter of jurisprudence. To quote him, "the subject – matter of jurisprudence is positive law – law simply and strictly so called; or law set by political superior to political inferiors." The chief characteristics of positive law are command, duty and sanctions, that is every law is command, imposing a

duty, enforced by sanction.
Austin, however, accepts that there are three kinds of laws which, though, not commands, may be included within the purview of law by way of exception. They are: -
i. Declaratory or Explanatory laws; These are not commands because they are already in existence and are passed only to explain the law which is already in force.
ii. Laws of repeal; Austin does not treat such laws as commands because they are in fact the revocation of a command.
iii. Laws of imperfect obligation; they are not treated as command because there is no sanction to them. Austin holds that command to become law, must be accompanied by duty and sanction for its enforcement.

**Austin's Concept of Law**

Austin's Definition of Law; Law, in the common use, means and includes things which cannot be properly called 'law'. Austin defined law as 'a rule laid down for the guidance of an intelligent being by an intelligent being having power over him.'
Law of 2 kinds: (1) Law of God, and (2) Human Laws: This may be divided into two parts: (1) Law of God – Laws set by God for men. (2) Human Laws – Laws set by men for men.

**Two kinds of Human Laws, Human Laws may be divided into two classes;**
1. Positive Law; These are the laws set by political superiors as such, or by men not acting as political superiors but acting in pursuance of legal rights conferred by political superiors. Only these laws are the proper subject – matter of jurisprudence.

2. Other Laws; Those laws which are not set by political superiors (set by persons who are not acting in the capacity or character of political superiors) or by men in pursuance of legal rights.

Analogous to the laws of the latter class are a number of rules to which the name of law is improperly given. They are opinions or sentiments of an undeterminate body of men, as laws of fashion or honour. Austin places International Law under this class. In the same way, there are certain other rules which are called law metaphorically. They too are laws improperly so called.

**Positive Law as Command**
The law properly so – called is the positive law depends upon political authority – the sovereign. Every rule, therefore, according to Austin is a command. So laws properly so called are a species of commands. If you express or intimate a wish that I shall do or forbear from some of your wish, the expression or intimation of your wish is a command. If I am bound by it, I lie under a duty to obey it. Command – duty are, therefore, correlative terms. Command further implies not only duty but sanction also.

**Law is Command**
Positive law is the subject – matter of jurisprudence, Austin says that only the positive law is the proper subject – matter of study for jurisprudence. "The matter of jurisprudence is positive law: law simply and strictly so called: or law set by political superiors to political inferiors." Jurisprudence is

the general science of positive law. The characteristics of law.

**Command and Sanction**
Sanction as an evil which will be incurred if a command is disobeyed and is the means by which a command or duty is enforced. It is wider than punishment. A reward for obeying the command can scarcely be called a sanction. A command embraces:
(a) A wish or desire conceived by a rational being to another rational being who shall do or forbear as commanded;
(b) An evil to proceed from the former to be incurred by the latter in case of non – compliance; and
(c) An expression or intimation of the will by words or otherwise.

**Commands are of two species:**
(a) Las or rules, and
(b) Occasional commands.
A command is a law or rules where it obliges generally to acts or forbearances of people. It is occasional or particular when it obliges to a specific individual for act or forbearance.
Law is a command which obliges a person or persons to a course of conduct. It requires signification and can, therefore, only emanate from a determinable source or author (a person or body of persons). Laws proceed from superiors and bind and oblige inferiors. Superiors are invested with might: the power of affecting others with pain or evil and thereby of forcing them to conform their conduct to their orders.

UNIT 2

**6. Write a note on Social Solidarity.**

Ans. Solidarity is an awareness of shared interests, objectives, standards, and sympathies creating a psychological sense of unity of groups or classes. It refers to the ties in a society that bind people together as one. What forms the basis of solidarity and how it's implemented varies between societies. In developing societies it may be mainly based on kinship and shared values while more developed societies accumulate various theories as to what contributes to a sense of solidarity, or rather, social cohesion.

According to Émile Durkheim, the types of social solidarity correlate with types of society. Durkheim introduced the terms mechanical and organic solidarity [7] as part of his theory of the development of societies in The Division of Labour in Society (1893). In a society exhibiting mechanical solidarity, its cohesion and integration comes from the homogeneity of individuals—people feel connected through similar work, educational and religious training, and lifestyle. Mechanical solidarity normally operates in "traditional" and small scale societies. In simpler societies (e.g., tribal), solidarity is usually based on kinship ties of familial networks. Organic solidarity comes from the interdependence that arises from specialization of work and the complementarities between people—a development which occurs in "modern" and "industrial" societies.

- Definition: it is social cohesion based upon the dependence which individuals have on each other in more advanced societies.

Although individuals perform different tasks and often have different values and interest, the order and very solidarity of society depends on their reliance on each other to perform their specified tasks. "Organic" here is referring to the interdependence of the component parts, and thus social solidarity is maintained in more complex societies through the interdependence of its component parts (e.g., farmers produce the food to feed the factory workers who produce the tractors that allow the farmer to produce the food).

Leon Duguit was a French Jurist and leading scholar of Droit Public (Public Law). He was greatly inspired by the Auguste Comte and Durkheim. He gave the theory of Social Solidarity which describe the social cooperation between individuals for their need and survival.

According to him, Social Solidarity is the spirit of oneness. The term 'Social Solidarity represents the strength, cohesiveness, mutual consciousness and viability of the society.' Leon Duguit's Social Solidarity explain the interdependence of men on his other fellow men. No one can remain without the depending on other men. Therefore, the social interdependence and cooperation are very important for human existence. The purpose of the law is to promote Social solidarity between individuals. And Leon Duguit deemed that law as bad law which does not promote social solidarity. Moreover, he also said that every man had the right and duty to promote social solidarity. For instance, in India, the codified laws are followed by everyone. Hence, it promotes Social Solidarity.

**7. Write a note on Social Engineering.**

**Ans.** Roscoe Pound's concept of law is of practical importance which inspires judges, legislators and jurists to mould and adjust law to the needs and to interests of the community. Since the society is always changing law should be continually adapted and readapted to the needs of individuals and society. He, therefore, stresses the need of paramount co-ordination and co-operation between the legislators, administrators, judges and jurists to work in unison towards the realization and effective implementation of law for securing social harmony and social justice to the general public with the a minimum of waste or friction and maximum of material satisfaction of wants, needs and interest.

POUND'S THEORY OF SOCIAL ENGINEERING

Roscoe pound conceived law as a 'social Engineering' its main task being to accelerates the process of social ordering by making all possible efforts to avoid conflicts of interest of individuals in the society . Thus courts, legislators, administrators and jurists must work with a plan and make an effort to maintain a balance between the competing interests in society. He enumerates various interests which the law should seek to protect and classified them into three broad categories, namely-

I. Private interests

ii. Public interests

iii. Social interests

I. Private Interests / Individual Interest-Individual interests, according to pound are claims, or demands or desires, involved in and looked at from the stand point of the individual life immediately as such asserted in title of the individual life'. In individual interest Dean Pound includes-

1) Personality- interest of personality consist of interests in -

A. the physical person,

B. freedom of will,

C. honor and reputation,

D. Privacy and sensibilities and

E. Belief and opinion.

2) Domestic relations - it is important to distinguish between the interest of individuals in domestic relationships and that of society in such institutions as family and marriage. Individual interests include those of

a. Parents and Children,

b. Husbands and Wives.

c. And marital interests.

3) Interest of substance- this includes

A. Interests of property,

B. Succession and testamentary disposition,

C. freedom of industry and contract,

D. promised advantages

E. advantageous relations with others,

F. freedom of association

II. Public Interest- Public interests according to him are the claims or demands or desires asserted by individuals involved in or looked at from the stand point of political life- life in politically organized society. They are asserted in title of that organization. It is convenient to treat them as claims of politically organized society thought of as a legal entity. The main public interest according to Roscoe pound are-

1. Interests of state as a juristic person which includes

a. Interests of state as a juristic person i.e. protection

b. Claims of the politically organized society as a corporation to property acquired and held for corporate purposes.

2. Interests of State as a guardian of social interest, namely superintendence and administration of trusts, charitable endowments, protection of natural environment, territorial waters, sea- shores, regulation of public employment and so on to make use of thing which are open to public use , etc. this interest seem to overlap with social interests.

III. Social Interests

To pounds social interest are claims or demands or desires, even some of the foregoing in other aspects, thought of in terms of social life and generalized as claims of the social

group. They are the claims functioning of society; the wider demands or desires ascertained in the title of social life in civilized society. Social interest are said to include

a. Social interest in the general security, -

Social interest in the general security embraces those branches of the law which relate to general safety, general health, peace and order, security of acquisitions and security of transactions.

b. Social interest in the security of social institutions,

Social interest in the security social institutions comprises domestic institution, religious institutions, political institutions and economic institutions. Divorce legislation may be adduced as an example of the conflict between the social interests in the security of the institution of marriage and the individual interests of the unhappy Spouses. There is tension between the individual interest in religious freedom and the social interest in preserving the dominance of an established church.

c. Social interest in general morals,-

Social interests in general morals cover a variety of laws, e.g. laws dealing with

prostitution, drunkenness and gambling;

d. Social interest in the conservation of social resources:

Social interests in the conservation of social resources covers conservation of social resources and protection and training of dependants and defectives , i.e. , conservation of human resources, protective and education of dependants and defectives , reformation of delinquents, protection of economically dependants.

e. Social interest in general progress and

Social interest in general progress has three aspects. Economic progress, political progress and cultural progress.

Economic progress covers freedom of use and sale of properly, free, trade, frees industry and encouragement of inventions by the grant of patents.

Political progress covers free speech and free association, free opinion, free criticisms.

Cultural progress covers free science, free letters, encouragements of arts and letters, encouragements of higher education and learning and aesthetics.

f. Social interest in individual life.

Meaning thereby each individual be able to live a human life according to the individual's (a) political life, (b) physical life,(c) cultural ,( d) social and ( e) economic life.

The end of law according to him is to satisfy a maximum of wants with a minimum of friction or confrontation. Elaborating the functional aspect of law, Roscoe pound stated that the function of law is to reconcile the conflicting interest of individuals in the community and harmonize their inter-relations The end of law according to him is to satisfy a maximum of wants with a minimum of friction or confrontation. Elaborating the functional aspect of law, Roscoe pound stated that the function of law is to reconcile the conflicting interest of individuals in the community and harmonize their inter-relations. He termed this as "Social Engineering".

8. Write a detailed note on Savigny's Volksgeist.

Ans. In a simple term, Volksgeist means the general or common consciousness or the popular spirit of the people. Savigny believed that law is the product of the general consciousness of the people and a manifestation of their spirit. The basis of origin of law is to be found in Volksgeist which means people's consciousness or will and consists of traditions, habits, practice and beliefs of the people. The concept of Volksgeist in German legal science states that law can only be understood as a manifestation of the spirit and consciousness of the German people.8 As already discussed, his theory served as a warning against hasty legislation and introduction of revolutionary abstract ideas on the legal system unless they mustered support of the popular will, Volksgeist. Savigny's central idea was that law is an expression of will of the people. It doesn't come from deliberate legislation but arises as a gradual development of common consciousness of the nation.9 The essence of Savigny's Volksgeist was that a nation's legal system is greatly influenced by the historical culture and traditions of the people and growth of law is to be located in their popular acceptance. Since law should always confirm to the popular consciousness i.e. Volksgeist, custom not only precedes legislation but is also superior to it. Hence, law wasn't the result of an arbitrary act of a legislation but developed as a response to the impersonal powers to be found in the people's national

spirit. Laws aren't of universal validity or application. Each people develop its own legal habits, as it has peculiar language, manners and constitution. He insists on the parallel between language and law. Neither is capable of application to other peoples and countries. The Volksgeist manifests itself in the law of the people: it is therefore essential to follow up the evolution of the Volksgeist by legal research.

Savigny felt that "a proper code [of law could only] be an organic system based on the true fundamental principles of the law as they had developed over time." Savigny's method stated that law is the product of the Volksgeist, embodying the whole history of a nation s culture and reflecting inner convictions that are rooted in the society s common experience. The Volksgeist drives the law to slowly develop over the course of history, thus, according to Savigny, a thorough understanding of the history of a people is necessary for studying the law accurately. Savigny in his own words view Volksgeist as, "The foundation of the law has its existence, its reality in the common consciousness of the people. We become acquainted with it as it manifests itself in external acts, as appears in practice, manners and customs. Custom is the sign of positive law."- Savigny. Hence, Savigny clearly believes that Volksgeist (common consciousness) is the foundation of law.

Criticism:

As already stated, a uniform definition of law is far from reality, and Savigny's Volksgeist is no exception. The following are the criticisms of Savigny's Volksgeist:

i. It is not clear who the volk are and whose geist determines the law nor it is clear whether the Volksgeist may have shaped by the law rather than vice-versa.

ii. In pluralist societies such as exist in most parts of the world it really seems somewhat irrelevant to use the concept of Volksgeist as the test of validity.

iii. He has over emphasized custom and underestimated the role of legislation.

iv. It unfortunately gave rise to the extreme nationalism in Germany and other countries.

v. It over emphasizes history rather than present.

**9. Explain the Jurisprudence of Law as per Sir Henry Maine.**

Ans. The historical school of jurisprudence reveals the belief that history is the foundation of the knowledge of the contemporary era. Two jurists who researched extensively in this area –Savigny and Sir Henry Maine (1822-1888). The nineteenth-century evolutionism in legal theory set initially by Savigny was nurtured with the publication of Ancient Law in 1861 by Sir Henry Maine. Sir Henry Maine sets the set the stage for anthropologists and sociologists like ***Durkheim, Morgan, Sorokin, Zimmerman and Max Weber*** who reconstructed their typologies of society on the approach and method of Sir Henry Maine. These varying typologies of society are essentially indicators of historical growth as to how the communities evolved. Sir Henry Maine came to a conclusion through his comparative study that the development of law and other social institutions in almost all the ancient societies was same. He explained stages of development of law.

Stages of Development of law:

1. **Law made by the ruler under divine inspiration:-**

In the beginning, the law was made by the command of the king believed to be acting under the divine inspiration of Goddess of justice. Who was above the law and whose commands must be obeyed by the inferiors.

2. **Customary Law:-**

In the next stage, the office of the King or Judge was inspired by the heads of the councils. Priest became a repository of law which circulated the King's power and claimed the sole monopoly of knowledge. Therefore, the priest class tried to preserve the customs of race or caste intact. Since the art of writing was not invented, the customs of the community became law for those who were united with blood relations.

In this way, we notice a special event. The concept of custom is a development of the theory of Maine emerging behind the themesters or judgments.

3. **Knowledge of law in the hands of Priests:-**

In the next phase of the development of the law, in order to implement and execute the law inspired by the Priest class, the King's right claimed to be learned in law as well as in

religion. The priest class claimed that they remembered the rules of customary law because the art of writing was not developed till then.

4. **Codification:-**

Then comes the era of codification marks the fourth and perhaps the final stage of development of law. With the discovery of the art of writing, a section of scholars and jurists came forward to condemn the authority of the priests as law officials. He advocated the codification of the law to make it accessible and easy to know. It broke the monopoly of the Priest class in matters of administration of law. The most important codes of the era were Rome's Twelve Tables, Codes of Manu which were a mixture of moral, religious and civil laws, Twelve Tables in Rome, Attic Code of Solomon, Hebrew Code, Codes of Hammurabi etc.

Then he moved on to explain different types of societies.

Types of Societies:-

According to Henry Maine societies are two types; Progressive Societies and Static Societies.

**Progressive Societies:-**

According to Henry Maine, those societies which go beyond the fourth stage as developing their laws, by new methods are called progressive societies. Progressive societies develop their laws by the three methods namely; Legal Fiction, Equity, and Legislation.

**Static Societies:**

According to Maine, when the primitive law has been embodied in a code, there is an end to its spontaneous development and such communities or societies which do not modifying or go beyond the fourth stage are called static societies.

**10 Write an essay on the American Realist School of Jurisprudence.**

**Ans.** The realism is the anti-thesis of idealism. Some jurists refuse to accept the realist school as a separate school of jurisprudence. American realism is a combination of the

analytical positivism and sociological approaches. It is positivist in that it first considers the law as it is. On the other hand, the law as it stands is the product of many factors. In as much as the realists are interested in sociological and other factors that influence the law. Their concern, however, law rather than society. Realists don't give any importance to laws enacted by legislature. And they uphold only judge-made law as genuine law. A great role of judges' understanding about law, society and also their psychology affect any judgment given by them. At the same time, in a same case applying same law two different judges give the different judgments.

Realism denounces traditional legal rules and concepts and concentrates more on what the courts actually do in reaching the final decision in the case. In strict sense, realists define law as generalized prediction of what the courts will do. Realists believe that certainty of law is a myth and its predictability depends upon the set of facts which are before the court for decision. It presupposes that law is intimately connected with the society and since the society changes faster than law so there can never be certainty about law. They do not support formal, logical and conceptual approach to law. The realist school evaluates any part of law in terms of its effect. Jerome Frank has stated, "Law is what the court has decided in respect of any particular set of facts prior to such a decision, the opinion of lawyers is only a guess as to what the court will decide and this cannot be treated as law unless the Court so decides by its judicial pronouncement." The judges' decisions are the outcome of his entire life history."

M EANING AND DEFINITION OF THE AMERICAN REALISM:

The insights of legal realism are mainly negative, revealing a deep skepticism about the model of rules, about any general and abstract theory of the law. Realism was not consolidated into a definite, coherent theoretical system; it can at best be described as a 'movement' or 'historical phenomenon' rather than a 'school of thought'. American Legal Realism expressed a set of sometimes self-contradictory tendencies rather than a clear body of tenets or a rigorous set of methodologies or propositions about legal theory.

According to Roscoe Pound, "Realism is the accurate recording of things as they are, as contrasted with things as they are imagined to be or wished to be or as one feels they ought to be".

According to Friedman, "Realist school prefers to evaluate any part of law in terms of its effects".

**AMERICAN REALIST MOVEMENT:**

Realism was not consolidated into a definite, coherent theoretical system; it can at best be described as a 'movement' or 'historical phenomenon' rather than a 'school of thought'. The realist movement began in the 19th century in America and gained force during the administration of President Franklin D. Roosevelt. The realist movement in United States represents the latest branch of sociological jurisprudence. Which concentrates on the decisions of law courts. Sometime it is called the 'left wing of the functional school.' This movement named as realist because this approach studies law, as it is in actual working and its effects. Realism was a movement without a clearly articulated theoretical foundation of its own. Some jurists refuse to accept realism as a separate school of jurisprudence. According to Llewellyn, "there is no realist school as such, it is only a movement in thought and work about law."

Realism is the anti-thesis of idealism. American realism is a combination of the analytical positivism and sociological approaches. *Julius Stone* calls the realist movement a 'gloss' on the sociological approach.

**BASIC FEATURES OF REALIST SCHOOL:**

Realism denounces traditional legal rules and concepts and concentrates more on what the courts actually do in reaching the final decision in the case. In strict sense, realists define law as generalized prediction of what the courts will do.

There are certain principal features of realistic jurisprudence as outlined by Karl Llewellyn and Prof. Goodhart:

- There has to be a conception of law in flux and of the judicial creation of law.
- Law is a means to social ends; and every part of it has constantly to be examined for its purpose and effects, and to be judged in the light of both and their relation to each other.

- Society changes faster than law and so there is a constant need to examine how law meets contemporary social problems.
- Realists believe that there can be no certainty about law and its predictability depends upon the set of facts which are before the court for decision.
- They do not support formal, logical and conceptual approach to law because the Court while deciding a case reaches its decisions on 'emotive' rather than 'logical' ground.
- They lay greater stress on psychological approach to the proper understanding of law as it is concerned with human behavior and convictions of the lawyers and judges.
- Realists are opposed to the value of legal terminology, for they consider it as tacit method of suppressing uncertainty of law.
- The realists introduced studies of case law from the point of view which distinguished between rationalization by a judge in conventional legal terminology of a decision already reached and the motivations behind the decisions itself.
- The realists also study the different results reached by courts within the framework of the same rule or concept in relation to variations in the facts of the cases, and the extent to which courts are influenced in their application of rules by the procedural machinery which exists for the administration of the law.

UNIT 3

**11. Explain the Hohfeld's Jural Relationships**

Ans. Prof. Wesley Newcomb Hohfeld always emphasized upon the important part played by analytical jurisprudence in the legal profession. He advocated that every legal professional must have a basic understanding of the concepts of analytical jurisprudence in order interpret and apply the law correctly and accurately. He believed that the task of finding solutions to legal problems becomes much easier by studying and applying concepts of analytical jurisprudence.

**Theory of Jural Relations**

According to Hohfeld, one of the greatest obstacles in finding solutions to legal problems is the assumption that all legal concepts can be reduced to 'rights' and 'duties'. Moreover, it is believed that the aforesaid two legal concepts are adequate enough to help solve the problems. Although *prima facie* it may appear to be a problem of only terminologies, Hohfeld argues that in a "closely reasoned (legal) problem" such an issue may lead to lack of clarity in thoughts and expression. He identifies eight fundamental legal concepts, namely- rights, privilege, power, immunity, no-rights, duty, disability and liability. He then proceeds to arrange them as 'jural opposites' and 'jural correlatives' and explains their practical application by giving relevant examples. The arrangement of the concepts as opposites and correlatives is as follows:

| | | | | |
|---|---|---|---|---|
| **Jural Opposites** | Rights | Privilege | Power | Immunity |
| | No-rights | Duty | Disability | Liability |

| | | | | |
|---|---|---|---|---|
| **Jural Correlatives** | Rights | Privilege | Power | Immunity |
| | Duty | No-rights | Liability | Disability |

Every pair of correlatives must exist together and none of the pairs of opposites can co-exist. Thus, if a person has a right, he also has a duty. However, if a person has a privilege, he cannot have a duty. The eight Jural Relations are basic parts of the more complex legal relations that law has to deal with. Let us discuss each of the relations separately in detail.

**Rights and Duties**

As discussed earlier, 'rights' is one of the most misunderstood terms since everything is tried to be defined as a right. Words such as privilege, power and immunity are used synonymously with the term 'rights'. However, Hohfeld is of the opinion that if we look at the statutes carefully, there is a marked distinction between the various legal concepts. Hohfeld proposes that the term rights must be confined to only that which exists corresponding to a duty. Rights and duties are correlated concepts and when a right is infringed there is always a duty that has been violated.

Hohfeld uses the example of trespass to explain the correlation between rights and duties. He states that suppose if X has a land and he has the right against Y that the latter shall not enter

in his land, Y also has the corresponding duty to not enter upon X's land. He goes on to say that an appropriate synonym for the term 'right', in the light of the aforesaid meaning accorded to it, would be 'claim'.

**Privilege and No-rights**

Hohfeld defines privilege as the jural opposite of duty. Privilege, according to him, is the negation of a duty. The negation of duty takes place only when the contents of both, the duty and privilege, are opposite to each other. For instance, a *duty not to enter* can be negated by the *privilege of entering*. Duty is the correlative of right. Similarly, privilege also has a correlative. However, there exists no particular term to explain the same, which is why, Hohfeld has decided to term it as a "no-right". Thus, if I have the privilege of entering into land, the correlative is a "no-right" against my entering to the land. Unlike a duty which has to be necessarily fulfilled, one may or not exercise his privilege. There is no right that is infringed in case of non-exercise of a privilege.

After discussing the meaning of the concept of privilege, Hohfeld emphasizes upon the importance of differentiating between a privilege and a right and discusses how usage of both the terms interchangeably has caused "blurring of ideas".

**Powers and Liabilities**

Legal power is the jural opposite of legal disability and the jural correlative of legal liability. Power is the ability conferred upon an individual by the law to alter or create new legal relations. One can make a will of his property or can alienate his property; one can marry one's deceased wife's sister–all these are often termed as rights however a careful legal analysis reveals that they are powers, not rights.

A synonym for legal power is (legal) ability. Legal relations may be altered by facts and circumstances which may or may not be in human control. When such facts are in control of one or more human beings, such human being is said to possess legal power. Liability is the jural correlative of power. Whenever a person exercises the power to alter existing legal relations or to create new legal relations, the person with whom such legal relations have been created or altered owes a liability to the former. Hohfeld proposes the terms "subjection" and "responsibility" as synonyms of the term "liability". Many 'duties' or 'obligations', ignorantly stated to be so, are actually liabilities.

**Immunities and Disabilities**

Immunity is the jural correlative of disability and the jural opposite of liability. In simple terms, immunity is the negation of liability. According to Hohfeld, the contrast between power and immunity is the same as the contrast between right and privilege. He states that a right is the "affirmative claim" against someone and privilege is a freedom from such an affirmative claim. Similarly, power is the "affirmative control" over a legal relation and immunity is the freedom from such control. The jural correlative of immunity is a disability which refers to no-power. Thus, when a person exercises immunity in a legal relationship with another, the latter has no power over the legal relation.

**Conclusion**

Hohfeld explains exactly how several conceptions are mistaken as rights and duties. With his theory of jural relations, he has provided legal professionals with a powerful tool to help understand complex legal problems and devise effective solutions. The widespread tendency to confuse rights with liberties can lead a jurist to make conceptual errors and faulty interpretations. For example, if one believes that the right to free speech is a right (in the strict sense), but in fact it is only a liberty, then one will wrongly believe that others have duties of non-interference which are correlative to this 'right'. The concepts of rights, privileges, powers, immunities seem to be the legal benefits granted to an individual while the four correlative terms – duty, no-right, liability and disability are the corresponding legal burdens.

12. Explain Different types of rights.

Ans. The standard of permitted action within a certain sphere are called rights. In other words, a right is any action of a person which law permits. Legal rights is different from a moral or natural right in the sense that it is recognized & protected by law, whereas the latter may/may not be recognized & protected by law. We shall now, discuss the types of rights in detail.

Kinds of Legal Rights

In simple words, the court of law can enforce legal rights against persons and also against the government. A legal right is an interest accepted and protected by law. Also, any debasement

of any legal right is punishable by law. Legal rights affect every citizen. Legal rights are equally available to all the citizens without the discrimination of caste, creed & sex.

I. Perfect & Imperfect Rights

The perfect right has the following features:

It is recognized by law. It is enforceable by law. So, in the case of breach of this right, a person may go to court for enforcing this right.Thus, all fundamental rights, viz. Right to equality, right to religion, etc. are perfect rights as these are enforceable by law.

The imperfect right has the following features:

It is recognized by law. It is not enforceable by law. This means that a person cannot go to court for the breach of imperfect right. All the time-bound claims or debts come under the category of imperfect rights.

II. Positive & Negative Rights

The basis of distinguishing right as positive or negative is the nature of correlative duty it carries with it. Under Positive rights, the person has to perform some positive duty to fulfill this right.

Negative rights prevent a person to do some act, that is it corresponds to a negative duty. Example: Right to life under article 21 of the Indian constitution is a negative right because it prevents a person to kill another person.

III. Real & Personal Rights

Real right or right in- rem corresponds to the duty imposed upon the people in general. It is available against the whole world in general. Example: Tort or crime is a real right.

Personal right or right in-persona is available against a particular person & it corresponds to duty the duty imposed upon a particular person. Therefore, the personal right generally arises out of contractual obligation. Example: breach of contract is a personal right.

IV. Proprietary & Personal Rights

A proprietary right is available with respect to a property that is it relates to the owner & his assets. The assets must have some monetary value. Example: the right to ownership of property, Right to patent, Right to goodwill, etc.

A personal right is related to a person's life i.e. his reputation or standing in the society. These rights promote a person's well being in society & have no economic value. Example: Right to life.

V. Public & Private Rights

The rights which are vested in a person by state or govt. or constitution is called public rights. Example: Right to vote, Right to use public parks, etc.

Private rights are connected with private individuals or persons. Example: A contract entered into by two people gives rise to private rights to them.

VI. Inheritable & Uninheritable Rights

Inheritable rights can be passed from one generation to another, i.e. this right survives even after the death of its owner. Example: A son is a legal heir to the property of his father after his death.

Uninheritable rights die with the death of its owner. Example: All personal rights are uninheritable rights.

V. Right in repropria & Right in realiena

A person possesses Right in repropria with respect to his own property. He can use, dispose of, destroy, modify or exclude others from his property. Thus, this right gives a person, absolute ownership over the property.

Right in realiena is the right in the property of another person. Example: Right of way over the neighbor's field. So, it is not an absolute right.

**13. Explain the Concept of Property under Jurisprudence.**

Ans. The term property is commonly used to define the objects which are owned. In other words, property denotes those things in which right of ownership can be expanded. The term property includes both living and non-living things. Lands, chattels, shares, and debts are included in the property.

In a wider sense, the term includes all those rights which a person has or can be exercised. For instances, right to life, personal liberty, reputation and all those rights which he can exercise against others. Hence, in its wider sense, it can be termed as all those things or material objects without which a person cannot live.

The term property has been described by various jurists as:-

**SALMOND** says that the law of property is the law of proprietary rights 'right in rem', the law of proprietary rights 'in personam' is distinguished from it as the law of obligations. According to this usage, a freehold or leasehold estate in land, or patent or copyright is included in property but debt or shares or benefit arising out of a contract is not property.

According to Salmond, property has been termed in a variety of senses:

1. **Legal Rights-** It includes all those rights which a person is entitled by a way of law. All those material objects which a person owns as per the law are his legal rights. These are the rights which he can exercise over others. It includes a person's personal as well as proprietary rights.
2. **Proprietary Rights-** It does not include personal rights, it only include proprietary rights. It means that land, chattels, shares or debts are his property but his right to life and reputation are not included in his property.
3. **Corporeal Property-** It only includes those property which real or which can be seen i.e. land, chattels, etc. It does not include shares or debts as property.

**HOBBES AND BLACKSTONE** are in favour of that property which is entitled by law, i.e. legal rights.

**AUSTIN** suggests that property is the greatest enjoyment which a person holds. According to him, property includes whole of assets whether personal or proprietary.

**Kinds of Property**

- Corporeal

- Incorporeal

**Corporeal Property**

It is also termed as tangible property. It is the right of ownership over material things. It includes only those things which are real and visible. Person who has the right to use a thing is called as the owner of the object and the object is called as property. It includes only material things, i.e. land, house, chattels, money, ornaments etc.

Corporeal Property can be divided into two;

1. Movable and Immovable Property
2. Real and Personal property

**Movable and Immovable Property**

A corporeal property can be movable or immovable.

Immovable property includes land, house, walls etc. It includes that property which cannot be moved from one place to another. Objects which are physically attached to the earth and permanently fastened to anything attached to the earth are termed as immovable property.

Whereas Movable property are those properties which can be easily moved from one place to another by the help of a person. It includes chattels, ornaments, etc.

**Real and Personal Property**

There is no such distinction between real and personal property. Real property means all rights over the land which is recognized by law. Whereas Personal property means all other proprietary rights whether right in rem or right in personam.

**Incorporeal property**

Incorporeal property is other proprietary rights which are right in rem and are not tangible and real.

Incorporeal Property can be divided into two;

1. ***Jura in re aliena***
2. ***Jura in re propria***

**Jura in re aliena**

They are called as encumbrances. It includes property, the ownership of which is in the hand of one person and it is used by other person.

It is categorized into following:

1. Lease;
2. Servitude;
3. Securities;
4. Trusts;

**Right in re propria**

Proprietary rights are of both materials as well as non-material things. Material things are the physical objects and non-material things are the rights attached to the things. Right in re propria is mainly over immaterial things. The person having right over the thing which he attains due to his skill and labour.

It is categorized into following:

1. Patent
2. Copyright
3. Commercial Goodwill

**14. What do you understand by the Concept of Ownership? Elaborate**

Ans. Ownership refers to the relation that a person has with an object that he owns. It is an aggregate of all the rights that he has with regards to the said object. These rights are *in rem*, that is, they can be enforced against the whole world and not just any specific person. The concept of ownership flows from that of possession. In the primitive societies, there was no idea of ownership. The only concept that they identified with was that of possession. It was only after they started settling down by building homes and cultivating land that they developed the idea of ownership.

**Essentials of Ownership**

Upon analyzing the various definitions of ownership, the following essentials of ownership can be derived:

1. **Indefinite point of user-** The owner of a property has the liberty to use it. Others have the duty to not to use it or to not to interfere with the owner's right to use it.
2. **Unrestricted point of disposition-** The owner has the right to dispose of the property at his own will. A person needs to have the ownership of a thing in order to transfer that ownership to someone else. Mere possession does not give the power to dispose of the ownership.
3. **Right to possess-** The owner has the right to possess the thing which he owns.
4. **Right to exhaust-** If the nature of the thing which is owned is such that it can be exhausted then the owner has the right to exhaust it at his own will.
5. **Residuary character-** The owner may part with several rights with regards to the thing he owns. This does not take away the ownership from him.
6. **Right to destroy or alienate-** An owner has the right to destroy or alienate the thing that he owns.

**Subject Matter of Ownership**

One of the subject matters of ownership is material objects. Salmond is of the view that the real subject matter of ownership is rights. This particular view of Salmond is supported by the common law system. However, it has also received some amount of criticism. It has been argued that law generally recognizes ownership of land and chattels and not of any right. A person is said to have certain rights and not own rights.

The subject-matter of ownership is essentially determined by the legal system of a state. There are certain objects which, by their very nature, are incapable of being owned such as jungles, air, water, etc. However, the legal system of a country may recognize the ownership of such objects thereby making them a subject matter of ownership.

**Modes of Acquisition**

Ownership may be acquired in two ways.

Firstly, ownership may be acquired over a thing which has no owner. Such things are known as *res nullius* and the ownership may be acquired by possession.

Secondly, there may be things which are already owned by someone else. The ownership in such cases can be acquired using the derivative method, that is, by way of purchase, gift, inheritance, etc. The acquisition of ownership, unlike possession, has to be done strictly by lawful means.

**Kinds of Ownership**

Ownership may be of the following kinds:

**1. Corporeal and Incorporeal Ownership**

Corporeal ownership refers to the ownership of material objects whereas incorporeal ownership refers to the ownership of a right. Incorporeal ownership can also be said to be the ownership of intangible things. Examples of corporeal ownership include ownership of a house, table, car, etc. whereas those of incorporeal ownership includes ownership of trademarks, copyright, patents, etc.

**2. Trust and Beneficial Ownership**

The subject-matter of such ownership consists of property owned by two persons wherein one person is obligated to use it to the benefit of the other. The person under such an obligation is called the trustee and his ownership is known as trust ownership. The person to whose benefit the property is to be used is called the beneficiary and his ownership is known as beneficial ownership. Trust ownership is only a matter of form and not a matter of substance. This means that a trustee's ownership of the property is only nominal in nature. He is given someone else's property fictitiously by law and thereby obligating him to use it to the real owner's benefit.

**3. Legal and Equitable Ownership**

Legal ownership refers to the ownership as recognized by the rules of a legal system whereas equitable ownership refers to the ownership as recognized by the rules of equity. There may be cases wherein law does not recognize the ownership due to some effect but equity does. In such situations, the ownership is said to be equitable ownership. Legal ownership is a right *in rem* whereas equitable ownership is a right *in personam* since equity acts are *in personam.* A

person may be the legal owner of a thing and another may be the equitable owner of the same thing at the same time.

**4. Vested and Contingent Ownership**

All kinds of ownership may either be vested or contingent. Ownership is vested ownership when the title of the person is perfect. On the other hand, ownership can be said to be contingent if it is imperfect and can be perfected subject to the fulfilment of certain conditions. Thus, contingent ownership is conditional in nature.

**5. Sole Ownership and Co-ownership**

Under ordinary circumstances, a right can be owned by only one person at a time. Such ownership is known as sole ownership. However, in certain cases, same right may be vested in two individuals at the same time. This is known as co-ownership. For instance, partners of a firm are co-owners of the partnership property.

**6. Common ownership and Joint Ownership**

Co-ownership is of two kinds. It may be owned in common or joint ownership. In case of common ownership the owners' share in the property can be inherited by their respective heirs whereas in case of joint ownership, in case of death of any one of the owners, his or her share is transferred to the other owner. This is the fundamental point of difference between the two.

**7. Absolute and Limited Ownership**

Absolute ownership is one wherein the owner is vested with all the rights with regards to the property which he owns. Such rights are exclusively vested in the owner. It must be noted here that **absolute use** of the property implies **general use** since the property can only be used by lawful means and for lawful purposes. When there are limitations imposed upon the owner's rights with regards to his property, the ownership is known as limited ownership.

The concept of life tenancy under English law is a classic example of limited ownership. Hindu law too recognizes limited ownership. When a Hindu widow is made the owner of her husband's property so long as she remains alive after which the property shall pass on to the legal heirs, the ownership of the widow is limited ownership.

15. Explain the concept of Personality.

Ans. A juristic person is things, the mass of assets, a community of human beings or an organization on which one can apply the legal law. Juristic personality is the capability to have legal rights and duties. The nature of legal personality is a prior need for legal capacity and ability of any legal person to amend rights and duties. For the Judicial person, one has to incorporate in accordance with the law. On the other hand for the natural person, one has to acquire legal personhood by birth. Let us discuss the nature of personality in detail.

Persons- Nature of Personality

According to Salmond, "A person is any being whom the law regards as capable of rights and bound by legal duties." There are two kinds of persons, Natural persons, and Legal persons.

Legal persons are juristic, fictitious or artificial persons and a natural person is a human being with a natural personality and as per law, is capable of rights and duties. A legal person has a real existence but its personality is fictitious, because such a thing does not exist in fact but which is deemed to exist in the eye of law.

**Legal Personality/ Juristic Personality**

We use the term "personality" for human beings alone because it is only them who can be the subject-matter of rights and duties, therefore of juristic personality. There are two essentials of a legal person such as corpus and the animus.

The corpus is the body into which the law infuses the animus on the other hand animus is the personality or the will of the person.

**Nature of Legal Personality**

Legal personality is an artificial creation of law. Entities under the law are capable of being parties to a legal relationship. A natural person is a human being and legal persons are artificial persons, such as a corporation. Law creates such corporation and gives certain legal rights and duties of a human being.

A legal personality is what provides a person or organization rights and responsibilities by the law. Usually, we automatically assume that Humans have a legal personality. This is so as

such legal systems are built for the use of human beings. These days, the concept of legal personality is frequently a part of discussions about the rights or legal responsibility of the entities such as corporations that cannot be defined by a single person.

UNIT 4

**16. What do you understand by the concept of Justice and its types?**

Ans. The concept of justice is as old as the origin and growth of human society. A man living in society desires peace and, while living in he tends to experience a conflict of interests and expects a rightful conduct on the others part. And this is why jurists like Salmond and Roscoe Pound have emphasized the importance of justice.

Through the instrumentality of law regulated by the state, the concept of justice became more clear. As the law grew and developed the concept of justice walked parallel and expanded its tentacles into different spheres of human activities. The essence of legal justice lies in ensuring uniformity and certainty of law and at the same time ensuring the rights and duties duly respected by all. The notion of justice is the impartiality imbibed in it. The violation of justice which is enforced by the law results in state sanction as 'punishment'.

In the words of Chief Justice Coke it has been rightly said that 'wisdom of law and justice is wiser than man's wisdom,' thereby legal justice represents the collective wisdom of the community which Rousseau called as 'General Will' of the people.

Definition

The term justice has been derived from the Latin word 'Jungere' which means to bind or tie together, thus in this way it can be stated as justice is the key ailment which ties the individuals in the society together and harmonizes a balance between them and enhances human relation.

*In the words of jurists-*

- Blackstone- "Justice is a reservoir from where the concept of right, duty, and equity evolves."

- Salmond- "Though every man wants to be righteous and just towards him, he himself being 'selfish' by nature may not be reciprocal in responding justly." According to him, some kind of external force is necessary for maintaining an orderly society, and without justice it is unthinkable.

**Types of Justice**

Justice represents itself in kinds mainly:-

- Social Justice

In the words of Chief Justice, P.B.Gajendragadkar-social justice means ending all kinds of social inequalities and then provide equal opportunities to all.

Commenting on social justice Mr. M.C. Chagla, the former Chief Justice of the Bombay High court observed in the case of **Prakash Cotton Mills v. State of Bombay, 1957 II LLJ 490 (Bom)** that " we are no longer living in the laissez-faire….. it is true that social justice is imponderable and we asked not to introduce the principles of social justice in constructing legislation that comes for interpretation before us. But in our opinion, no economic, social or labor legislation can be considered by the court without applying the principles of social justice in interpreting these related provisions of law."

While in the case of **State of Mysore v. Workers of Gold Mines 1958 II LLJ 479 (SC)** the Supreme Court observed that the concept of social justice is a living concept of revolutionary impact: it gives substance to rule of law and meaning and significance to the idea of welfare of the state.

Thus, the concept of social justice aims to uplift the underprivileged section without unduly and unreasonably affecting the interests of the upper section of the society. The concept of social justice finds its expression in Articles 14(equality before law), 15(prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth), 16(equality of opportunity in matters of public employment) and 39 (b) and (c) [(b) ownership and control of the material resources and its equal distribution, (c) operation of the economic system not resulting to the concentration of wealth and means of production to the common detriment], of the constitution of India.

It also determines the concept of Processual Justice based on natural law which is the very basis of not only substantive law but also the remedial justice. Legal maxims like **Nemo**

**Judex In Propria Cause (**no one can be a judge in his own case**); Audi Altrem Partem(**here the other side or party**)** plays a vital role.

- Economic Justice

It demands that all citizens should have adequate opportunities to earn their livelihood and get equal pay for equal work, which could substantially help them in fulfilling their basic needs. From financial inclusion to better health care the state government should create opportunities for them by generating employment opportunities, following MNREGA, RSBY and so on. No person or group of person should indulge themselves in exploitation and be exploited. There must be a fair and just equitable distribution of wealth and resources, and the gap between rich and poor should get abridged.

- Political Justice

It means granting of equal political rights and opportunities to all citizens to take part in the administration of the country. The legality of the right to vote and contest election free and fairly.

- Legal Justice

It has two dimensions as the formulation of just laws and then to do justice according to it. While making laws the will of the rulers must not be used on ruled. Laws should be based on public opinion and public needs considering the core of social values, morality and the concept of just and unjust must be considered. It simply means rule of law and not the rule of person. Objective due dispensation of justice by the courts of law is an essential ingredient of legal justice.

**17. What do you understand from John Rawls theory of Justice? Comment**

Ans. Rawls theory of justice revolves around the adaptation of two fundamental principles of justice which would, in turn, guarantee a just and morally acceptable society. The first principle guarantees the right of each person to have the most extensive basic liberty compatible with the liberty of others. The second principle states that social and economic positions are to be a) to everyone's advantage and b) open to all. A key problem to Rawls is to show how such principles would be universally adopted and here the work borders on

general ethical issues. He introduces a theoretical "veil of ignorance" in which all the "players" in the social game would be placed in a situation which is called the "original position". Having only a general knowledge of the facts of "life and society", each player is to abide based on their moral obligation. By denying the players any specific information about themselves it forces them to adopt a generalized point of view that bears a strong resemblance to the moral point of view.

"Moral conclusions can be reached without abandoning the prudential standpoint of positing, a moral outlook merely by pursuing one's own prudential reasoning under certain procedural bargaining and knowledge constraints." Rawls proposes that the most reasonable principles of justice for a society are those that individuals would themselves agree to behind the "veil of ignorance", in circumstances in which each is represented as a moral person, endowed with the basic moral powers. What this position supports is that while each person has different ends and goals, different backgrounds and talents, each ought to have a fair chance to develop his or her talents and to pursue those goals – fair equality for opportunity. It is not a race or contest where the talented or gifted prevail, it should be complete cooperation among all so that there may be reasonable life for all.

What the "veil of ignorance" brings out is that we can accept utilitarianism as a public conception of justice only if we are prepared to let someone be subject to conditions we would not be prepared to subject ourselves. However, it is not the responsibility of my actions to ensure the fulfillment of another person's goals. These principles create an equal distribution of the "pie", if you will, yet it is not attainable unless pursued or strived for. There is no room for idle observation, meaning, that while we all possess equal opportunity as we all are equally moral persons, the choice of what you wish to possess materially as well as intellectually is the discretion and capability of the individual.

Primarily, these principles promote equality among all. Each individual has the same basic liberties and opportunities. Each individual has a moral obligation to accept the existence of every other human being. In doing so, all people become equal in their position and desires. We are equal in that each has the basic powers of choice and on acting on a sense of justice. The responsibility of procedure and growth relies on each and every individual his/her self. By doing so we may create a level playing field. Is this a form of pure competition? It would seem so. Competition in that what is desired must be achieved by one and desired by many

perhaps. A benefit of competitive circumstance is the betterment of all parties involved as they must evolve in order to surpass one another.

Also, in fair equality for opportunity we may eliminate all forms of discrimination and discretion of races, ethnic origin, social standards and religious intolerance and beliefs. All of these characteristics are a component of the individual person thus making him/her "individual". Justice is only succumbed when the liberties of an individual are affected because of an external opinion of these characteristics, and, in the oppression of these characteristics upon another. They are nothing more than components of a people.

18. Comment on the Concept of Justice according to Fuller.

Ans. According to Sen, the dominant approach, which he refers to as 'transcendental institutionalism', is beleaguered by two central problems: the problem of feasibility and the problem of redundancy. The first is a result of the practical difficulty, even impossibility, of arriving at a single set of principles that can help us to select just institutions through a process of impartial reasoning. In Rawls' theory of justice, for instance, his two lexically ordered principles of justice are, it is argued, those that would be unanimously selected through an impartial decision procedure - through the hypothetical using the 'veil of ignorance' device. These principles then provide the basis for choosing actual institutions in the 'legislative stage'. Clearly, however, much depends on the assumption that Rawls' two principles of justice are those that would indeed emerge from the original position. And Sen is skeptical that this is so.

In fact, Sen maintains that there are many principles that can pass the test of impartiality. He illustrates this point, first, using an anecdote about the competing claims of three children over the distribution of a single flute. One child argues that they should receive the flute because they are the best flautist; the second, because they are the poorest of the lot; and the third, because they crafted the flute without help from the others. The three arguments are based, in turn, on principles of utility, economic equity, and the entitlement to the fruits of one's unaided efforts. Each can be defended with strong, impartial arguments. And, returning to Rawls, it is similarly possible, for example, to provide substantial reasons for selecting Harsanyi's utilitarian principle in the place of Rawls' maximin principle as the basis for resolving distributional questions within a situation similar to the original position.

But this indeterminacy has profound implications for Rawls' theory of justice, for 'if there is no unique emergence of a given set of principles of justice that together identify the institutions needed for the basic structure of society, then the entire procedure of justice as fairness, as developed in Rawls' classic theory, would be hard to use'. Sen even suggests that Rawls' basic claim about the emergence of a unique set of principles of justice from the original position (as defended in *A Theory of Justice*) was considerably qualified in his later writings, such as *The Law of Peoples*, and that accepting the full implications of these qualifications would mean abandoning the stage-by-stage theory of justice.

The second problem - the redundancy problem - is that the identification of fully just social arrangements is neither a necessary nor sufficient guide to reasoned choice of just policies, strategies or institutions. It is insufficient because, as Sen explains, 'the characterization of spotless justice, even if such a characterization were to emerge clearly, would not entail any delineation whatsoever of how diverse departures from spotlessness would be compared and ranked'. In other words, using an analogy with paintings, the fact that a person regards Da Vinci's Mona Lisa as the most perfect picture in the world does not reveal anything about how they would rank a Picasso against a Van Gogh. But it is also unnecessary because in adjudicating between the various merits of a Picasso and a Van Gogh there is no reason to identify the most perfect picture in the world, just as when determining the relative heights of Mount Kilimanjaro and Mount McKinley knowing that Mount Everest is taller than both is an entirely redundant fact.

In contrast to transcendental institutionalism, Sen advocates what he calls a 'realization-focused comparative approach'. In doing so, he sides with thinkers such as Adam Smith, Marquis de Condorcet, Jeremy Bentham, Mary Wollstonecraft, Karl Marx, and JS Mill, among others, who each attempted to evaluate the desirability of particular 'social realizations', rather than search for a set of perfectly just first principles. It may not be possible to agree on perfectly just institutions, but, Sen contends, using a comparative approach we can at least arrive at widespread consensus on the injustice of certain practices or outcomes relative to others.

Such a comparative approach to questions of justice, he believes, is closely aligned with social choice theory, one of the many fields in which Sen made his mark as an economist,

earning him a Nobel-prize in 1998. Social choice theory assumes that, like the plurality of impartial principles of justice that can plausibly sustain critical scrutiny, there can be a variety of competing principles that figure in our assessments of various social orderings. And while it may sometimes appear to be impossible to satisfy all or even most of these competing principles at once - as in Kenneth Arrow's for example - such impasses can often be resolved by incorporating more information about interpersonal comparisons of well-being and relative advantages. Similarly, Sen insists, 'for an adequate understanding of the demands of justice, the needs of social organizations and institutions, and the satisfactory making of public policies, we have to seek much more information and scrutinizing evidence'.

This, in particular, is something that Sen believes that Rawls' theory does not do well. Sen offers Rawls' use of the original position as an example of what he calls 'closed impartiality'. The 'veil of ignorance' device is, Sen admits, a useful, if hypothetical, way of reaching an impartial social choice, free of various vested interests. But it does not ensure the open scrutiny of the values of the people within the original position. The vast plurality of alternative views held by outsiders - their unique moral perspectives and rankings of social realizations that can reveal hidden biases in our choice of basic principles - are simply beyond the scope of Rawls' theory. Furthermore, by limiting moral claims of outsiders we may be doing an injustice to those that fall outside the artificially closed circle of the original position.

Sen contrasts this example of 'closed impartiality' with the 'open impartiality' of Adam Smith's 'impartial spectator'. Smith's reflective device, which asks us to observe our actions and institutions from the standpoint of an outsider, specifically refrains from limiting the extent to which the views of others can be considered, refusing to confine moral discussion within the boundaries of a nation-state or any other locality. And, as in social choice theory, such openness to, and critical reflection upon, alternative views and different ways of approaching social problems, Sen believes, can provide a more solid ground for ranking the 'just-ness' or, at least, manifest injustice of certain social realizations, even if they are merely partial and ordinal rather than comprehensive, cardinal rankings.

Of course, an engagement with contrary arguments does not imply that we will be able to arrive at agreed positions on every issue (and Sen does not see this as a drawback in his

theory - not at all), nor does it oblige us to accept any of them. But there is a connection between what Sen calls the 'objectivity' of an ethical judgment and its ability to withstand open public scrutiny. Sen thus underscores the importance of public reasoning for justice throughout the book, and he regards democracy, especially when understood as 'government by discussion' rather than the Schumpeterian 'government by elections', as a particularly appropriate form of public reasoning, which can serve to increase the 'objectivity' of political solutions.

Without doubt, the argument Sen presents in the *The Idea of Justice* deserves to be seriously considered by contemporary political philosophers and lay-readers alike. It commands respect, for even if it fails to convince it will surely sharpen the arguments of others. Much of what passes for philosophy, including political philosophy, has been repeatedly accused of being irrelevant to the real choices and concerns of those outside of philosophy departments. And in *The Idea of Justice* Sen presents a serious challenge to those departments, forcing them to prove their relevance and demonstrate how they can actually inform tough decision-making.

However, if we are convinced by Sen's argument, this raises interesting questions about the role of the philosopher and their claim to any authority or special knowledge. According to Sen, 'philosophers' should not - and cannot - strive to become the architects of castles in the sky. Instead, he asks us all to start right at the foundations: to share, explore, and debate our perspectives on how to repair the edifices in which we currently live. Justice arises not from a blueprint, but from a process of open public reasoning in which as many potential policies, strategies or institutions are considered as possible. However, in this process it is not clear that the people who currently occupy philosophy departments have any special standing. They become, according to Sen, purveyors rather than adjudicators of wisdom, on an even standing with economists, doctors, scientists and lawyers, with whom they should collaborate intensely. Sen's Philosopher turns out to be anyone willing to cross boundaries, willing to explore alternative ways of thinking and living across disciplines, communities and time. What matters is that people know more about what's out there and make more informed choices - that they are smarter - because, for Sen, smarter is better.

**19. The Indian Constitution is a symbol of Natural Justice. Elaborate.**

**Ans.** In The Constitution of India, nowhere the expression Natural Justice is used. However, golden thread of natural justice sagaciously passed through the body of Indian constitution. Preamble of the constitution includes the words, 'Justice Social, Economic and political' liberty of thought, belief, worship... And equality of status and of opportunity, which not only ensures fairness in social and economical activities of the people but also acts as shield to individuals liberty against the arbitrary action which is the base for principles of Natural Justice.

Apart from preamble Art 14 ensures equality before law and equal protection of law to the citizen of India. Art 14 which strike at the root of arbitrariness and Art 21 guarantees right to life and liberty which is the fundamental provision to protect liberty and ensure life with dignity. Art 22 guarantees natural justice and provision of fair hearing to the arrested person. Directive principles of state Policy specially Art 39-A takes care of social, economic, and politically backward sections of people and to accomplish this object i.e. this part ensure free legal aid to indigent or disabled persons, and Art 311 of the constitution ensures constitutional protection to civil servants. Furthermore Art 32, 226, and 136 provides constitutional remedies in cases violation of any of the fundamental rights including principles of natural justice. With this brief introduction author undertakes to analyze some of the important provision containing some elements of Principle of Natural Justice.

Constitutional Provisions relating to the 'Principles of Natural Justice'

- Article 14: as we know that this Article guarantees equality before law and equal protection of law. It bars discrimination and prohibits both discriminatory laws and administrative action. Art 14 is now proving to be bulwark against any arbitrary or discriminatory state action. The horizons of equality as embodied in Art 14 have been expanding as a result of the judicial pronouncements and Art 14 has now come to have a highly activist magnitude. It laid down general preposition that all persons in similar circumstance shall be treated alike both in privileges and liabilities imposed.
- Art. 22: gives protection to arrested person against arrest and detention in certain cases which within its ambit contains very valuable element of natural justice,

  (1) No person who is arrested shall be detained in custody without being informed, as soon as maybe, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall

be detained in custody beyond the said period without the authority of a magistrate.

- **Art 32, 226 and 227:**

Art 32 and 226 of the constitution provides for constitutional remedies for violation of fundamental Rights and other legal rights respectively remedies, Under Art 32 and 226 can be exercised by issuing appropriate Writ, Direction and Orders. Writs in the nature of Habeas Corpus mandamus, prohibition quo-warranto and certiorari. Writ of Habeas Corpus is invoked to prevent unlawful detention and Mandamus is invoked to compel public official to perform his legal duties. Whereas Writ of Prohibition and Certiorari are used to prevent Judicial and quasi-judicial bodies from acting without jurisdiction, in excess of jurisdiction, or where error of law apparent on face of record, violation of Fundamental Right and on the ground of violation of Principles of Natural Justice. However, in recent time it is new development that Writ of Certiorari can also be invoked against Administrative authority exercising adjudicatory functions,

- Art 311 deals with Dismissal, removal, or reduction in rank of persons employed in civil capacities under the Union or a State, though Art. 310 of the constitution adapts 'doctrine of Pleasure' Art 311 constitution provides sufficient safeguards against misuse of such power, (1) of Art 311 declares that no person who is a member of civil service of the Union or an all-India service of State or holds a civil post under Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed and Clause (2) of Art.311 declares no such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. The word 'reasonable opportunity of being heard' includes all the dimension of principles of natural justice, accordingly no dismissal, removal, or reduction of rank of civil servant can be made without giving reasonable opportunity of being heard.

In a welfare state like India, the role and jurisdiction of administrative agencies is increasing at a rapid pace and with rapid expansion of state liability and civic needs of the people conferment of administrative discretion became need of an hour. With expansion in scope of discretionary power of administrative authority the regulatory measures are to be equipped with sufficient power to prevent abuse of discretion. In this regard Constitutionalzed rule of law country like India, component of natural law, i.e. fair play in action must be found and reproclaimed by judiciary to keep intact the supremacy of rule of law in India. In this regard author submits that "the rules of natural justice can operate only in areas not covered by law validly made" such old judicial decisions of Apex Court and other High Court must be reconsidered and correct view would be declaring principles of natural justice necessary corollary of Law, they must operate in presence of and even in contravention to the established law where the interest of justice demands.

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.

**20. Explain the theory of Justice given by Nozick.**

**Ans.** Entitlement Theory:

Robert Nozick bases his theory of justice on rights in the Entitlement Theory. The rights come from the concept of entitlement. In other words rights mean entitlement. One has right or claim to anything means that one is entitled to it. If justice means the distribution of right, duties, privileges etc. then the idea of justice can appropriately be interpreted as entitlement theory of justice.

Nozick is reluctant to give preference to distributive justice because this concept does not give proper idea about the theory. He observes: "it would be best to use a terminology that clearly is neutral". Implementation or realisation of the entitlement to holdings creates the foundation of the theory of justice. Thus Nozick's theory of distributive justice and entitlement theory are same and convey identical meaning.

There are three different principles or three major topics of holdings:

(1) When a man acquires a holding (we can interpret it as property though Nozick does not use this particular term) according to the principle of justice and law, then the person concerned is entitled to that holding. In other words, property acquired in a legal and justifiable way shall cause under the authority of the person who has acquired it and it is a type of justice.

2. If a person happens to acquire a holding by means of transfer and here in this case the basic principles of justice has been strictly adhered to, then this justice- based transfer can reasonably be called an entitlement. The transfer takes place from one person to another. There are different forms of transfer such as voluntary exchange, gifts or any other type.

3. In all societies not all transfers or acquisitions take place in proper or legal or justifiable ways. There may be illegal transfers or acquisitions and it has been found that such cases are not at all rare. Naturally the rectification of this injustice or wrong can lead to another type of holding. Nozick calls it the "rectification of injustice in holding".

When the three above noted holdings are conglomerated under one head that gives birth to a concrete shape of the theory of justice. It can be better put in the words of Nozick. He writes: "The general outlines of a theory of justice in holdings are that the holdings of a person are just if he is entitled to them by the principles of justice in acquisition and transfer, or, by the principle of rectification of injustice. If each person's holdings are just then the total set of holdings is just".



## SUBJECT: INTERNATIONAL LAW

## PAPER CODE: LLB 304

UNIT I

Q.1 Discuss the nature and development of international law? Is it law in true sense or not?

Q.2 Explain in detail the basis of International Law? How will you justify the essence of International law?

Q.3 what are the subjects of International Law? Discuss the conditions of statehood?

Q.4 Discuss in detail concept, role, rights and duties of international Organizations?

Q.5 how will you justify the importance of codification of International law? How the status of individuals has been developed under international law? Analyze through different theories.

UNIT II

Q. 6 what do the sources of International Law? Discuss the traditional source of international law .also explain how a usage could be converted into a International customary law?

Q.7 Treaties or International conventions are the highly accepted sources of International law .justify.

Q.8 Discuss in detail different types of general principles of law recognized by the civilized nations.

Q.9 what do we understand by International Resolutions? Discuss the importance of General Assembly Resolutions and Security Council Resolutions as a source of International law.

Q.10 Explain how other sources of law like writings of jurists and "principles of jus cogens" , Equity lay a strong base of International Law?

UNIT III

Q.11 what is De facto and De jure recognition? How the different theories have measured its importance under International law? Also discuss the retroactive effect of recognition?

Q.12 Discuss in detail the concept of Extradition with respect to state Jurisdiction and treaty law.

Q. 13 what is Asylum in International Law? Discuss the basis and purpose of asylum?

Q.14 Explain in detail the concept of the Territorial sea and the contiguous zone in respect of

a. measurement

b. rights of coastal states

c. rights of other states

Q.15 Explain how the jurisdiction of Exclusive economic zone has developed discussing about the concept of continental shelf. Also discuss about the crimes committed in High Seas.

UNIT IV

Q.16 Discuss about the contemporary International issue of prohibition of use of Force.

Q.17 Explain the exceptions to the prohibition of use of force. Support with case laws

Q.18 what do you understand by individual and collective self defense .explain

Q.19 what do you understand by humanitarian intervention? How different states take this justification for answering imminent attack by other states?

Q.20 Explain the doctrine of responsibility to protect under International law in detail.

ANSWERS

**ANS.1**

Law is that element which binds the members of the community together in their adherence to recognised values and standards. It is both permissive in allowing individuals to establish their own legal relations with rights and duties, as in the creation of contracts, and coercive, as it punishes those who infringe its regulations. Law consists of a series of rules regulating behaviour, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions. And so it is with what is termed international law, with the important difference that the principal subjects of international law are nation-states, not individual citizens.

There are many contrasts between the law within a country (municipal law) and the law Public international law covers relations between states in all their myriad forms, from war to

satellites, and regulates the operations of the many international institutions. It may be universal or general, in which case the stipulated rules bind all the states (or practically all depending upon the nature of the rule), or regional, whereby a group of states linked geographically or ideologically may recognise special rules applying only to them, for example, the practice of diplomatic asylum that has developed to its greatest extent in Latin America.

The rules of international law must be distinguished from what is called international comity, or practices such as saluting the flags of foreign warships at sea, which are implemented solely through courtesy and are not regarded as legally binding. Similarly, the mistake of confusing international law with international morality must be avoided. While they may meet at certain points, the former discipline is a legal one both as regards its content and its form, while the concept of international morality is a branch of ethics. This does not mean, however, that international law can be divorced from its values that operate outside and between states, international organizations and, in certain cases, individuals.

Definition of International Law:

According to Oppenheim, International Law is a "Law of Nations or it is the name for the body of customary law and conventional rules which are considered to be binding by civilized States in their intercourse with each other."

Thus, International Law can be considered as treaties, set of rules and agreements between countries that are binding between them. International Law governs how nations must interact with other nations. It is extremely useful in regulating the issue of jurisdiction which arises when people trade among different States. The main purpose of International Law is to promote justice, peace and common interest.

Can International Law be termed as a true law?

There has been a lot of controversy regarding this question. Some answered the question in negative while others in the affirmative. Some feel that International Law lacks the element of certainty, stability and predictability.

Not a true law

John Austin, a leading English writer on Jurisprudence supports the view that International Law is not a law. As per him, International Law is a code of moral force and rules of conduct only. In his opinion, International Law does not have any sanction behind it and it doesn't emanate from a law giving authority. He described International Law as the one consisting of positive International morality and opinions or sentiments which are followed by the nations as per their own wish.

Hobbes and Pufendorff are also of the view that International Law is not a true law as the law is not truly invested with true legal force and it is not backed by the command of a superior.

Holland is of the view that International Law is extremely different from ordinary laws as it is not supported by the State's authority. As per him, the private law is writ large. He describes International Law as the vanishing point of Jurisprudence. He is of the view that as International Law lacks sanction (which is the most important element of Municipal Law) it can not be kept in the category of true law.

A true Law

Hall And Lawrence consider International Law as true law. According to them, International Law is derived from custom and precedents which are a source of law and it is habitually treated like a certain kind of positive law.

Sir Frederick Pollock observed that for International Law to be binding upon the members, the only essential conditions are the existence of political community and the recognition by its members of settled rules binding upon them in that capacity. International Law wholly satisfies these conditions.

Austin in his definition of law has given more importance to sanction and fear in compliance of law. In case of International law there is neither sanction nor fear for its compliance hence it is not law in proper sense of the term. But now the concept has changed and International Law is considered as law. There is no consideration of fear or sanction as essential part of

law. If fear and sanction are considered necessary then there are sufficient provisions in UNO charter for compliance of the International Law as Law :-

According to Bentham's classic definition international law is a collection of rules governing relations between states. Two of the most dynamic and vital elements of modern international law.

1. In its broadest sense, International law provides normative guidelines as well as methods, mechanisms, and a common conceptual language to international actors i.e. primarily sovereign states but also increasingly international organizations and some individuals.
2. Although international law is a legal order and not an ethical one it has been influenced significantly by ethical principles and concerns, particularly in the sphere of human rights. International is distinct from international comity, which comprises legally nonbinding practices adopted by states for reasons of courtesy. e.g. the saluting of the flags of foreign warships at sea.)

· In some states like USA and UK international Law is treated as part of their own law. A leading case on the point is the, Paqueta v/s Habanna-1900. Justice Gray observed that the international law is a part of our law and must be administered by courts of justice."

· As per statutes of the International Court of Justice, the international court of Justice has to decide disputes as are submitted to it in accordance with International Law.

· International conventions and conferences also treat international Law as Law in its true sense.

· The United Nations is based on the true legality of International Law.

· That according to article 94 of UNO charter, the decisions of the International Court of Justice are binding on all Parties (States).

· Customary rules of International Law are now being replaced by law making treaties and conventions. The bulk of International Law comprises of rules laid down by various law-making treaties such as, Geneva and Hague conventions.

On the basis of above mentioned facts and arguments, the International Law is law in true sense of the term. United States and U.K., treat International Law as part of their law. In a case of West Rand Central Gold Mining Company Ltd., v/s Kind- 1905, the court held the International Law has considered it as a part of their law. From the above analysis it is revealed that the International Law is law. The International Law is law but the question arises as to what are the basis of International Law. There are two theories which support it as real law:-

1. Naturalist Theory:- The Jurists who adhere to this theory are of the view that International Law is a part of the Law of the Nature. Starke has written, "States submitted to International Law because their relations were regulated by higher law, the law of Nature of which International Law was but a part." Law of nature was connected with religion. It was regarded as the divine Law. Natural Laws are original and fundamental. They incorporate the will of the Governor and governed and advance their consent or will. That is why international law is also based on natural law.

   Vattel Furfendorf, Christain, Thamasius, Vitona are the main supporters of this theory.It was viewed that natural law is uncertain and doubtful but it is accepted that Natural Law has greatly influenced the growth and has given the birth to International Law and its development. Most of its laws are framed from Natural Law.

2. Positivist Theory:- This theory is based on Positivism i.e. law which is in the fact as contrasted with law which ought to be. The positivists base their views on the actual practice of the states. In their view customs and treaties are the main sources of International Law. According to German economist, Heagal, "International Law is the natural consent of states. Without the consent of states, no law can bind the states. This consent may be express or implied." As pointed out by Starke, " International Law can in logic be reduced to a system of rules depending for their validity only on the fact that state have consented to them." As also pointed by Brierly, "The doctrine of positivism teaches that International Law is the sum of rules by which states have consented to be bound." As said by Bynkeshock, "The basis of International Law is the natural consent of the states. Without the consent of states no law can bind the states."

   The critics of the above views say that consent is not always necessary for all laws. There are some laws which are binding on states irrespective of their consent e.g. Vienna Convention on the Law of Treaties. Article 36 of the Treaty says that the provisions of the Treaty may be binding on third parties even if they have not consented to it.

   CONCLUSION: - Gossil Hurst says, "That International Law is in fact binding on states, because they are states." This is very much correct because every state in the world wants peace, Law and order and that is possible only through existence of International Law. Therefore it is in natural interest of States to accept the existence of International Law.

   International Law is the vanishing point of Jurisprudence.

   Holland has remarked that International Law is the vanishing point of jurisprudence in his view , rules of international law are followed by courtesy and hence they should not be kept

in the category of law. The international Law is not enacted by a sovereign King. It has also no sanctions for its enforcement which is the essential element of municipal law. Holland further say that International Law ass the vanishing point of Jurisprudence because in his view there is no judge or arbiter to decide International disputes and that the rules of the I. Law are followed by States by courtesy.

Austin also subscribes to this view, Justice V.R.Krishna Iyer formally member of Indian Law Commission has also remarked, "It is a sad truism that international law is still the vanishing point of jurisprudence. This view is not correct. It is now generally agreed that Holland's view that international law is the vanishing point of jurisprudence is not correct.

But now it is well settled that International Law is law. It is true that International Law is not enacted by sovereign and has no agency for its enforcement. But it is true that it is a weak law. A majority of International lawyers not subscribe to this view is based on the proposition that there are no sanctions behind international Law are much weaker than their counterparts in the municipal law, yet it cannot be successfully contended that there are no sanctions at all behind international law.

The jurists who do-not consider international law as the vanishing point of jurisprudence say that there is difference between state law and International Law. International Law cannot be enacted by the state but still there is agency for its enforcement. According to Dias, "International Law is obeyed and complied with by the states because it is in the interests of states themselves.

For this object they give the following arguments:-

1. The judgements of International court of Justice are binding on States.
2. If any state does not honour the order/judgement of International court of justice, the Security Council may give its recommendation against that state for action.
3. The judicial powers of International Court of justice (Voluntarily and compulsory) have been accepted by the States.
4. The judgement of International court of Justice has been followed till date.
5. The system of enforcement i.e. sanctions and fear, has been developed.

For example :- If there is a threat to international peace and security, under chapter VII of the U.N. Charter, the security council can take necessary action to maintain or restore international peace and security. Besides this the decisions of the International Court of Justice are final and binding upon the parties to a dispute.

The gulf war 1991 Iraq trespassed and acquired the whole territory of Quait in her possession by violation of International Law. The Security Council passed a resolution against Iraq and

asked her to liberate Quait. But Iraq did not honour the resolution of Security Council; hence therefore may economic and political restrictions were composed against Iraq. But all in vain. Then USA and her allies were permitted to compel Iraq to honour resolution of Security Council. Consequently USA and her allies used force against Iraq and freed Quait.

The same action was taken against North Korea and Cango during the year l948 and 1961. The Security Council imposed penalty against Libya for shooting down American Plane in Lockerbie (Scotland) in 1992, consequently two citizens were also killed. The Security Council forced Libyan Government to surrender two terrorists who were involved in this mishap and Libya obeyed the order of S. Council.

The greatest proof of its utility and importance is the fact that its successor the International Court of Justice established under the United Nations charter is based on the Statute of the Permanent Court of International Justice, the United Nations & Security Council Charter possess wide powers to declare sanctions against the states who are guilty of violence of the provisions of the same under chapter-VII

Thus International Law is in fact a body of rules and principles which are considered to be binding by the members of International Community in their intercourse with other. The legal character of International Law has also been recognized in 1970 Declaration on the Principle of International Law Concerning Friendly relation and Cooperation among states.

Conclusion:- On the basis of above discussion it may be concluded that the International Law is in fact law and it is has developed in the evolving times .

**ANS .2**

Introduction:

"Implementation, Compliance, and Effectiveness" was the main theme of the 91st Annual Meeting of the American Society of International Law (ASIL) (1997).

Generally speaking, international law is treated and observed by States as law with binding authority, and States generally comply with their international obligations. Yet, what makes international law "work" has never been easily answered. Many international law scholars and practitioners have been bewildered by questions such as: Why do States generally comply with obligations imposed by rules of international law? Where does international law derive its validity? Why does international law have its binding force?

The Naturalist Theories-

Various doctrines exist regarding the basis for the binding authority of international law.In the 17th and 18th centuries and earlier times, under the influence of theology and the "law of nature," the science and study of international law was dominated by the naturalist school. This school maintained that the validity of international law was based upon the will of God and that sovereigns were subject not only to divine law, but also to the laws of nature established by God. From the 19th century and onwards, positivism gradually replaced the dominant role of naturalism. The positivist school generally taught that the will of the State was the ultimate source of all laws, international and domestic, and the basis of the binding force of international law could only be sought from the fact that States consented to be bound by it.5 Between the naturalist and the positivist schools, there was an "eclectic school," also known as the "Grotian" school, which attempted to harmonize naturalism and positivism. However the proponents of eclecticism were either "more naturalist" or "more positivist," thereby making it difficult to regard the eclectic school as a separate discipline. For example, the renowned "eclecticists," Baron Christian von Wolff (1679- 1754)6 and Emerich de Vattel (1714-1767), essentially belonged to the naturalist school.

even more popular and dominant in the 17th and 18th centuries. Insofar as concerns the field of international law, the German jurist, Sammuel Pufendorf (1632-1694) was the most prominent pioneer and representative of the 17th century doctrines of natural law.

The Doctrine of "Social Contract" -

1. The Doctrine-The doctrine of social contract, otherwise known as the school of social bond or the doctrine of social solidarity, is a theory derived from the naturalist school. The concept of social contract can be traced to the teachings of ancient Greek Sophists (meaning teachers of wisdom or specialists im wisdom). Some of the Sophists believed that "law and society are based upon a contract between those concerned ('the social contract') and ... this fact has an impact upon the contests of legal system.According to the doctrine of social contract, all laws are the result of society and their validity is based on a kind of social bond, social contract or social solidarity,4 " which is the case with domestic law as well as with international law." For the proponents of this doctrine, the individual is born free and equal. He is only bound by his own will and not by any external force.

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The Doctrine of Fundamental Rights of the State -

The Doctrine-The doctrines of fundamental rights of the State and of social bond are closely related theories based on the law of nature. As de Visscher pointed out, the doctrine of

fundamental rights of States and the doctrine of social contract, "far from being mutually exclusive, were complementary. Both were essentially individualistic."56 These two theories both prevailed in the 18th and 19th centuries, and still have their supporters in the 20th century. Indeed, the doctrine of fundamental rights of the State, from a somewhat different angle, expresses the same idea as the "social contract" theory. Under the "fundamental rights" doctrine, principles of international law can be deduced from the essential nature of the State. According to this doctrine, every State by virtue of its statehood and its capacity as a member of the family of nations is.endowed with certain fundamental, inherent or natural rights. These rights are not created by general customary or conventional international law, but originate in the nature of the State. The norms underlying these fundamental rights of the State are the ultimate basis and source of positive international law, and have a greater obligatory force than the rules of positive international law which exist in the form of customs and treaties.

Positivist Theories -

Positivism in General Indirect opposition to the naturalist theories are positivism and various derivative positivist theories. Positivism generally teaches that the law of nations is the aggregate of positive rules by which States have consented to be bound, exclusive of any concepts of natural law such as "reason" and "justice." For the positivists, nothing can be called "law" among States to which they have not consented. The proponents of the positivist doctrines maintain that the will of the State is absolutely sovereign and that it is the source of the validity of all law. The validity of all laws, whether domestic or international, depends upon the supreme will of the State. The positivists believe, as Starke observes, that the rules of international law are, in the end, similar to domestic law in the sense that they both derive their binding force from the will of the State.

The Doctrine of the Will of the State-

While Gentilis was the first to maintain that the basis of international law was the will of States. Law was also subject to the abstract concept of the "State" because the State itself was sovereign and supreme, therefore nothing could be beyond the State, or there was no room to subject the State to any other authority.

The Doctrine of Consent -

The Doctrine-The exponents of the doctrine of consent also maintain that the will of the State is the controlling element of the binding force of international law, but their emphasis is on the mechanism of State consent through which the will of the State is expressed. For them, the rules of international law become positive law when the will of the State consents to being bound by them whether expressly or impliedly. According to the consent doctrine, it is the sovereign and supreme will of the State that commands obedience. This will of the State is said to be expressed in the case of domestic law through State legislation and in the case of international law through consent to international rules. Being a main theory of positivism, the doctrine of consent generally teaches that the consent or common consent of States voluntarily entering the international community constitutes the basis of validity of international law. States are said to be bound by international law because they have given their consent.

Doctrine of Automatic Limitation-

The Doctrine-The consent theory as originally propounded was later modified in certain respects by followers of the positivist school. It later developed into the auto-limitation or selflimitation doctrine (also known as "voluntarist positivism" or "voluntarism"), and the doctrine of pacta sunt servanda. Some proponents of the auto-limitation doctrine attribute a will to States, clothe that will with full sovereignty and authority, and maintain that international law consists of those rules which the wills of the various States have accepted by a process of voluntary self-restriction. The doctrine of States' auto-limitation or self-limitation is thus another traditional theory of the positivist school. It teaches that international law is the outcome of the exercise of self-limitation by States, and that the basis of its validity is the wills and voluntarism of States. The self-limitation doctrine proclaims that States are sovereigns, whose wills reject any type of external limitation, and if their sovereignty is in any way limited, that limitation cannot be from any external force, but only be imposed by the States themselves.

The Doctrine of Pacta Sunt Servanda -

The Doctrine-It was "the true [Italian] Maestro" Dionisio Anzilotti (1869-1950) that formulated the theory of pacta sunt servanda to explain the basis of the validity of international law.12 6 He regards the rules of international law to be either customary rules or rules arising out of treaties or agreements among States and considers the doctrine of pacta sunt servianda as "an absolute postulate of the international legal system.' ' 127 Anzilotti

considered States to be bound to obey such rules by reason of a pact both express and implied and "stressed the openly or tacitly conventional character of international law, which in his view relied on pacta sunt servanda.'

Kelsen observes that in accordance with the principle of pacta sunt servanda, the basic norm of customary international law is identical with that of conventional international law.

Conclusion- all these theories were the essence and laid the basis of international law.

**ANS.3**

SUBJECTS OF INTERNATIONAL LAW:

By subjects of international law it is meant that those entities which possess international personality. In other words subjects of international law are those entities that have rights duties and obligations under international law and which have capacity to possess such right, duties and obligations by bringing international claims. In past the matter was not much debatable because according to the contemporary circumstances and scope of international law only the states were qualified for international personality, but in near past along with the increasing scope of international law many other entities have been given international personality. Now, the question arises; whether they may be treated as subjects of international law or not? And also if they were given the international personality then what shall be the criteria for ascertaining the qualification of their being the subjects of international law. So, there are different theories as regard to the above debate. The most prominent theories may be discussed as under:

1. **Realist Theory: –** According to the followers of this theory the only subject of the international law are the Nation States. They rely that Nation States are the only entities for whose conduct the international law came into existence. The Nation States, irrespective to the individuals composing them, are distinct and separate entity capable to have rights, duties and obligations and can possess the capacity to maintain their right under international law. So, the Nation States are the ultimate subjects of International law.
2. **Fictional Theory: –** According to the supporters of this theory the only subjects of international law are the individuals. For the reason, that both the legal orders are for the conduct of human being and for their good well. And the Nation States are nothing

except the aggregate of the individuals. Though the rules of international law relate expressly to the Nation States but actually the States are the fiction for the individuals composing them. Due to this reason individuals are the ultimate subjects of International law.

3. **Functional Theory: –** Both the Realist and Fictional theories adopted the extreme course of opinions. But Functional theory tends to meet both the extremist theories at a road of new approach. According this theory neither states nor individuals are the only subjects. They both are the subjects of modern international law. Because for states being primary and active subject of international law have recognized rights, duties and obligations under international law and are capable to maintain the same by bringing international claim. At the other hand in the modern international law individuals have also granted certain rights, duties and obligation under international law and maintain the same by bringing direct international claims. Even, not only states and individuals are the subjects of international law but several other entities have been granted international personality and became the subjects of the international law. This is because of the increasing scope of international law.

**Conclusion: –** If all the above theories are to be analyzed philosophically then it may be concluded that Functional Theory seems to be more accurate because due to modern scope of the international law and world trend. It is obvious that there are many actors in international law, which have been granted rights, duties and obligations, and also to secure their rights and have been provided with capacity to bring international claims. So along with states and individuals neither, certain other entities which have been given international personality shall be treated as subjects of international law but also all those new entities which with due course of time are going to be given international personality.

**A ) State alone are the subject of international law /Realist Theory**

Some Jurist have Expressed the view that only States are the subject of international law. In their view International Law regulates the conduct of the state and only state alone are the subject of international law. According to them as per the positivism view, individual is an object and not a subject of International law. International Law gives more Emphasis and stress upon the states, their sovereignty ,etc .

**Criticism**

This view has been criticized by various jurist because this theory fails to explain the case of slaves and pirates. Under international law slaves have been conferred upon some rights by the states. In the same way pirates are treated as Enemies of the mankind and they may be punished for piracy by the state. The jurist who emphasis that States alone are the subjects of international law, are of the view that slaves and pirates are exception and are objects of international law. It is argued that the treaties which confer certain rights over the slave and pirates impose certain obligations upon the states if there is no search obligation of the states, the slaves cannot have any rights under international law. Professor Oppenheim is of the view that since the law of nation is primarily a law between the States, state are to that extent, the only subject of the law of nations. Professor Oppenheim subsequently has changed the view and mentioned that," States are primarily ,but not exclusively, the subjects of International law. To the extent that bodies other than States directly possesses some rights, power and duties in international law they can be regarded as subjects of international law possessing international personality. Many of the rules of international law are directly concerned with regulating the position and activities of the individual and many more directly affect them. Thus it is wrong to say that individuals or not the subjects of international law. Some Jurist are of the view that individuals who are the basis of the society and are the subject of international law and not the object of international law. Even the International Court of Justice has rejected the proposition that states are the only subject of international law. But held that the states are responsible for an act of his agent. As per the modern international law, it is generally recognised that besides States public International organisations, Individual and certain other non state and entities are also the subject of international law."

**B) Individuals alone are subject of international law/ fictional theory-** Some Jurist Express the view that in the ultimate analysis of International law , it will be evident that only individuals are the subjects of international law. Professor Kelson is the chief exponent of the theory . Even before kelson, Westlake had remarked," the duties and rights of the States are

only the duties and rights of man who composed them. Prof. Kelson has analysed the concept of the state and Expressed the view that state is a technical legal concept and includes rules of law applicable on the persons living in a definite territory. Hence under International Law duties of the states are ultimately the duties of individual. and there is no difference between International Law and State Law . as per Kelson both laws apply to the individual and they are for the individual.

**Criticism**

The view taken by the Kelson is more logical and practical. so far as the practice of the state is a concerned, it is seen that the primary concern of international law, is with the rights and duties of the states.

It can be seen, certain treaties have been entered into which have conferred certain rights upon individuals. As per International Court of Justices, statute, though States can be parties to the international processing, a member of other international instruments have recognised ready procedural capacity of the individual. There are number of examples wherein international law applies on individual not only mediately but also directly. It is wrong to say that pirate, slave,etc are only object of International Law.

**States, individual and certain non-state entities are subject of international law/ functional theory**

This view not only combines the first and second view but Goes a step ahead to include international organisations and certain other non state and entities as subjects of international law. This view appears to be more practical and are better than the first two views.

The reason in support of this view are as under

1) In present times, several treaties have conferred upon individual certain rights and duties, for example International Covenant on human rights .

2) permanent Court of Justice in Danzing Railways official case, 1928, held that if any treaties the intention of the parties is to enforce certain rights upon some individuals, then International Law will recognise such rights and enforce them.

3) Geneva convention on Prisoners of War 1949, has conferred certain rides upon the Prisoners of law.

4) The Nuremberg and Tokyo tribunals laid down the principle that International Law may impose obligations directly upon the individuals.

5) The Genocide convention, 1948 ,has imposed certain duties upon the individual and persons guilty of the crime of genocide maybe punished .

6) A new trend has started in the international field under which some rights has conferred upon individuals even against the States. for example European convention on human rights,1950, International convention on human rights 1966, optional protocol, by which an individual who is the victim of the violation of human rights, May send petition regarding violation of human rights by his own state to the United Nations Commission on Human rights.

7) it is now agreed that International organisations are also the subject of international law. United Nation is an international person under international law and it is held by International Court of Justice that United Nation is a subject of international law and capable of possessing rights and duties and it has capacity to maintain its right by bringing International things.

8) The law making treaties in respect of international criminal law, have imposed certain obligations upon the individuals , for example narcotic drugs convention, 1961, Hague conversation of suppression of unlawful Seizure of aircraft 1970.

Thus the states are not only the subjects of international law. There is no doubt that states are still the main subject of international law and most of the part of international law concerns with the conducts and relationship of state with each other, but in view of the developing and changing character of the International Law , International organisations and some non-state entities individuals are also the subject of international law. It is apparent from the above discussion that the position of subjects of international law has greatly changed with the passage of time. Originally, sovereign States were the only actors in the international community, but in present century new non state entities such as International organisations and Institutions and individuals have been given the status and rank of international legal subjects.

CONDITIONS/ REQUIREMENTS OF STATEHOOD:

There is no exact definition of the term "state" in international law. However in this law, the essesntial critria for statehood in international law is well settled. Article 1 of the Montevedio convention on the rights and duties of states of 1993 provides the following qualifications:

A. a permanent population

B. A defined territory

C. Government

D. Capacity to enter into relations with other states.

Other requirements:

Independence, sovereignity, self determination and recognition are other requirements of statehood used either as separate criteria or in association with the above requirements.

**ANS.4**

INTRODUCTION

An **Inter-governmental Organization** (IGO) is defined as "association of States established by and based upon a treaty, which pursues common aims and which has its own special organs to fulfill particular functions within the organization."

A **Non-governmental Organization** (NGO) is defined as “those organizations founded by private individuals, which are independent of States, oriented towards the rule of law, pursue public rather than private goals as an objective, and possess a minimal organizational structure. -.

NGOs are not established by treaty. They do not have the same privileges and immunity status as an IGO; however, like an IGO, they can be global (Human Rights Watch) or in scope. Privileges and immunities include exemption from taxes, customs duties, inviolability of premises and documents, and immunity from judicial process.

Presently the international organisation that is working at international level is united nationa organisation.

The United Nations is the second attempt at a global peace initiative. In 1919, U.S. President Woodrow Wilson pushed for the League of Nations after World War I. It had 58 members, but the United States was not one of them. Congress refused to ratify membership, fearing that would pull the United States into countless wars. Many felt the League failed because it could not prevent the outbreak of World War II.

The main parts of the U.N. are the General Assembly, the Security Council, the Economic and Social Council, the International Court of Justice, and the Secretariat.

**The General Assembly** is composed of representatives of all member states. It creates the mandates that guide the day-to-day work of the boards and councils under it. The General Assembly meeting lasts for several weeks in September of each year, and it gives world leaders a chance to come together and form working relationships.

**The Security Council** is the most powerful U.N. unit. Its mandate is to keep the peace. The five permanent members are China, France, Russia, the United Kingdom, and the United States. The General Assembly also elects 10 non-permanent members that hold two-year terms.

All U.N. members must comply with Security Council decisions, and the Council sends peace-keeping forces to restore order when needed. The Council can impose economic sanctions or an arms embargo to pressure countries that don't comply, and it authorizes the U.N.'s members to take military action if needed.

**The Economic and Social Council** conducts analysis, agrees on global norms, and advocates for progress in the areas of sustainable development, humanitarian work, and financial development. It forms partnerships as needed and oversees joint U.N. action to address related issues.

**The International Court of Justice** is located at the Hague in the Netherlands. It settles legal disputes between countries.

**The Secretariat** carries out the day-to-day work of the organization. It has several departments and offices that carry out distinct responsibilities. The Security Council nominates its leader, the Secretary-General.

**How the UN Works**

The U.N. is not a government and has no right to make binding laws. Instead, it uses the power of persuasion. The U.N. committees negotiate multilateral agreements that give more teeth to its policies. Combined, they form a body of international law.

All nations contribute to the U.N. budget, so they each have a part in funding U.N.-specific initiatives.

Every member votes in the General Assembly meeting, so the U.N.'s decisions reflect the prevailing values and goals of the majority of its members. Thus, countries that don't comply know they are in the minority.

**Members**

There are 193 members of the U.N. The United States recognizes 195 countries. The two that aren't U.N. members are Kosovo and the Holy See. Russia won't allow Kosovo to become a member because it still considers it a province of Serbia. The Holy See has not applied for membership, although it has "permanent observer" status.

Notably, the U.N. granted Palestine "permanent observer" status, even though the United States considers it to be part of Israel. China replaced Taiwan, which it now considers a province.

All peace-loving countries that are willing and able to carry out their obligations under the U.N. charter can join the UN. All members of the Security Council must approve. Then, two-thirds of the General Assembly must also approve the membership.

**Other UN Organizations and How They Influence the World**

Within the U.N., there are some well-known agencies that carry on its work. The International Atomic Energy Agency helps to prevent nuclear proliferation and possible annihilation by a worldwide nuclear war. Below are several other UN organizations and their functions:

- The United Nations Climate Change secretariat manages the global response to the threat of climate change.
- The United Nations Educational, Scientific, and Cultural Organization addresses world hunger.
- The United Nations International Children's Emergency Fund focuses on the protection and care of the world's children.
- The World Bank provides financial and technical assistance to emerging market countries.
- The World Health Organization monitors disease outbreaks and assesses the performance of health systems.
- The North Atlantic Treaty Organization is an alliance of 26 countries created to promote peace in Europe.
- The United Nations Office on Drugs and Crime supports countries' efforts to stop human trafficking. It provides data and research on the global problem.

Specifically, the UN summarises its role in the following terms. Its purposes are:

- To maintain international peace and security
- To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples;
- To cooperate in solving international economic, social, cultural and humanitarian problems and in promoting respect for human rights and fundamental freedoms;

- To be a centre for harmonising the actions of nations in attaining these common ends.

Its principles are:

A. It is based on the sovereign equality of all its members;

B. All members are to fulfil in good faith their Charter obligations;

C. They are to settle their international disputes by peaceful means, and without endangering international peace and security, and justice;

D. They are to refrain from the threat or use of force against any other states;

E. They are to give the United Nations every assistance in any action it takes in accordance with the Charter, and shall not assist states against which the United Nations is taking preventive or enforcement action;

Nothing in the Charter is to authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.

This idealistic expression of the aims and purposes of the UN needs to be set against what has been possible, given the limits placed on the organisation by the most powerful states in it. The principles of the organisation make it clear that, if the UN is to work, the individual members must fulfil the obligations they undertake. Unlike the Concert of Europe, the UN is a permanent structure, but 'it is [nevertheless] an extension to the states system, not an alternative to it'.

It is an organisation of equal sovereign states and indeed all states in the General Assembly have one vote regardless of size or wealth; however, in the Security Council, which is the only organ with binding powers, some states are more equal than others. The UN is not an autonomous agent making decisions separate from the power politics of the world. The

Permanent Five, the victorious powers and allies of World War II, have a veto power and therefore their interests

are supreme when decisions are made on what actions the UN will take and how well resourced such action will be.

From 1945 to 1990, the Cold War ensured that all conflicts around the world were translated into tests of one or other of the superpowers and this precluded action in all but exceptional cases, such as Korea. As a result of the power of the Permanent Five in the Security Council, the UN has been prevented from acting on any matters that affect them or their interests - for example in Tibet, Chechnya or Central America. Moreover, the organisation, on the decision of the members, particularly the most powerful member the United States, has been deprived of funds, for both peacekeeping and for its humanitarian functions. What has been the result of this difference between ideal and reality? On the one hand, the hope that the UN might provide a solution to the problems of war and injustice has been dashed for many people. On the other hand, there is confusion over the UNs role and the place of the nation state within it.

This report accepts the argument that the UN is an essential element of international relations in the post Cold War world and therefore it will examine the organisation and Australia's response to it with a view to recommending how, in the committee's judgement, it might best fulfil its

role.



**ANS.5**

**What is Codification?**

Code is a consolidation of the statute law or statute collecting all the law relating to a particular subject. Codification is the process of translating into statutes or conventions, customary law and their rules arising from the decisions of tribunals, with little or no alteration of the law. Codification secures, by means of general conventions, agreements among the states upon certain topics of international law and acts as a check whereby the determination of particular law is not left to the caprices of judges. It also tends to reconcile conflicting views and renders agreement possible among different States.

## 2) Different Meanings of Codification

The term codification of international law ( Codification of the Law of Nations) has been employed 3 different senses -countries by the preparation and enactment of uniform statutes.

(2) A systematic re-statement of existing customary international law, for example as retaining and declaring the existing rules of international law.

(3) developing, amending and improving the law as it is re-stated

The committee on the progressive development of international law and its codification, set up by the United Nations General Assembly resolved the controversy between the second and third meaning of codification. Article 15 of the statutes of the International Law Commission distinguishes between the progressive development of international law and its codification.

According to Professor Woosley, the Codification of Law of nations (International law) must entail two processes -

(1) The scientific determination of the law, and

(2) the achievement of the universal acceptance of the law of so Defined by means of a multilateral convention Generally Accepted. He admitted that in character the second process was the legislative and political system.

Codification basically involves a process of legislation and consolidation.

## 3) Brief History of International Codification

The idea of codification of the law of nation (codification of international law) was first mooted by Bentham at the end of the 18th century. He suggested Utopian International Law which could be the basis of an everlasting peace between civilized States.

## 4) Difficulties of Codification

The main difficulty, however, in the way of codification is as Sir Cecil Hurst aptly remarks, "if it is left to government to meet in conference for the purpose of deciding what are the rules of International Law, it is inevitable that their efforts will be directed to agreeing or trying to agree on the rules of international law as they ought to be for example rules which would be appropriate to the present day requirements; and delegates will find that the requirement of government so diversified, so contrary that agreement is impossible.

**United Nations Charter and Codification**

United Nations Charter, Article 30 of the Charter gives ample scope for the codification of

International law. it reads -

"the general assembly shall initiate studies and make recommendations for the purpose of - a

(a) Promoting International co-operation in the political field and encouraging the progressive development of international law and its codification....."

The first Hague conference met in 1899 and drafted three conventions. The first of these was the famous Convention for the Pacific Settlement of International Disputes, which resulted in the establishment of the Hague Tribunal. The second was a convention respecting the laws and customs of war on land, which embodied many of the provisions of the Lieber code; the third was a convention adapting the Geneva Red Cross convention of 1864 to maritime warfare. Recourse to the Hague Tribunal was purely optional, but the two other conventions have been absorbed into the national law of the ratifying countries, and have proved important contributions to international law.

The work of the Hague conference of 1907 was of u much more exhaustive character than that of 1899. It promulgated thirteen new conventions, three of which amended the conventions of 1899, and eleven of which dealt with questions relating to the conduct of war. The Final Act of the second Hague conference recommended to the powers that a third conference be held in 1914, to consider among other things "the preparation of regulations relative to the laws and customs of naval war," and that a preparatory committee should be set up some two years in advance to ascertain "what subjects are ripe for embodiment in an international regulation." It was believed at this time that through the institution of the Hague conferences a means had been found of obtaining the consent of all nations, not only to the existing rules of international law, but to reforms in the existing rules and to the introduction of new rules. The chief source of international law in the future, it was said, would be the Hague conferences.

Some steps were taken toward the establishment of a preparatory committee for the proposed third Hague conference, but on June 22, 1914, the Government of the United States suggested postponement of the conference until 1916, and soon thereafter the war so changed the international situation that the project for a new conference was forgotten.

**International Law and the World War**

One of the conventions adopted at the second Hague conference called for the creation of an international prize court to which appeals might be taken from the prize courts of belligerent, nations. It soon became apparent, however, that in the absence of a clear understanding of the rules of prize law none of the great powers would intrust final jurisdictional power to an international court. This situation led Great Britain to call a conference on international maritime law, which resulted in the signature on February 26, 1909, of the Declaration of London by the delegates of Great Britain, France, Italy, Japan, Germany, Austria, the Netherlands, and the United States.

The Declaration of London laid down a long series of rules which were asserted in its preamble to "correspond in substance with the generally recognized principles of international law." This statement was not strictly accurate and the declaration never was ratified by any of the governments concerned,[9] although its provisions were observed by both belligerents in the Italo-Turkish War. The Declaration of Paris had similarly been observed by both belligerents in the Spanish-American War, although neither was a party to that declaration.

Soon after the outbreak of the World War, President Wilson addressed a note to the belligerents suggesting that they accept the Declaration of London in its entirety as a code of international law. Such action, it was urged, would prevent the grave misunderstandings between belligerents and neutrals that were certain to arise in the absence of a clear understanding of their respective rights at sea. Germany and Austria announced their readiness to accept the President's proposal, if their enemies would do likewise. The British government replied that it could observe the provisions of the declaration only in so far as they did not conflict with the "efficient conduct" of naval operations. The United States thereupon withdrew its suggestion, and this opportunity to establish the international law of the sea in time of war on a firm basis was lost.

The principles of international law, as they had been understood prior to the World War, were violated by both sets of belligerents during the conflict, leading finally to the entry of the United States as a belligerent as a result of Germany's submarine campaign. At the end of the war the law governing the use of the sea in time of war was left in a state of chaos. "If a war occurred today a belligerent could with Allied precedent justify almost any conceivable practice."

Confusion in other branches of international law was created by the terms of the Versailles treaty. Germany admitted at the peace conference that her violation of the neutrality of Belgium at the outbreak of the war was a "breach of international law" and recognized the "principle of responsibility for violation of international law." She pointed, however, to other violations by the Allies during the war, and vigorously protested against many provisions of the Versailles treaty on the ground that they constituted new violations of the established principles of international law. These included certain provisions which deprived Germany of her place of equality in trade, certain provisions in regard to German colonies and German rights and interests outside Germany, and the provisions in regard to the trial of the Kaiser and penalties in general. The Allies replied either that the Germans were mistaken or that there was "no universally recognized rule of international law" as to the matter in question, and that they therefore were free to deal with it "in the most convenient manner."

**The League and the Law of Nations**

The preamble of the covenant of the League of Nations—Part I of the Versailles treaty—states it to be one of the objects of the League "to achieve international peace and security…. by the firm establishment of the understandings of international law as the actual rule of conduct among governments." The covenant makes no further reference to international law and no specific provision for realization of the purpose set out in its preamble. Attention was directed to this omission by Elihu Root soon after the first draft of the covenant was made public, February 14, 1919. In a letter to Senator Lodge, he said:

> International law is not mentioned at all except in the preamble; no method is provided and no purpose is expressed to insist upon obedience to law, to develop law, to press forward agreement on its rules and recognition of its obligations. All questions of right are relegated to the investigation and to the recommendation of a political body to be determined as matters of expediency.

Advantage of codification

- **Certainty:**-By codification law becomes certain and uncertain as it generally is in precedent and custom.

- **Simplicity-** The codification makes law simple and accessible to everybody. By codification law on any particular point is made accessible and known to everyone, so that the citizen come in a position to know their rights and duties well.
- **Logical Agreement:-** By codification law is logically arranged in a coherent form and there occurs no chance of conflicts arising among the different provisions of law.
- **Stability:–** The codification makes the law simple and stable. Stability is very essential for law so that the people may have confidence in it and the legal transaction may be made easily.
- **Planned Development:-** Codification bring uniformity, which in turn helps in the planned development of the country.
- **Unity:-** Codified Law has a uniform and wider application. This helps in developing affinity and unity among the people, who are governed by the same laws.

**ANS.6**

he International Court of Justice Statute defines customary international law in Article 38(1)(b) as "a general practice accepted as law".[4] This is generally determined through two factors: the general practice of states and what states have accepted as law (opinio juris sive necessitatis).

There are several kinds of customary international laws recognized by states. Some customary international laws rise to the level of *jus cogens* through acceptance by the international community as non-derogable rights, while other customary international law may simply be followed by a small group of states. States are typically bound by customary international law regardless of whether the states have codified these laws domestically or through treaties.

***Jus cogens***

A peremptory norm (also called *jus cogens*, Latin for "compelling law") is a fundamental principle of international law which is accepted by the international community of states as a norm from which no derogation is ever permitted (non-derogable). These norms are rooted from Natural Law principles, and any laws conflicting with it should be considered null and

void. Examples include various international crimes; a state violates customary international law if it permits or engages in slavery, torture, genocide, war of aggression, or crimes against humanity.

*Jus cogens* and customary international law are not interchangeable. All *jus cogens* are customary international law through their adoption by states, but not all customary international laws rise to the level of peremptory norms. States can deviate from customary international law by enacting treaties and conflicting laws, but *jus cogens* are non-derogable.

Codification of international customary law

Some international customary laws have been codified through treaties and domestic laws, while others are recognized only as customary law.

The laws of war, also known as *jus in bello*, were long a matter of customary law before they were codified in the Hague Conventions of 1899 and 1907, Geneva Conventions, and other treaties. However, these conventions do not purport to govern all legal matters that may arise during war. Instead, Article 1(2) of Additional Protocol I dictates that customary international law governs legal matters concerning armed conflict not covered by other agreements.

Definition of custom:

".. not only must the acts concerned amount to a settle practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (...) The States concerned must therefore feel that they are conforming to what amounts to a legal obligation."

North Sea Continental Shelf case – ICJ, 1969



**State practice**

When examining state practice to determine relevant rules of international law, it is necessary to take into account every activity of the organs and officials of states that relate to that purpose. There has been continuing debate over where a distinction should be drawn as to the weight that should be attributed to what states do, rather than what they say represents the law. In its most extreme form, this would involve rejecting what states say as practice and

relegating it to the status of evidence of *opinio juris*. A more moderate version would evaluate what a state says by reference to the occasion on which the statement was made. It is only relatively powerful countries with extensive international contacts and interests that have regular opportunities of contributing by deed to the practice of international law. The principal means of contribution to state practice for the majority of states will be at meetings of international organizations, particularly the UN General Assembly, by voting and otherwise expressing their view on matters under consideration. Moreover, there are circumstances in which what states say may be the only evidence of their view as to what conduct is required in a particular situation.

The notion of practice establishing a customary rule implies that the practice is followed regularly, or that such state practice must be "common, consistent and concordant".Given the size of the international community, the practice does not have to encompass all states or be completely uniform. There has to be a sufficient degree of participation, especially on the part of states whose interests are likely to be most affected, and an absence of substantial dissent. There have been a number of occasions on which the ICJ has rejected claims that a customary rule existed because of a lack of consistency in the practice brought to its attention.

Within the context of a specific dispute, however, it is not necessary to establish the generality of practice. A rule may apply if a state has accepted the rule as applicable to it individually, or because the two states belong to a group of states between which the rule applies.

A dissenting state is entitled to deny the opposability of a rule in question if it can demonstrate its persistent objection to that rule, either as a member of a regional group or by virtue of its membership of the international community. It is not easy for a single state to maintain its dissent. Also, rules of the *jus cogens* have a universal character and apply to all states, irrespective of their wishes.

Demand for rules that are responsive to increasingly rapid changes has led to the suggestion that there can be, in appropriate circumstances, such a concept as "instant custom". Even within traditional doctrine, the ICJ has recognized that passage of a short period of time is not necessarily a bar to the formation of a new rule. Because of this, the question is sometimes raised as to whether the word "custom" is suitable to a process that could occur with great rapidity.

EXAMPLES OF CUSTOMARY RULES:

1. Diplomatic immunity

2. Freedom of outer space

3. Delimitation of continental shelf, principle of open sea

FORMATION OF INTERNATIONAL CUSTOMARY LAW:

A uasge is generally understood as a states practice.

Following elements tends to convert usage into custom:

1. Duration- generally it is long duration of time. But it is been seen that a usage could also be converted into custom in short period od time

2. Uniformity of pactice

3. consistency

4. Reasonableness

5. Consent of individuals and states

**ANS 7.**

TREATIES:

Treaties and conventions are the persuasive source of international law and are considered "hard law." Treaties can play the role of contracts between two or more parties, such as an extradition treaty or a defense pact. Treaties can also be legislation to regulate a particular aspect of international relations or form the constitutions of international organizations. Whether or not all treaties can be regarded as sources of law, they are sources of obligation for the parties to them. Article 38(1)(a) of the ICJ, which uses the term "international conventions", concentrates upon treaties as a source of contractual obligation but also acknowledges the possibility of a state expressly accepting the obligations of a treaty to which it is not formally a party.

For a treaty-based rule to be a source of law, rather than simply a source of obligation, it must either be capable of affecting non-parties or have consequences for parties more extensive than those specifically imposed by the treaty itself.

Thus, the procedures or methods by treaties become legally binding are formal source of law which is a process by a legal rule comes into existence: it is law creating.

The term "*treaty*" is used as a generic term embracing all kinds of international agreements which are known by a variety of different names such as, *conventions, pacts, general acts, charters, statutes, declarations, covenants, protocol*s, as well as, the name *agreements* itself. A treaty may be defined as an international agreement concluded between States in written form and governed by International Law.

The law-making treaties constitute a primary source of International Law. Since the middle of the nineteenth century, there has been an astonishing development of law-making treaties. The rapid expansion of this kind of treaties has been due to the inadequacy of customs in meeting the urgent demands arose from the changes which have been transforming the whole structure of international life. Law-making treaties have been concluded to regulate almost every aspect concerning the international community. Examples of important treaties are: the *Charter of the United Nations*, the four *Geneva Conventions of 1949*, the *Vienna Convention on Diplomatic Relations* of 1961, the *International Covenant on Civil and Political Rights* of 1966, the *Convention on the Law of the Sea* of 1982, and the *Outer Space Treaty* of 1967.

In contrast with the process of creating law through custom, treaties are a more modern, more deliberate and speedy method. They are of growing importance in International Law. Their role in the formation of new rules of International Law increases day after day. Today, the law-making treaties are considered the most important primary source of Public International Law.

**Treaties as custom**

Some treaties are the result of codifying existing customary law, such as laws governing the global commons, and jus ad bellum. While the purpose is to establish a code of general application, its effectiveness depends upon the number of states that ratify or accede to the particular convention. Relatively few such instruments have a sufficient number of parties to

be regarded as international law in their own right. The most obvious example is the 1949 Geneva Conventions for the Protection of War Victims.

Most multi-lateral treaties fall short of achieving such a near-universal degree of formal acceptance and are dependent upon their provisions being regarded as representing customary international law and, by this indirect route, as binding upon non-parties. This outcome is possible in a number of ways:

- When the treaty rule reproduces an existing rule of customary law, the rule will be clarified in terms of the treaty provision. A notable example is the Vienna Convention on the Law of Treaties 1969, which was considered by the ICJ to be law even before it had been brought into force.
- When a customary rule is in the process of development, its incorporation in a multilateral treaty may have the effect of consolidating or crystallizing the law in the form of that rule. It is not always easy to identify when this occurs. Where the practice is less developed, the treaty provision may not be enough to crystallize the rule as part of customary international law.
- Even if the rule is new, the drafting of the treaty provision may be the impetus for its adoption in the practice of states, and it is the subsequent acceptance of the rule by states that renders it effective as part of customary law. If a broad definition is adopted of state practice, the making of a treaty would fall within the definition. Alternatively, it is possible to regard the treaty as the final act of state practice required to establish the rule in question, or as the necessary articulation of the rule to give it the *opinion juries* of customary international law.
- Convention-based "instant custom" has been identified by the ICJ on several occasions as representing customary law without explanation of whether the provision in question was supported by state practice. This has happened with respect to a number of provisions of the Vienna Convention on the Law of Treaties 1969. If "instant custom" is valid as law, it could deny to third parties the normal consequences of non-accession to the

**The United Nations Charter**

Pursuant to Chapter XVI, Article 103 of the United Nations Charter, the obligations under the United Nations Charter overrides the terms of any other treaty. Meanwhile,

its Preamble affirms establishment of the obligations out of treaties and source of international law.

Treaties are the principal source of Public International Law.

The **Vienna Convention on the Law of Treaties** defines a 'treaty' as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation' (Article 2(1)(a)).

A treaty is an agreement between sovereign States (countries) and in some cases international organisations, which is binding at international law. An agreement between an Australian State or Territory and a foreign Government will not, therefore, be a treaty. An agreement between two or more States will not be a treaty unless those countries intend the document to be binding at international law.

Treaties can be bilateral (between two States) or multilateral (between three or more States). Treaties can also include the creation of rights for individuals.

Treaties are commonly called 'agreements', 'conventions', `protocols' or `covenants' , and less commonly `exchanges of letters'. Frequently, `declarations' are adopted by the UN General Assembly. Declarations are not treaties, as they are not intended to be binding, but they may be part of a process that leads ultimately to the negotiation of a UN treaty. Declarations may also be used to assist in the interpretation of treaties.

TYPES OF TREATIES

:1. UNILATERAL

2. BILATERAL/MULTILATERAL

ANS 8.

***GENERAL PRINCIPLES OF LAW***

Article 38 of the Statute of the ICJ refers to "*the general principles of law recognized by civilized nations*" (all nations are now considered as civilised) as a primary source of International Law. This source is listed the third after international conventions and international customs. The Court shall apply the general principles of law in cases where treaties and customs provide no rules to be applied.

There is no agreement on what the term "*general principles of law*" means. Some say it means general principles of international law; others say it means general principles of national law. Actually, there is no reason why it should not mean both; the greater expansion in the meaning of this term, the greater chance of finding rules to fill the gaps in Treaty Law and Customary Law.

There are various opinions as to the origin of the general principles of law. Some regard them as being originated from the *Natural Law* which underlies the system of International Law and constitutes the criteria for testing the validity of the positive rules. Others regard them as stemmed from the national legal systems (*Positive Law*) and have been transplanted to the international level by recognition.

As is true of other aspect of international law, the question of general principles of law is a subject of disagreement. Even the drafting materials, the *travaux préparatoires* of the drafting committee reveals different views. The American member of the drafting committee, Elihu Root appeared to have in mind principles recognised in national legal systems. Article 38(1)(c) of the Statute of the ICJ (UN 1945) refers to the general principles of law recognised by civilised nations, not general principles of international law. However, there is reserve about inferring international law from municipal law especially if 'Civilised Nations' was intended to mean western nations. A reason for the inclusion of this source of international law is to assist in making decisions where there are gaps in the law. This may allow an international court to avoid declaring the matter is legally unclear, *non liquet*, and thus decline to resolve the dispute in question. Some basic principles of law commonly cited include: The principle of good faith, which is being faithful to a sense of obligation; the bar against a party raising a claim again after it has been settled by judicial decision (*res judicata*); and the bar that precludes taking a position which is contrary to a position already established either by previous admission or action and legally determined as being true (*estoppel*).

he scope of general principles of law, to which Article 38(1) of the Statute of the ICJ refers, is unclear and controversial but may include such legal principles that are common to a large number of systems of municipal law. Given the limits of treaties or custom as sources of international law, Article 38(1) may be looked upon as a directive to the Court to fill any gap in the law and prevent a nonliquet by reference to the general principles.

In earlier stages of the development of international law, rules were frequently drawn from municipal law. In the 19th century, legal positivists rejected the idea that international law could come from any source that did not involve state will or consent but were prepared to allow for the application of general principles of law, provided that they had in some way been accepted by states as part of the legal order. Thus Article 38(1)(c), for example, speaks of general principles "recognized" by states. An area that demonstrates the adoption of municipal approaches is the law applied to the relationship between international officials and their employing organizations, although today the principles are regarded as established international law.

The significance of general principles has undoubtedly been lessened by the increased intensity of treaty and institutional relations between states. Nevertheless, the concepts of estoppel and equity have been employed in the adjudication of international disputes. For example, a state that has, by its conduct, encouraged another state to believe in the existence of a certain legal or factual situation, and to rely on that belief, may be estopped from asserting a contrary situation in its dealings. The principle of good faith was said by the ICJ to be "one of the basic principles governing the creation and performance of legal obligations". Similarly, there have been frequent references to equity. It is generally agreed that equity cannot be employed to subvert legal rules (that is, operate *contra legem*). This "equity as law" perception is reinforced by references to equitable principles in the text of the United Nations Convention on the Law of the Sea 1982, though this may be little more than an admission as to the existence, and legitimation, of the discretion of the adjudicator.

However, the principles of estoppel and equity in the international context do not retain all the connotations they do under common law. The reference to the principles as "general" signify that, if rules were to be adapted from municipal law, they should be at a sufficient level of generality to encompass similar rules existing in many municipal systems. Principles of municipal law should be regarded as sources of inspiration rather than as sources of rules of direct application.

The statutory recognition of *res judicata* is—according to most—found in Article 38(1)(c) of the ICJ Statute, as a general principle of law recognized by civilized nations In fact, when Lord Phillimore was entrusted in 1920, by the Advisory Committee of Jurists, with the task of drafting the PCIJ's Statute, he stated that 'the general principles […] were these which were accepted by all nations *in foro domestico*, such as certain principles of procedure, the principle of good faith, and the principle of *res judicata*'. From that point onwards, the idea of *res judicata*, deeply embedded in domestic systems, Brought into public international law by virtue of Article 38 (1)(c) of the ICJ Statute, became popular .

Reciprocity in IL can be best described as a creator of balance between the interests and actions of States. In effect, it creates a balance between the rights, duties and obligations of States where States can have a sense of balance and fairness in their respective duties and obligations but also with respect to their rights. Reciprocity plays a pivotal role in balancing interests of States, since inter-State negotiations include a degree of equalising gains and advantages in the light of the various interests of each State

ANS 9

A **United Nations General Assembly Resolution** is a decision or declaration voted on by all member states of the United Nations in the General Assembly.

General Assembly resolutions usually require a simple majority (50 percent of all votes plus one) to pass. However, if the General Assembly determines that the issue is an "important question" by a simple majority vote, then a two-thirds majority is required; "important questions" are those that deal significantly with maintenance of international peace and security, admission of new members to the United Nations, suspension of the rights and privileges of membership, expulsion of members, operation of the trusteeship system, or budgetary questions.

the legal effects of resolutions of the United Nations Security Council (SC) and General Assembly (GA), as established in the judgments and opinions of the International Court of Justice (ICJ), have focused on binding effect, with only passing references to other substantive effects such as authorizing effect and (dis)empowering effect or to the modal

effects that shape them and the factual and legal determinations that trigger them.1 This article aims to correct that imbalance.

The effects differ according to the type of resolution.2 The term 'resolution' as used in UN practice has a generic sense, including *recommendations* and *decisions*, both of which have a vague and variable meaning in the Charter.3 The Court, on the other hand, reserves the expression 'decision' for binding resolutions and 'recommendation' for non-binding ones.4 A resolution is 'binding' when it is capable of creating obligations on its addressee(s).5 There is some disagreement over whether *declarations*, which in theory only interpret the Charter or assert the content of general international law,6 constitute a sub-category of recommendations or a separate category. Our analysis will show that there is a point in treating these as a separate category. Note that a resolution, as a formal instrument, may combine different provisions that, substantively, respectively recommend, decide or declare. These three expressions will here be used in their substantive meaning, whereas 'resolution' will, depending on the context, either be a generic substantive term or designate the formal instrument.

Other factors relevant for the effects are the conventional7 or customary8 legal basis of the resolutions, their compatibility with the Charter (*intra vires* or *ultra vires*),9 their addressees (one member, some members, all members, other UN organs ...), their subject matter (to which the Charter may attach different legal consequences), their terminology (*shall* as opposed to *should*, *recommend* as opposed to *demand*, etc.), and, for the possible effects on international customary law, the ways they are adopted, who and how many vote for and against them, and perhaps even why they do so.10 But the title of the resolutions (declaration, code, charter...) is irrelevant, as is the express or implied nature of the powers upon which their adoption is based.11

The most fundamental factor is whether the effects are intrinsic or extrinsic. Intrinsic effects stem directly and immediately from the adoption of the resolution, on the basis of powers supplied by a treaty or the customary law internal to it (usually the UN Charter, but possibly another treaty making use of the existing UN institutional structure12). Extrinsic effects spring from the resolution but are, due to the adopting body's lack of the necessary powers, directly based on international customary law.13 The difference between the two hypotheses is the absence or presence, between the resolution and general international law, of an intermediate legal basis providing the adopting body with the relevant special powers.

There are three basic types of legal effects.14 A legal rule, when triggered by a determination that the conditions for its application are fulfilled, states the obligations, rights and powers that result.15 A resolution may therefore have the legal effect of (i) creating obligations, rights and/or powers (which we shall call 'substantive effects')16, and/or (ii) making determinations17 of facts (e.g. that an alleged fact is true) or legal situations (e.g. that an obligation was violated), which trigger the substantive effects ('causative effect'). To this should be added (iii) how and when the substantive effects operate ('modal effects'). Each of these categories has a dual nature according to whether the effects are intrinsic or extrinsic. By showing this, the present article aims to contribute to the basic theory of the legal effects of unilateral instruments in public international law.18

Several issues are closely related to the present topic, yet fall outside of it. Sometimes there is only an illusion of legal effects. This is the case when a resolution simply restates an obligation, a right or a power that already exists. Declarations in principle only interpret or restate the law, in which case they have no legal effect. Likewise, a resolution which merely interprets the Charter does not, in theory, have any legal effect of its own. To the extent that it details and substantially adds to the Charter, any ensuing legal effect does not come from the resolution of a given organ, but from the fact that it may be considered generally acceptable by UN Members.19 Here we find legal effects, but they do not originate in the resolution. Legal effects deriving from someone's (anticipatory or subsequent) acceptance of a resolution, or the particular way in which it was adopted, or obligations protracted on its basis,20 do not stem from the resolution itself.

The ICJ has not recognized any intrinsic legal effects based on customary norms internal to the UN legal order or operating on general international law.21 Hence, this section is limited to effects based on treaty law and operating on the UN legal order. Most of the Court's discussions of the legal effects of GA and SC resolutions have concerned the existence, force and scope of binding effect. But it has also dealt with authorizing effect, which is not necessarily the mirror image of binding effect, and (dis)empowering effect. Finally, the Court has begun to outline its approach to the causative and modal effects respectively triggering and shaping the substantive ones.

**A Binding Effect**

Discussions of binding effect abound in ICJ jurisprudence and legal literature. Consequently, this section will only provide a concise overview. Only decisions have binding effects; recommendations do not.22 Crudely put, the decisional powers of the GA are restricted to 'organizational' matters internal to the UN legal order (including semi-external matters such as the budget, or admission, suspension and expulsion of members), while the SC also possesses decisional powers in the 'operational' realm of international peace and security.23

***1 The Binding Effect of GA Decisions***

The binding effect of GA decisions is limited, *ratione materiae*, to organizational matters, but may cover, *ratione personae*, the entire UN sphere.

Although GA resolutions are recommendatory as a rule,24 especially regarding external relations with Member States,25 the Court has recognized the binding legal effect of GA decisions pertaining to the admission of new Member States,26 voting procedure,27 or apportionment of the budget,28 and in general has confirmed that the Court possesses certain powers of decision.29 The Court has never clarified whether the GA has any decisional powers in mandate/trusteeship matters.30 Resolutions of the GA have no binding effect in the operational realm of international peace and security. Neither the GA's budgetary powers in this area, nor its enforcement powers to suspend or expel UN Members, fall outside of the organizational sphere.31

*Ratione personae*, GA decisions obviously bind their (valid) addressees. They may also bind the UN at large, and consequently all Member States, e.g. through their regular contributions to the budget.32 This generalized effect includes those that voted against the decision, such as the trustee state in questions pertaining to its trusteeship.33 So the binding scope of GA decisions covers the entire internal UN sphere.

***2 The Binding Effect of SC Decisions***

The ICJ has not definitively decided whether SC decisions possess an overriding binding effect, but it has specified that the binding effect includes, *ratione materiae*, operational matters and covers, *ratione personae*, all Member States.

Unlike the recommendations of the SC,34 its decisions have binding force,35 but the Court has made only a provisional finding that SC decisions have an overriding normative power

capable of pre-empting obligations flowing from traditional sources of international law.36 Recognizing such overriding binding force would give a secondary source of UN law (decisions) a greater normative value than many primary sources of international law (treaties) – thereby giving the SC a potentially very disruptive power – and would ultimately place great faith in the SC truly acting on behalf of all Member States.37

*Ratione materiae*, the binding effect of SC resolutions belongs to the realm of international peace and security38 and includes enforcement under Chapter VII of the UN Charter,39 but is not limited to that.40 Since just about any significant international event or situation can be characterized as a threat to peace and security,41 the scope of the SC's binding powers, if combined with an overriding binding force, would make the SC a dauntingly powerful organ. Whether a specific SC resolution is binding is determined by the language used in it, the discussions leading to it, the Charter provisions invoked, etc.,42 all with the purpose of establishing the *intent* of the SC.43 The precise content of the binding effect is left to the SC itself,44 but the Court has found certain 'implicit' legal effects and, inversely, put some limits on the effects45 when these conflict with the principles and purposes in Chapter I of the UN Charter.46 This limitation is too vague to have much practical value in the absence of any organ competent to review the validity of SC resolutions.47

*Ratione personae*, an SC decision may bind all UN Member States, including 'those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council'.48 As for non-Member States, the most coherent interpretation of a difficult passage in the *Namibia* opinion rejects any direct binding effect.49 This interpretation respects the basic principle that treaties only bind parties, and avoids the difficult question of whether the UN Charter is subject to special rules within the law of treaties. It also leads to the same practical outcome since just about every state is now a member of the UN.

**Impact on International Customary Law?**

If a UN resolution merely interprets pre-existing substantive international norms, it may be helpful for understanding and applying them. If it restates existing international norms, it may have an evidentiary value for establishing these. But in neither case does the resolution have any impact on the state of the law. Granted, in practice it can be hard to draw the line between what, on the one hand, is merely interpretative or declaratory and what, on the other

hand, is truly creative. The Court has often been vague in separating the impact of UN resolutions on customary law from their interpretative or evidentiary value. After having been entirely unclear in the 1970s, the Court gained in clarity in the 1980s and then retreated again in the 1990s.

In the 1970s, the Court identified GA declarations as a 'further important stage' in the development of international law,96 or inferred the 'existing rules of international law' from them,97 but made no mention of how or why this could be done.98

The 1986 *Nicaragua* judgment achieved greater clarity. For instance, it found that the description of acts constituting armed attacks annexed to GA Resolution 3314 (XXIX) 'may be taken to reflect customary international law'.99 The word 'reflect' indicates that GA resolutions are here used as *evidence* of customary law100 and are therefore not given any legal effect.

But the *Nicaragua* opinion also took a different approach, this time confirming that UN resolutions may have an impact on customary law. Searching for an *opinio juris* concerning the rule of abstention from the threat or use of force against the territorial integrity or political independence of other states, the Court found that:

> This *opinio juris* may, though with all due caution, be deduced from, inter alia, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.101

SECURITY COUNCIL RESOLUTIONS:

The Security Council has primary responsibility for the maintenance of **international peace and security**.

Some of its actions have international law implications, such as those that relate to **peacekeeping missions, ad hoc tribunals, and sanctions**. In accordance with Article 13(b) of the Rome Statute, the Security Council can refer certain situations to the Prosecutor of the International Criminal Court (ICC), if it appears international crimes (genocide, crimes against humanity, war crimes, the crime of aggression) have been committed.

ANS10

EQUITY:

According to Montesquieu, human reason is the heart of law, and for that reason it is not difficult to find similarities in the fundamental principles of all legal systems. Human reason should be supported by morality and a sense of justice. Thus, law comes closer to equity. The relationship between law and equity found expression in ancient laws. It found expression not only in the Biblical' law but also in other scriptures. The canon law of Rome gave a definite recognition to equity, and in fact, the term "equity" is derived from the Roman aequitas. Early societies used to interpret the sanctity and function of law in relation to morality.

the importance of equity in the administration of justice can hardly be over-emphasised. The recognition of this aspect of justice has been explicit in some legal systems and implicit in others, but nowhere can a clear definition of equity be found. Consequently, this has given rise to much speculative work on the nature, content, and uses of equity not only in municipal legal systems, but also in the sphere of international law.

According to Jowitt's Dictionary of English Law,3 "equity" means "fairness or that rule of conduct which in the opinion of a person or class ought to be followed by all other persons." The term "fairness" is the crucial word in this context. Despite the jurisprudential complexity attached to the word, it may be safer to assume that the meaning of the term should be traced

in its benignant spirit and in the complex of circumstances. Jowitt further elaborated that moral equity "should be the genius of every kind of human jurisprudence; since it expounds and limits the language of the positive laws, and construes them not according to their strict letter, but rather in their responsible and benignant spirit." However, in all fairness it may be stated that in his attempt to "define" equity, Jowitt "described" equity. Because the connotation of the term covers a wide area, it is difficult to define it. Therefore, equity has been descriptive rather than definitive.

Therefore, the meaning of equity can always be found in its attributes, which are traceable both in the municipal and international legal systems. It is in this sense that equity has been applied by international tribunals, arbitral or otherwise, in the administratin the North Sea Continental Shelf Cases,"' the International Court has been quite specific as to the meaning of equity. The Court said: On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves-that is to say, rules binding upon States for all delimitations;-in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field, namely:

(a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;

(b) (b) the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied,-for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved. The Court found that the Continental Shelf of any state must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another state. What was noticeable in the

judgment was that as "no one single method of delimitation was likely to prove satisfactory in all circumstances, ... [a] delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and. . . that it should be effected on equitable

Therefore, on a further interpretation of the Court's statement, it may be stated that even where "practice" is not uniform and consequently law is not uniform either, decisions should be effected on equitable principles not only to uphold justice but also to avoid inconsistency with certain basic legal notions. This is not true, of course, if the parties themselves agree to settle the dispute by agreement or to refer such a dispute to arbitration. The Court also found that in order to attribute appropriate meaning to equity, various relevant factors should be considered, as were geological and geographical factors in the present case,' and a reasonable degree of proportionality among factors should be maintained. However, the meaning of equity should not be extended too far. At this point caution should be exercised as to the elements which should be included in explaining the meaning of equity. First, in examining the growth of equity in international law, no attempt should be made to emphasise the contribution of any particular municipal legal system. Secondly, "equity" does not necessarily imply "equality," because in order to maintain equality in the theoretical sense, an inequity may be created.

ANS11.

MEANING AND DEFINITION:

**Recognition of state** - "***the formal acknowledgement or acceptance of a new state international personality by the existing States of the International community***".
It the acknowledgement by the existing state that a political entity has the characteristics of statehood

ESSENTIALS FOR RECOGNITION AS A STATE;

Under the International Law, Article 1 of the Montevideo Conference, 1933 defines the state as a person and lays down following essentials that an entity should possess in order to acquire recognition as a state:

1. It should have a **permanent population**.

2. A **definite territory** should be controlled by it.

3. There should be a **government** of that particular territory.

4. That entity should have the **capacity to enter into relations with other states**.

THEORIES OF RECOGNITION:

CONSTITUTIVE THEORY:

The main exponents related to this theory are **Oppenheim, Hegal and Anziloti**. According to this theory, **for a State** to be considered as an **international person**, its recognition by the existing states as a sovereign is required. This theory is of the view that only after recognition a State gets the status of an **International Person** and becomes a subject to International Law. So, even if an entity possesses all the characteristics of a state, it does not get the status of an international person unless recognized by the existing States. This theory does not mean that a State does not exist unless recognized, but according to this theory, a state only gets the exclusive rights and obligations and becomes a subject to International Law after its recognition by other existing States.

DECLARATORY THEORY:

The main exponents of the Declaratory Theory of Statehood are **Wigner, Hall, Fisher and Brierly.** According to this theory, any new state is independent of the consent by existing states. This theory has been laid down under Article 3 of the Montevideo Conference of 1933. This theory states that the existence of a new state does not depend on being recognized by the existing state. Even before recognition by other states, the new state has the right to defend its integrity and independence under International law.

MODES OF RECOGNITION:

There are two modes of recognition of State:

**1. DE FACTO RECOGNITION**

It is extended where a govt. has not acquired sufficient stability.

It is provisional (temporary or conditional0 recognition. It is not legal recognition. However, it is recognition in principle.

Three conditions for giving de-facto recognition.

(i) permanence

(ii) the govt. commands popular support

(iii) the govt. fulfills international obligations.

**2. DE JURE RECOGNITION:**

It is legal recognition.

It means that the govt. recognized formally fulfills the requirement laid down by International law.

De-jure recognition is complete and full and normal relations can be maintained.

EXAMPLES OF DE FACTO RECOGNITION:

One of the examples of de facto and de jure recognition is the recognition of the Soviet Union was established in 1917. It was de facto recognized by the government of UK in 1921 but it was not given de jure recognition until 1924.

Bangladesh was established in March 1971. India and Bhutan recognized it just after 9 months of establishment but the United States gave it legal recognition after nearly 1 year in April 1972.

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Bangladesh was established in March 1971. India and Bhutan recognized it just after 9 months of establishment but the United States gave it legal recognition after nearly 1 year in April 1972.

IMPLIED RECOGNITION:

When the existing state recognizes a newly formed state through any implied act, then it is considered as an implied recognition.

**Implied recognition** can be granted through any implied means by which a current state treats the newly formed state as an international person. The implied credit not granted through any official notification or declaration. The recognition through implied means varies from case to case.

**WITHDRAWAL OF DE JURE RECOGNITION:**

Withdrawal of **de jure recognition** is a very debatable issue under the **International Law.** Withdrawal of a de jure recognition is a very exceptional event. If strictly interpreted, the de jure recognition can be withdrawn.

Even though the process of recognition is a political act, de jure recognition is of legal nature. Jurists who consider de jure recognition as a political act considers it revocable.

Such revocation of de jure recognized states can be withdrawn only when a state loses the essential characteristics of statehood or any other exceptional circumstances. This type of revocation can be done expressly by the recognizing state by issuing a public statement.

**RETROACTIVE EFFECTS OF RECOGNITION:**

The **recognition** of a state or government is "**retroactive**" to the date when it first became established as a state or government. Although this may be true, under the existing doctrine of the English and American courts, for municipal purposes. When a state acquires recognition, it gains certain rights, obligations and immunities. It acquires the capacity to enter into diplomatic relations with other states. It acquires the capacity to enter into treaties with other states.

The state is able to enjoy the rights and privileges of international statehood. The state can undergo state succession. With the recognition of state comes the right to sue and to be sued. The state can become a member of the United Nations organization.

**ANS 12**

**EXTRADITION:**

In **Black's Law Dictionary**, extradition has been defined as "**The surrender by one state or Country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender.**"

Hence, Extradition is the act of sending a person from one jurisdiction to another where he/she is accused of committing a crime and is being demanded to get them tried as per the legal procedure in the sovereign demanding such person.

PURPOSE OF EXTRADITION:

Extradition is a process towards the suppression of crime. Criminals are therefore extradited so that their crimes may not go unpunished. Extradition acts as a warning to the criminals that they cannot escape punishment by fleeing to another state.Criminals are surrendered as it safeguards the interest of the territorial state. Extradition is based on reciprocity. A state which is requested to surrender the criminal today may have to request for extradition of a criminal on some future date. Extradition is done because it is a step towards achievement of international cooperation in solving international problems of a social character. The state on those territory the crime has been committed is in a better position to try the offender because the evidence is more freely available in that state only.

**LEGAL STATUS OF EXTRADITION:**

As per the Indian Law, the extradition of an escapee or fugitive from India to another nation or vice versa is dealt by the rules laid down in the Extradition Act, 1962. This law forms the legislative basis for extradition in India. The Extradition act deals with two schedules and five chapters. The Government of India till date has entered into Bilateral Extradition treaties with 42 countries to make the extradition process efficient and hassle-free. Apart from this, our country has entered into extradition arrangement with 9 countries as well. Extradition request can be made by India to any country. The countries with which India has a treaty have the obligation to consider the request due to the treaty between the two countries.

**DOCTRINE OF DOUBLE CRIMINALITY:**

Also known as the Principle of Dual Criminality, it is one of the most significant principles governing the law of extradition. It states that extradition process can only happen when the

criminal act under scrutiny is an offense in both the jurisdiction of the sovereign states. In order to ensure that a crime is recognized in both the states ,a list of offences is attached in the extradition laws of some states. But generally, a list of crimes is embodied in the treaties for which extradition is done.

**OPPORTUNITY OF FAIR TRAIL:**

Before the Extradition process is initiated by the requested state it is ensured that the fugitive will be given a chance to represent himself under a procedure of fair trial in the requesting state. This principle is read with the principle of non-inquiry, where the requesting state is under no obligation to subject its judicial procedures as per the punctilious evaluation criteria of the requested state. This principle isn't absolute and rigid in nature but the requested state can question the judicial procedure in the requesting state if the same is on the face of it is against the principle of law and justice. Also, political offenses (**crimes** directed against the security or government of a nation, such as treason, sedition, espionage, murder during a revolution, etc.) are generally excepted from **extradition**. As with any treaty, dramatic change to a nation's government can threaten the integrity of an **extradition** treaty. Extradition or non-extradition of its own nationals depends upon the wordings of the extradition treaties. Nationals may therefore be extradited if there is no bar in the national extradition law or in the treaty. But if the restriction is imposed therein regarding the extradition of its own nationals, it becomes a duty

**ANS 13**

**ASYLUM:**

Asylum is a Latin word and it derives its origin from a Greek word "Asylia" meaning inviolable place. The term asylum in common parlance means giving protection and immunity by a state to an individual from their native country. In day to day conversation, the term asylum is used interchangeably with the term refugee, there is difference between the two procedurally where a person who is still overseas seeks protection from a nation when

given patronage after reaching there is given the title of a refugee whereas in asylum the person seeks the protection from a nation after reaching there and hence is known as asylee or asylum seeker.

BASIS OF ASYLUM:

A state has a right to grant asylum to a person on the principle that it has a sovereign right to control over the individuals found on its territory. Thus, the right of territorial asylum has been conferred to a state on the basis of its sovereignty over the territory.

PURPOSE OF ASYLUM:

The main purpose of asylum is to give shelter to those who have well-rounded fear in their home countries of persecution. The Universal Declaration of Human Rights under article 14 (1), provides that "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

FORMS OF ASYLUM:

**TERRITORIAL ASYLUM:**

It is granted in the territorial boundary of a state providing asylum. Every sovereign state has the right to control and maintain jurisdiction on its territory, hence the decision to extradite someone or give them asylum is totally under its discretion. Thus a state has territorial sovereignty over all its subjects and aliens. Territorial asylum is based mainly on the national law of the sovereign.

**EXTRA-TERRITORIAL ASYLUM:**

This form of asylum is usually granted by a state beyond its state territory and usually at places which are not a part of its physical territory. In such case, a state providing asylum in its embassy established in a foreign state is called Diplomatic Asylum. Asylum may also be granted to asylee in Warships because they are exempted from the jurisdiction of the foreign

state in whose water it is operating. Such warships are under the patronage of the Flag state. The same is not the case with merchant's vessels as they are not immune to the provisions of international law. Hence, Extra-territorial Asylum is based on the framework of International Law Conventions.

**LEGAL STATUS OF ASYLUM:**

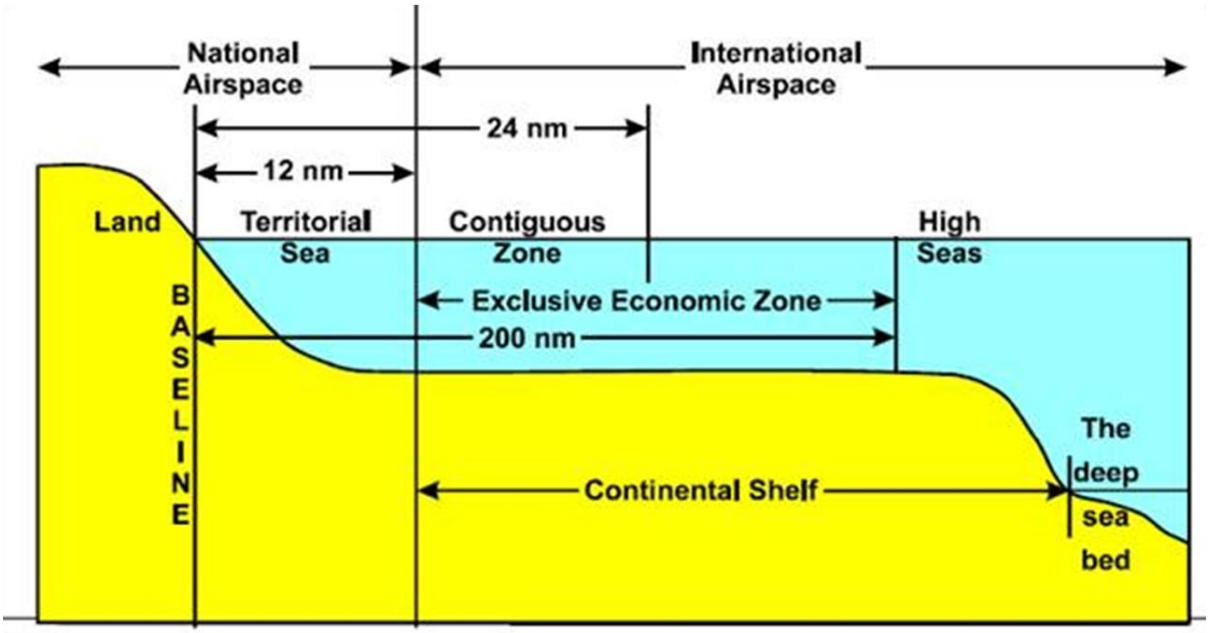
National and International law are the only two forms which support and govern the practice of Asylum.

India which is home to one of the largest refugee population in South Asia has no specific law dealing with the issue of asylum and is yet to enact one. Refugee and asylum seekers in India are subject to various non-specific laws like The Registration of Foreigners Act, 1939, The Foreigners Act, 1946, Foreigners Order, 1948, and Passport Act, 1920These laws are used by the Indian government officials in order to deal with the intricacies arising out of the entry of refugees and asylum seekers in our country. Since there is no specific asylum policy in India, the government grants asylum on a case-to-case basis.

**ANS 14.**

**TERRITORIAL SEA:**

The **law of the sea** is a body of customs, treaties, and **international** agreements by which governments maintain order, productivity, and peaceful relations on the **sea**. The entire sea was divided into 3 parts, viz. territorial sea, contiguous zone and the high seas.




UNCLOS:—

**Law of the Sea** is a body of international law governing the rights and duties of states in maritime environments. It concerns matters such as navigational rights, sea mineral claims, and coastal waters jurisdiction. While drawn from a number of international customs, treaties, and agreements, modern law of the sea derives largely from the United Nations Convention on the Law of the Sea (UNCLOS), effective since 1994, which is generally accepted as a codification of customary international law of the sea, and is sometimes regarded as the "constitution of the oceans". Law of the sea is the public law counterpart to admiralty law (also known as maritime law), which applies to private maritime issues, such as the carriage of goods by sea, rights of salvage, ship collisions, and marine insurance.

INNOCENT PASSAGE- RIGHT OF COASTAL STATES:

All States have the right of **innocent passage** through the territorial sea of another state, although there is no right of innocent air space passage. Innocent passage is considered moving through the territorial sea in a way that is not prejudicial to the security of the coastal State, including any stopping and anchoring necessary to ordinary navigation. Innocent passage implies two important **limits to the power of coastal State jurisdiction in the territorial sea:**

(1) the obligation not to hamper, deny, or impair the right of innocent passage; and

(2) the recognition of innocent passage even in the case of vessel-source pollution as long as the pollution is not willful and serious.

With notice, innocent passage may be suspended in specified areas of the territorial sea for security reasons.

**CONTIGUOUS ZONE:**

The **contiguous zone** is a band of water extending farther from the outer edge of the territorial sea to up to 24 nautical miles (44.4 km; 27.6 mi) from the baseline, within which a state can exert limited control for the purpose of preventing or punishing "infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory.

The same provision is being provided under article 24 of the Geneva convention and article 33 of united nations conventions on laws of the sea ,1982.

**ANS 15**

**EEZ:**

It is referred to as an area beyond and adjacent to the territorial waters and the limit of such zone is two hundred nautical miles from the baseline. Continental shelf was an older concept in international law to define maritime jurisdiction of the coastal state which has now largely been replaced worldwide by concept of EEZ which prescribes a uniform limit of 200 nauticle miles irrespective of the natural prolongation of the continental shelf. In this zone a coastal state has the exclusive right to exploit or conserve any resources found within the water ,on the sea floor or under the sea floors subsoil. These resources encompass both living and non-living resources.

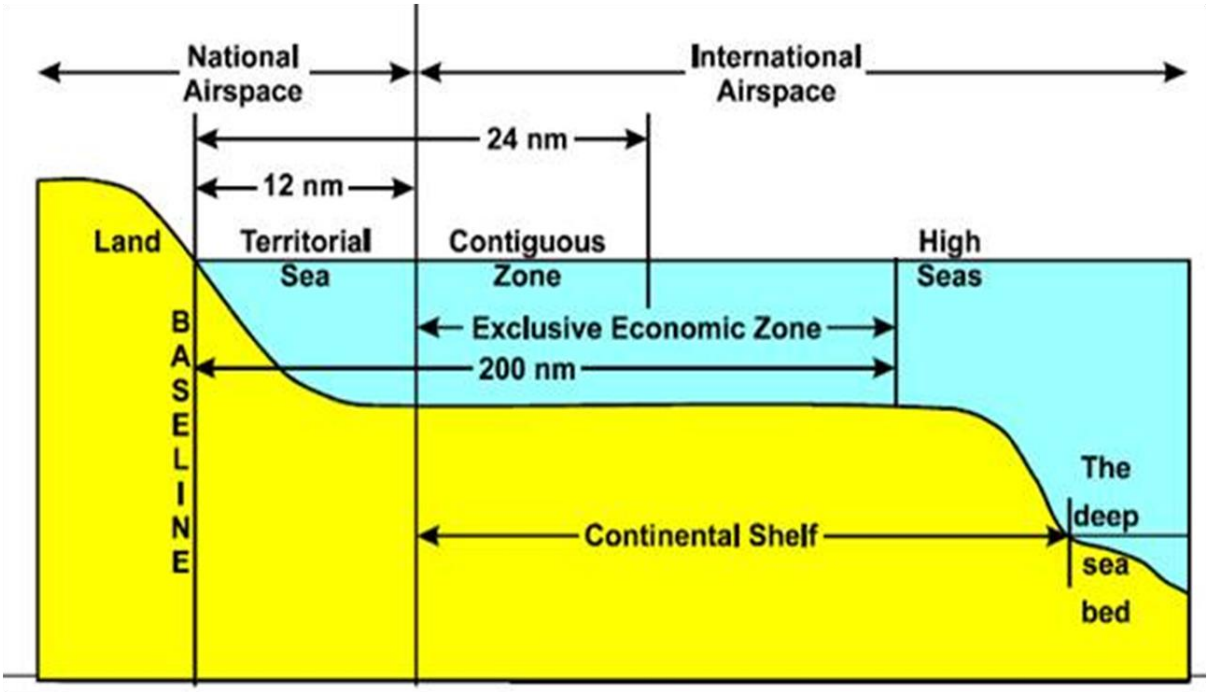
Offshore energy generation from waves, currents, wind. Art 56 of UNCLOS provides for the same provision.

**CONTINENTAL SHELF:**

The area of seabed around a large land mass where the sea is relatively shallow compared with the open sea . A continental shelf is a portion of a continent that is submerged under an

area of relatively shallow water known as a shelf sea. Under the united nations conventions on the law of the sea, the name continental shelf was given a legal definition as the stretch of the seabed adjacent to the shores of a particular country to which it belongs. THE COMMISSION ON THE LIMITS OF CONTINENTAL SHELF:

The definition of the continental shelf and criteria for the establishment of its outer units are set out in **Article 76** of the convention. Continental shelf is that part of the continental margin which is between the shoreline and the shelf break, or where there is no noticeable slope, between the shoreline and point where the depth of the superjacent water is approx. between 100 and 200 mtrs.




HIGH SEAS:—The high seas denote all parts of the sea that are not included in the EEZ, territorial se or internal waters of a State. The rule was formulated in 1609 by Grotius in his treatise *mare liberium* by arguing that the sea cannot be owned. Hence, all states whether coastal or landlocked shall be free to exercise therein the freedom of navigation, of overflight, of immersion, of fishing and of constructing artificial islands etc.

However, the regime has been considerably changed under the Convention on the Law of the Sea of 1982. Article 87(2) of the Convention lays down the limitation of the general nature on the freedom of high seas by stating that the freedom of the high seas "shall be exercised with due regard for the interests of other States in their exercise of the freedom of high seas."

CRIMES:

Piracy

Slavery

Unlawful trade etc



**ANS 16**

PROHIBITION OF USE F ORCE:

The use of force by states is controlled by both customary international law and by treaty law. The UN Charter reads in article 2(4):

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

This principle is now considered to be a part of customary international law, and has the effect of banning the use of armed force except for two situations authorized by the UN Charter.

Article 51 also states that: "Nothing in the present Charter shall impair the inherent right to individual or collective self-defence if an armed attack occurs against a state."

There are also more controversial claims by some states of a right of humanitarian intervention, reprisals and the protection of nationals abroad.

Typically measures short of armed force are taken before armed force, such as the imposition of sanctions.

The first time the Security Council authorized the use of force was in 1950 to secure a North Korean withdrawal from South Korea. Although it was originally envisaged by the framers of the UN Charter that the UN would have its own designated forces to use for enforcement, the intervention was effectively controlled by forces under United States command.

The major developments in international law is the prohibition of use of threat together with the use of force itself.

A system of collective sanctions against any offending state that uses force protects this prohibition

These sanctions are found in article 39- 51 of the UN charter-

To maintain international peace and security and to that end: to take effective collective measures for the prevention and removal of

1. threats to the peace

2. suppression of acts of aggression

3. other breaches of the peace and to bring about by peaceful means

4. settlement of international disputes

As according to article 1(1) of the UN charter is to maintain international peace, security and stability.

One way of achieving this goal is to prohibit the use of force amongst states.

In order to achieve this aim ,art 2(4) contains a prohibition on this use of force

The question whether a right of anticipatory self-defence has survived the UN Charter remains controversial, among States and among authors.

During the Cold War, one side seemed to take the position that action in self-defence was only lawful if an armed attack had actually been launched.

IMMINENT ATTACK -CASE LAW:

It is […] the Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorize the use of force to mount a pre-emptive attack against a threat that is more remote".

The application of the imminence criterion can be difficult in practice. A classic example is the Israeli attack on a nuclear plant in Iraq in 1981. On 7 June 1981, Israel bombed a research centre near Baghdad, destroying the Osirak nuclear reactor which, it said, was developing nuclear bombs that would have been ready for use against Israel in 1985.

The Security Council, after extended debate, unanimously and strongly condemned 'the military attack by Israel in clear violation of the Charter of the United Nations and the norms of international conduct.'

The debate focused on the necessity of Israel's actions. It was agreed that Israel had failed to exhaust all peaceful means for resolution of the matter. Israel had also failed to produce evidence that it was threatened with an imminent attack.

Such a legal basis is available, under the doctrine of humanitarian intervention,

conditions are (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;

(ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and

(iii)the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose)."

The provision of self defense is allowed until the un security council has intervened.

It could be both individual and collective self defence.

The best example is of Nicargua case,ICJ

Article 51, preserves the right to self defense and outlines the procedures to be followed in case of an armed attack.

The right of "collective self-defense" was enshrined in Article 51 of the 1945 United Nations Charter. It refers to the right of all UN countries to use military force to defend other member nations from attack. It has provided the basis for all UN-authorized military operations, from the Korean War onwards.

PERMISSIBLE USE OF FORCE:

It is observed that, an irregular forceful attack can prompt the use of force in case of armed attack

Eg- as in case of 9/11 attacks, where the security council allowed the US to use force against the terrorists.

The use of self defense is limited in customary international law

There is no right to pre-emptive self defense when an armed attack has occurred , a state does not have to wait for an armed attack to actually occur to use force.

LEADING CASE :NICARGUA VS. USA

***Overview:***

*The case involved military and paramilitary activities carried out by the United States against Nicaragua from 1981 to 1984. Nicaragua asked the Court to find that these activities violated international law.*



***Facts of the Case:***

In July 1979, the Government of President Somoza was replaced by a government installed by *Frente Sandinista de Liberacion Nacional* (FSLN). Supporters of the former Somoza Government and former members of the National Guard opposed the new government. The US – initially supportive of the new government – changed its attitude when, according to the United States, it found that Nicaragua was providing logistical support and weapons to guerrillas in El Salvador. In April 1981 the United States stopped its aid to Nicaragua and in September 1981, according to Nicaragua, the United States "decided to plan and undertake activities directed against Nicaragua".

The armed activities against the new Government was carried out mainly by (1) *Fuerza Democratica Nicaragüense* (FDN), which operated along the border with Honduras, and (2) *Alianza Revolucionaria Democratica* (ARDE), which operated along the border with Costa Rica. Initial US support to these groups fighting against the Nicaraguan Government (called "*contras*") was covert. Later, the United States officially acknowledged its support (for example: In 1983 budgetary legislation enacted by the United States Congress made specific provision for funds to be used by United States intelligence agencies for supporting "directly or indirectly military or paramilitary operations in Nicaragua").

Nicaragua also alleged that the United States is effectively in control of the *contras*, the United States devised their strategy and directed their tactics, and that the *contras* were paid for and directly controlled by the United States. Nicaragua also alleged that some attacks against Nicaragua were carried out, directly, by the United States military – with the aim to overthrow the Government of Nicaragua. Attacks against Nicaragua included the mining of Nicaraguan ports, and other attacks on ports, oil installations, and a naval base. Nicaragua

alleged that aircrafts belonging to the United States flew over Nicaraguan territory to gather intelligence, supply to the contras in the field, and to intimidate the population.

The United States did not appear before the ICJ at the merit stages, after refusing to accept the ICJ's jurisdiction to decide the case. The United States at the jurisdictional phase of the hearing, however, stated that it relied on an inherent right of collective self-defence guaranteed in A. 51 of the UN Charter when it provided "upon request proportionate and appropriate assistance…" to Costa Rica, Honduras, and El Salvador in response to Nicaragua's acts of aggression against those countries (paras 126, 128).

NOTE:THIS UNIT IS SMALL ,SO THE CONTENTS ARE OVERLAPPING

**ANS 20**

RESPONSIBLITY TO PROTECT:

The Responsibility to Protect (R2P or RtoP) is a global political commitment which was endorsed by all member states of the United Nations at the 2005 World Summit in order to address its four key concerns to prevent genocide, war crimes, ethnic cleansing and crimes against humanity.

Sometimes use of force can be linked with other political reasons when it comes to protection of nationals.

It is used as a veil to cover political agendas.

International non govt. organizations have also played a functional role to promote responsibility to protect

They are focused in perspective of human rights violations.

Importance of use of military force to avert cases of terrorism and associated activities.

E.g.- Kosovo's crisis in 1999

In cases of violation of human rights violations, humanitarian intervention could be justified.

Debating the right to "humanitarian intervention" (1990s) Following the tragedies in Rwanda and the Balkans in the 1990s, the international community began to seriously debate how to react effectively when citizens' human rights are grossly and systematically violated. The question at the heart of the matter was whether States have unconditional sovereignty over their affairs or whether the international community has the right to intervene in a country for humanitarian purposes. In his Millennium Report of 2000, then Secretary-General Kofi Annan, recalling the failures of the Security Council to act in a decisive manner in Rwanda and the former Yugoslavia, put forward a challenge to Member States: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?" From humanitarian intervention to the responsibility to protect (2001) The expression "responsibility to protect" was first presented in the report of the International Commission on Intervention and State Sovereignty (ICISS), set up by the Canadian Government in December 2001. The Commission had been formed in response to Kofi Annan's question of when the international community must intervene for humanitarian purposes. Its report, "The Responsibility to Protect," found that sovereignty not only gave a State the right to "control" its affairs, it also conferred on the State primary "responsibility" for protecting the people within its borders. It proposed that when a State fails to protect its people – either through lack of ability or a lack of willingness – the responsibility shifts to the broader international community

United Nations World Summit (2005) In September 2005, at the United Nations World Summit, all Member States formally accepted the responsibility of each State to protect its population from **genocide, war crimes, ethnic cleansing and crimes against humanity.** At the Summit, world leaders also agreed that when any State fails to meet that responsibility, all States (the "international community") are responsible for helping to protect people threatened with such crimes. Should peaceful means – including diplomatic, humanitarian

and others - be inadequate and national authorities “manifestly fail” to protect their populations, the international community should act collectively in a “timely and decisive manner” – through the UN Security Council and in accordance with the UN Charter – on a case-by-case basis and in cooperation with regional organizations as appropriate.

Implementing the responsibility to protect (2009) Based on the outcome document of the 2005 World Summit, a 2009 report by the SecretaryGeneral outlined a strategy around three pillars of the responsibility to protect: 1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement; 2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility; 3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the UN Charter.

Why do we need the responsibility to protect?

The responsibility to protect is a principle which seeks to ensure that the international community never again fails to act in the face of genocide and other gross forms of human rights abuse. “R2P,” as it is commonly abbreviated, was adopted by heads of state and government at the World Summit in 2005 sitting as the United Nations General Assembly. The principle stipulates, first, that states have an obligation to protect their citizens from mass atrocities; second, that the international community should assist them in doing so; and, third, that, if the state in question fails to act appropriately, the responsibility to do so falls to that larger community of states. R2P should be understood as a solemn promise made by leaders of every country to all men and women endangered by mass atrocities.

How does R2P affect the idea of sovereignty?

States have long accepted limits on their conduct, whether towards their own citizens or others. The UN Universal Declaration of Human Rights requires that states protect individual and social rights; the Geneva Conventions and various treaties and covenants prohibiting

torture, trafficking in persons, or nuclear proliferation similarly restrict the right of states to behave as they wish. At the same time, there has been a shift in the understanding of sovereignty, spurred both by a growing sensitivity to human rights and by a reaction to atrocities perpetrated upon citizens by their own leaders. Sovereignty is increasingly defined, not as a license to control those within one's borders, but rather as a set of obligations towards citizens. Kofi Annan spoke of the sovereignty of the individual as well as of the state. Francis Deng, the Special Adviser on the Prevention of Genocide and the former representative of the Secretary-General on internally displaced persons, developed the concept of "sovereignty as responsibility." And chief among those responsibilities, he and others argued, is the responsibility to protect citizens from the most atrocious forms of abuse. Simply put, people come first.



**PROPERTY LAW**

**LLB 306**

**Question1. Explain, in detail, what is meant by the term immovable property under Transfer of property act, 1882? What all is included in it? Differentiate it with movable property.**

Answer 1. The definition of "Immovable Property is given in Section 3 Transfer of Property states "Immovable Property does not include standing timber growing crops or grass". This definition of immovable property is neither clear nor complete it simply says that the property includes standing timber Growing crops or grass. It is not clear as to what it includes.

According to Section 3(26) of the General Clauses Act, AB07 immovable property includes land, benefits to arise out of land and things attached to the earth. The Definition of immovable property given in the General Clauses Act is applicable to the Transfer of Property Act Vide Babulal v. Bhawani, (1912) But this definition is also not complete Moreover, the expression things attached to the earth which is not defined in the General Clauses Act, has been defined separately in Section 3 of the Transfer of Property Act The definition of things "attached to the earth" is given in Section 3 of Transfer of Property Act, states:

"attached to the earth" means-

a) rooted in the earth, as in the case of trees or shrubs,

b) imbedded in the earth, as in the case of walls or buildings,

c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached

thus in order to get a clear and complete meaning of "immovable property It is necessary to consider the definition given in Section 3 of the Transfer of Property Act as well as the definition given in the General Clauses Act On the basis of the definitions given in both these Acts, the expression immovable property may be defined property in the following words

Immovable Property includes -

1. Land

Land means surface of the earth, It includes everything upon the surface of land, under the surface of land and also above the surface of land. Anything above the land, as long as it is not removed from there shall be part of the land and as such an immovable property. Thus, soil and mud deposited on the surface of earth would be immovable property. The water collected in a pit or accumulated in the pond or lake is also immovable property because the water is part and parcel of the surface of earth. Water flowing in the river gives the impression that it is movable but its water always remains on the surface of the earth. Therefore, at the rivers have been regarded as part of the land and as such immovable property although the water is moving. Everything under the surface of land is also part of land and is included in the expression immovable property. For example, sub-soil, minerals, coal or gold mines etc.

The underground steams of water are immovable properties because they flow under the land. Thus included in the term land. Moreover, not only the things on the land and under the land are immovable properties, but the space which is above the land is also the part of land and is an immovable property.

2. Benefits to arise out of land

Besides land, the benefit which a person gets from land, is also an immovable property. One may get a benefit from a land under some right. A right by the exercise of which a person gets certain benefits is called beneficial right or beneficial interest in that property.

Beneficial Interest in a property is called intangible or incorporeal property. Thus, any right which is exercised over a land (or any other immovable property) and by the exercise of which a person gets certain profit or gain, would be his intangible immovable property For example a piece of land is immovable property, therefore, if any right is exercised by a person upon that land, that right becomes intangible immovable property of that person. As mentioned above land means and includes everything upon its surface such as house pond or river. It also includes everything beneath the land such as minerals or mines etc. Thus right of way exercised on the land or a right to use a land under lease or tenancy is an immovable property. Therefore that of a tenant to live in the house of his land-lord is an immovable property of the tenant. Similarly the right of fishery i.e. right to catch fish from a pond or river, is also an immovable property. It may be noted that the water in the pond

or river is an immovable property, therefore, everything in this water including fish shall also be immovable property And since the right of fishery is exercised on 'fish in the water, which is an immovable property, therefore, this right is an immovable property Right of ferry means right of transportation on rivers or lakes by boats or steamer. Since river or lake-water is an immovable property and boats or steamers are used on such waters, therefore right of ferry' has been held to been immovable property. Similarly, since land also includes everything beneath its surface such as mines, therefore, the right to extract coal or gold or minerals etc. from the mines is also an immovable property.

3. Things attached to the Earth.

The expression things attached to the earth has been defined separately in Section 3 of the Transfer of Property Act.

Things attached to the earth means (i) things embedded in the earth (ii) thing attached to what is so embedded in the earth, and (ii) thing rooted in the earth.

A. Things embedded in the earth.-Things which are fixed firmly in the earth and becomes part of the land are things embedded in the earth. For example house building, walls, or electricity poles are immovable properties because they are things embedded in the earth. Walls and houses are not just placed on the surface of the land, the surface of the earth is dug deep thereafter the whole structure is fixed permanently. Where the things are just the placed on the surface of the earth without any intention to make them part of the land, the things may not be immovable properties even if they appear to be fixed in the land. For example, heavy things such as anchor, road-roller or a heavy stone placed on the land may go two or three feet deep into the earth by virtue of their weight. But such things are not annexed to or embedded in the earth and thus are not the immovable properties.

A machinery which is attached to a concrete base by nuts and bolts to fix it firmly cannot be regarded as a thing embedded in the earth because it is not fixed or attached to the land with intention of any beneficial enjoyment of the land where it is installed. As a matter of fact machinery is or installations of business are fixed to the land for commercial purpose

only. As a matter of fact machineries or other installations are regarded as accessory to the business and not an annexation to the premises.

B. Things attached to what is so embedded in the earth.-

Where thing is attached to something which is embedded in the earth for its permanent beneficial enjoyment, the thing so attached would also become immovable property. Doors, windows or shutters of a house are attached to its walls for permanent enjoyment of that house. Therefore, the doors, windows and shutters are regarded as immovable properties. Things imbedded in the earth are immovable properties because they become part of the land. Things permanently attached to what is so embedded would also be part of a thing which is itself is a part of land. Thus doors, windows are regarded as part of the house which is part of the land. But such thing must be attached permanently and must also be attached for the beneficial enjoyment of the house or building. And things attached without any intentions of making them a part of the house or building would not be immovable property like electric bulb, window screens etc. are movable properties.

C. Things rooted in the earth.

Trees, plants or shrubs which grow on land are rooted in the earth. With the help of their roots, they keep themselves fixed in the earth and become part of the land. Until cut down the trees are permanently attached to the land where they are grown. Therefore, as a general rule in respect of all the trees, plants, herbs and shrubs is that they are immovable properties except standing timber, growing crops and grass, which are movable properties.

MOVABLE PROPERTY

A property which is not immovable is movable. Movable property has not been defined in the transfer of property Act. Section 3 of the Act excludes standing timber, growing crops and grass from the definition of the immovable property. This simply means that standing timber, growing crops or grass are movable property because what is not immovable may be movable. The General Clauses Act, 1897 defined movable property as property of every description except immovable property. According to Section 2 (9) of the Registration Act movable property includes standing timber, growing crops and grass, fruits on trees, fruit-

juices in the fruits on the trees, and the property of every description except immovable property.

a) Standing Timber

Standing timber is movable property, A green tree rooted in the earth is called a standing timber provided its woods are generally used for timber purpose for making houses or household furniture. If there is a tree the woods of which are fit to be used for making doors, windows or furniture, the same tree which under general future is on immovable property, shall be treated as standing timber and as such a movable property. For example, the woods of Sheesham, Neem, Babool or Teak-trees are used for making houses doors, tables or chairs, therefore these trees have been held to be movable properties although they are the things rooted in the earth. Bamboo trees have no utility except that they may be used in making houses or as poles, therefore, bamboo trees have been held to be movable properties.

Fruit-bearing trees are not standing timber They are planted-and grown for taking fruits etc from them and not for taking their wood Therefore, fruit-bearing trees are immovable property. Mahua tree has been held as an immovable property. Similarly, palm or dato-trees which are exclusively for taking their fruits or drawing toddy from them, have been held immovable property

There are certain trees, for example a mango-tree, which give us fruits but their wood is also used for timber purposes. Whether such trees are standing timber to movables) or not depends upon the intention of its owner If its owner intends to keep the tree growing and green forever, the tree is not standing timber even its woods are fit to be used for furniture etc. On the other hand, the owner intends that the tree is to be cut down soon for utilizing its wood, the green tree would be standing timber.

b) Growing Crops

Growing crops and growing grass are movable properties. Growing crops mean crops standing in the field. Although the crops, say of wheat and barley, are nothing but a collection of plants rooted in the field yet they are not immovable property because every crop is bound to be cut in the near future when it becomes ripe. The crops in the field have no use except their produce. The crops of wheat or paddy etc. and also the vegetable crops of potato etc are, therefore, movable properties. Sugarcane crops and the crops of indigo

(neel) have been held movable property. Crops include creepers, Crops of grapes and the crops of betel leaf (pan) etc are also movable properties.

c) Growing Grass

The growing grass rooted in the earth, is also a movable property. Grass in the field has no other utility except that it could be used as fodder for the cattle. For this, it is bound to be cut down or be grazed by some animal. No further vegetative growth may be intended by the owner of the land upon which the grass is grown. However, since the right to cut grass is a right exercised upon the land, this right is a 'beneficial interest in the land and as such, an immovable (incorporeal) property.

Difference between movable and immovable property

| Basis | Movable Property | Immovable property |
|---|---|---|
| Movement | The movable property can easily be transported from one place to another, without changing its shape, capacity, quantity or quality. | The immovable property cannot easily be transported from one place to another. If transported, it will lose its original shape, capacity, quantity or quality. |
| Transfer | Mere delivery with intention to transfer the movable property completes the transfer. | Mere delivery does not sufficient for a valid transfer. The property must be registered in the name of the transferee. |
| Registration | Registration is optional under the Indian Registration Act, 1 908. | Compulsorily registration under the IndianRegistrationAct,1908,subject to condition that its value if exceeds |

| | | |
|---|---|---|
| | | Rs. 100. |
| Illustration | Mango trees, if cut and sold for timber purpose, are deemed as movable property. | Mango trees, if sold for nourishment and for fruits, they are deemed as immovable property. |
| Examples | vehicles, books, utensils, timber, etc. | Land, houses, trees attached to the ground; so long they are so attached. |

**Question 2. Explain in detail, transfer for the benefit of an unborn person and rule against perpetuity under Transfer of property act, 1882.**

Answer 2. UNBORN CHILD

"A person not in existence has a specific reference to one who may be born in the future but does not have a current existence".

Even though a child in the womb is literally not a person in existence, but has been so treated under both Hindu Law and English Law, discussed elaborately as under.

STATUS OF UNBORN CHILD

There is nothing in the law to prevent a man from owning property before he is born. His ownership is necessarily contingent, indeed, for he may never be born at all; but it is none the less a real and present ownership. A child in its mother's womb is for many purposes regarded by a legal fiction as already born, in accordance with the maxim nasciturus pro jam nato habetur.

THE LAW OF PROPERTY

There is a fiction that a child en ventre sa mere is a person in being for the purpose of:

(1) acquisition of property by the child itself, or

(2) being a life chosen to form part of the period in the rule against perpetuities.

The principle is well settled now, although the older authorities show some disagreement.

In (1), the basis of the rule is not that in a gift to "children" the natural or ordinary meaning of "children" is such as to include a posthumous child, but that an artificial sense must be given to the word, because "the potential existence of such a child places it plainly within the reason and motive of the gift"; this is, of course, assuming that the donor has not expressed or implied in the document an intention to confine the gift to children living at the date at which the gift takes effect.

To put the matter in another way, if the donor had thought about it at all, he would almost certainly have said that he wished to include his posthumous children among the beneficiaries. There is no fiction as to his intention, but the law can give effect to that intention only by the fiction that the child en ventre sa mere is actually born, provided it is in fact subsequently born alive.

The fiction is applicable in (1) only if it is for the benefit of the child, not where it may be detrimental to him. But in (2), i.e., in connexion with the perpetuity rule, the fiction holds whether it be for the advantage of the unborn child or not. Even with respect to the benefit in (1), it must be for the child's direct benefit; e.g., if there be a gift to X for life, with a limitation over to X absolutely if X leave issue, but, if he leave none, then to Y, and if X die leaving a child en ventre sa mere, the property will go to Y; for the gift conferred no direct benefit on X's child unborn at X's death. Such was the decision of the house of lords in Elliot v. Joicey, and it evoked a considerable amount of adverse criticism.

TRANSFER OF PROPERTY TO AN UNBORN CHILD

Section 13 of the Transfer of property Act read as follows:

"Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transfer in the property."

Section 13 gives effect to the general rule that a transfer can be effected only between living persons. There cannot be a direct transfer to a person who is not in existence or is unborn. This is the reason why section 13 uses the expression transfer 'for the benefit of' and not

transfer ‘to’ unborn person. A child in the mother’s womb is considered to be competent transferee. Therefore, the property can be transferred to a child in the mother’s womb because the child exists at that time but not to an unborn person who does not even exist in the mother’s womb. Every transfer of property involves the transfer of interest. As soon as the property is transferred, the transferor is divested of that interest and the interest is vested in the transferee. For vesting of interest, therefore, it is necessary that the transferee must be in existence.

Otherwise the interest will remain in abeyance till the transferee comes into existence. This is against the very concept of an interest. Section 13 provides that the property cannot transfer directly to an unborn person but it can be transferred for the benefit of an unborn person. For transfer of property for the benefit of unborn person two conditions are required to be fulfilled:

1) Prior life interest must be created in favor of a person in existence at the date of transfer, and

2) Absolute interest must be transferred in favor of an unborn person.

PRE-REOUISITES FOR A VALID TRANSFER OF PROPERTY TO AN UNBORN PERSON

Section 13 provides a mechanism for a specific mechanism for transferring property validly for the benefit of unborn persons. The procedure as follows:

1) The person intending to transfer the property for the benefit of an unborn person should first create a life estate in favor of a living person and after it, an absolute estate in favor of the unborn person.

2) Till the person, in whose favor a life interest is created is alive, he would hold the possession of the property, enjoy its usufruct i.e. enjoyment the property.

3) During his lifetime if the person, (who on the day of creation of the life estate was unborn) is born, the title of the property would immediately vest in him, but he will get the possession of the property only on the death of the life holder.

Creation of a Prior Life Interest

As far as the creation of a prior interest is concerned, first, the property is given for life to a living person. It is not necessary that life interest should be created in favor of only one living person. The transfer is competent to create successive life interests in favor of several living persons at the same time.

For instance, A transfer property to B for life, and after him, to C, and then to D again for their lives and then absolutely to B's unborn child UB.



A ——————————B (life interest)

——————————-C (life interest)

——————————-D (life interest)

——————————-UB (Absolute interest) [fig (i)]

On B's death, the possession would be taken by C and on C's death, by D. On D's death, the possession would go to B's child, who should have come in existence by this time. If he not there, the property would revert back to A, if he is alive, else to his hiers.

No Life Interest for an Unborn Person

As far as the unborn is concerned, no life interest can be created for the benefit of an unborn person. Section 13, specifically prohibits that, by the use of the expression, 'the interest created for the benefit of such person' shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property. It means that the transfer must convey to the unborn person, whatever interest he had in the property, without retaining anything with him. Thus, no limited estate can be conferred for the benefit of the unborn person. If limited interest in the property is settled for him, the same would be void.

For instance, A creates a life estate in favor of his friends B, and a life estate for the benefit of B's unborn first child UB1 and then absolutely to B's second child UB2.

A ——————— B (Life interest)

——————— UB1 (Life interest)

——————— UB2 (Absolute interest) [fig (ii)]

The second figure is of limited interest in the property for the benefit of an unborn person and would therefore be void and incapable of taking effect in law. After the death of B, here, the property would revert back to A or his hiers as the case may be, as even though the transfer for the benefit of UB2 appears to be proper, as it is dependent on a void transfer that cannot take effect in law; a transfer subsequent to, or dependent on a void transfer can also not take effect. Thus, where a father gave a life interest in his properties to his son and then to his unborn child absolutely, it was held that the settlement was valid. But where the interest in favor of the unborn child was a life interest the settlement would be void, and a subsequent interest would also fail.

Similarly, where there is a possibility of the interest in favor of the unborn child being defeated either by a contingency or by a clause of defeasance, it would not be a bequest of the whole interest, and would be therefore be void.In the example cited above, in figure (ii), suppose UB1 dies before B and UB2 is alive when the life estate in favor of B comes to an end. Even then, the transfer of the benefit of UB2 will not take effect as the validity of the transfer has to be assessed from the language of the document and not with respect to probable or actual events that may take place in future. It is the substance of the transfer that will determine whether it is permissible under the law or not and not how the situation may emerge in the future.

In Girish Dutt v. Data Din, A made a gift of her property to B for her life and then to her sons absolute. B had no child on the date of execution of the gift. The deed further provided that in

case B had only daughters, then the property would go to such daughters but only for their life. In case B had no child then after the death of B, the property was to go absolutely to X.

The deed on paper provided a life estate in favor of B's unborn daughters: which is contrary to the rule of Sec.13. However, B died without any child, and X claimed the property under the gift deed. The court held that where a transfer in favor of a person or his benefit is void under sec.13, any transfer contained in the same deed and intended to take effect or upon failure of such prior transfer is also void. In determining whether the transfer is in violation of sec.13, regard has to be made with respect to the contents of the deed and not what happened actually.Here as the transfer stipulated in the contract that was void, the transfer in favor of X also became void. Hence, X's claim was defeated.

Case Laws

Sopher's case

In the case of Sopher v Administrator General of Bengal a testator directed that his property was to be divided after the death of his wife into as many parts as there shall be children of his, living at his death or who shall have pre-deceased leaving issue living at his death. The income of each share was to be paid to each child for life and thereafter to the grand-children until they attained the age of 18, when alone the grand-children were to be absolutely entitled to the property.

The bequest to the grand-children was held to be void by Privy Council as it was hit by Section 113 of the Indian Succession Act which corresponds to sec.13 of Transfer of property Act. Their Lordships of the Privy Council observed that: "If under a bequest in the circumstances mentioned in Sec.113, there was a possibility of the interest given to the beneficiary being defeated either by a contingency or by a clause of a defeasance, the beneficiary under the later bequest did not receive the interest bequeathed in the same unfettered form as that in which the testator held it and that the bequest to him did not therefore, comprise the whole of the remaining interest of testator in the thing bequeathed.

Ardeshir's Case

In Ardeshir v. Duda Bhoy's case D was a settler who made a settlement. According to the terms of the settlement, D was to get during life, one-third each was to go to his sons A and R. After D's death, the trust property was to be divided into two equal parts. The net income

of each property was to be given to A and R for life and after their death to the son's of each absolutely.

If A and R were each to pre-deceased D without male issue, the trust were to determine and the trust property were to the settler absolutely. The settler then took power to revoke or vary the settlement in whole or in part of his own benefit. It was held that R's son who was not born either at the date of settlement or his death did not take any vested interest and the gift to him was invalid. A's son who was alive at these dates did not also take a vested interest.

Applicability of Sopher and Ardeshir rulings in India

The decision in Sopher's case and Ardeshir's case were applied by Bombay High Court in Framroz Dadabhoy v Tahmina, in this case, bai Tahmina settled a certain sum upon trust in favor of herself for life and after her death and subject to the power of appointment by codicil or Will among her issues born during her lifetime in trust for all her children who being sons shall attain the age of 18 or being daughters shall attain that age or marry under that age being daughter's, in equal sums.

It was held by their Lordships that the decision in the Sopher's case could not be applied to the trusts of a settlement which were transfer inter-vivos. It was held that the words 'extend to the whole of remaining interest of the transferor in the property' in sec.13 of the Transfer of Property Act were directed to the extent of the subject-matter and to the absolute nature of the estate conferred and not to the certainty of vesting.

RULE AGAINST PERPETUITY

Perpetuity means an uncertain period or time or indefinite period. There are people who want to retain their property in their own families from generations to generations. This will be a loss to the society because it will be deprived of any benefit arising out of that property. Free and frequent circulation is important and the policy of the law is to prevent the creation of such perpetuity.

Origin:

Perpetuity may arise in two ways- (a) By taking away the power of alienation from the transferor (b) By creating a remote interest in the future property. A condition restraining the transferee's power of alienation is void as per S.10 of the Act. And a disposition to create a future remote interest is prohibited under S.14 of the Act.

Object:

As discussed earlier, it is important to ensure free and active circulation of property both for trade and commerce as well as for the betterment of the property that ultimately[26] is good for the society. Thus, the object of this section is to see that the property is not tied- up and to prevent the creation of perpetuity.

Following conditions must be satisfied to attract Section 14:

There must be a transfer of property.

The transfer should be to create an interest in favour of an unborn person.

Interest created must take effect after the lifetime of one or more persons living at the date of such a transfer and during the minority of the unborn person.

The unborn person must be in existence at the expiration of the interest of the living persons.

The vesting of the interest in favour of the ultimate beneficiary may be postponed only up to the life or lives of living persons plus the minority of the ultimate beneficiary but not beyond that.

EXTENT OF PERPETUITY PERIOD

Position in India – Life or any number of lives in being + period of gestation + minority period of the unborn beneficiary.

English Law – Life or lives in being +period of gestation +minority period.

DIFFERENCE BETWEEN INDIAN AND ENGLISH LAW

The minority period in India is 18 years whereas it is 21 years under English law.

The period of gestation should be an actual period under Indian Law but it is a gross period under English law.

Under Indian law, the property should be given absolutely to the unborn person whereas in English law, need not be absolutely given.

The unborn person must come into existence before the death of the last life estate holder as per Indian law whereas he must come into existence within 21 years of the death of the last life estate holder in case of English law.

EXCEPTIONS

Transfer for public benefit. Where property is transferred for the benefit of the people in general, then it is not void under this rule. e.g. for the advancement of knowledge, religion, health, commerce or anything beneficial to mankind.

Covenants of Redemption. This rule does not offend the covenants of redemption in the mortgage.

Personal Agreements. Agreements that do not create any interest in the property are not affected by this rule. This rule applies only to transfers where there i transfer of interest.

Pre-emption. In this, there is an option of purchasing a land and there's no question of any kind of interest in the property, so this rule does not apply.

Perpetual Lease. It is not applicable to the contracts of perpetual renewal of leases.

This rule is not applicable to mortgages because there is no creation of the future interest.

**Question 3. Explain the doctrine of election under transfer of property act, 1882**

Answer 3. The doctrine of election is stated in Sec. 35 of the Transfer of Property Act alongside Section 180 to 190 of the Indian Succession Act.

It states that when a party transfers a property over which he does not hold any right of transfer and entailed in that transaction is the benefit conferred upon the original owner of the property, such title-holder must elect his option to either validate such transfer of property or reject it; upon rejection, the benefit shall be relinquished back to the transferor subject nevertheless :

"Where the transfer has been through gratuitous means and the transferor has become incapable of making a new transfer.

In all cases where the transfer is for consideration".

An illustration to further explain :

A owns a property that is worth Rs 800. B professes to transfer the same to C through the Rs1000 instrument to A. But the A, the owner opts/elects to retain his property and thus, forfeits the gift of Rs 1000.

EXCEPTIONS

When the owner who is considering the election between retaining the property and accepting a particular benefit, chooses the former, he is not bound to relinquish any extraneous benefit that he gains through the transaction.

The acceptance of the benefit by the original owner shall be deemed to be as election by him to validate the transfer, if he is aware of his responsibilities and the circumstances that might influence a prudent man into making an election.

This knowledge of the circumstances can be assumed if the person who gains the benefit enjoys it for a period of more than two years. Further discussion over this has been made under the heading of "Modes of Election".

If the original owner does not elect his option within a year of the transfer of property, the transferor would require him to elect his choice. Even after the reasonable time, if he still does not also still elect, the original owner shall be assumed to have elected the validation of the property transfer as his choice.

In context of a minor, the period of election shall be stalled till the individual attains majority unless he is represented by a guardian.

UNDERSTANDING THE PRINCIPLE

In simple words, a person utilizing the benefits of an instrument also has to carry the burden attached. This doctrine is founded upon a model wherein a person persuades another to act in a manner to his prejudice and derives any advantage from that, then he cannot turn around and claim that he was not liable to perform his part as it was void. This doctrine is universal and is applicable to Hindus, Muslims as well as Christians.

So, this doctrine contains the principle that the exercise of a choice by a person left to himself of his own free will to do one thing or another binds him to the choice which he has voluntarily made, and is founded on the equitable doctrine that he who accepts benefit

under an instrument or transaction of his choice must adopt the whole of it or renounce everything inconsistent with it. Thus, it is a general rule that a person cannot approbate and reprobate. Also, the election is confined to the case of a gift or Will and does not apply in case of a legal remedy.

Conditions precedent for equity of election:

A transfer of property by a person who has no right to transfer;

As a part of the same transaction, he must confer some benefit on the owner of the property and

Such owner must elect either to confirm such transfer or to dissent from it.

OTHER IMPORTANT CONDITIONS

Proprietary Interest

Election over a property is not asked to made by a person unless he holds a proprietary interest which are disposed off in derogation of the person's rights.

So, election cannot take place if the property that is decided by the transferor to be disposed does not happen to be owned by any individual to whom an interest is being provided through the transfer. Also, it cannot take place if the transferor does not provide any benefit on the individual who is the original owner of the property.

"As part of the same transaction"

One cardinal condition for the doctrine of election to be executed is that the benefit conferred upon the original owner should be as part of the same contract by which he transfers the property over which he holds no right to transfer.

In the landmark case of Ramayyar v. Mahalaxmi, a widow had given a gift in excess of her powers and had then provided a will which stated that " excluding the properties which I have already given away, I will make the following dispositions". The Court ordered that the plaintiff under the will was not excluded from the election doctrine from contesting the previous gift which wasn't the issue of the will at all.

It is to be noted that different nature of two properties is not a bar to election by the owner like in the case of Ammalu v. Ponnammal where a person who was managing the

properties of the daughter of his deceased brother, died leaving a will bequeathing a portion of it to B. It was held that the doctrine of election did apply for the niece.

Donor's Intention

In order to create a situation of election, it is important that the intention of the testator should be clear with regard to disposing of the property which he does not own. Parol evidence is not acceptable and thus the intention must be prima facie clear.

Indirect Benefit

The benefit that the original owner is conferred with has to be direct in nature and if indirect, he does not need to elect.[xxi] This principle is explained in Section 184 of Indian Succession Act, 1925 and states that "when the devisee who claims derivatively through another does not take under the deed, and is not bound by the equity attaching thereto."

Difference in Capacity

An individual can in one capacity utilize a benefit while can dissent or reject that benefit in another capacity. It means to explain that it is possible to facilitate two roles of an individual wherein he can for example, accept legacy for an estate while in his personal competence, he could retain the property.

Modes of Election

The election by the owner can either be direct or indirect. In direct election, it is simply through communication about the elected choice or option. Though, in case of an indirect election, "the acceptance of the benefit by the original owner is subject to two conditions:

He has to be aware of his duty to elect, and

There must be proof of knowledge of circumstances which would influence the judgment of a reasonable man in making an election

Enjoyment for two years of the benefit by the person on whom it is conferred with any dissent.

The election shall be presumed when the donee acts in such a manner with the property gifted to him that it becomes impossible to return it to the original owner in its original state.

Difference between English Law and the Indian Law Perspective

The English law depends upon the principle of compensation which means that if the original owner does not choose to validate the transfer, he can keep the property and also the benefit accrued, subject to compensation provided to the donee, to the extent of the property he had suffered a loss for.

But in the Indian law context, this doctrine is influenced by the principle of forfeiture which states that if the original owner does not choose to validate the transfer, the donee incurs a forfeiture of the conferred benefit which goes back to the transferor.

COMPENSATION

Estimated cost of the property which is attempted to be transferred towards the transferee is the approximation of the compensation that he shall receive. However, in context of immovable properties, there arises the issue of changing value of the property according to the lapse of time. Thus, this valuation is to take place at the date of the instrument becoming operational rather than at the time of election.

**Question 4. What do you mean by Contingent and Vested Interest? Differentiate between the two.**

Answer 4. Concept of Vested Interest

Section 19 of the Transfer of Property Act, 1882 states about Vested Interest. It is an interest which is created in favour of a person where time is not specified or a condition of the happening of a specified certain event. The person having the vested interest does not get the possession of that property but has the expectancy to receive it upon happening of a specified certain event.

For example, A promises to transfer his property to B on him attaining the age of 22. B will have vested interest in A's property till the time he does not get the possession of it.

Death of the person who is having this interest will not have any effect over that interest as after the deceased, the interest will vest in his legal heirs.

For example, in the above example, if B dies at the age of 21, then the interest vested in B will pass on to the legal heirs of B and they will be entitled to the property in the prescribed time period.

There are the important aspects of a vested interest as stated above, all these are discussed in detail below:

Interest should be vested: This is the basic meaning of the provision that lays down that interest should be created in favour of a person where time is not specified or a condition of the happening of a specified certain event. A person should profess to transfer a particular property in order for this interest to be created.

Right to enjoy property is postponed: When interest is vested in a person, he does not immediately get the possession of that property and hence cannot enjoy that property.

But any person who is not a major and has a guardian is only entitled to the vested interest after he attains majority.

For example, X agrees to transfer the property 'O' to Y and directs his guardian Z to give him the property when he attains the age of 22. Y gets vested interest once he attains the age of 18.

Time of vesting: The interest is vested right after the transfer is initiated. Nothing can stop the interest from vesting in the person in favour of whom the transfer is to be made.

Contrary Intention: The transferor can specify a particular time as to when the interest will be vested in the person who will receive the property.

Death of the transferee: If the transferee dies before getting the property in his possession, the interest vested in him will now vest in his legal heirs and they will get the possession of that property once the condition is fulfilled.

In the case of Lachman v. Baldeo, a person transferred a deed of gift in favour of another person but directed him that he will not get the possession of that property until the transferor himself dies. The transferee will have a vested interest even though his right of enjoyment is postponed.

Characteristics of Vested Interest

1) Vested interest creates a present right that is in effect immediately, although the enjoyment is postponed to the time prescribed in the transfer. It does not entirely depend on the condition as the condition involves a certain event.

2) Death of transferee will not render the transfer invalid as the interest will pass on to his legal heirs.

3) Vested interest is a Transferable and heritable right.

Section 20 of the Transfer of Property Act, 1882 states about vested interest to an unborn child. The interest in the property will be vested in him once he is born. The unborn child may not get the right of enjoyment of the property immediately after having vested interest.

Concept of Contingent Interest

Section 21 of the Transfer of Property Act, 1882 states about Contingent Interest. It is an interest which is created in favour of a person on a condition of the happening of a specified uncertain event. The person having the contingent interest does not get the possession of that property but has the expectancy to receive it upon happening of that event but will not receive the property if the event does not happen as the condition is not fulfilled. Contingent interest is entirely dependent on the condition imposed on the transfer.

For example, A agrees to transfer the property 'X' to B on the condition that he shall secure 90 % in his exams. This condition is uncertain and the happening of the event or not happening is in doubt and therefore B here acquires a contingent interest in the property 'X'. He shall get the property only if he gets 90 % and when the condition is fulfilled.

In the case of Leake v. Robinson (2), the court held that whenever a condition involves a bequest that is to be given 'at' a particular age or 'upon attaining' a particular age or 'after' attaining this particular age, then it can be derived that the transfer involves a contingent interest.

Characteristics of Contingent Interest

1. A) This interest is entirely dependent upon the condition. It only happens when the condition is fulfilled.

2. B) Death of the transferee before getting the possession of the property will result in the failure of continent interest and the property will remain with the transferor.

3. C) Contingent interest is a Transferable right, but whether it is heritable or not, it depends upon the nature of such any transfer and the condition.

There are some important aspects surrounding contingent interest which are explained in detail below:

1. Interest: In a transfer if a condition is such that the transfer will take effect only upon the fulfilment of that condition and till that time, the interest is contingent.

2. Contingent Interest exists in wills: Any bequest to a wife, son or daughter can be a contingent interest if the condition provides so.

3. Exception: When a person who has an expectancy in the rights of ownership of a particular property, and he for the time being till the happening of the event, gets any sort of income that arises from that property. This interest in the property does not come under the aspect of contingent interest.

Section 120 of the Indian Successions Act, 1925 lays down the exceptions for contingent interest.

Section 22 states about the transfer to a group or class of members with a contingent interest. For example, there is a transfer to a group of 5 people, and the condition is that the property will be vested in persons who attain the age of 40 years on this particular date. The persons who have attained this age will get an interest in the property and people who have not, will not get an interest in that property.

Section 23 states about a transfer that happens after happening of an event that was mentioned in the transfer involving contingent interest. This provision simply lays down one of the two branches of Section 21 that laws down about contingent interest. The two branches are happening of an event and non-happening of an event. This Section states about what happens after the happening of the specified uncertain event.

Section 24 states about a transfer to a group or class of members who will get the property on a condition that they shall be living at the specified date. This is also a contingent interest as the event mentioned here is an uncertain event. The transfer will only take place

for those people who satisfy the condition of surviving at a particular date. The legal heirs of the deceased cannot claim an interest in that property as a transfer involving a contingent interest solely depends upon the fulfilment of the condition.

Difference between Vested & Contingent Interest

| Sign number | Ground of Difference | Vested Interest | Contingent interest |
|---|---|---|---|
| 1. | Section | Vested interest is provided in Section 19 of the Transfer of Property Act, 1882. | Contingent interest is provided in Section 21 of the Transfer of Property Act, 1882. |
| 2. | Definition | It is an interest which is created in favour of a person where time is not specified or a condition of the happening of a specified certain event. The person having the vested interest does not get the possession of that property but has the expectancy to receive it upon happening of a specified certain event. | It is an interest which is created in favour of a person on a condition of the happening of a specified uncertain event. The person having the contingent interest does not get the possession of that property but has the expectancy to receive it upon happening of that event but will not receive the property if the event does not happen as the condition is not fulfilled. |
| 3. | Condition | The condition involves a specified | The condition involves a specified uncertain |

| | | | |
|---|---|---|---|
| | | certain event. A certain event means an event that will eventually happen. | event. There is a chance of the happening or non-happening of that particular event. |
| 4. | Fulfilment of conditions | Vested Interest does not entirely depend on the condition as the condition involves a certain event. It creates a present right that is in effect immediately, although the enjoyment is postponed to the time prescribed in the transfer. | Contingent interest is entirely dependent on the condition imposed on the transfer. Interest is only transferred to the transferee on the fulfilment of the condition imposed. |
| 5. | Right of Ownership | This right is created as soon as the interest is vested. | There is mere chance to be having the ownership rights. |
| 6. | Death of transferee | Death of the person who is having this interest will not have any effect over that interest as after the deceased, the interest will vest in his legal heirs. | Death of the transferee before getting the possession of the property will result in the failure of continent interest and the property will remain with the transferor. |
| 7. | Transferable and | Vested interest is a Transferable and | Contingent interest is a Transferable right, but |

| | | | |
|---|---|---|---|
| | heritable? | heritable right. | whether it is heritable or not, it depends upon the nature of such any transfer and the condition. |
| 8. | The present right of enjoyment. | There is present, immediate right even when its enjoyment is postponed. | There is no present right of enjoyment, there is a mere expectancy of having such a right. |
| 9. | Examples | X professes to transfer the property 'O' to Y when he attains the age of 20. There is a vested interest with Y for the property 'O'. | X professes to transfer the property 'O' to Y on the condition that he shall construct a well in his property. If he constructs, Y shall get contingent interest in the property until the condition is not fulfilled. |

**Question 5. Explain transferable and non transferable properties as per section 6 of Transfer of property act, 1882**

Answer 5. Section 6 of the transfer of property act deals with the concept of what may be transferred. Property and interests in property as a general rule are transferable, and it should also be noted that the very transferability of the property is based on the maxim 'alienation rei prefertur juri accrescendi', and the meaning of the maxim goes like this– Law favours alienation to accumulation. Therefore it should be noted that any actions made to interfere with the power of the owner to alienate his interest in the property are considered disfavour in law. The transfer of property act, 1882 is civil legislation of great

importance owing to the huge number of property related transactions taking place throughout the country.

Section 6

It specifically speaks about, what may be transferred. Property of any kind may be transferred, except as otherwise provided by this act or even by any other law for time being in force, and these exceptions will be discussed in detail in the following sub-sections.

Sub-Section(a)- Transfer of Spes Succession

The concept of Spes Succession can be explained with the help of an Example– A family consists of father F and son S, F being the owner of the property has the ownership with him during his lifetime and no one else including his son is allowed to sell the property, without his consent. Now, if F dies intestate, s would inherit his property and hence, here it can be said that S is the Heir Apparent. Here S's succession to the property in the future is a chance due to two main reasons.

Firstly, As F is the owner of the property he may sell it, dispose of it in any manner he thinks or make a will in someone's favour. Eventually, nothing will be left for S.

Secondly, son S dies during the lifetime of his father. Thus, if S during the lifetime of his father transfers the property without his father's consent then the transfer would be void ab initio and is also expressly prohibited by the act. In the case of Official Assignee, Madras v. Sampath Naidu, it was observed by the court that a mortgage executed by an heir apparent is void even if he subsequently acquired the property as an heir. Hence, from above it can be concluded that the transfer of spes succession is void ab initio.

Sub-section (b)- Right of re-entry

The right of re-entry means the right to resume the possession of the land which would have been given to some other person for a certain period of time. And the cases of re-entry are usually seen in the cases of leases, which would empower the lessor to re-enter upon the demised premises if the rent is in arrear for a certain period or if there is a breach of covenants in the lease.

Re Davis and Company, in this case, A purchased certain goods from B, which was on a hire purchase agreement. This agreement contained a clause which was that after purchase, A would take the property and would also pay the instalments on time, and in case A fails to pay the instalments B would enter A's premise and take the possession of the property. The important point to be noted here is that the right to Re-enter is a personal right of B and the same cannot be transferred by him, and in any case, if he transfers this right to entry, to his creditors or anyone, then the same would be void.

Sub-section (c)- Easement

An easement can be quoted as a right which the owner or the occupier of certain land has in his possession for the beneficial enjoyment of the said land, or it may even be to do, or to continue to do something or to prevent something from being done. This very concept of easement includes under its ambit an important principle of 'profits a pendre', which actually means– A right to enjoy the benefits arising out of the land.

Example: Where A as an owner has the right of way over the way of the land of another for purposes which are connected with the beneficial use of his own land then, this can be termed as an easement. Similarly, in the case of Ganesh Prakash v. Khandu Baksh, it was held that the right to dry clothes over the flat masonry and roofs of shops is a right of easement.

It should also be noted that an easement cannot be transferred apart from the dominant heritage to which by the nature of the right it is attached, and this was held in the case of Sital v. Delanney.

Sub-section (d)- Restricted Interests

This clause states that a person cannot transfer anything which is interest restricted in its enjoyment to him. For example- Two brothers partition a property among themselves and in addition give a right of pre-emption, which means one of them if at all wants to sell the property should first offer it to the other brother, who would be preferential in buying it. Here it should be known that these rights are personal rights and cannot be transferred. And if any such transfers take place such a transfer would be considered void. In the case of Shoilojanund v. Peary Charon, it was held that a right to receive voluntary and uncertain offerings at worship are interest restricted to personal enjoyment and hence, cannot be transferred.

The following kinds of interest can be held non-transferable:

Services Tenure

Religious Office

A right of Pre-emption

Emoluments which are attached to the priestly office. But it should, however, be noted that the right to receive offerings which are made at a temple is independent of on obligation to perform services which would involve qualifications of personal nature, and such rights are transferable.

Sub-section (dd)- Right to Future Maintenance

The sub-section of maintenance, it has been established that a right to future maintenance is solely for the personal benefit of the person to whom it has been granted and therefore, this very right cannot be transferred further. Thus an example can be quoted here regarding the rights of a woman to either receive maintenance from her husband under a decree or award of the court. Or to receive a share from the property on the demise of the husband or under a will is a personal right. This right can neither be transferred nor can it be attached by a court's decree. And this was held in the case of Dhupnath v. Ramacharit.

Sub-Section(e)- Mere right to sue

It was in the landmark case of Sethupathi v. Chidambaram, where it was held that a mere right to sue is something which cannot be transferred. Here the word 'mere' itself means that the transferee has developed no interest than just a bare right to sue.

For Example- A contracts to buy goods from B On due date A fails to take delivery and B sells the goods in the market at a loss of Rs.10000. B transfers the right to recover the damages to C. The transfer is invalid.

Sub-section (f)- Public office

It should be noted in the first place that a public officer cannot be transferred. In the same fashion, even the salary of the police officer cannot be transferred whether before or after it becomes payable. The word public officer is meant to be someone who has been appointed to discharge a public duty, and in turn, receive a monetary return of it which is in the form

of the salary. Here, as the salary becomes something which is given on return of the personal service of a person, it can neither be transferred or attachable.

In the case of Ananthayya v. Subba Rao, it was held that where there is an agreement between two people and according to which a person agreed to pay a certain proportion of his income to his brother in consideration of his having been maintained by the latter, now in such cases this provision will not be applicable, which was held by the court.

Sub-section (g)- Pensions

Pension is like a salary, it is a sum of money periodically payable by the government which can be to an ex-serviceman or to a person who has ceased to be in employment. In the case of Saundariya Bai v. Union of India it was held that pension is non-transferable, so long as it is unpaid and in the hands of the government. Another important aspect which should be taken into consideration is that pension is different from bonus and rewards, and also, on the contrary, these are transferable.

Sub-section (h)- Nature of interest

No transfer can be made insofar as it is opposed to the nature of the interest affected thereby. Thus, the things which are dedicated to public or religion uses or service inam, cannot be transferred.

Transfer for Unlawful object or Consideration – Any transfer which is for an unlawful object or consideration is not permissible under this section. And it is also in consonance with section 23 of the Indian Contract Act, which provides that consideration or object is unlawful if:

Is Fraudulent

It is opposed to public policy

It is forbidden by law.

Is of such a nature that it defeats the provisions of any law.

Transfer of Person Legally Disqualified– A transfer to a person to be legally disqualified to be a transferee is not permitted. Under section 7 of the said act, the transferee is required to be competent to the contract and also should not have been disqualified legally.

Sub-section (i)- Statutory prohibitions on the transfer of Interest

This section makes it clear that a tenant having an un-transferable right of occupancy cannot in any way transfer his interest, and this was held in the case of Shanti Prasad v. Bachchi Devi. But at the same time, this clause even contains an exception to the general rule which says that all tenancies or leaseholds are transferable. It gives effect to different enactments whereby it says certain categories of leasehold interests or tenancies are made non-transferrable. Similarly, where a farmer of an estate, in respect of which default has been made in paying revenue, cannot assign his interest in the holding.

**Question 6. Who is an Ostensible owner? When can transferee get a good title against the real owner?**

Answer 6. The law relating to transfer by an ostensible owner as given in section 41 of the Act is now is subject to the provisions of Benami Transaction Act 1988. This Act extends to the whole India except Jammu and Kashmir. Ostensible owner is the person who has all the inditcta of ownership without being the real owner. An ostensible owner has all the indications of the ownership and looks like owner. Thus, a person may have possession and enjoyment of the property and may also have entered his name in the official records but even then he may not be the real owner of the property.

BENAMI TRANSACTIONS (Prohibition of Right to Recover Property) Act 1988.

According to Sec 2(a) benami transaction means any transaction in which property is transferred to one person for a consideration paid or provided by another person. i.e., the property is transferred in the name of the other. Where the person purchases the property in another name is called benami, the person in whose name the property is purchased is called as benamidar, the person, in whose name the property is held, shall become the real owner.

Section 4(1) of the Act says that no suit, claim or action to enforce any right in respect of any property which is benami transaction against the person in whose name the property is held or against any other person shall lie by or behalf of a person claiming to be the real owner of such property This section also has an exception and this act is not applicable to the following cases:

a. where the person in whose name the property is held is a coparcener in Hindu

Undivided Family and the property is held for the benefit of the co-larceners in the family.

b. where the persons in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another for whom he is a trustee or towards his stand in such capacity.

A significant feature of this Act is that besides prohibiting benami transactions section 3(3) of the Act provides also that a person who enters into such transaction is punishable with imprisonment, for a term which may extend to three years or with fine or both. However there is no prohibition and no punishment if the property is purchased in the name of wife or unmarried daughter for their benefit(Sec. 3(2))

Nature and scope of the Act.

The nature and scope of this Act, as interpreted and explained by the Supreme Court, at present, may be summarized as under:

a. The Benami Transaction Act, 1988 is not of retrospective operation. It cannot be made applicable to suits or proceedings which already started before commencement of this Act and in such cases benamidar cannot be treated as real owner.

b. This Act is not declaratory in nature. Rather it is prohibitory in nature and prohibits benami transactions which are entered into after commencement of this Act.

c. Subject to certain exceptions all the benami transactions entered into after commencement of this Act have been made punishable, Section 3(3) now creates a new offence of entering into such transactions. In respect of benami transaction entered into after commencement of this Act, no person is now allowed to take plea under section 41 of the T.P. Act that the property stands only in the name of benamidar and that he is the real owner.

Law prior to Benami Transaction Act.

The law incorporated in section 41 of the transfer of property Act before the commencement of the Benami Transaction Act 1988.A person who purchases the property in the name of another is called as Benami transaction. A person does not become ostensible owner has entrusted him with temporary control over the property only for some

specific purposes eg., karta of Hindu joint family, a trustee or a manager. But it s difficult to ascertain whether a person is an ostensible owner or real owner. Because he has all the character of the real owner.

In Jayadayal Poddar V/s Bibi Hazar, AIR, 1970, SC

The Supreme Court has observed the following considerations must be taken or into account while deciding whether a person is ostensible owner or not.

i. Source of the purchase money i.e., who paid the price.
ii. Nature of possession after the purchase. Who has the possession.
iii. Motive for giving benami color to the transaction. Why the property was purchased in the name of other person.
iv. Relationship between the parties i., whether the real owner and the ostensible owner were related to each other or were strangers.
v. conduct of the parties in dealing with the property
vi. custody of the title deeds.

Essential conditions for the application of Section 41:

The following conditions are necessary for the application of this section.

i. There is transfer of an immoveable property by an ostensible owner with the express or implied consent of the real owner.

ii. the transfer is for consideration

iii. The transferee has acted in good faith and

iv. The transferee has exercised reasonable care in finding out the transferor'spower to make the transfer.

Transferee has taken reasonable care, good-faith or bona fide intention of the transferee is not enough. To attract the provisions of this section the transferee must also have exercised reasonable care in ascertaining the title and authority of the transferor. Reasonable care means that care which a man of ordinary prudence should be taken while making inquiries regarding the title of an immovable property.

**Question 7..Discuss the doctrine of Part Performance. State the difference between Indian Law and English Law of Part-Performance.**

Answer 7. The doctrine of part-performance is an equitable doctrine. It is also known as equity of part performance". Under this doctrine, if a person has taken possession of an immovable property on the basis of a contract of sale and has either performed or, is willing to perform his part of contract then, he would not be ejected from the property on the ground that the sale was unregistered and legal title had not been transferred to him.

For example; there is a contract of sale of a piece of land between A and B. The contract is sin writing, stamped attested and duly executed but not registered by A who is the seller. B, who is the purchaser, has performed or is willing to pay the same. On the basis of such contract B takes possession of land. Now, A sells the land to C through a registered deed. having the legal title of the land, attempts to eject B. At this stage, since B has no legal title, law may not protect his possession but, equity shall help him from being dispossessed.

The doctrine of part performance is, therefore based upon the maxim:"equity looks on that as done which ought to have been done". That is to say, equity treats that subject matter of a contract as to its effects in the same manner as if the act contemplated in the contract had been fully executed, from the moment the agreement has been made, through all the legal formalities (e.g. of registration)of contract have not been yet completed.

Part –performance in India Before 1929:-

Before 1929, the application of English equity of part-performance was neither certain nor uniform. In some cases it was applied whereas in some other cases it was not applied. In Mohammed Musa V/s Aghore Kumar Ganguli the Privy Council held that equity of part-performance could be applied to Indian casesjust as it was being applied in England. But later on, in Ariff V/s Jadunath, thePrivy Council changed its opinion and held that the doctrine of part performance could not be applied in Indian cases to over ride or by passes the express provisions of the Indian Registration Act, and Transfer of Property Act.

Form the above discussion it is clear that the Anglo Indian courts and the Privy Council were in favour of this equity in Indian but with some modifications. Application of English equity in India was therefore, neither uniform nor certain, it was necessary to enact law on

this subject. Accordingly, Section 53-A was included in the transfer of property Act by the Amending Act of 1929.

Section 53 –A provides that:-

(i) Where a person contracts to transfer an immovable property for consideration, and

(ii) Acting in furtherance of this contract, the transferee has taken possession over a part or whole of property, and

(iii) Such transferee has either performed his part of contract or ids willing to perform it;

Essentials conditions for application of section 53-A:-

Analysis of the provisions of secytion53-A makes it clear that following essentials conditions are necessary for its application:-

(1)There is a contract for the transfer of an immovable property.

(2)The transferee takes possession of the property under this contract.

(3)The transferee has either performed his part of contract or is willing to perform the same.

When the above mentioned conditions are fulfilled, the transferee can defend his continuance of possession over property. In other words, if these requirements are fulfilled, the transferee is entitled to claim, under this section, that he should not be dispossessed or evicted from the property.

1. Contract for transfer of immovable property:- for the application of this section, the first condition is that there must be a contract and the contract must be transfer of immovable property for value.

(a) It must be a written contract. An oral contract does not have any valid to defend under part- performance.

(b) Agreement to sell:- an agreement to sell does not by itself create any right interest or title to property. Such rights are created only by a sale deed. Accordingly in the case Sukhwinderkaur V/s Amerjit Singh, the court held that an agreement to sell is not required to be registered. It is admissible in evidence in a suit for specific performance.

(c) Transfer for consideration: the written contract must be for the transfer of an immovable property for consideration.

(d) Movable property: this section does not apply to an agreement for the transfer of movable property.

(e) Valid contract: it may be noted that section 53-A is applicable only where the contract for the transfer is valid in all respect. It must be an agreement enforceable at law under the Indian Contract Act 1882.

2. Possession in furtherance of contract:- the second essential requirement is that the transferee has taken possession or continues possession in part-performance of the contract or, has some act in furtherance of the contract.

3. Transferee is willing to perform his part of contract:- where a person claims protection of his possession over a land under section 53-A his own conduct must be equitable and just. It is an essential condition for the applicability of this section that the transferee must be willing to perform his part of contract.

Difference between English and Indian Law:

Section 53-A incorporates the provisions of English equitable doctrine of part – performance. But this section is not total importation of English law. It is modified form of English law; the importation id therefore partial. Indian law of part-performance may be distinguished from the English law as under.

(a) Under English law, the doctrine of part-performance is applicable to written as well as oral agreements whereas, section 53-A is applicable only where the agreement of transfer is written.

(b) In England, the equity of part-perf0ormance is active as well as passive.

That is to say, under English law, the transferee is entitled to defend his possession and is also entitled to enforce his right in an independent suit e.g. a suit for specific performance or, for an injunction to restraint disposition.

In India, section 53-A does not give any right of action to the transferee. Part-performance is only passive here

**Question 8. Elucidate the doctrine of "Lis Pendens" as provided under the Transfer of Property Act, 1882.**

The law incorporated in Section 52 is based on the doctrine of lispendens. Lis means litigation and pendens means pending so, lispendens means pending litigation". The doctrine of lispendens is expressed in the well known maxim; pendent lite nihilinnoventure, which means „during the pendency of litigation nothing new should be introduced" under this doctrine, the principle is that during pendency of any suit regarding title of a property, any new interest in respect of that property should not be created. Creation of new title or interest is known as a transfer of property. Therefore in essence, the doctrine of lispendens prohibits the transfer of property pending litigation.

Provision of section 52:- the doctrine of lispendens as laid down in section 52is as follows:

(a) During the pendency of suit or proceeding.

(b)Property cannot be transferred or otherwise dealt with, and

(c) If so transferred the transferee is bound by the decision of the court whether or not he had notice of the suit or proceeding.

Essential conditions for application of section 52:-

Following conditions are necessary for the application of the doctrine oflispendens as provided in section 52:

1. There is a pendency of a suit or proceeding.

2. The suit or proceeding must be pending in a court of competent jurisdiction.

3. A right to immovable property is directly and specifically involved in the suit.

4. The suit or proceeding must not be collusive.

5. The property in dispute must be transferred or otherwise dealt with by any party to suit.

6. The transfer must affect the rights of the other partly to litigation. When the above mentioned conditions are fulfilled, the transferee is bound by the decision of the court. If the decision of the court is in favour of the transferor, the transferee has rights in the

property transferred to him. If the decision goes against the transferor, the transferee cannot get any interest in the property.

1. Pendency of suit or proceeding:- the section applies only where a property is transferred during pendency of litigation. Pendency of a suit is which that period during which the case remains before a court of law for its final disposal. If a case is instituted in court, the first step is presentation of the plaint, and the last step is passing of a decree. So, the pendency of a suit begins form the date on which the plaint is presented and terminates on the date when final decree is passed.

2. Pendency in court of competent jurisdiction:- the suit or proceeding during which property id transferred, must be pending before a court of competent jurisdiction. Where the suit is pending before a court which has no proper jurisdiction to entertain it, the lispendens cannot apply.

3. Rights to immovable property must be involved:-another condition for applicability of his section is that in the pending suit, right to immovable property must directly and specifically be in question. The litigation should be regarding title or interest in an immovable property. Where the question involved in the suitor proceeding does not relate directly to any interest in an immovable property, the doctrine of lispendens has no application. Following suits have been held involve question of rights in immovable property are within the scope o f this section:

(i) A suit for partition.

(ii) A suit for mortgage.

(iii) A suit for pre-emption.

(iv) Easement suit.

Rights in movables: the doctrine lispendens does not apply where the suit involves rights in movable properties. Standing timber is movable property; therefore this section cannot apply where the issue before the court is right in respect of standing timber.

4. Suit must not be collusive:-LisPendens is inapplicable if the suit is collusive in nature. A suit is collusive if it is instituted with a mala fide intention. Mala fide intention behind instituting a suit is inferred from the fact that parties to the suit know their respective rights

in the property and there is no actual dispute. Such suit is therefore, fictitious and the very purpose of filing the suit is to get judicial decision for some evil designs e.g. defrauding a third party.

5.Property is transferred or otherwise dealt with:- during pendency of suit, the property must be transferred or otherwise dealt with by any of the parties to suit.

Transfer includes sale, exchange, lease and mortgage. Thus, during pendency of suit if the disputed property is sold or given exchange, is leased or is mortgaged either by plaintiff or by defendant, doctrine of lispendens shall apply on it and the transfer would be subject to decision of the court.

6. Transfer affects rights of any other party:- the last condition for applicability of section 52 is that the transfer during pendency must affects the rights of any other party to suit. The principle of lispendens is intended to safeguard the parties to litigation against transfers by their opponents. So, the words any other party here does not mean stranger to suit. It means any other party between whim and the party who transfers; there is an issue for decision which might be prejudiced by alienation.

Effects of the principle of lispendens:-

When the condition necessary for the applicability of this section are fulfilled the result is that transferee is bound by the decision of the court. It may be noted that normally decree of a court binds only the parties to the suit, under the principle of lispendens, a person who purchase during pendency of the suit is also bound by the decree made against that party from whom he had purchased.

**Question 9. Elucidate the concept of "Feeding the grant by Estoppel under Transfer of property act, 1882.**

Answer. The Rule of Estoppel signifies that when a person makes a promise to another person, which is more than what he can perform or which he is incapable of performing, then he cannot later on claim incompetency as a legitimate excuse when he acquires the competency to fulfil his promise. In simple words, he, later on, cannot claim incompetency to avoid his liabilities. Such a person would be compelled to fulfil the promise when he

acquires the competency to perform it. This competency feeds the estoppel. Estoppel signifies a stop, now you have to stick to what you said.

Example: A represents to B that he is authorised to transfer the property X whereas in reality he is not and professes to transfer the same. Acting on that representation B provides consideration for the same. Now the transfer is inoperative as A had no authority to transfer the property. But later on, A acquires the property under the will of his Uncle, who was the owner of the property. Now A can be compelled to complete the transfer. He cannot plead the transfer to be inoperative on the grounds that he had no authority at the time of transfer.

The Rule of Estoppel has been adopted in Indian Legislations from the Common Law. The Rule of Estoppel has been embodied in Section 43 of Transfer of Property Act, 1882. It explains what happens when a transfer is done by an unauthorised person but he, later on, acquires interest in the property transferred.

Essentials of Section 43

The transferor makes a false representation that he's authorised to transfer a certain immovable property

This representation may be erroneous or fraudulent

The transferor professes to transfer the property;

For consideration;

The transferee enters into a contract, acting on that representation;

The transferor, later on, acquires some interest in the property while the contract is subsisting.

The transfer would operate on any such interest acquired, at the option of the transferee.

Provided that, there is no subsequent bona fide transferee, who has entered into the transfer without having any notice of the earlier contract between the transferor and the prior transferee.

Representation: May be Fraudulent or Erroneous

In order for the Rule of Estoppel to apply, there must be some kind of representation. It is not needed for a representation to be fraudulent or intentional. There might be 2 cases:

A fraudulently makes B to believe that he has the right to transfer the property and B acts on that representation. And later on, A acquires the same right.

A believes that he has the authority to transfer the property and makes B to believe the same. B acts on that belief. In reality, A doesn't have the authority but he, later on, acquires it.

In both the cases mentioned above, the Rule of Estoppel would apply. The section was amended in 1929 which added the word fraudulently, earlier it was just erroneously. Hence, the purpose of this section is, it doesn't matter whether the transferor has acted fraudulently or innocently. What is material is he made the representation and the transferee acted on it.

The representation can be expressed or implied. It is presumed that when a person says that 'he will transfer the property', he is conveying that he has the authority to transfer that particular property. It would amount to a representation and the Rule of Estoppel will be attracted when he gains the competency to transfer.

Viraya v. Hanumanta

A, B and C were coparceners and held the family property jointly. A sold the property to alienee without the consent of other coparceners. A failed to deliver the property to the alienee as the joint family property cannot be transferred without the consent of all the coparceners. Alienee filed a suit against A for the enforcement of the contract.

During the pendency of the suit, C died. A's share in the joint property increased to one half. It was held that alienee was entitled to the share (including the increased share) of A in the property.

The transferee enters into a contract, acting on the representation made by the transferor:

Acting on the representation made by the transferor depicts the lack of knowledge on the part of the transferee. Hence, for there to be a representation, it is material that the transferee should be unaware or should not have the notice of the lack of competency on the part of the transferor to enter into the transaction. In a case where the transferee knows

about the defect in the title of the transferor at the time of the transfer, Section 43 or the Rule of Estoppel would not apply. Absence of knowledge on the part of the transferee about the defect in the title of the transferor also means that the transferee took reasonable care to protect his interest and then believed the title of the transferor should be good. Hence, it is a duty on the part of the transferee to inquire before entering into the transaction as to the title of the transferor and protect his own interest.

The test of reasonable care is the amount of care that an ordinarily prudent man would take. This shows that the knowledge on the part of the transferee could be actual or constructive. Actual knowledge means when the transferee knew the title of the transferor to be bad and constructive knowledge means when the transferee could've detected the lack of title but did not because of his own negligence. Even if the constructive knowledge on the part of the transferee is present at the time of the transfer, then the Rule of Estoppel won't apply.

Kartar Singh v. Harbans Kaur

Lands which are the subject matter of the case belonged to the minor son and his mother executed the sale deed of those lands. The son on attaining majority filed a suit contending that the sale was not binding on him and hence is void. The court declared the deed to be void and directed the restoration of the possession of the properties to the son. Before the restoration of possession could take place, the son died. Mother succeeded to those lands as an heir. The transferee claimed the benefit under Section 43. The court in the present case examined whether the transferee had the knowledge about the incompetency of the mother to execute the sale deed. It was observed that the sale deed mentioned that the land had been acquired by her and her minor son and she was acting as her guardian.

The transferee could've inquired that whether mother was competent to alienate the property of her minor son as a guardian as, In law, unless a guardian has been authorized by the court, he cannot alienate the property of the minor.

Held: The transferee had the knowledge of the fact that the mother was incompetent to effect a valid transfer and Section 43 of TPA would have no application.

Transfer: The property in question must be immovable property.

The transfer must be for consideration. It doesn't mean that the transferee has paid some monetary consideration to the transferor but that the consideration should be the essence of the transfer. Hence, Section 43 would not be attracted by gratuitous transfers like a gift, etc. The section applies to Sale, mortgage, lease, charge and exchange.

The doctrine doesn't apply to:

Sale made through the court

Where the transfer was forbidden by law, or

The transfer that is contrary to public policy.

Transfer by minor or lunatic is not qualified to attract the application of this section.

The transferor, later on, acquires some interest in the property while the contract is subsisting.

The Rule of Estoppel or Section 43 would be applicable only when the transferor subsequently acquires any interest in the property.

The section would apply only when the transferor acquires the interest in the property and not his successors or heirs. The application of the section is personal in character and won't apply against the person who acquires the property in his own right.

Example: A made B believe that he had the authority to transfer the property, which actually belonged to his brother. A died during the lifetime of his brother. When the brother died, the property went to heirs of A, who were also the heirs of the brother. B cannot go against A's heirs under Section 43.

The interest must be acquired by the transferor while the contract is still subsisting. It means that the contract shouldn't have come to an end before acquiring the interest.

Example: A makes B believe that he has the authority to transfer the property, which actually belongs to his brother. They enter into a contract of sale for the same. B, later on, gets to know that A has no authority to make the transfer. B asks for the consideration that had been paid, back. A pays the money back. A few days later, A's brother dies and A inherits the same property. But now B cannot exercise his option to validate the sale as the contract had already come to an end.

The transfer would operate on any such interest acquired, at the option of the transferee.

This means the transfer made is voidable at the option of the transferee. The transferee has the option to make the transfer valid.

The condition is different under Common Law. Under common law, if the contract is subsisting at the time when the transferee acquires the interest in the property, the transfer is validated automatically. There is no need for any action on the part of either transferor or transferee.

Proviso: This explains a situation where even when all the essentials of Section 43 have been fulfilled, the Rule of Estoppel won't apply.

If the property has been transferred by the transferor to another person, before the transferee could exercise the option to validate the transfer, the transferor loses the remedy of validation. But this will apply only in the case where

The subsequent transferee is bona fide transferee i.e. she must not have knowledge about the first transfer/contract. Knowledge can be actual or constructive.

The second transfer must be for a consideration.

Example: A represents to B that he is authorised to transfer the property X whereas in reality he is not and professes to transfer the same. Acting on that representation B provides consideration for the same. A, later on, acquires the property under the will of his Uncle, who was the owner of the property. Now the transfer becomes operative at the option of B i.e. B can either ask for the transferor to complete the transferor can ask for his money back. Before B could exercise his option, A sells the property to C. C had no knowledge about the contract between A and B.

Sale to C is valid and B has lost the option to validate his own transfer.

Comparison between the Rule of Feeding the Grant by Estoppel and Spec Successions:

Section 6 (a) of TPA provides that the chance of an heir apparent to succeed to the property of an intestate cannot be transferred. If the same is transferred, the transfer is void.

On the other hand Section, 43 makes the transfer valid at the option of the transferee if a person acquires the right in the property as an heir and the rest of the essentials are also fulfilled.

Jumma Majid Mercara V. Kodimaniandra Deviah

In this case, the Supreme Court drew a distinction between Section 43 and Section 6 (a) of TPA. It held that there is no reason for conflict between them and they both relate to different spheres. Section 6 (a) enacts a rule of substantive law whereas Section 43 enacts rule of Estoppel, which is one of evidence. The two sections operate on different fields and under different conditions.

The main difference between the two lies in the fact that the transfer that falls under section 6 (a) is within the knowledge of the transferee as well and there is no misrepresentation. Whereas, under Section 43, the absence of knowledge on the part of the transferee is one of the main conditions.

In case of a chance of an heir apparent being transferred, even the constructive notice on the part of the transferee would bring the case under Section 6 (a).

**Question 10. Explain, in detail the concept of Fraudulent transfer under Transfer of Property act, 1882.**

Answer 10. According to it, when a thing is done by a person with the intention to defraud the other, he is said to have done that thing fraudulently. The term defraud was explained by the Supreme Court in Dr. Vimla V. Delhi Administration. Supreme Court observed that the term defraud involves 2 elements: Deceit and Injury to the person deceived. The injury doesn't only mean economic loss. It includes deprivation of property or money and includes any harm caused to any person in body, mind, reputation or such others.

Fraudulent Transfer signifies a transfer that takes place in order to Deceive or defraud another. Example: A took a loan from B and mortgaged the property X as security. Later on, A realized that he was not able to pay back the loan and it would be paid out of the property X now. In order to prevent that, he sold the property to C. Here A's intention was to defraud B, hence the transfer was a fraudulent transfer.

Fraudulent Transfer is dealt with under Section 53 of Transfer of Property Act, 1882.

This section recognizes the need to protect the interest of the creditors. The rule of equity, justice, and good conscience has been incorporated in this section. It prevents a person from defeating the legitimate claims of his creditors.

Essentials of Section 53 of TPA:

53 (1): Transfer by the transferor

Of immovable property

With the intention to defeat or delay his creditors

The transfer is voidable at the option of the creditor defeated or delayed.

Provided that there is no subsequent transferee, who Acted in good faith, and

The transfer was for consideration.

53 (2): Transfer by the transferor

Of immovable property

The transfer is done without consideration

The transfer is done with the intention to defraud a subsequent transferee

Such transfer is voidable at the option of the subsequent transferee.

Transfer

In order to attract this section, there must be a transfer. The transfer must be of immovable property. The transfer must be a real one which creates a vested title in favour of the third party. Fictitious transfers do not attract this section. The fictitious transfer is where the transferor remains the real owner of the property.

Hence, in order to set aside the transfer under section 53, it has to be proved that the transfer was a real one and not a sham one. Example: X took a loan from Y and kept his property A as security. X then gets the property mutated in favour of his son. The mutation is done without effecting a transfer. As the father is still the owner of the property, what

appears to be a transfer is merely a sham and as Y still has the claim over this property, there is no need to move under Section 53 of TPA.

Intention to defeat or delay the creditors:

A creditor here is a person to whom the transferor owes the financial liability. In order to apply Section 53 of TPA, it is necessary for a creditor to exist, and it is not necessary for the creditor to be secured. The creditor can be unsecured as well. Even a subsequent creditor can move under this section. This means that it is not necessary for the transferor to be in debt at the time of the transfer. If the transfer is made prior to the debt transaction, with the intention that the transferor might take a loan in the future and wanted to take the property out of reach of the future creditors, it is equally fraudulent and can be set aside at the option of the creditors. But the mere fact that the loan was taken right after the transfer of property or there was subsequent indebtedness, is not evidence of fraudulent intention towards subsequent creditors.

A Muslim wife in lieu of her dower debt amounts as a creditor.

The basic objective behind this section is to protect the creditors from being delayed or defeated by removing the possible security. In order to attract section 53, it is necessary for the intention to be fraudulent. Hence, the intention behind the transfer must be to defeat or delay the creditors. The phrase 'creditors' doesn't mean that the intention should be to defeat or delay all the creditors. The intention to defeat some or even just one of the creditors is enough to attract Section 53.

Kanchanbai v. Moti Chand:

Transferor owed the Creditor Rs. 2600. The creditor asked for the money back/recovery of money. When even after being asked for the recovery of money, the transferor didn't pay back, the creditor threatened to file a suit. After receiving the notice of the same, the transferor executed a gift deed in favour of her daughter in law. Creditor filed a suit under Section 53 of TPA against the transfer. It was contended by the transferor that Section 53 of TPA was not attracted in the present case as there was just a single creditor. It was observed by the court that: the phrase creditors would also include a single creditor. The section would be attracted even when a single creditor is defrauded or there was intention just to defraud a single creditor. Here the transfer was done with the intention to defeat and delay the creditor's claim. Hence, section 53 would be applicable. Mere preference of one

creditor over the others is not sufficient to attract this section unless it's shown that it was done with the intent to defraud other creditor's claims.

Example: A mortgaged his property X to C1, C2, and C3. While repaying the loan, he gave preference to C1. Mere this fact won't amount to intention to defraud C2 and C3.

The transfer should be defeat and delay the creditors. If the transferor transfers his property but is willing to pay the creditors back what he owes to them or if just a portion of the property is transferred and there is another property left which is sufficient in value to pay back the creditors then, the Section 53 will not apply.

Example: A took a loan from C and mortgaged the property X as security. After a few days, he sold the property X to B. Now C can question or deny the transfer under Section 53.

But in order to move under Section 53, he has to prove that he is not able to recover the money from A personally. If A is ready to pay back the money to C personally without involving the property, then Section 53 will not be attracted.

The section operates only against fraudulent transfers. There might arise a case where the transfer is done for two considerations one of which is for fraudulent intention, which is separable from each other then, the whole transaction would not be regarded as fraudulent. Only that portion of the transaction would be regarded as fraudulent for which there was an intention to defraud. And the transfer would be given effect to the extent the transaction can't be regarded as fraudulent. But in cases where the substantial portion of the transaction is fraudulent and the fraudulent and not fraudulent portions cannot be separated, then the whole transaction would become voidable.

Framing of Suit

Privity of contract is followed which means only the parties to a contract can sue. Hence, no third party, who is not a party to the suit can sue on the creditor's behalf. The suit is instituted by the creditor on the ground that the transfer has been made with the intention to defeat or delay the creditors of the transferor.

The suit is instituted in the representative category i.e. on behalf of and for the benefit of all the creditors. It is to avoid the multiplicity of suits over the same subject against the

same opposite party/parties. Dismissal of the suit of one creditor would be binding on all the creditors.

Burden of Proof

There is no presumption in law that the transfer was effected with the intention to defeat or delay the creditors. The existence of fraud would not be presumed by the court, it has to be proved. So, when the transfer of property is challenged on the grounds of fraud then the primary onus is on the petitioner to show how he was connected to the property and how has the fraud taken place.

Hence, here the primary onus is on the creditors to prove that the transfer was effected with the intention to defeat and delay the creditors. But once it has been proved then the burden shifts on the transferee to prove that he bought the property in good faith and consideration.

Proviso: A bona fide transferee who paid the consideration for the transfer has been protected under this section. A bona fide transferee would mean that the transferee is unaware or has no knowledge about the fraudulent intentions of the transferor. The knowledge includes actual and constructive notice. If the transferee has the constructive notice of the fraud then it will be presumed that he had the knowledge about the fraud.

Also, the consideration must be the essence of the transfer. The transferee of a gratuitous transfer would not be protected. A creditor is a transferee in good faith even where he is aware of the proceedings of another creditor against the transfer as he is protecting his own interest and not defeating other creditor's interests. Section 53 further provides that this section will not affect any law relating to insolvency, which is in effect for the time being.

**Question 11. Elucidate Mortgagor's right of redemption, how can he exercise his right and explain the effect of the redemption.**

Answer 11. Right of redemption is one of the important rights of the mortgagor's and that has been reflected in section 60 of the Transfer of Property Act. At any time after the principal money has become due, the mortgagor has a right on payment the mortgagor has a right to redeem his property. Right to redeem his right to recover something by making certain payments, Mortgagor's right of redemption means mortgagor's right to recover or get back the

property after making payment of the loan. If the loan has been paid, the interest so transferred must revert back to the mortgagor. The mortgagee cannot retain any interest in the mortgage property. It may be noted that immovable property is a bundle of several interest. Out of all interest only an interest is transferred to mortgagee's security for the repayment of loan, after creating an interest in favour of mortgagee. The mortgagor still has the remaining interest. The remaining interest is called as residuary ownership.

Equity of redemption

In England mortgagor's right of redemption was introduced by the Chancery Courts. Chancery courts were the courts of equity. Therefore, mortgagor's right to redeem the mortgage by making payments even after the due date is known as equity of redemption. The equity courts introduced this right in order to do justice with cases on mortgage decided under the common law.

At common law mortgage was transfer of legal estate subject to condition the condition was nonpayment of debt on fixed date then the mortgage property belonged absolutely to mortgagee. In default of payment of debt the mortgagor would lose all his rights with respect to mortgaged property o relaxation was given to him under the common law. This would be great injustice to the mortgagors. So equity was adopted to rescue the mortgagor from this burden.

The courts of equity realized the main purpose of the effecting a mortgage was to give security to the moneylender for repayment of his money. Therefore, the money lender should not be given any legal right to hold on the property absolutely, if the mortgagor was ready to pay with the reasonable time after the expiry of the due date. Hence the equity of redemption was introduced by the Chancery Courts in England to give relief to those mortgagors who would not replay the loan within stipulated time. The main purpose of developing the doctrine of redemption was to protect the interests of mortgagors who in default of repayment of loan had to lose all rights in their properties. To overcome such situations, the equity had to go a step further by declaring that : "once a mortgage always a mortgage and nothing but a mortgage".

Clog on Redemption.

Clog on redemption means any condition or stipulation which prevents the mortgagors from redeeming the mortgage-property on payment of loan, right of redemption in England is

known as mortgagor's equity of redemption. Equity does not permit any fetters or clog on mortgagor's right of redemption and holds that once a mortgage, always a mortgage'. A clog on equity of redemption is void. In India the mortgagor's right of redemption as laid down in section 60 of this Act, is a statutory right. However as discussed earlier the right of redemption in India is based on English equity of redemption. In India too, clog on mortgagors right of redemption is void because no condition or stipulation can prevail against the statutory right given by section 60. This section has not used the words " in the absence of contract to contrary". Accordingly, a clog on mortgagor's right of redemption is void as being against the provisions of section 60 as well as violative of the principles of equity. The result is that even mortgagor cannot stipulate against his own right of redemption. However, a condition or stipulation is a clog and thereby void, only in the following circumstances:

The condition or stipulation has been imposed only by the mortgagee, not by any other person who is stranger to transaction.

The condition or stipulation must be incorporated in the mortgage deed itself. Parties are free to stipulate otherwise by any independent contract outside the mortgage-deed. The condition or stipulation included in the deed must be unreasonable, against public policy and with malafide intention. The condition or stipulation puts either absolute restraint on mortgagor's right of redemption or prevents him from redeeming the mortgage for unreasonably long period.

Exercise of Right of Redemption: Mortgagors may exercise his right of redemption in any of the following manners:

a. By paying or tendering the mortgager money to the mortgagee

b. By depositing the mortgage money in the court.

c. By filing a suit for redemption.

a. payment or tender of mortgage money: The mortgage money debt may also be paid directly to mortgagee. Payment may be made also to his authorized agent. Unless the mortgagor makes payment or tenders to make payment of debt, he cannot redeem the mortgage. Before the mortgagor claims redemption, he must either pay money to mortgagee or tenders to pay the same.

To whom payment is to be made: The mortgagor may pay the money to mortgagee or to his authorized agent, payment made to an agent who disclaims authority to revise the mortgage money on behalf of mortgagee, is not regarded as payment of debt. Where the mortgagee is minor payment should be made to his lawful guardian. Where there are two or more joint mortgagees the payment must be made to all of them jointly. In such cases payment made to the one mortgagee does not discharge the debt against the remaining mortgagees.

Mode of payment: The mode of payment can be made either in cash or cheque as the mortgagee prefers. Payment at proper time and place.

b. Deposit of mortgage money in court.

The second mode of redemption is deposit of mortgage money in the court. Mortgage money means capital money (amount of loan) plus interest not he capital money calculated till the date of deposit. Unless the whole of mortgage money is deposited in the court there is no valid discharge. When the mortgage money is deposited in the court the court shall cause notice to mortgagee that such deposit has been made. Where mortgagee is not living in the district in which the property is situated, the notice will be served to his agent. If the mortgagee accepts the money deposited in the court. He is deemed to have done it in full discharge of the debt and he has to redeem the mortgage.

Suit for redemption: The mortgagor has a right to redeem the mortgage either by making payment to mortgagee or by depositing the money in court. If he does not want to redeem the mortgage by any of the two methods. The third mode available to him is to file a suit for redemption in the court of law. That is to say, a mortgagor is at liberty to redeem the mortgage directly by filing a suit for redemption. The suit must be filed by the mortgagor only after the right redemption of accrues to him i.e., after the payment of the principal money has become due. The suit must not be filed by the mortgagor when he has already lost his right of redemption. The mortgagor right of redemption is lost by foreclosure or sale or when it is barred by the limitation under the Limitation Act. Limitation for filing a suit for the redemption is thirty years from the date on which the payment becomes due and the right of redemption of accrues to mortgagor.

Effect of Redemption: The effect of mortgagor's right of redemption is that mortgagor becomes entitled to the following rights.

a. Mortgagor is entitled to get back the mortgage-deed and all the documents relating to the mortgage if they are in possession of the mortgagee. On the redemption the mortgagor can compel the mortgagee to deliver him the documents of the mortgage before the redemption. The mortgagee is bound to return not only the mortgage deed but also all the documents relating to the mortgaged property which are in his possession.

b. Mortgagor is entitled to get back the possession of the property. In usufructuary mortgage the mortgagor delivers the possession of the property to mortgagee. The mortgagee is bound to deliver the possession of the whole property which was given to him under the mortgage. If the portion of the property is lost due the negligence of the mortgagee then he is bound to pay for it.

c. Mortgagor is entitled to compel the mortgagee to retransfer the mortgage property, such conveyance can be demanded only when the mortgage is of English Mortgage. In English Mortgage mortgagor binds himself to repay the loan on certain date and transfers the property absolute subject to the condition that the mortgagee shall retransfer it to the mortgagor on repayment of the loan.

Hence I would like to conclude that the redemption of the mortgage property by the mortgagor is one of important right to get back his property back once he repays the loan amount to the mortgagee. Because of this right the interest of the mortgagor is protected in the society and we should also notice that this principle is based on equity and good conscience.

**Question 12. Explain the concept of Marshalling and Contribution with relevant case laws.**

Answer 12. The Rule of Marshalling and Contribution are concepts embodied in the Transfer of Property Act, 1882 ('TOPA"). Section 81 and 82 of TOPA deals with the Rule of Marshalling and contribution respectively. Before the supersession of the rules are discussed, an understanding of the concepts themselves is imperative.

Rule of Marshalling

Marshalling means "to arrange" and the Rule is first introduced in TOPA under Section 56. Section 56 may be explained in the following manner:

There must be an owner of two or more properties,

He must mortgage two or more of his properties to any person,

Thereafter, he must sell one or more of these properties to any person other than the one he mortgages the properties to. The sale must include at least one property that has been mortgaged by the owner,

The buyer of such properties is entitled to have the owner satisfy the mortgage-debt out of the property or the properties not sold him before he purchases the property. This can be subject to a contract stating the contrary,

The rule of marshalling should not be so exercised so as to prejudice the rights of the mortgagee, any persons claiming under the mortgagee, or any person who has acquired an interest with consideration in any of the properties.

In short, the Rule of Marshalling provides the buyer, in the above case, the right to demand from the owner that the property be free from any and all encumbrances before the buyer purchases the property. Section 81 also adopts the Rule of Marshalling but in cases of Mortgages. Section 81 may be understood in the following manner:

There must be an owner of two or more properties. He must mortgage two or more of these properties to any person,

He must then mortgage one or more of these properties to another person,

The subsequent mortgagee is entitled to have the mortgage-debt of the prior mortgagee satisfied out of the properties not sold to him. This can be subject to a contract stating the contrary too,

Similar to Section 56, the rule of marshalling here too should not be so exercised so as to prejudice the rights of the mortgagee or any person who has acquired an interest with consideration in any of the properties. Marshalling, in this context, may be explained by an illustration. If the mortgagor mortgages three of his properties X, Y and Z to A and then mortgages X to B, B is entitled to have the mortgagor satisfy his debt from the sale proceeds of the properties Y and Z and only if the said sale proceeds fall short, can property X be sold.

In Barness v. Rector, W mortgaged two of his properties A and B to X. W then mortgaged property A to Y and property B to Z. Here, the court held that X's mortgages will be

apportioned proportionately between properties A and B and the surplus of A will go to Y and surplus of B will go to Z.

The doctrine of Marshalling is thus based on the principle that a creditor who has the means of satisfying his debt out of several funds shall not, by the exercise of his right, prejudice another creditor whose security comprises only one of those funds.

Rule of Contribution

The Rule of Contribution relates to the collective contribution towards a mortgage debt by mortgagors. It gives one mortgagor the right to have the other's property contribute to the discharge of the mortgage debt. When a creditor has a single claim against several debtors, he can realize the debt from any one of them, but as per the rule of contribution he can claim contribution to the debt by the other debtors, so that the burden might fall on all equally. The rule is encapsulated under Section 82 of TOPA and may be divided as per the following:

Mortgaged Property Belonging to two or more persons

This is based on the following essentials:

A mortgaged property must belong to two or more persons based on a common loan,

Each mortgagor, in absence to a contrary contract, is liable to contribute as per his share of the mortgage,

For example, X, Y and Z mortgaged their properties to D mortgaging a common debt. Now if D can recover the entire debt from the properties mortgaged by X, X is entitled to demand Y and Z to contribute their portion of the debt out of their mortgaged properties. The Privy Council has lucidly explained it in Kampta Singh v. Chaturbhuj. The Privy Council held that if a person owns one property subject, with the property of other persons, to a common mortgage, and has paid off the mortgage debt, he is entitled to call upon the owners of the other property to bear their proper proportion of the burden.

When One Property is Mortgaged First and then again mortgaged with another Property

When the mortgagor has two properties and he mortgages one to secure one debt and then mortgages both to secure another debt, if the former debt is paid out of the former property, each property is then liable to contribute to the latter debt after deducting the amount of the former debt from the value of the property from which it has been paid.

In Bohra Thakur Das v. Collector of Aligarh,the mortgagor mortgaged the village of Kachaura to one, Nand Kishore. He again mortgaged villages, Kachaura and Agrana, to Nand Kishore. The Plaintiffs purchased the equity of redemption from Agrana. The first mortgagees purchased Kachaura by a decree. The plaintiffs sued and contended that the first mortgagees were liable to pay the proportionate share of the debt for redemption of the second mortgage. The court held that since the whole of Kachaura was swallowed up by the first mortgage by the decree, the entire burden of the second mortgage fell entirely on Agrana. The Privy Council, in appeal, overruled the decision of the court and held that the first mortgagees would have to contribute to the second mortgage, as they purchased Kachaura.

However, in Sesha Iyer v. Krishna Iyenger, the situation was quite different. Two properties X and Y were mortgaged to R and properties X and Z were mortgaged to P. R executed his decree on the mortgage by sale of X. P then sued to enforce his mortgage. However, X had already been sold. P sought to sell Z and also demanded contribution against Y. The Court held that if the plaintiffs had bought part of the mortgaged property subsequently sold under R's decree, they might by paying off the debt and saving the property from sale, have acquired a right to contribution by securing a lien on the other property. However, since the plaintiffs did nothing, no right to contribution arose.

Supersession of the Rule of Marshalling over the Contribution

The proviso to Section 82 denotes that the rule of Marshalling under section 81 supersedes Contribution under Section 82. The Hon'ble Madras High Court has even held it to be well settled that the Right to Contribution is controlled by the Right of Marshalling.This may be best understood by an example:

There is an owner of two properties X and Y, who mortgages property X to A then to B then X and Y properties to C and lastly property X to D. Since X and Y both contribute to C's mortgage, the value of the said contribution must include a deduction from property X, the value of A's mortgage and from property Y, the value of B's mortgage. However, D being the last mortgagee still has a right of marshalling and he can ask C to pursue property Y first instead of property X. Thus, right of D to marshal his securities supersedes his contribution that is to be made.

The reason why marshalling supersedes contribution is because the last mortgagee is given an opportunity to make the mortgagor discharge the mortgage debt from other mortgaged

properties first before he realizes the mortgage debt from the properties mortgaged to the person who holds the right of marshalling. However, if after exercising the right of marshalling, the amount realized from the other properties is insufficient, the last mortgagee must then contribute as his is the only mortgage debt left to be realized.

Marshalling is the right of subsequent mortgagees whereas contribution is with respect to mortgagors. Marshalling is if a creditor has multiple funds to realize his debt, he must first pursue the multiple funds instead of prejudicing the creditor who is secured only by one fund. Whereas in contribution all the co-mortgagors who have taken a debt by mortgaging their properties have to make contributions towards debt proportionately according to their respective shares. The Proviso to Section 82 of TOPA gives precedence to the former over the latter.

**Question 13. Explain the term "Mortgage". What are the rights and liabilities of a Mortgagor?**

Answer 13. The rights and liabilities of a mortgagor arise during a mortgage. A loan may be secured or unsecured. Where a loan is given simply on the basis of debtor's promise to pay (e.g. on promissory-note), such loans are called as unsecured loans. But, where the creditor takes security from the debtor for the repayment of his money, the loan is known as secured loans. One such way to secure loans is mortgage. Section-58(a) of the Transfer of Property Act, 1882 has defined mortgage as the transfer of an interest in a specific immovable property for securing:

The payment of money given to him or to be given through loan, or

An existing or future debt, or

The performance of an engagement which may give rise to a pecuniary liability.

Who is a mortgagor? The person who has transferred the interest in a specific immovable property is known as mortgagor. For instance, A wants a loan from B. Now B wants his amount to be secured which he is going to loan A. A will transfer the interest in a specific immovable property to B and will give him the authority of selling it in case A is not able to repay B's amount. Here A is the mortgagor.

Who is a mortgagee? The transferee or person in whose favour the interest is being transferred is known as mortgagee. In the above-given example, the person who is lending money i.e. B is the mortgagee.

What is mortgage-money? The principal amount which is given as loan and the interest amount which mortgagor will pay to mortgagee along with the principal amount. Sum of both the principal amount and interest is known as mortgage-money.

What is a mortgage deed? It is an instrument by which the transfer of interest in a specific immovable property is affected. It is a kind of agreement which legally binds both the mortgagor and mortgagee.

Different kinds of mortgage: There are six kinds of mortgage which are recognized under the Transfer of Property Act, 1882. They are discussed in the act from section 58(b)-58(g). Following are the different kinds of mortgage:

- Simple Mortgage [section-58(b)]
- Mortgage by conditional sale [section-58(c)]
- Usufructuary Mortgage [section-58(d)]
- English Mortgage [section-58(e)]
- Mortgage by deposit of title deeds [section-58(f)]
- Anomalous Mortgage [section-58(g)]

Rights of Mortgagor

Every mortgage-deed leaves a right to the mortgagor and a corresponding liability for mortgagee and vice versa. Following are the rights given to a mortgagor given by the Transfer of Property Act, 1882:

- Right to redemption
- Right to transfer mortgaged property to a third party instead of retransferring
- Right of inspection and production of documents
- Right to accession
- Right to improvements
- Right to a renewed lease

- Right to grant a lease

Right to Redemption (section-60)

It is one of the most important rights of a mortgagor given under section of the Act. This right puts an end to mortgage by returning the property of mortgagor. The right to redeem further grants three rights to the mortgagor:

Right to end mortgage deal

Right to transfer mortgaged property to his name

To take back possession of property in case of delivery of possession

In the case of Noakes & Co. vs. Rice (1902) AC 24, Rice was a dealer who mortgaged his property, premise and goodwill to N subject to the provision that if R paid back the whole amount, the property would be transferred back to his name or any other person's. A covenant was attached that stated whether or not the amount is due, R would only sell Malt liquor by N in his premises. Because of this covenant, R had difficulty in redemption and it didn't give him absolute right over his property. House of Lords held that anything which clogs this right is bad and they came up with the concept that 'once a mortgage always a mortgage' and said that mortgage could never be irreducible.

This principle was added to protect the interest of a mortgagor. Any condition or provision which prevents a mortgagor from redeeming his mortgaged property is a clog on the right of redemption. The right to redemption continues even though the mortgagor fails to repay the loan amount to mortgagee. In the case of Stanley v. Wilde, (1899) 2 Ch 474, it was held that any provision mentioned in the mortgage-deed which has an effect of preventing or impeding the right to redemption is void as a clog on redemption.

Exceptions to the right- The right to redeem has three exceptions. It can be extinguished under the following cases:

- By the act of parties
- By operation of law
- By decree passed by the court

Obligation to transfer to the third party instead of transferring it to mortgagor (section-60A)

This right was added in the Act by Amendment Act of 1929. This right provides the mortgagor with authority to ask the mortgagee to assign the mortgage debt and transfer the property to a third person directed by him. The purpose of this right is to help the mortgagor to pay off the mortgagee by taking a loan from a third person on the same security.

Right to inspection and production of documents (section-60B)

This section is also inserted by the Amendment Act of 1929. It is the right of mortgagor to ask mortgagee for the production of copies of documents of the mortgaged property in his possession for inspection on notice of reasonable time. The expenses incurred on production or copies of documents or travel expenses of a mortgagee are to be paid by the mortgagor. This right is available to the mortgagor only as long as his right to redeem exists.

Right to Accession (section-63)

Basically, accession means any addition to property. According to this right mortgagor is entitled to such accession to his property which is in the custody of mortgagee. There are two types of accession:

Artificial accession- It is when mortgagor made some efforts and it increased the value of land.

Natural accession- The name itself defines i.e. without any man-made efforts.

In case an accession is made to the property due to the efforts of mortgagee or at his expense and such accession is inseparable, mortgagor, in order to be entitled to such succession, needs to pay the mortgagee the expense of acquiring such accession.

If such separate possession or enjoyment is not possible, the accession must be delivered with the property; it is the liability of mortgagor, in the case of an acquisition which is necessary to preserve the property from destruction, forfeiture or sale, or made with his assent, to pay the proper cost thereof, as an addition to the principal money, with interest at the same rate as is payable on the principal amount, or, where no such rate is fixed, at the rate of nine percent per annum.

Right to Improvements (section-63A)

According to this right if the mortgaged property has been improved while it was in possession of mortgagee, then on redemption and in the absence of any contract to the contrary mortgagor is entitled to such improvement. The mortgagor is not liable to pay mortgagee unless:

Improvements made by the mortgagee were to protect the property or with the prior permission of mortgagor.

Improvements were made by the mortgagee with the permission of the public authority.

Right to Renewed Lease (section-64)

If the mortgagor is entitled the mortgaged property is a leasehold property and during the duration of mortgage the lease gets renewed then, on redemption the mortgagor is entitled to have the benefit of the new lease. This right is available to the mortgagor unless he enters into any contract to the contrary with mortgagee.

Right to grant a Lease (section-65A)

This right was introduced by the Amendment Act of 1929. Prior to this right, the Transfer of Property Act did not allow a mortgagor to lease out the mortgaged property on his own but only with the permission of mortgagee. Now, a mortgagor has the right to lease out the mortgaged property while he is in lawful possession of that property, subject to the following conditions:

- All conditions in the lease should be according to the local laws and customs to prevent any fraudulent transaction.
- No rent or premium shall be paid in advance or promised by mortgagee.
- The contract shall not contain any provision for the renewal of the lease.
- Every such lease shall come into effect within a period of six months from the date of its execution.
- Where the mortgaged property is a building, the term of the lease should not exceed three years in total.

Duties/liabilities of a mortgagor

Along with the rights given to a mortgagor, the Transfer of Property Act has also conferred some duties on him. Following are the duties of a mortgagor:

- Duty to avoid waste
- Duty to indemnify for defective title
- Duty to compensate mortgagee
- Duty to direct rent of a lease to mortgagee
- Duty to avoid waste (section-66)

This section imposes a duty on the mortgagor to not to commit any act which leads to the waste of property or any act which reduces the value of the mortgaged property. Waste is divided into two categories:

Permissive waste– A mortgagor who is in possession of the mortgaged property is not liable to the mortgagee for any minor waste.

Active waste– When an act is done which causes major waste of the property or leads to the reduction in the value of mortgaged property, then the mortgagor will be liable to the mortgagee.

Duty to indemnify for defective title

It is the duty of a mortgagor to compensate the mortgagee for a defective title in the mortgaged property. A defective title refers to a situation when a third party starts claiming or interferes with mortgaged property. It is a liability for the mortgagor to compensate for the expenses incurred by mortgagee for protecting the title of that property.

Duty to compensate mortgagee

If the mortgaged property is in possession of mortgagee who is paying all the taxes and other public charges, then it is the duty of mortgagor to compensate mortgagee for incurring such expenses. Similarly, when there is no delivery of possession i.e. the mortgaged property is still in possession of mortgagor, then it is his duty to pay all public charges and taxes levied on it.

Duty to direct rent of a lease to mortgagee

Where the mortgaged property is leased by mortgagor then it is his duty to direct lessee to pay the rent, etc. to the mortgagee.

**Question 14. What are the essential elements of a Mortgage? Also explain the different types of mortgage.**

Answer 14. A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage-money , and the instrument by which the transfer is effected is called a mortgage-deed.

The essential nature of mortgage is that it is a transfer of an interest in specific immovable property to the lender, called a mortgagee. The mortgage is simply the transfer of an interest in the property mortgaged. It is not the transfer of absolute interest in the property.

There is necessarily a transfer of interest in specific immovable property by reason of the execution of the mortgage. That would be there irrespective of whether a debt has arisen or not because it is a necessary element of mortgage, but a mortgage is not always executed for securing debt which has already arisen. A mortgage can be executed for securing payment of money to be advanced. Money which may be paid later may be secured by a current mortgage.

Equitable mortgages executed in favour of banks to secure overdraft accounts would operate as mortgages but the debts thereunder would arise only when liability is incurred by reason of a debit being found in the overdraft account as a result of operating the account.

Elements of a Mortgage

The following are the essential characteristics of a mortgage :

(1) There must be a transfer of an interest.

(2) There must be specific immovable property intended to be mortgaged.

(3) The transfer must be made to secure the payment of a loan or to secure the performance of a contract.

Transfer of Interest

The right of the mortgagee is only an accessory right which is intended merely to secure the due payment of the debt.

Mortgage is simply a transfer of interest in the immovable property while the ownership still retains with the mortgagors. Thus, where a joint family property is subject to mortgage, there is no transfer of ownership and the coparceners being its lawful owners are competent to allot the mortgaged property in oral partition to any of the coparceners. The coparcener to whom the mortgaged property is allotted becomes its absolute owner and is entitled to redeem the mortgage.

The words 'transfer of an interest' also bring out the distinction between : (i) a mortgage and an agreement to mortgage, and (ii) a mortgage and a charge. A mortgage is a transfer of an interest and creates a right in rem, but mere agreement that one person shall lend the money and the other would borrow it by way of mortgage, does not create any interest in the property intended to be mortgaged. Such an agreement is not even capable of specific performance, that is, the court cannot compel the parties to borrow or lend money. Such an agreement only gives rise to an obligation to pay damages. Since a mortgage creates a right in rem, such right is available against all subsequent transferees of the mortgaged property irrespective of notice.

Specific immovable property.

The description of the property in the mortgage deed, if any, must at least be sufficient to identify the property.

Consideration of mortgage.

The consideration of a mortgage may be either : (1) money advanced or to be advanced by way of loan; (2) an existing or future debt; or (3) the performance of an engagement giving rise to pecuniary liability.

Effect of failure of mortgagee to advance amount undertaken.--

A mortgage under the Transfer of Property Act is a transfer of an interest of an interest in the land mortgaged, and not a mere contract. Once a document transferring immovable property has been registered, the transaction passes out of the domain of a mere contract and falls into one of a conveyance.

Therefore, a transaction of mortgage formally, executed does not become void or ineffective merely because the mortgage fails to advance the amount of money undertaken to be advanced by him. If, without advancing the amount agreed to be advanced, he sues on the title created under the deed of mortgages the court will not award him a decree for anything more than what he has advanced. But this does not mean that the mortgage is invalid.

Forms of Mortgage

1.Simple Mortgage.--

The characteristics of a simple mortgage are : (1) that the mortgagor must have bound himself personally to repay the loan, (2) that to secure the loan he has transferred to the mortgagee the right to have specific immovable property sold in the event of his having failed to repay, and (3) that possession of the property is not given to the mortgagee.

No delivery of Possession

The outstanding feature of a simple mortgage is that possession is not delivered to the mortgagee, but remains with the mortgagor. Since the mortgagee is not put into possession of the property, he has no right to satisfy the debt out of the rents and profits, nor can he acquire the absolute ownership of mortgaged property by foreclosure.

It will be seen that the mortgage, has, on default of the mortgagor, a two fold cause of action

One arising out of the breach of the convenant of repay and the other arising out of the mortgage. The mortgagee may, therefore, sue him for the mortgage-money or may proceed against the property or may combine both these remedies in one suit. If he sues on personal undertaking only, he obtains a money decree but if he sues on the mortgage,he obtains an

order for the sale of the property.

2. Mortgage by conditional Sale.--

The Mohammedan Law forbids the taking of interest and therefore in order to evade the prohibition of interest, a kind of mortgage, known as byebilwafa was devised. The mortgagor purported to make over the property to the mortgagee, by way of an absolute sale, and the mortgagee (the ostensible buyer) agreed to resell the property, at the expiry of a certain stipulated time, on being repaid the money advanced by him.

Essentials of a mortgage by conditional sale.

In a mortgage by conditional sale. --

(1) the mortgagor must ostensibly sell the immovable property,
(2) there must be a condition that either,
(a) on the repayment of the money due under the mortgage on a certain date, the sale shall become void or the buyer shall retransfer the property to the seller, or
(b) in default of payment on that date the sale shall become absolute.
(3) the condition must be embodied in the document which effects or purports to effect the sale.

This is, therefore, a mortgage in which the ostensible sale is conditional and intended simply as a security for the debt. The word “ostensible” means that it has an appearance of sale but is really not a sale. It is merely executed in form of sale with a condition attached to it. The ostensible sale need not be accompanied with possession. The mortgagee does not acquire any personal right against the mortgagor.

It is to be noted that the sale does not become absolute in default of payment on the due date by itself until there is a decree absolutely depriving the right of redemption of the mortgagor. For a transaction to be a mortgage by conditional sale proviso to Section 58 envisages that the condition effecting or purporting to effect the sale as a mortgage transaction, must be incorporated in one and the same deed.

Where separate documents of sale deed of reconveyance and lease deed were executed in the same transaction and the condition effecting the sale as a mortgage was not embodied in the sale deed itself, the mortgagor was debarred from saying that the transaction was in the nature of mortgage by conditional sale.

3. Usufructuary Mortgage.-- The characteristics of a usufructuary mortgage are :
(1) possession of the property is delivered to the mortgagee;
(2) the mortgagee is to get rents and profits in lieu of interest or principal or both;
(3) no personal liability is incurred by the mortgagor; and
(4) the mortgagee cannot foreclose or sue for sale.

No personal liability.

The mortgagor cannot be sued personally for the debt. The mortgagee is only entitled to remain in possession of the mortgaged property till the principal and interest are defrayed according to the terms of the agreement. Since a usufructuary mortgagee is entitled to remain in possession until the debt is paid off, no time limit can be fixed expressly during which the mortgage is to subsist.

4. English Mortgage.--

An English Mortgage is a transaction in which the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgage property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the department. Thus, the main features of this mortgage are,--

(i) that the mortgagor should bind himself to repay the mortgage money on a certain day;
(ii) that the mortgage property should be transferred absolutely to the mortgagee; and
(iii) That such absolute transfer should be made subject to a proviso that the mortgagee will recovery the property to the mortgagor, upon payment by him of the mortgage money on the appointment day.

5.Mortgage by deposit of title-deeds.--

In England, a mortgage of this kind is called an " equitable mortgage" as opposed to a "mortgage" because in this type of mortgage, there is simply a deposit of document of title without anything more, without writing or without any other formalities. The object of the Legislature in providing for this kind of mortgage is to give facility to the mercantile community in cases where it may be necessary to raise money all of a sudden before an opportunity call be afforded of preparing the mortgage-deed. This mortgage, therefore, does not require any writing and being an oral transaction, is not affected by the Law of Registration.

The term Equitable mortgage and being inappropriate in India on account of the absence of classification or division of estates or rights into legal and equitable, it is called a mortgage by deposit of title-deeds.

6. Anomalous mortgage.--

Several other kinds of mortgages are in use in various parts of India which are in the nature of usufructuary mortgage. These and other types of mortgages have been given the name of 'anomalous' mortgage. Anomalous mortgage has been defined as a mortgage which does not fall under any of the five classes mentioned above.

An anomalous mortgage includes :

1. A simple mortgage usufructuary is a combination of a simple mortgage and a usufructuary mortgage and consequently an anomalous mortgage. In this transaction, the mortgagee is in possession and pays himself the debt out of the rents and profits and there is also personal undertaking as well as a right to cause the property to be sold on the expiry of the date fixed for payment.

2. A mortgage usufructuary by conditional sale is another instance of an anomalous mortgage. Here the mortgagee is in possession as a usufructuary mortgagee for a fixed period and if the debt is not discharged at the expiry of the period, he gets all the rights of a mortgagee by conditional sale. In case the debt is not paid within the time fixed, the mortgagee gets the right of foreclosure, that is a right to deprive the mortgagor's right of redemption.

Mode of transfer in a mortgage.-- There are three ways in which property may be transferred by way of mortgage:-

(1) Registered instrument.

(2) Delivery of Possession.

(3) Deposit of title-deeds.

Registered instrument.

In the case of a mortgage other than a mortgage by deposit of title-deeds, if the principal money secured is Rs. 100 or upwards, a registered instrument is compulsory.

Registration of mortgage by deposit of title deeds.--

When the debtor deposits with the creditor the title deeds of his property with an intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required.

**Question 15. Differentiate between a charge and a mortgage**

Answer 15. Main Differences Between Mortgage and Charge

- A charge can be paid for an infinite period while Mortgage is paid for a specific timeline and the property can be sold once one is unable to pay as agreed upon.
- Mortgages have a personal liability attached to it except in places where it is excluded by a contract while charge has no personal liability except when it is stated in a contract.
- Mortgages are mainly the transfer of ownership of interest from one party to another for an immovable asset while the charge is just a way of security to secure a debt by way of pledge, hypothecation or even a mortgage.
- The lender doesn't get to sell the property in charges, to recover the amount while the property can be sold off to another person's mortgages.
- Charges don't require registration under the law, while mortgages do require registration under the property transfer act of 1882.

- Whereas mortgage transfer interest, A charge is only used for the sole purpose to give the right of receiving payment out of a particular property and does not operate as a transfer of an interest in the property.

| Parameter of Comparison | Charge | Mortgage |
|---|---|---|
| Property applied to | Charged on movable and immovable property | Charged on Immovable property |
| Payment Period | Infinite Payment Period | Fixed payment period |
| Originality-Formation | Created by the operation of law | Agreement and Act between two parties |
| Liability | No personal liability except for special cases with contract introduction | Personal liability expected except when excluded by a contract |
| Registration | Requires registration under the law - Transfer of Property Act 1882 | Does not require registration except when created by an act of parties |



**Question 16. Explain the concept of lease with its essentials. What do you mean by Tenancy at will and tenancy by sufferance?**

Answer 16. Lease defined: A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.-- The transferor is called the Lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

A lease of immovable property is a transfer of a right to enjoy such property made for a certain time or in perpetuity. The expression “transfer of a right to enjoy” stands is contrast with the words “transfer of ownership” occurring in Section 54 in the definition of sale. In a sale, all the rights of ownership, which the transferor has, passes on to the transferee. In a lease, there is a partial transfer, that is a transfer of a right of enjoyment for a certain time. The person who transfers the right is called the lessor and the person to whom the right is transferred is called the lessee.

It should be noted that while both a sale and a mortgage to a minor are valid, a lease to a minor is void as the lease imports a covenant by transferee(lessee), to pay rent and perform various conditions which may be imposed in a lease. A contract with a minor is void. The fundamental conception of a lease is that it is the separation of the right of possession from ownership.

For a lease of immovable property, there must be a lessor and a lessee. An agreement of lease must also be executed lawfully by the lessor and the lessee containing the terms and conditions of the lease for lawful consideration. The lessor and lessee must also be persons who are competent to contract. Unless the aforesaid requirements are satisfied, an agreement of lease of immovable property cannot be lawfully made and executed. A lawful agreement of lease of immovable property cannot be lawfully made and executed. A lawful agreement of lease of immediately property is therefore, a contract within the meaning of section 10 of the contract Act.

In every case, there is an implied contract that the lessee will be put in possession of the property of the lessor. The term 'lease' imports a transfer of an interest to enjoy the property. One of the essential conditions of a lease is that the tenant should have the right to the exclusive possession of the land.

The essential elements of a lease are:-

(i) the parties;

(ii) the subject-matter of immovable property;

(iii) the duration of a right to enjoy the immovable property; and

(iv) the consideration.

The parties.

Both parties, i.e., the lessor and the lessee must be competent to contract. A lease cannot be created without any express or implied contract between two parties.

Subject-matter.

The subject-matter of a lease must be immovable property.

Duration.

The next element is that the right to enjoy the property must be transferred for a certain time or in perpetuity. It may commence either in the present or on some date in future or on the happening of a event which is bound to happen. Where day is expressed for the commencement of the lease, such day must be excluded in computing the whole period of lease. Section 110 enacts that if the day of commencement is not stated, the lease begins from the date or execution. If it is expressed to commence from a past day, that is only for the purpose of computation, and the interest of the lessee begins from the date of execution.

Both the time when the lease begins and the time when i ends must be fixed. Apart from leases for certain time, a lease may be in perpetuity. Such leases are generally agricultural leases.

A lease of, immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

There is no simple Litmus Test distinguish a lease as defined in Section 105 from a licence as defined in Section 52 of the Easement Act, but the character of the transaction turn on the operative intent of the parties. To put it pithily, if an interest in immovable property, entitling the transferees to enjoyment, is created, it is a lease, if permission to use land without right to exclusive possession is alone granted, alicence is the legal result. Marginal variations to this broad statement are possible.

Permanent Lease.-- In India, the permanent leases or a lease in perpetuity may be created either expressly or inferred from the circumstances of a given case. In the latter case it is said to have been created through a presumed grant. The tenancy of a permanent nature in the sense that it could not be revoked so long as the plaintiff paid rent in cash or kind, may be inferred from various terms and conditions of a lease.

The mere fact that a uniform fixed rent had been paid for a long time or the fact that the lessees had been in possession of the land for a long time making construction of land at their own cost would not raise a presumption that the tenancies were of a permanent character. In every case an inference of permanency of tenancy is a question of fact depending upon the facts of each particular case. The onus of proving that a tenancy is permanent is on the tenant setting up such a case.

(a) Tenancy – at – will.

A lease which is silent as to duration of term would be void as a lease, but if the lessee has taken possession, a tenancy-at-will is created. It arises by implication of law in cases where a person takes possession of the premises with the consent of the owner. It may also arise by an express agreement to let for an indefinite period for compensation accruing from day to day. The tenant in such a case is not a trespasser and his only liability is to pay compensation for use and occupation. A tenancy-at-will is terminable by either party. A demand by the landlord for possession is sufficient to terminate his tenancy-at-will.

Under Section 105 of the Transfer of Property Act, a lease creates right or an interest in enjoyment of the demised property and a tenant or a sub-tenant is entitled to remain in possession of the demised property until the lease is duly terminated and eviction takes place in accordance with law.

For ascertaining whether a document creates a licence or lease, the substance of the document must be prepared to the form. It is not correct to say that exclusive possession of a party is irrelevant but at the same time is not conclusive. The other tests, namely intention of the parties and whether the document creates any interest in the property or not are important consideration.

(b) Tenancy by sufferance.

Another type of a tenancy may be noted here. It is called a 'tenancy by sufferance'. It also arises by implication of law when a person who has been in possession under a valid lease continues in possession even after the expiration of the lease without the consent of the lessor. Thus, a tenant holding over after the expiration of the term is a tenant at sufferance. A tenancy at sufferance is terminated at any time by the landlord entering without notice or demand.

Consideration

The consideration is either premium or rent. Premium is the price paid or promised to be paid i a lump sum. If the consideration is premium, the transaction may either be zuripeshgi lease or a usufructuary mortgage. In the former case, the premium is not given as a loan and the relationship of a debtor and a creditor does not subsist while in latter transaction, it is essentially a lending and a borrowing transaction.

Rent is a periodical payment. But the definition of rent given in this section is wide enough to include not only money but also the delivery of a share of the crop, of the rendering of service, etc.

Section 105 recognises also a lease of immovable property in consideration of a share of crops.

Nature of payment as premium or rent.--

Section 105 bring out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and the latter a revenue receipt.

Agreement to lease.--

A document whereby the terms of a lease, are finally fixed and it intended to give the right of enjoyment to the lessee either at once or at a future date is a lease. On the other hand, a document which only binds the parties, the one person promising to grant the lease and the other promising to accept it, is merely an agreement to lease. If the intended lessee enters into possession, he can, under section 53-A, resist the lessor's suit for ejectment :provided the agreement is in writing.

Suit based on possessory title.--

Where both parties rely on possessory title, it is necessary that they should prove effective possession over the property in order to succeed on the basis of possessory title. Effective possession means actual possession or possession through a tenant who must have paid the rent voluntarily or under a decree to the person claiming possessory title.

**Question 17. Explain the rights and liabilities of lessor and lessee under the concept of lease.**

Answer 17. Lease basically means when one person through the means of a contract conveys or rents his property to another person for a specified amount of time in return for a periodic or a lump-sum payment. e.g. A leases his house to B for 8 months for periodic payment of Rs. 10000 per month. This is the most basic example of a lease.

The term "lease" is defined under Section 105 of The Transfer of Property Act, 1882 and it states that- "A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specific occasions to the transferor by the transferee, who accepts the transfer on such terms".

There are 4 terms that we will come across this article which are related to lease of immovable property and they are as follows:

- Lessor- The transferor of the immovable property is called lessor.
- Lessee- The transferee of the immovable property is called lessee.
- Premium- The premium is the price paid for obtaining a lease of immovable property.
- Rent- The money or service that is rendered is known as rent.

Elements of a valid lease

For a lease to be valid it has certain prerequisites that are needed to be fulfilled and they are as follows:

Competency of Lessor and Lessee- For a lease to be valid both the lessor and the lessee must be competent enough to constitute a contract. For a lessor and lessee to be competent they must be:

- The lessee must be a major.
- The lessor must hold the title and authority to make the lease.
- Both the lessor and lessee must be of sane mind.

Subject matter- The subject matter of the lease must be immovable property like a flat, house or loft.

Consideration- There must be a form of consideration involved in the contract. Without a consideration it would not be a valid lease rather it would be treated as a gift. The consideration is usually in the form of premium plus rent but sometimes it can be premium alone or rent alone.

Duration- A lease for an immovable property shall be made for 11 months. In case the duration exceeds a year i.e 12 months or more then a lease agreement can only be made by a registered instrument as per Section 107 of the Transfer of Property Act, 1882.

Delivery and Acceptance- The lessor must deliver the contract and the lessee must accept the contract without any form of undue influence, coercion. Once the lessee accepts the contract, the lease becomes valid.

Nature of lease: In case there is neither an oral confirmation or a registered document of a lease agreement accompanied by delivery of possession then there is no formation of a lessor and lessee relationship.

Absence of registration: If there is an absence of a registered deed when the duration of a lease agreement for immovable property is above 1 year then in that case Section 106 of the Transfer of Property Act applies and it states that:

- Immovable property for manufacturing or agricultural purpose- If there is an absence of a registered deed for an immovable property that is used for manufacturing or agricultural purpose then, in that case, it is considered to be under a year to year lease and the lease can be terminable on part of lessor or lessee by six months' notice.
- Immovable property used for other purposes- If there is an absence of a registered deed for an immovable property that is used for some other purposes, in that case, it is

considered to be under a month to month lease and the lease can be terminable on part of lessor or lessee by a fifteen day's notice.

Every notice that is delivered must be in writing and signed by the person delivering it. The notice must be delivered to the lessee personally or through the mail.

Agreement to lease and lease deed or lease agreement

There are certain differences between an agreement to lease and a lease agreement but both of these terms are often confusing for common people and it makes them vulnerable. So basically an agreement to lease is the initial part of a lease agreement. Agreement to lease does not create any legal obligation, agreement to lease just implies the possibility of any future transfer. Agreement to lease just denotes the terms and conditions of a prospective lease agreement. It is just a stepping stone in the process of the lease. On the other hand, a lease deed or a lease agreement is a final contract. A lease deed along with the delivery of possession creates a legal obligation upon a person. A lease deed transfers the rights from a lessor to lessee for a specific duration.

Lease and License

Lease and License are another two terms that confuse a lot of people. However, it does make sense because both lease and license share some common points but by no means, they can be substituted for each other as both of these terms are quite different. A lease is generally a grant of property by one person to another in return for some consideration which is usually in the form of rent. A license is permission to do some act and without the permission doing such an act will be illegal. A lease consists of a transfer of interest in the immovable property but in case of a license, there is no such transfer of interest in the property. A lease is transferable and heritable whereas a license is non-transferable and it is based purely on personal privilege. A lessee is permitted to uphold a suit in his own name against trespassers and strangers. A licence does not create an interest in the property in support of the licensee and so, he is not entitled to uphold suits in his own name. Death of either party i.e. lessor and lessee does not affect a lease, whereas a licence is terminated in such situations.

Rights and Liabilities of a Lessor

Rights of a lessor

Right to accretions- If during the tenancy period or during the duration of the tenancy any further accretion, accumulation or addition is made in the property then the lessor is entitled to such property. Such addition can be natural or by the expense of the lessee but after the termination of the tenancy period, the lessee must deliver the title to the lessor.

Right to collect rent- The lessor has the right to collect rent or any form of consideration as mentioned in the terms and conditions of the contract from the tenant without any form of interruptions.

Liabilities of a lessor

Duty of disclosure- The lessor is bound to disclose any form of a material defect in the property. There are two kinds of defects:

- Latent defect- Latent defect cannot be discovered rationally or through inspection by the lessor.
- Apparent defect- Apparent defect can be easily discovered through some inspection. So basically a lessor shall disclose any apparent defect to the lessee and it is vital to disclose such defects as they interfere with the enjoyment of the property by the lessee.

To give possession- The lessor must give possession of the property to the lessee on lessee's request. However, this liability only arises when there is a request on behalf of the lessee.

Covenant for quiet enjoyment- The lessee has all the rights to enjoy the property. It is the duty of the lessor to not cause any form of interruptions during the tenancy period. The Madhya Pradesh HC stated that actions such as physical interference or direct interference in the premises lead to a breach of enjoyment and interruptions.

Rights and liabilities of a lessee

Rights of a lessee

To charge for repair- If the lessor fails to make any repairs in the property which the lessor is bound to do in that case the lessee can make such repairs by his personal expenses. If a lessee makes such repairs by his personal expenses then, in that case, it is the right of the lessee to

deduct the cost of such repairs from the rent or the lessee may simply charge the lessor for such repair.

Right to remove fixtures- The lessee has the right to remove any fixture in the property during the time period of the lease, however, after the termination of the lease deed the lessee must leave the property in the condition in which he received it. In case the lessee fails to do so, the lessor can sue the lessee.

Right to assign his interest- The lessee can sub-lease the property or the lessee can absolutely transfer his interests. However, if the lease deed restricts a lessee to assign his interest then the lessee is prohibited to do so and even after the transfer of his rights, the lessee is still subject to all the liabilities related to the lease deed.

Right to have benefits of crops- When the lease is of uncertain duration then, in that case, the lessee or his/her legal representative has been given the right to gain benefits from all the crops grown by them.

Liabilities of a lessee

Duty to disclose material facts- The lessee is bound to inform the lessor of any material fact which the lessee is aware of and the lessor is not. In case the lessee does not disclose such fact and the lessor suffers any loss then the lessee is bound to compensate the lessor.

Duty to pay rent- The lessee is bound to pay the rent or the premium to the lessor or his agent in the proper time and proper place as decided by the lease deed. In case the lessee fails to pay his/her rent then, in that case, the lessor can eject the lessee on the ground of non-payment of rent or file a suit for arrears of rent.

Duty to maintain the property- The lessee is bound to maintain the property in a good condition as it was when he was given the possession of the property. The lessor or his agent are allowed to inspect the property at the reasonable ground. Only the changes caused by irresistible forces can act as an exception for this liability.

Duty to give notice- If the lessee becomes aware that any person has tried or is trying to damage the rights of the lessor or the title of the lessor is endangered then, in that case, the lessee must give notice to the lessor.

Duty to use the property in a reasonable manner- The lessee must use the property in a manner as if it was his/her own property.

Duty not to erect any permanent structure- A lessee cannot erect any permanent structures except in the case of agriculture without the consent of the lessor.

Duty to restore possession- After the determination of the lease, the lessee must restore the possession of the property to the lessor. If the lessee does not vacate the premises even after the expiry of the notice, the lessee is then bound to pay the damages.

Termination of a lease

A lease is terminated in eight different ways that are discussed below:

- A lease is terminated after the expiry of the specified time period.
- If the length of the lease is until the happening of some event and when that event happens the lease is terminated.
- If the lessor's interest in the property is to terminate the lease on the happening of some event and when the event happens the lease is terminated.
- When the lessee surrenders by implying.
- When both the lessor and lessee mutually agree to end the contract.
- On the expiry of a notice which expressly conveys the intention to terminate the vacancy and such notice must be unconditional.
- Through forfeiture which legally allows a lessor to re-enter and reclaim his property.
- If the interest of both the lessor and the lessee in the whole property becomes vested at the same time in one person in the same right, then by the operation of law merger takes place.

**Question 18. What do you mean by "Sale". Explain in detail, the essentials of a valid sale.**

Sale is transfer of ownership for money consideration. Section 54 defines sale as a transfer of ownership in exchange for a price paid or promised to be paid. Accordingly, the elements which are necessary to constitute as a sale as under:-

a. Transfer of Ownership

b. Money consideration

1. Transfer of Ownership

Sale is a transfer of ownership. Ownership is absolute interest in the property. Therefore, in a sale there is transfer of all the right sin the property sold, no rights in respect of property are life with transferor (seller). Ownership means bundle of all the rights and liabilities of property. So, when ownership is transferred, there is transfer of all the rights in property by transferor to transferee. In other words, nothing less than ownership or absolute interest may be transferred by way of sale. Lease is also a transfer of property but there is transfer of only partial interest (right of use or enjoyment of property). Similarly, mortgage too is transfer of property but it is transfer of merely a limited interest in the mortgaged-property.

2. Money Consideration

The ownership in the property must be transferred in exchange of money. That is to say the transferor must receive some money from the transferee is return of the transfer of ownership of his property. The money in exchange of ownership is called 'price However, for a valid sale the amount of money is an irrelevant factor. It may or may not be adequate sum of money as compared to the market value of property. For example, transfer of ownership in a property valuing one lac rupees in consideration of only one hundred rupees is a sale, although the price is negligible or grossly inadequate.

ESSENTIALS OF A VALID SALE

Essentials of valid sale are as under

- the parties. the seller and the purchaser are competent.
- the subject matter i.e. the property is in existence
- The money consideration ie. the price has been fixed op referred.
- The conveyance i.e. the transfer has been made as prescribed under the law.

1. The Parties: Seller and Purchaser

There are two parties in a sale. The translator is called seller and the transferee is called purchaser. Seller and purchaser are also known as vendor and vendee. Seller and purchaser both must be competent on the date when the sale is being made. The seller must be competent to contract, must be of sound mind and must have attained the age of majority.

Competency alone is not sufficient. The seller must also have the right to sell the property. Since only ownership may be transferred in a sale, therefore, the seller must be owner of property at the time of effecting the sale. A tenant is not competent to sell the property under his tenancy because he has no absolute interest in that property. Moreover, the property must also be transferable property within the meaning of Section 6 of this Act A seller has no right to transfer a non-transferable property.

The purchaser may be any person provided he is not disqualified to purchase a property under any law enforced in India. For example, a Judge, a legal practitioner or an official of the Court is incompetent to purchase actionable claims under Section 136 of this Act. Although minor is not competent to contract but, he is a competent purchaser. Sale in favour of minor valid.

The Subject Matter Immovable Property

Sale is transfer of ownership in some property. This Act dots with sale of only immovable property, Sale of movable are dealt with under the Sale of Goods Act 1030. The subject matter of sale under Section 54 is, therefore, immovable property Immovable property is other tangible or intangible. The subject matter of a sale may be any kind of immovable property :defined in Section 3 of the Transfer of Property Act, Accordingly to immovable property which may be subject matter of sale means land, benefit arising out of land and the things attached to earth Things attached to earth Include things embedded to on the things attached to who embedded to earth and the things rooted in the earth Dub standing timber growing crops grass, the land and all the beneficial Interest in land are included in the term immovable property. Land houses gardens etc. are tangible immovable properties. Beneficial interests such as right to collect rent, right of fisheries or right to extract minerals etc. are intangible immovable properties and may be sold.

However, the immovable property whether it is tangible or intangible must be in existence on the date of execution of sale. Further the property must be owned by seller and must also be transferable property within the meaning of section of this Act

Money Consideration : The Price

The money consideration which is called rice is an essential element of a sale. The price must be fixed or referred in the sale deed Its payment is not necessary for completion of the transfer but its reference is necessary. The price may be paid at the time of execution of the

sale deed. It may be paid in advance or after execution of the deed. Some part of it may also be paid at the time of execution and the rest may be promised to be paid in future. If no price has been mentioned or ascertained in the sale deed then even a registered sale deed then even a registered sale deed may not be regarded as sale.

Where a Muslim husband makes gift of a land in lieu (consideration) of her unpaid dower, the transfer is not a gift but a sale because ownership is transferred in consideration of dower which is money debt. Such transaction is known under Muslim Law as Hiba-bil-Ewaz having all the legal incidents of sale.

Conveyance: Mode of Transfer

Sale is transfer of ownership of an immovable property. Property therefore must be transferred from seller to purchaser. Part two of Section 54 provides two modes of Transfer of Property: (i) delivery of possession and (ii) registration of the sale deed.

i) Delivery of Possession

Where the property is tangible immovable property of a values less than rupees one hundred the sale may be made by delivery of possession. Writing and registration is not essential. However, if the parties so desire, they may get the sale deed registered. Thus, in case of tangible immovable property valuing less than rupees one hundred, registration is not compulsory, it is optional. The simple method of delivery of possession in the case of sale of tangible immovable property of value less than rupees one hundred has been provided because of the small sum of money involved in the transaction.

ii) Registration of Sale Deed

Registration is necessary to complete the sale in following cases:

(a) Where tangible immovable property is of the value Rs. 100 or more, and
(b) Where the property is intangible immovable property of any valuation.

CONTRACT FOR SALE AGREEMENT TO SALE: SECTION 54

Section 54 defines also contract of sale. According to this section a contract for the immovable property is a contract that so of the property shall take place on terms settled between the parties may be noted that in every Rule there is proceeding contract of sale Upon due execution of this contract, the property is transferred from vendor to vendor. Thus, sale is

complete in furtherance of that very contract Is implied contract may be called 'contract of sale oral agreement to sale

But contract of sale is a different thing. Sometimes the parties are unable to execute the sale deed at present but they intent that sale deed at present but they intend that sale would take place between them in future. In order to have an evidence and permanent proof of their intention, they enter into an agreement the property would be sold to the other contracting party and to nobody else. This agreement is called 'contract of sale'. In a contract for sale the intention of the parties (as expressed therein) is not to effect an immediate transfer of ownership but to agree to do the same in future on the terms settled between them

The last paragraph of Section 54 clearly says that a contract for sale does not itself, create any interest or charge on the property No site or interesting respect of the property is therefore, created in favour of the purchaser on the basis of such contract Under English Law, a contract for sale creates an equitable ownership in favour of the purchaser and the vendor holds property for him as a trustee. But the doctrine of equitable estate is not recognized in India. Therefore, the contract for sale creates neither legal estate nor equitable estate in favour of the transferee

Contract for sale is, therefore, merely a document creating a right to obtain another document namely, a duly executed sale deed. Such a contract need not be registered even thoughts mentioned in the document that a part or the whole price has been paid by the vendee. The contract for sale is purely a contract within the meaning of the Indian Contract Act A person who enters into such a contract does not become entitled to any interest in the land for the sale of which the contract was made So, he cannot apply to restrain or sol aside the execution of a sale deed of the same land to another person.

**Question 19. Discuss the rights and duties of the buyer and seller under Transfer of Property Act, 1882**

Answer 19. Section 55 deals with the respective rights and liabilities of seller and buyer in the absence of any contract to the contrary That is to say the rights and liabilities as given below, are for an open sale in which the sale-deed is silent about rights and liabilities of the seller and buyer.

The rights and liabilities (duties) of seller and buyers as even in this section, have been divided into two categories: (a) The rights and liabilities before the sale and (b) the rights and liabilities after the sale. The reason behind this classification is that sale is a transfer of property the process of which beings with the constitution of contract and ends with transfer of ownership (title) from seller to buyer. Therefore, the rights and liabilities before the completion of sale are contractual in nature.

Seller's Duties and Rights

Seller's Duties before Sale

Before the sale is completed, the seller's duties are as under

a) To disclose material defects in the property or title, it any. (Section 55 (1) (a)

b) To produce the title deeds for inspection. [Section 55 (1) (b))

c) To answer relevant questions as to title. (Section 55 (1) (c)

d) To execute conveyance, (Section 55 (1) (d))

e) To take care of the property and title-deeds Section 55 (1) (e)

f) To pay the outgoings (Section 55 (1) (g)

a) Disclosure of Material Defects (Section 55 () ()]

Before completion of sale, the seller is bound to disclose to the buyer and latent material select in the property or any defect in his own title (ownership rights).The defect in the property which the seller is bound to disclose is a defect which is known to the seller but the purchaser is not aware of it

Where the defect is patent the seller has no duty to disclose it and the rule of caveat emptor (purchaser be aware) shall apply. Under this section the seller has duty to disclose only latent material defect. Defect is latent when it cannot be seen or discovered by a man exercising ordinary prudence and care. A latent defect is hidden or concealed defect For instance, underground drain which gasses through the land sold would be a latent defect because the buyer cannot see it while inspecting the land.

Production of title deeds (Section 55 (6)

If the buyer requests the seller for the title deeds for his inspection the seller has a duty to produce not only those documents which are in his possession but also arrangements for the inspection all those documents which are within his power example, where the title deeds are in possession of the mortgagee, they are not seller's possession but in his power.

If a buyer does not inspect the deeds he would be fixed with constructive notice of any defect in seller's power of transfer if so found later on

Answer relevant questions as to title (Section 55 (1) (c))

The seller's next duty is to answer all questions put by the buyer which are relevant for passing of the title. The questions regarding time may be regarding identity of the property due execution of the sale deed b competent person or the validity of the attesting of deed. Rent being received from the property is a material question which may be asked the buyer and which the seller is under duty to inform. It is the duty of the seller to answer an specific questions material to his title

Duty to Execute Conveyance (Section 55 (1) (d)

The seller's next duty is to execute the conveyance. That is to say, he has to elect the transfer of ownership. This is done by signing or affixing thumb-impression on the sale-deed by the seller, Where the seller does not sign or affix his mark on the sale deed, there is no execution of the sale deed. The payment of price by the buyer and execution of conveyance by the seller are reciprocal duties of buyer and seller

Care of title deed and Property (Section 55 (1) (e))

After execution of the conveyance, the next duty of the seller is to take care of the property and the documents of title. They are to be handed over to the buyer after the sale. In between the date of contract of sale and the delivery of property, although the seller continues to be its owner/yet, he has to keep the property intact so that it can be delivered to the buyer after the sale.

- In this regards, the position of the seller is that of a trustee and he has to hold the property and the tile-deeds as a trustee holds the trust-property under the Indian Trusts Act

Payment of the outgoings {Section-55 (1) (g))

Before completion of sale, the seller continues to the owner of the property. Therefore, the Government dues etc. are to be paid by him. Seller's last duty before completion of sale is to pay all the outgoings. Outgoings of a property are Government dues or public charges such as revenue, taxes or rents etc. due on the property.

Seller's Duties After the Sale

Seller's duties after the completion of the sale are given below.

a) to give possession to the buyer. (Section 55 (1) (f)

b) to covenant for title. (Section 55 (2))

c) to deliver title deeds on receipt of the price. [Section 55 (3)]

Giving possession of property (Section 55 (1)

On being required by the buyer the seller has duty to give possession of property to buyer or to such person as he (buyer) directs. There is an implied contract to give the possession of the property to buyer. As regards to mode of giving possession may be stated that delivery possession depends upon the nature of property, In the case of tangible immovable, physical control. In case of intangible immovable property the possession is-symbolic.

Covenant for title {Section 55 (2)}

Sale is a transfer of ownership or absolute interest. When a person contracts to sell his property, it is implied that he must be owner of that property otherwise he would no have attempted to sell it Section 55 (2) of the Act lays down that in every sale the seller implicitly undertakes a guarantee that the interest which he transferring subsists and he has authority to transfer.

Delivery of the title deeds (Section 55 (3)]

The seller has to deliver the title-deeds of the property to purchaser after completion the sale. After sale, the title deeds are to pass on to the buyer as a natural consequence of the transfer of ownership. The seller is liable to hand over not only those documents which are in his possession but also those which are important and within his power. Where such documents or their certified copies are to be obtained from Government officers, the seller is liable to bear the expenses in obtaining them.

However, the proviso to Section 55 (3) lays down that:

a) Where the seller retains that part of property with him which is of greatest value and, such property is included in the documents, the seller is entitled to retain all the documents with him.

b) Where the whole of such property is sold to several buyers the person who purchases largest part of property would be entitled to retain all the documents.

Seller's Rights Before Sale (Section 55 (4) (a))

Before completion of sale, the seller is entitled to all the rents, profits or other beneficial interests of the property. It may be mentioned thal sale is completed only upon the transfer of ownership. Until ownership is transferred, the seller continues to be owner and as such he has every right to enjoy the profits of the property. Before passing of the title, there is only a'contract of sale) The contract of sale does not create any proprietary interest in favour of thebuyer. So, it is the seller's right to get rents, profits or produce the sale-property.

Seller's Right After Sale (Section 55 (4) (b)]

After completion of sale, if the price or any part of it remains unpaid, the seller acquires alien or charge on the property. When the sale is completed, the ownership is transferred from seller to buyer. In such a situation if price remains unpaid, the seller can neither refuse delivery of possession nor can claim back the possession if already given to buyer. The completion of sale of an immovable property does not depend on the payment of price; the price or a pan of; it may also be paid after the sale. Therefore, under Section 55(4) (b) the seller is given a right to recover the unpaid purchase money from out of the property. This is called as a statutory charge of the seller for unpaid-price.

Buyer's Right and Duties

Buyer's duties before Sale

Before completion of sale, the duties (liabilities) of the buyer are as under :

To disclose facts which material increase the value of property. (Section 55(5) (a))

To pay the price [ Section 55(5) (a)]

Duty of Disclosure (Section 55(5) (a)

Before completion of sale, the buyer is liable to disclose to the seller the facts which materially increases the value of property This liability is limited to disclosure of Those facts which relate to title or interest of the buyer

Payment of Price (Section 55(5)-(b)

Normally, the execution of sale-deed and payment of price take place simultaneously. Therefore for the completion of sale in favour of buyer, the seller has the duty of execution of deed and buyer has corresponding duty of payment of price. But the buyer is not bound to pay the full amount before transfer of ownership

Buyer's Duties After the Sale

After completion of sale, the buyer has following two liabilities:

a) to bear the loss to property, if any. Section 55 (5) (c)

b) pay the outgoings. (Section 55 (5) (d)

a) To bear the loss to Property Section 55 (5) (c)]

After sale, the buyer becomes owner of property sold to him. As such, if there is any loss to property subsequent to sale, it is the buyer who shall suffer that loss as owner of property. He cannot hold the seller (who was owner before completion of sale) to bear the loss unless it is proved that loss was caused by seller himself However, where the seller has-insúred the property against fire and after completion of sale the property is destroyed or damaged by fire the buyer may require the seller to apply the insurance money from restoring of repairing the property. (Section 49, Transfer of Property Act]

b) To pay the outgoings (Section 55 (5) (d)]

After completion of sale, since buyer becomes owner of the property, he is liable to pay the outgoings in Government dues revenue or taxes. Before sale, the liability to pay these public charges is on the seller. After sale, together with ownership this liability is also transferred to buyer.

Buyer's Right Before Sale

The buyer has only two right one before completion of sale and the other after the sale. Before completion of sale, the buyer has a lien (charge) on the property for any sum of money paid by him as price if sale could not be completed. After completion of sale, he is entitle to get all the benefits etc. of the property incidental to ownership.

Before completion of a buyer has a charge on the property for any sum of money which he had paid towards price or an advance Where the sale does not take effect due to the default of the seller or where the seller refuses to execute the conveyance, the buyer has a right to recover all the sums paid together with interest. Interest is able from the date of payment of probeert the date of delivery of property, to purchase or the execution of sale-deed whichever is ari o to be noted at purchaser's charge unit Section 55 (6) (b) is a statutory charge and differs from contractual charge which may be entitled for claim under separate contract

Buyer's Rights After Sale [Section 55 (6) (a)]

After completion of sale, the buyer becomes owner of the property Therefore, he is entitled to get all the benefits arising out of that property with effect from the date of transient of ownership Thus, the buyer is entitled to get the rents, profits or produce or any other beneficial interest which are legal incidents of that property

**Question 20. What are the essentials of a valid gift? How is a gift effected under transfer of property act? What do you mean by Onerous gifts?**

Answer 20. Gift defined ( S 122)

A gift is the transfer:

- of certain existing movable or immovable property,

-made 1) voluntarily,and

2)without consideration,

- by one person called the donor to another called the donee, and

- accepted by or on behalf of donee.

Such acceptance must be made during the life-time of donor, and while he is still capable of giving. If the donee dies before acceptance,the gift is void.

Gift how effected( S 123)

A gift of a) immovable property must be effected by a registered instrument,signed by or on behalf of the donor,and attested by at least two witnesses.

b) Movable property may be effected either by registered instrument signed and attested as above or by delivery.

Requisites of a valid gift-

1) There should be a donor and a donee.

2) Subject matter of gift must be certain and existing and capable of transfer.

3) The gift should be made voluntarily and without consideration.

4) There should be a transfer on the part of donor.

5) There should be an acceptance by or on behalf of donee during his life-time.

6) The acceptance must be at a time when the donor is alive and capable of giving.

7) Donor and donee must both be living persons.

8) When the property is immovable, there must be a registered instrument properly attested.

9) in case of movable property,there must be either a registered instrument properly attested or delivery of possession.

10) There can be no gift of future property.

11) Gift should not be made under undue influence,duress etc.

12) registered instrument is not necessary to validate gift of immovable property by muslim person.

Kinds of gift

1) void gift

The following gifts are void viz-

1) Gift made for an unlawful purpose,

2) Gift depending on a condition,the fulfilment of which is impossible or forbidden by law.

3) Where donee dies before acceptance.

4) Gift by a person incompetent to contract that is a minor, lunatic etc.

5) A gift comprising existing and future property is void as to the latter.

6) A gift of a thing to two or more donees of whom one does not accept it ,is void as to the interest which he would have taken had he accepted.

7) A gift which under an agreement between the parties is revocable wholly or in part at the mere will of the donor is void wholly or in part as the case may be.

Onerous gift

A gift may not always be of a beneficial character, but may at times burdened with an obligation. Said gift is known as onerous gift. Where a gift is in the form of a single transfer to the same person of several things, of which one is ,and the others are not burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Onerous gift to disqualified person: If a donee who is not competent to contract accepts property burdened by any obligation, he is not bound by his acceptance. But if after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound.

Universal done: A universal donee is one to whom the donor's whole properly is given and who subsequently becomes liable for all the debts due by and liabilities of the donor at the time of gift to the extent of properly comprised in the gift.

Revocation or suspension of gifts

A gift once made irrevocable except in the following two cases:

1) A gift is revocable if donor and donee have agreed that on the happening of a specified even( not depending upon the will of donor),gift should be suspended or revoked.

2) A gift can also be revoked in those cases in which a contract can be rescinded.(for example, for fraud, misrepresentation etc)

These rules do not however effect the rights of a transferee for consideration without notice.



## LLB 308 Investment and Competition law

**UNIT 1**

Q1 Explain the History, Origin and evolution of securities laws in India?
Q2 Discuss the role of SCRA 1956, in security market and how they Regulate the market?
Q3 SEBI 1992, in security market and how they Regulate the market?
Q4 Depositories Act 1996 in security market and how they Regulate the market?
Q5 Types of securities in security market?

**UNIT 2**

Q1 What are the important terms, definitions and parties under SARFAESI Act 2002?
Q2 What are the essential conditions and procedure for Registration & Cancellation of certificate of registration of Assets reconstruction Company?
Q3 What are the powers and functions of RBI or CG under SARFAESI Act 2002?
Q4 What are the Consequences or measures given U/S 9 & 13(4) of SARFAESI Act 2002? Explain. Is there any relation between the two sections?

Q5 Is there any provision according to which you can make application against the measure of Debts recovery? Can you make any appeal to appellate tribunal or to any High court?

**UNIT 3**

Q1 Who are Persons, Persons resident in India and Person Resident Outside India under FEMA 1999?
Q2 Who is Authorize person U/S 10 and how he is inspected by RBI?
Q3 Procedure to appoint, terms and functions of an adjucating officer, under FEMA 1999? Is there any appeal against the order of an adjucating officer?
Q4 Procedure to appoint, and Powers of a Director of Enforcement, under FEMA 1999? Can any other officer of any other department act like officer under Director of enforcement?
Q5 What are the objective of THE FOREIGN TRADE (DEVELOPMENT ANDREGULATION) ACT, 1992 and power of CG under the same?

**UNIT 4**

Q1 What are the difference between MRTP Act 1969 & Competition Act 2002?
Q2 What are the difference between VERTICAL AGREEMENT & HORIZONTAL AGREEMENTS under Competition Act 2002?
Q3 Powers and Functions of CCI?
Q4 What are the types of Combinations under CA 2002? Explain. Are there any threshold limits for the combination in India and outside India?
Q5 How evolution of Competition Law took place in India? Is there any role of UK and US behind the evolution?

**ANSWERS**

**UNIT 1**

**Answer 1**

PRE-INDEPENDENCE
Civil war broke
New opportunities for export
No proper Financial assistance were there
Introduction of securities
Establishment of Dalal Street in 1875
Native Share and Stock Broker Association was made
Calcutta Stock Exchange came in 1908
Controller of capital issue as a Body came into existence in 1940s
Capital issue control act Came in 1947

POST INDEPENDENCE

SCRA came in !956
SEBI as a body came in 1989
SEBI Act in 1992
NSE 1992
Depositories 1996
Companies Act 2013

**Answer 2**

SCRA gives the power to CG through which securities market regulated properly, which are as follows

U/S 3. Application for recognition of stock exchanges
U/S 4. Grant of recognition to stock exchanges.
U/S 4A. Corporatization and demutualization of stock exchanges
U/S 4B. Procedure for corporatization and demutualization
U/S 5. Withdrawal of recognition
U/S 6. Power of Central Government to call for periodical returns or direct inquiries to be made
U/S 7. Annual reports to be furnished to Central Government by stock exchanges
U/S 7A. Power of recognized stock exchange to make rules restricting voting rights, etc
U/S 17. Licensing of dealers in securities in certain areas
U/S 21. Conditions for listing
U/S 21A. Delisting of securities
U/S 22. Right of appeal against refusal of stock exchanges to list securities of public companies
U/S 22A. Right of appeal to Securities Appellate Tribunal against refusal of stock exchange to list securities of public companies

**Answer 3**

SEBI Act !992 gives the power to Board through which securities market regulated properly, which are as follows

U/S 11. Functions of Board
U/S 11A. Board to regulate or prohibit issue of prospectus, offer document or advertisement soliciting money for issue of securities
U/S 11AA. Collective investment scheme
U/S 11C. Investigation
U/S 11D. Cease and desist proceedings
U/S 12. Registration of stock brokers, sub-brokers, share transfer agents, etc.
U/S 15K. Establishment of Securities Appellate Tribunals.

**Answer 4**

Depository Act !996 gives the power to Board through which securities market regulated properly, which are as follows

U/S 3. Certificate of commencement of business by depositories
U/S 4. Agreement between depository and participant
U/S 5. Services of depository
U/S 6. Surrender of certificate of security
U/S 7. Registration of transfer of securities with depository
U/S 10. Rights of depositories and beneficial owner
U/S 17. Rights and obligations of depositories, etc.
U/S 18. Power of board to call for information and enquiry
U/S19A.Penalty for failure to furnish information, return, etc
U/S19B.Penalty for failure to enter into an agreement
U/S19C.Penalty for failure to redress investors' grievances
U/S19D.Penalty for delay in dematerialization or issue of certificate of securities
U/S19E. Penalty for failure to reconcile records
U/S 21. Offences by companies.

**Answer 5**

U/S 2(h) of SCRA 1956 Define "securities"— include

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ia) derivative;

(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;]

(ic) security receipt as defined in clause (zg) of section 2 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;]

(id) units or any other such instrument issued to the investors under any mutual fund scheme;]

[Explanation.—For the removal of doubts, it is hereby declared that "securities" shall not include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a combined benefit risk on the life of the persons and investment by such persons and issued by an insurer referred to in clause (9) of section 2 of the Insurance Act, 1938 (4 of 1938);]

(ie) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be;]

(ii) Government securities;

(iia) such other instruments as may be declared19 by the Central Government to be securities; and]

(iii) rights or interest in securities;

**UNIT 2**

**Answer 1**

U/S 2(b) “asset reconstruction” means acquisition by any 2[asset reconstruction company] of any right or interest of any bank or financial institution in any financial assistance for the purpose of realization of such financial assistance;

U/S 2 [(ba) “asset reconstruction company” means a company registered with Reserve Bank under section 3 for the purposes of carrying on the business of asset reconstruction or securitization, or both;] (c) “bank” means— (i) a banking company; or (ii) a corresponding new bank; or (iii) the State Bank of India; or (iv) a subsidiary bank; or 4[(iva) a multi-State co-operative bank; or] (v) such other bank which the Central Government may, by notification, specify for the purposes of this Act;

U/S 2(k) “financial assistance” means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution2[including funds provided for the purpose of acquisition of any tangible asset on hire or financial lease or conditional sale or under any other contract or obtaining assignment or license of any intangible asset or purchase of debt securities;]

U/S 2(l) “financial asset” means debt or receivables and includes—
(i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
(ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
(iii) a mortgage, charge, hypothecation or pledge of movable property; or
(iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
(v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
[(va) any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or (vb) any right, title or interest on any intangible asset or license or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain license of the intangible asset; or]

U/S 2(u) “4[qualified buyer]” means a financial institution, insurance company, bank, state financial corporation, state industrial development corporation, [trustee or [asset reconstruction company]which has been granted a certificate of registration under sub-section (4) of section 3 or any asset management company making investment on behalf of mutual fund] or a foreign institutional investor registered under the Securities and Exchange Board of India Act, 1992 (15 of 1992) or regulations made thereunder,1[any category of non-

institutional investors as may be specified by the Reserve Bank under sub-section (1) of section 7] or any other body corporate as may be specified by the Board;

U/S 2(m)"financial institution" means—

(i) a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956); (ii) any institution specified by the Central Government under sub-clause

(ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);

(iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges ) Act, 1958 (42 of 1958); [(iiia) a debenture trustee registered with the Board and appointed for secured debt securities; (iiib) asset reconstruction company, whether acting as such or managing a trust created for the purpose of securitization or asset reconstruction, as the case may be;]

(iv) any other institution or non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act;

**Answer 2**

U/S 3. Registration of [asset reconstruction companies]. —

(1) No 1[asset reconstruction company] shall commence or carry on the business of securitization or asset reconstruction without— (a) obtaining a certificate of registration granted under this section; and

[(b) having net owned fund of not less than two crore rupees or such other higher amount as the Reserve Bank, may, by notification, specify;] Provided that the Reserve Bank may, by notification, specify different amounts of owned fund for different class or classes of 3[asset reconstruction companies]: Provided further that a 1[asset reconstruction company], existing on the commencement of this Act, shall make an application for registration to the Reserve Bank before the expiry of six months from such commencement and notwithstanding anything contained in this sub-section may continue to carry on the business of securitization or asset reconstruction until a certificate of registration is granted to it or, as the case may be, rejection of application for registration is communicated to it.

(2) Every 1[asset reconstruction company] shall make an application for registration to the Reserve Bank in such form and manner as it may specify.

(3) The Reserve Bank may, for the purpose of considering the application for registration of a 1[asset reconstruction company]to commence or carry on the business of securitization or asset reconstruction, as the case may be, require to be satisfied, by an inspection of records or books of such 1[asset reconstruction company], or otherwise, that the following conditions are fulfilled, namely:—

(a) that the 1[asset reconstruction company] has not incurred losses in any of the three preceding financial years;
(b) that such 1[asset reconstruction company]has made adequate arrangements for realization of the financial assets acquired for the purpose of securitization or asset reconstruction and shall be able to pay periodical returns and redeem on respective due dates on the investments made in the company by the 2[qualified buyers]or other persons;
(c) that the directors of 1[asset reconstruction company] have adequate professional experience in matters related to finance, securitization and reconstruction;
(e) that any of its directors has not been convicted of any offence involving moral turpitude;
4[(f) that a sponsor of an asset reconstruction company is a fit and proper person in accordance with the criteria as may be specified in the guidelines issued by the Reserve Bank for such persons;] (g) that1[asset reconstruction company]has complied with or is in a position to comply with prudential norms specified by the Reserve Bank;
5[(h) that 1[asset reconstruction company] has complied with one or more conditions specified in the guidelines issued by the Reserve Bank for the said purpose.]
(4) The Reserve Bank may, after being satisfied that the conditions specified in sub-section (3) are fulfilled, grant a certificate of registration to the 6[asset reconstruction company]to commence or carry on business of securitization or asset reconstruction, subject to such conditions, which it may consider, fit to impose.
(5) The Reserve Bank may reject the application made under sub-section (2) if it is satisfied that the conditions specified in sub-section (3) are not fulfilled: Provided that before rejecting the application, the applicant shall be given a reasonable opportunity of being heard.
(6) Every 1[asset reconstruction company]shall obtain prior approval of the Reserve Bank for any substantial change in its management7[including appointment of any director on the board of directors of the asset reconstruction company or managing director or chief executive officer thereof] or change of location of its registered office or change in its name:

U/S 4. Cancellation of certificate of registration. — (1) The Reserve Bank may cancel a certificate of registration granted to a [asset reconstruction company], if such company—
(a) ceases to carry on the business of securitization or asset reconstruction; or
(b) ceases to receive or hold any investment from a [qualified buyer]; or
(c) has failed to comply with any conditions subject to which the certificate of registration has been granted to it; or
(d) at any time fails to fulfil any of the conditions referred to in clauses (a) to (g) of sub-section (3) of section 3; or
(e) fails to— (i) comply with any direction issued by the Reserve Bank under the provisions of this Act; or (ii) maintain accounts in accordance with the requirements of any law or any direction or order issued by the Reserve Bank under the provisions of this Act; or (iii) submit or offer for inspection its books of account or other relevant documents when so demanded by the Reserve Bank; or (iv) obtain prior approval of the Reserve Bank required under sub-section (6) of section 3:

**Answer 3**

U/S 12. Power of Reserve Bank to determine policy and issue directions. —
(1) If the Reserve Bank is satisfied that in the public interest or to regulate financial system of the country to its advantage or to prevent the affairs of any 1[asset reconstruction company] from being conducted in a manner detrimental to the interest of investors or in any manner prejudicial to the interest of such 1[asset reconstruction company], it is necessary or expedient so to do, it may determine the policy and give directions to all or any [asset reconstruction company]in matters relating to income recognition, accounting standards, making provisions for bad and doubtful debts, capital adequacy based on risk weights for assets and also relating to deployment of funds by the 1[asset reconstruction company], as the case may be, and such company shall be bound to follow the policy so determined and the directions so issued.
(2) Without prejudice to the generality of the power vested under sub-section (1), the Reserve Bank may give directions to any 1[asset reconstruction company]generally or to a class of 2[asset reconstruction companies]or to any 1[asset reconstruction company]in particular as to— (a) the type of financial asset of a bank or financial institution which can be acquired and procedure for acquisition of such assets and valuation thereof; (b) the aggregate value of financial assets which may be acquired by any 1[asset reconstruction company]. [(c) the fee and other charges which may be charged or incurred for management of financial assets acquired by any asset reconstruction company; (d) transfer of security receipts issued to qualified buyers.]

U/S [12A. Power of Reserve Bank to call for statements and information.—The Reserve Bank may at any time direct a 1[asset reconstruction company]to furnish it within such time as may be specified by the Reserve Bank, with such statements and information relating to the business or affairs of such 1[asset reconstruction company](including any business or affairs with which such company is concerned) as the Reserve Bank may consider necessary or expedient to obtain for the purposes of this Act.]

U/S [12B. Power of Reserve Bank to carry out audit and inspection. — (1) The Reserve Bank may, for the purposes of this Act, carry out or caused to be carried out audit and inspection of an asset reconstruction company from time to time. (2) It shall be the duty of an asset reconstruction company and its officers to provide assistance and cooperation to the Reserve Bank to carry out audit or inspection under sub-section (1). (3) Where on audit or inspection or otherwise, the Reserve Bank is satisfied that business of an asset reconstruction company is being conducted in a manner detrimental to public interest or to the interests of investors in security receipts issued by such asset reconstruction company, the Reserve Bank may, for securing proper management of an asset reconstruction company, by an order— (a) remove the Chairman or any director or appoint additional directors on the board of directors of the asset reconstruction company; or (b) appoint any of its officers as an observer to observe the

working of the board of directors of such asset reconstruction company: Provided that no order for removal of Chairman or director under clause (a) shall be made except after giving him an opportunity of being heard. (4) It shall be the duty of every director or other officer or employee of the asset reconstruction company to produce before the person, conducting an audit or inspection under sub-section (1), all such books, accounts and other documents in his custody or control and to provide him such statements and information relating to the affairs of the asset reconstruction company as may be required by such person within the stipulated time specified by him.]



**Answer 4**

U/S 9. Measures for assets reconstruction. —
**(1)**Without prejudice to the provisions contained in any other law for the time being in force, an asset reconstruction company may, for the purposes of asset reconstruction, provide for any one or more of the following measures, namely:— (a) the proper management of the business of the borrower, by change in, or takeover of, the management of the business of the borrower; (b) the sale or lease of a part or whole of the business of the borrower; (c) rescheduling of payment of debts payable by the borrower; (d) enforcement of security interest in accordance with the provisions of this Act; (e) settlement of dues payable by the borrower; (f) taking possession of secured assets in accordance with the provisions of this Act; (g) conversion of any portion of debt into shares of a borrower company: Provided that conversion of any part of debt into shares of a borrower company shall be deemed always to have been valid, as if the provisions of this clause were in force at all material times.
**(2)** The Reserve Bank shall, for the purposes of sub-section (1), determine the policy and issue necessary directions including the direction for regulation of management of the business of the borrower and fees to be charged.
**(3)** The asset reconstruction company shall take measures under sub-section (1) in accordance with policies and directions of the Reserve Bank determined under sub-section (2).]

U/S 13 (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely: —
(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset;
[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:
Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt: Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.



**Answer 5**

U/S 17. Application against measures to recover secured debts

U/S 17A. Making of application to Court of District Judge in certain cases
U/S 18. Appeal to Appellate Tribunal.
U/S 18B. Appeal to High Court in certain cases

**UNIT 3**

**Answer 1**

U/S 2(u) "person" includes—
(i) an individual,
(ii) a Hindu undivided family,
(iii) a company,
(iv) a firm,
(v) an association of persons or a body of individuals, whether incorporated or not,
(vi) every artificial juridical person, not falling within any of the preceding sub-clauses, and
(vii) any agency, office or branch owned or controlled by such person;

U/S 2(v) "person resident in India" means—

(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include—

(A) a person who has gone out of India or who stays outside India, in either case—

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, otherwise than—

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

(ii) any person or body corporate registered or incorporated in India,

(iii) an office, branch or agency in India owned or controlled by a person resident outside India,

(iv) an office, branch or agency outside India owned or controlled by a person resident in India;

U/S 2(w) "person resident outside India" means a person who is not resident in India;

**Answer 2**

U/S 2(c) "authorised person" means an authorised dealer, money changer, off-shore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities;

U/S 10. Authorised person.—(1) The Reserve Bank may, on an application made to it in this behalf, authorize any person to be known as authorised person to deal in foreign exchange or in foreign securities, as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit.

(2) An authorization under this section shall be in writing and shall be subject to the conditions laid down therein.

(3) An authorization granted under sub-section (1) may be revoked by the Reserve Bank at any time if the Reserve Bank is satisfied that—

(a) it is in public interest so to do; or

(b) the authorised person has failed to comply with the condition subject to which the authorization was granted or has contravened any of the provisions of the Act or any rule, regulation, notification, direction or order made thereunder:

U/S 12. Power of Reserve Bank to inspect authorised person.—(1) The Reserve Bank may, at any time, cause an inspection to be made, by any officer of the Reserve Bank specially authorised in writing by the Reserve Bank in this behalf, of the business of any authorised person as may appear to it to be necessary or expedient for the purpose of—

(a) verifying the correctness of any statement, information or particulars furnished to the Reserve Bank;

(b) obtaining any information or particulars which such authorised person has failed to furnish on being called upon to do so;

(c) securing compliance with the provisions of this Act or of any rules, regulations, directions or orders made thereunder.

(2) It shall be the duty of every authorised person, and where such person is a company or a firm, every director, partner or other officer of such company or firm, as the case may be, to produce to any officer making an inspection under sub-section (1), such books, accounts and other documents in his custody or power and to furnish any statement or information relating

to the affairs of such person, company or firm as the said officer may require within such time and in such manner as the said officer may direct.

**Answer 3**

U/S 16. Appointment of Adjudicating Authority. —
(1) For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the person alleged to have committed contravention under section 13, against whom a complaint has been made under sub-section (3) (hereinafter in this section referred to as the said person) a reasonable opportunity of being heard for the purpose of imposing any penalty:
(2) The Central Government shall, while appointing the Adjudicating Authorities under sub-section (1), also specify in the order published in the Official Gazette, their respective jurisdictions.
(3) No Adjudicating Authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government.
(4) The said person may appear either in person or take the assistance of a legal practitioner or a chartered accountant of his choice for presenting his case before the Adjudicating Authority.

U/S 17. Appeal to Special Director (Appeals). —
(1) The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction.
(2) Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, may prefer an appeal to the Special Director (Appeals).
(3) Every appeal under sub-section (1) shall be filed within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:
Provided that the Special Director (Appeals) may entertain an appeal after the expiry of the said period of forty-five days, if he is satisfied that there was sufficient cause for not filing it within that period.
(4) On receipt of an appeal under sub-section (1), the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority.

U/S 35. Appeal to High Court. —Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order:
Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

**Answer 4**

U/S 36. Directorate of Enforcement. —
(1) The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act.

(2) Without prejudice to the provisions of sub-section (1), the Central Government may authorize the Director of Enforcement or an Additional Director of Enforcement or a Special Director of Enforcement or a Deputy Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement.
(3) Subject to such conditions and limitations as the Central Government may impose, an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act.

U/S 37. Power of search, seizure, etc.—
(1) The Director of Enforcement and other officers of Enforcement, not below the rank of an Assistant Director, shall take up for investigation the contravention referred to in section 13.
(2) Without prejudice to the provisions of sub-section (1), the Central Government may also, by notification, authorize any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India to investigate any contravention referred to in section 13.
(3) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 (43 of 1961) and shall exercise such powers, subject to such limitations laid down under that Act.

U/S 38. Empowering other officers.—(1) The Central Government may, by order and subject to such conditions and limitations as it thinks fit to impose, authorize any officer of customs or any central excise officer or any police officer or any other officer of the Central Government or a State Government to exercise such of the powers and discharge such of the

duties of the Director of Enforcement or any other officer of Enforcement under this Act as may be stated in the order.
(2) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on the income-tax authorities under the Income-tax Act, 1961 (43 of 1961), subject to such conditions and limitations as the Central Government may impose.

**Answer 5**

Objective of this act is to provide for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto.

POWER OF CENTRAL GIOVERNMENT
U/S 3. Powers to make provisions relating to imports and exports.
U/S 5. Foreign Trade Policy
U/S 6. Appointment of Director General and his functions.
U/S 9A. Power of Central Government to impose quantitative restrictions.

**UNIT 4**

**Answer 1**

**DIFFERENCE BETWEEN MRTP ACT & COMPETITION ACT**

| SNo | MRTP ACT | COMPETITION ACT |
|---|---|---|
| 1. | Based on command and control regime | Based on Liberalized regime |
| 2. | Based on Pre-reform scenario. | Based on Post-reform liberalized Scenario |
| 3. | No such provision in MRTP | Central and State Government can seek CCI's recommendation/ Opinion at the time of making |

| | | |
|---|---|---|
| | | economic policies |
| 4. | No provision for regulations of combinations | Regulations of combinations are there |
| 5. | There is no role of Advocacy for MRTP | Advocacy plays an important role in Competition Law |
| 6 | Effects doctrine is implicitly recognized | Effects doctrine is explicitly recognized |
| 7 | Based on size & structure factor | Based on conduct and behavior factor |
| 8. | Mere Presence of Dominance is non compliance | Abuse of dominance position is non compliance |
| 9. | Registration of agreements are compulsory | Not compulsory |
| 10. | No Penalties were imposed for offences | Penalties are imposed for offences |
| 11. | The word cartels are not defined | Cartels defined U/S 2(c) |
| 12. | Competition Principles are not defined | Competition principles are explicitly defined |

**Answer 2**

Types of Agreement

•A 'horizontal agreement' is an agreement for co-operation between two or more competing businesses operating at the same level in the market.

•A vertical agreement is an agreement between firms at different levels of the supply chain. For instance, a manufacturer of consumer electronics might have a vertical agreement with a retailer according to which the latter would promote their products in return for lower prices.

**Answer 3**

Powers of CCI

•Duties of Commission (U/S 18)

•Inquiry into certain agreements and dominant position (U/S 19)

•Inquiry into Commission (U/S 20)

•Reference by Statutory Authority (U/S 21)

•Power to award compensation (U/S 34)

•Power to regulate its own procedure (U/S 36)
•Power to review its own order (U/S 37)
•Power to impose lesser penalties

**Answer 4**

Types of Combinations
•**Horizontal Combinations** are those which are between rivals, who are on same stage of supply chain and these combinations are most likely to cause AAEC.
•**Vertical Combinations** are those which are between business houses which are on different stage or level of supply chain and less likely to cause AAEC.
•**Conglomerate Combinations** are those which are between the enterprise which are not in same kind of business or they don't exist in same relevant market and they are less likely to cause AAEC.

**Answer 5**

Evolutions of competition law in India
•MIC (Monopolies Inquiry Committee) in 1964
•Hazari Committee in 1966
•MRTP Act, 1969
*for prohibition of monopolistic, unfair and restrictive trade practice*
•Liberalization, 1991
•After this, difficulty arose to administer present market
•Raghavan Committee in Oct 1999
•Competition Act, 2002 and Competition (Amendment) Act, 2007
To meet the requirement of highly competitive market
*Anti-Competitive Agreements*
*Abuse of Dominance*
*Combinations*
*Competition Advocacy*

The Bill drafted by the MIC (Monopolies Inquiry Committee) in April 1964, as amended by the Committee of the Parliament became the MRTP Act, 1969 and was enforced from 1st June, 1070. The Act drew its inspiration from the mandate enshrined in the Directive principles of State policy in the Constitution. "
After MIC there is Hazari Committee in 1966 which also investigated the licensing policies in India for Business houses.
"The MRTP Act drew heavily upon the laws embodied in the Shaman Act and the Clayton Act of the United States of America, the Monopolies and Restrictive Trade Practices (Inquiry and Control) Act, 1948, the Resale Prices Act, 1964 and the Restrictive Trade Practices Act, 1964 of United Kingdom. The US Federal Trade Commission Act, 1914, as amended in 1938

and the Combines Investigation Act, 1910 of Canada also influenced the drafting of this Act"[1]

"In October 1999, the Government of India constituted a High-Level Committee under the Chairmanship of Mr. SVS Raghavan ['Raghavan Committee'] to advise a modern competition law for the country in line with international developments and to suggest legislative framework, which may entail a new law or suitable amendments in the MRTP Act, 1969. The Raghavan Committee presented its report to the Government in May 2000.

On the basis of the recommendations of the Raghavan Committee, a draft competition law was prepared and presented in November 2000 to the Government and the Competition Bill was introduced in the Parliament, which referred the Bill to its Standing Committee. After considering the recommendations of the Standing Committee, the Parliament passed December 2002 the Competition Act, 2002.

Hence, the Monopolies and Restrictive Trade Practices Act, 1969 [MRTP Act] was repealed and was replaced by the Competition Act, 2002, with effect from 1 September, 2009

## Subject: Code of Criminal Procedure

## Paper Code: LLB 310

**Unit-1**

**Q1. Discuss in detail the object and Importance of CrPC in Criminal Justice Administration in India.**

**Ans.** The object, purpose, or design of all procedural law is to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The **object** of the Code is to ensure that an accused person gets a full and fair trial along certain well established and well under stood lines that accord with notions of natural justice. Where an accused is tried by a Court, the court must be a competent court under the law vested with jurisdiction to try such cases, the accused must be told and made to understand the nature of the offence of which he is being tried, his plea is recorded, he is provided with full and fair opportunity to

defend himself against the charge, it is substantial compliance of the outward form of law. And where the accused alleges and shows substantial prejudice caused to him the compliance of law is not substantial. In the former case, if there is an error or omission in the trial it is called a curable irregularity which does not vitiate the trial. In the later case where prejudice is caused to the accused and it is a substantial prejudice, such error, omission or mistake in trial is called incurable illegality and the consequence of it is vitiating the trial. Justice is to be done and not denied. Justice is to be shown to have been done according to law and it is not sacrificed at the alter of the procedure.

The foundation **purpose** of the Criminal Procedure Code, is to ensure a fair trial where none of the rights of the accused are compromised nor are they unjustifiably favored. Furthermore, to ensure that the judge concerned hears all parties who are relevant to the trial, their presence at the trial is obviously important. That is why an entire chapter of the Code concerns itself with the process of ensuring the attendance of any person concerned with the case, including an accused or a witness, through various measures, viz. summons, warrant, proclamation and attachment of property. The latter two are used when the former do not yield satisfactory results. Many would argue that the simplest way to ensure the presence of a person, especially an accused, would be to arrest him in all circumstances and detain him so that his presence is beyond doubt. However, such an action would go against the fundamental right that this Constitution provides with, the right to personal liberty under Article 21. Criminal law hinges on that right and no person can be deprived of this right unless very cogent reasons are present which argue against his release. This is why the Code envisages both warrant and summons to procure the attendance of persons concerned. In this project, I will look into the four variants used to procure the attendance of persons for trial. Of course, since the provisions are mostly procedural in nature, few substantive issues arise but interpretation of these provisions nevertheless gives rise to various issues. Moreover, the way they are used by the various functionaries involved viz. the judiciary and the police, also has given rise to substantive literature on this. Furthermore, I will give special attention to procurement of attendance of witnesses and how the provisions have been used by the functionaries in ensuring that witnesses attend the trial. Substantive laws are of no use without existence of a procedure so as to apply it, and would act only as a cadaver. This makes it necessary for us to have a procedure in order to make substantive laws pragmatic. Criminal Procedure or Code of Criminal Procedure, 1973 (hereinafter Code) being one such procedural law provides a track on which laws relating to crimes can scamper smoothly. The Code of Criminal Procedure as it stands today is a hybrid law, with an improved form as a result of numerous

legislative changes. The evolution of Code of Criminal Procedure can be traced back to the 1861 when the first code was enacted after the enactment of the Indian Penal Code, 1860. Subsequently, the Code was succeeded by Act 10 of 1882 and the latter was followed by Act 10 of 1882. As many as sixteen acts related to Criminal Procedure were passed since 1882. The code was again replaced by the Code of Criminal Procedure in 1898. Subsequently, the 1898 code was amended by the Code of Criminal Procedure Amendment Act, 1923. In 1958, the First Law Commission in its 14th Report made extensive recommendations on the reform of the criminal justice system. The recommendations of the committee were considered and the Code was amended. In 1973, on the recommendations of the Fifth law commission's Forty-First report, the Parliament enacted the Code of Criminal Procedure, 1973. Prior to the enactment of the Code of Criminal Procedure of 1973, the system of prosecution in India contained several elements that were criticized as weaknesses by the Law Commission that "there is no uniformity in the prosecuting organization in India", but that "generally speaking, prosecution in the magisterial courts is in the hands of either police officials or persons recruited from the Bar and styled 'Police Prosecutors' or 'Assistant Public Prosecutors'", who "work under the directions of the Police department."

This had led to a **setup** where "the identity of the prosecuting agency was practically merged with that of the police and the prosecution branch was not recognized as a separate and distinct entity, independent of police control." The Law Commission believed that such a setup was flawed, because the Police Department had neither the legal know-how to conduct a prosecution, nor the "degree of detachment necessary in a prosecutor." On a more general note, the Commission also criticized the overall subordination of the prosecutor, to the District Superintendent of Police (in cases before the magisterial courts) and to the District Magistrate (in prosecutions at the Sessions Courts), who "controlled to a large extent" the exercise of the prosecutor's powers. As a result, it recommended not only that the prosecution agency be made separate from the police, but also that its subordination to the executive be reduced, and that it be given more independent powers in the actual conduct of the prosecution- for example, in deciding whether or not to withdraw prosecutions. To this end, the Commission suggested that a separate prosecution department be established in each district, headed by a 'Director of Public Prosecutions', who would, however, be "responsible to the State Government." Clearly, therefore, although the Law Commission's report did continue to conceptualize the status of the prosecutor as an agent of the Government, responsible to it, it also noted the importance of his or her independence from both the police

and the State executive. The Commission's recommendations were espoused, but only to some measure, and not in so many words, in the Code of Criminal Procedure of 1973.

Emphasis must also be laid on the intent and underlying objective of the Code of Criminal Procedure where it can be inferred from the 14th Law Commission report where it is stated that the importance of the Code of Criminal Procedure is based on two considerations. First, expense, delay or uncertainty in applying the best laws for the prevention and punishment of offences would render those laws useless or oppressive and second the law relating to criminal procedure is more constantly used and affects a greater number of persons than any other law.

From a legal standpoint, the object of the Criminal procedure code is to set up a mechanism for the ascertainment of the guilt or innocence of the accused and the code would provide machinery for punishment of offences against a substantive law in the form of a law dealing with the process of applying the instrument of criminal law to the facts of a particular case.

**Conclusion**: Crime culture does not develop overnight; it has long and deep roots. To eradicate any evil proper awareness and education is needed at all levels and it is the cooperation and coordination of all members of the society that can control the evil. But it needs constant check even when it comes under control. Our law schools and law colleges and even the Universities and higher education academies general and special are to play a role in national cause in creating this awareness and mutual cooperation. A dynamic and progressive approach in the application and enforcement of criminal law is required so as to eliminate the mischief which has crept into the criminal justice administration whereby the accused frustrate the provisions by deceit, cleverness, sham excuses and contrivances or get away from the rigours of law due to loopholes in the law of the procedure. Courts are not to act in aid of injustice to perpetuate illegalities or put a premium on illgotten gains. **Basic Principles** of Criminal Justice: • Law is to define the offence and its punishment. • Fair investigation is the right of both the victim and the accused. • Charge is to be clearly stated. • No man is to be condemned unheard. • Law must treat all equally. • Prosecution is to stand on its own legs. • Benefit of doubt is to go to the accused. • Accused has the right to engage a counsel. • Both the prosecution and the accused are to be given full opportunity of evidence.

**Q2. Write salient feature of CrPC 1973 and the hierarchy of Criminal Courts under Indian Judicial System.**

**Ans.** **Features** : The CrPC contains 484 Sections and XXXVII Chapters. The CrPC describes that all offences in Indian Penal Code 1860 shall be investigated, inquired into, tried unless it is otherwise dealt. However, CrPC does not affect any special law, local law or any special jurisdiction or power or procedure provided in any other law. Some of the **basic features** of CrPC are discussed below.

• Organisation of **Criminal Courts**: The CrPC provides a uniform set of criminal courts throughout the territory of India by conferring jurisdiction, powers and functions. The CrPC mandates separation of judiciary from the executive, which enables the state to work with independently and impartially without interference of any other organs of the State.

• **Fair Trial**: Under CrPC every person is entitled to fair trial and hearing by an independent and impartial Tribunal. The accused is presumed to be innocent, until the charges are proved. The accused has right to be represented by his counsel. Further, the accused has a right to cross-examine the witnesses of the opposite party.

• **Protection** to the accused person: Special provisions have been made to protect the interest of the accused person. The Supreme Court also gave some important guidelines with respect to the rights of the accused person in **D.K.Basu v. State of West Bengal, AIR 1997 SC 610**.

• Special Provision for the protection of the accused person: Free legal aid provision is made if the accused person is poor and cannot afford the costs of the litigation. In petty cases the accused can even plead guilty by post and send the amount of fine specified in the summons to the court, therefore he need not appear before the court.

• Judicial Magistrates are under the **control** of High Courts: All Judicial Magistrates shall work under the control of High Courts of the respective states. The Judicial Magistrates in Metropolitan cities are named as Metropolitan Magistrates. The CrPC abolished the appointing of honorary Magistrates and Justices of peace.

• **Trial Procedure**: Procedure for trial of summary cases shall be the same as that for summons cases except where it is provided otherwise. The Court of Sessions also have been given power to exercise the revisional jurisdiction in addition to the High Courts. An appeal by the state against the order of the acquittal can be filed only after obtaining the leave of the High Court. In case of adjournments, costs may be awarded against the party seeking adjournment including the prosecution.

• Duty of the **Police**: If the police officer refuses to record information about commission of the crime the aggrieved person does have a right to send the information by post to the superintendent of the police.

**(Sections 6 to 40)** The Indian Constitution has provided an integrated and unified judicial system. Supreme Court and High Courts have been created as constitutional courts with jurisdiction, powers and functions. The **Criminal Courts** discharge their functions under the provisions of CrPC. The High Courts have been vested with power of superintendence over all Courts and Tribunals within the State concerned. The Code outlines detailed provisions for the constitution of Criminal Courts such as Court of Sessions, Judicial Magistrates of First Class, Metropolitan Magistrates for Metropolitan areas, Judicial Magistrates of Second Class and Executive Magistrates. The hierarchy of courts in India is seen as under:

HIERARCHY OF COURTS IN INDIA

Supreme Court

High Court

Sessions Court/District Court

Additional Sessions/District Courts

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Assistant Session Court Court of Senior Civil Judge Metropolitan Magistrate Court/Judicial

First Class Magistrate Court of Junior Civil Judge

Second Class Magistrate

**Powers of the Courts**: The High Court or Courts of Session, Judicial Magistrates, Metropolitan Magistrates and the Executive Magistrates are given a number of powers to try, punish and pass sentence. The CrPC also imposes duty on the police and members of the society to assist the Magistrates in prevention of crimes and arrest of persons. The following table shows the powers of the respective courts to grant punishment.

| NAME OF COURT | PUNISHMENT |
|---|---|
| Supreme Court | Any Punishment |
| High Court | Any Punishment |
| Session and District Judge | Death sentence, life imprisonment(to be ratified by HC) and fine |
| Additional Session Judge | Death sentence, life imprisonment(to be |

| | |
|---|---|
| | ratified by HC) and fine |
| Assistant Session Judge | Ten years imprisonment and fine |
| Chief Judicial Magistrate | Seven years imprisonment and fine |
| Additional Chief Judicial Magistrate | Seven years imprisonment and fine |
| Chief Metropolitan Magistrate | Seven years imprisonment and fine |
| Addl Chief Metropolitan Magistrate | Seven years imprisonment and fine |
| Judicial Magistrate First Class | Three years imprisonment and fine |
| Metropolitan Magistrate | Three years imprisonment and fine upto Rs.5000/- |
| Judicial Magistrate Second Class | One year imprisonment and fine upto Rs.1000/- |
| Special Judicial Magistrate | One year imprisonment and fine upto Rs.1000/- |

**Q3. Functionaries under the Criminal procedure code and their role in Criminal Justice System.**

**Ans. Functionaries** under the code: include the Magistrates and Judges of the Supreme Court and high Court, Police, Public Prosecutors, Defence Counsels Correctional services personnel.

Functions, Duties and Powers of these Machineries:

**Police:** The code does not mention anything about the constitution of police. It assumes the existence of police and devolves various powers and responsibilities on to it. The police force is an instrument for the prevention and detection of crime. The administration of police in a district is done by DSP (District Superintendent of Police under the direction and control of District Magistrate. Every police officer appointed to the police force other than the Inspector-General of Police and the District superintendent of police receives a certificate in the prescribed form by the virtue of which he is vested with the powers, functions and privileges of a police officer which shall be cease to be effective and shall be returned forthwith when the police officer ceases to be a police officer. The CrPC confers specific powers such as power to make arrest, search and investigate on the members of the police force who are enrolled as police officers. Wider powers have been given to police officers who are in charge of a police station. As per section 36 of CrPC which reads as " the police officers superior in charge of a police station may exercise the powers of such officials." The

primary responsibility of Police is to protect life, liberty and property of citizens. It is for the protection of these rights that Criminal Justice System has been constituted assigning important responsibility to the Police. They have various of duties to perform, the most important among them being maintenance of Law and order and investigation of offences.

The police are charged with the responsibility of protecting precious Human Rights of the citizens. Whenever there is invasion or threat of invasion of one's human rights it is to the police that the citizen rushes for help. Unfortunately the contribution of the police in this behalf is not realized and only the aberrations of the police are noticed, highlighted and criticized. The aberrations must be corrected and the police respected for the difficult role they play even at the cost of their lives in the process of protecting the rights of the citizens.

**Investigation** conducted by Police. The Police investigate cognizable offences under section 156 CrPC without an order from the Magistrate. It also investigates non-cognizable offences under order of the Magistrate under section 155 CrPC. Besides this, the magistrate may order the police to investigate any offence, under sections 156 (3) CrPC.

**Prosecutor:** If the crime is of cognizable in nature, the state participates in a criminal trial as a party against the accused. Public Prosecutor or Assistant Public Prosecutor is the state counsel for such trials. Its main duty is to conduct Prosecutions on behalf of the state. The public Prosecutor cannot appear on behalf of accused. According to the prevailing practice, in respect of cases initiated on police reports, the prosecution is conducted by the Assistant Public Prosecutor and in cases initiated on a private complaint; the prosecution is either conducted by the complainant himself or by his duly authorized counsel. The upshot of this analysis is that no vested right is granted to a complainant or informant or aggrieved party to directly conduct a prosecution. So far as the Magistrate is concerned, comparative latitude is given to him but he must always bear in mind that while the prosecution must remain being robust and comprehensive and effective it should not abandon the need to be free, fair and diligent. So far as the Sessions Court is concerned, it is the Public Prosecutor who must at all times remain in control of the prosecution and a counsel of a private party can only assist the Public Prosecutor in discharging its responsibility. The complainant or informant or aggrieved party may, however, be heard at a crucial and critical juncture of the Trial so that his interests in the prosecution are not prejudiced or jeopardized. It seems to us that constant or even frequent interference in the prosecution should not be encouraged as it will have a deleterious impact on its impartiality. If the Magistrate or Sessions Judge harbours the opinion that the prosecution is likely to fail, prudence would prompt that the complainant or informant or aggrieved party be given an informal hearing. Reverting to the case in hand, we

are of the opinion that the complainant or informant or aggrieved party who is himself an accomplished criminal lawyer and who has been represented before us by the erudite Senior Counsel, was not possessed of any vested right of being heard as it is manifestly evident that the Court has not formed any opinion adverse to the prosecution. Whether the Accused is to be granted bail is a matter which can adequately be argued by the State Counsel. We have, however, granted a full hearing to Mr. Gopal Subramanium, Senior Advocate and have perused detailed Written Submissions since we are alive to impact that our opinion would have on a multitude of criminal trials. [Sundeep Kumar Bafna Versus State Of Maharashtra & Anr., (2015) 3 Scc (Cri) 558; (2014) 16 Scc 623, Criminal Appeal No. 689 Of 2014 [Arising Out Of Slp (Crl.)No.1348 Of 2014].

In Jaipal Song Naresh V State of Uttar Pradesh, it was pointed out by the **Allahabad High Court** that the intention of parliament to keep separate prosecution from the police is to investigate the offence and identify the guilt of accused. The Prosecutor is not under duty to represent police but has a duty to represent Crown. He should perform his duty without favor or fear. Hence, it was held that the prosecution should not be a part of investigation directly or indirectly. Before filling charge sheet in the court, the ball is in the court of police as soon as documents are prepared, it is the prosecution who leads the case. However, the role of police and Prosecutors is complementary to each other. Their mutual cooperation and harmony is a must in order to conduct effective prosecution. Police should take needful advice by the Prosecutors at the time of filling charge sheet in the law court.

**Defence Counsel:** According to section 303, any person accused of an offence before a criminal court has a right to be defended by a pleader of his choice. Such pleaders are not in regular employment of the state and a paid remuneration by the accused person. Since, a qualified legal practitioner on behalf of the accused is essential for ensuring a fair trial, section 304 provides that if the accused does not have means to hire a pleader, the court shall assign a pleader for him at state's expense. At present there are several schemes through which an indigent accused can get free legal aid such as Legal Aid Scheme of State, Bar Association, Legal Aid and Service Board and Supreme Court Senior Advocates Free Legal Aid society. The legal Services Authorities Act, 1987 also provides free legal aid for the needy.

The basic principle of natural justice says that no one should be condemned unheard. This is ensured by requiring the Magistrate to record the statement of the accused person under **Section 313** of the Cr.P.C and this is the first instance where the accused gets an opportunity to speak for himself and defend himself before the trial commences. However, an

accused person is a layman (in most cases) and is not well versed with the technicalities of law and rhetoric of the lawyers. Considering this, **Section 303** of the code vests upon the accused "the right to be defended by a pleader of his choice" who is known as the '**defence counsel**'.

Unlike other functionaries under the Code, the defence counsel is not a government employee but is employed by the accused person or his family to defend him against the alleged charges. Nevertheless, they are considered to be the officers of the court because their existence is indispensable to meet the purpose of a fair trial. These defence counsels acquire their right to represent the accused by independent contracts called the 'vakalatnama' and are not established under the code.

However, the code does provide for defence counsel in the form of free legal aid to persons who cannot employ an advocate due to certain social or economic backwardness. Providing free legal aid and appointing a defence counsel for indigent accused has been pressed by the apex court repeatedly in **Khatri (2) v. State of Bihar** and **Suk Das v. UT of Arunachal Pradesh**.

**Prison authorities and Correctional Services Personnel**: The court presumes the existence of Prisons and the Prison authorities. It empowers Magistrates and judges under certain circumstances to order detention of under trial prisoners in jail during the pendency of the proceedings. It also empowers the courts to impose sentences of imprisonment on convicted persons and to send them to prison authorities. However, the code does not make specific provisions for creation, working and control of such machinery. These matters are dealt with in separate acts such as The Prisons Act 1894, The Prisoners Act 1900 and The Probation of Offenders Act 1958. the prison authorities are also not established under the Code but the Code presupposes their existence. The prison and its regulation are overlooked by the Prisons Act, 1894, the Prisoners Act, 1900, the Borstal School Acts and the Probation of Offenders Act, 1958. The role of the prison authorities, however, is vital in all the three stages in any criminal case, i.e. pre-trial, trial and post-trial. During the pre-trial stage, the Magistrate is empowered to order the detention of an arrested person in judicial custody if he has reason to believe that the safety of the accused might be endangered under police custody. Any person under judicial custody is under the surveillance of the prison authorities of the district prison of that area. Further, the code also empowers the Magistrate and judges under certain circumstances, such as when an investigation is not completed in 24 hours under **Section 167**, order detention of such undertrial prisoners in jail during the pendency of the proceedings.

The courts are also empowered “to impose sentences of imprisonment on convicted persons and to send them to prison authorities for the due execution of such sentences”.

**Q4. Distinguishably define a) Charge and FIR. b) Summon case and Warrant case. c) Compoundable and Non Compoundable Offences.**

**Ans. Charge and FIR** A First Information Report is a description of the situation and the act that constitutes a cognizable offence as given to the office in charge of a police station by any person. Such information is signed by the person giving the information. If the information is given orally, it is reduced in writing by the officer in charge, read over to the informant, and then signed by the person. The substance of this information is also entered into a register which is maintained by the officer. This is the first time when an event is brought to the attention of the police. The objective of the FIR is to put the police in motion for investigating the occurance of an act, which could potentially be a cognizable offence.

An FIR is a mere allegation of the happening of a cognizable offence by any person. It provides a description of an event but it may not necessarily provide complete evidence. No judicial mind has to be applied while writing the FIR. However, upon receipt of an FIR, the police investigates the issue, collects relevant evidence, and if necessary, places the evidence before a magistrate. Based on these preliminary findings of the police, the magistrate then formally prepares a charges with which the perpetrator is charged. Thus, an FIR is one path that leads to a Charge. An FIR is vague in terms of the offences but Charge is a precise formulation of the offences committed. An FIR is a description of an event, while a Charge is a description of the offences committed in that event. An FIR may or may not name an offender but a charge is always against a person. An FIR is always of a cognizable offence, but a charge may also include a non-cognizable offence.

**b) Summons Case and Warrant Case**. As per Section 2 (w), "summons-case" means a case relating to an offence, and not being a warrant-case and as per Section 2 (x), "warrant-case" means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Cr P C classifies an offence as either cognizable or non-cognizable, and a trial procedure as summons case or warrant case. Thus, the terms summons case and warrant case are in reference to the procedure adopted for the trial of the case. Thus, the difference between the two can be seen from the point of view of their trial procedures as highlighted below –

| Summon Case | Warrant Case |
|---|---|
| CrPC prescribes only one procedure for all summons cases, whether instituted upon a police report or otherwise. | CrPC prescribes two procedures for the trial of a warrant case by magistrate - one for case instituted upon a police report and one for case instituted otherwise than on a police report. |
| No charge needs to be framed only the particulars of the offence needs to be conveyed to the accused | A charge needs to be framed against the accused |
| As per S. 252, if the accused pleads guilty, the magistrate must record the plea of the accused and may, in his discretion, convict him on such plea. | As per S. 241, After the charge is framed, the accused may plead guilty and the magistrate may convict him on his discretion |
| Accused my plead guilty by post without appearing before the magistrate | Accused must appear personally |
| The accused may be acquitted, if the complainant is absent or if the complainant dies. | Magistrate can discharge the accused if complainant is absent,or no charge is framed, or if the offence is compoundable and non cognizable |
| The complainant may, with the permission of the court, withdraw the complaint against the accused. | The complainant may, with the permission of the court, withdraw the remaining charges against an accused, if he is charged with several offences and convicted on one or more of them. |
| When a warrant case is tried as a summons case and if the accused is acquitted under S. 255, the acquittal will only amount to discharge. | When a summons case is tried as a warrant case and if the accused is discharged under S 245, the discharge will amount to acquittal |
| Trial of a warrant case as a summons case it is a serious irregularity and the trial is vitiated if the accused has been prejudiced. | Trial of a summons case as a warrant case is an irregularity which is curable under Section 465 |
| A summons case cannot have charges that require a warrant case | A warrant case may contain charges that reflect a summons case |

| | |
|---|---|
| Accused gets only one opportunity. | Accused may get more than one opportunity to cross-examine the prosecution witness |
| All cases which are not punishable by death, imprisonment for life, or for more than two years are summons cases | All cases which are punishable by death, imprisonment for life, or for more than two years are warrant cases |
| Conversion<br>As per Section 259, a summons case can be converted into a warrant case if the case relates to an offence that entails more than 6 months of imprisonment as punishment and the judge feels that in the interest of justice it the case should be tried as a warrant case<br>Conversion- As per Section 259, a summons case can be converted into a warrant case if the case relates to an offence that entails more than 6 months of imprisonment as punishment and the judge feels that in the interest of justice it the case should be tried as a warrant case | A warrant case cannot be converted into summon case. |

It is important to note that the question whether a summons or a warrant should be issued in the case is not related to whether the case is a summons case or a warrant case

**c) Compoundable and Non compoundable-** Some offences largely affect only the victim and no considerable harm is considered to be done to the society. In such offences, if the offender and victim compromise, there is no need to waste court's time in conducting a trial. The process of reaching a compromise is called Compounding. Conceptually, such offences, in which a compromise can be done and a trial can be avoided, are called Compoundable offence. Rest of the offences are non-compoundable. Technically, offences classified as Compoundable by **Section 320** of CrPC are compoundable. Section 320 specifies two kinds of Compoundable offences - one where permission of court is required before compounding can be done for example, voluntarily causing grievous hurt, Theft, criminal breach of trust, assault on a woman with intention to outrage her modesty, etc. and one where permission of the court is not required for example, causing hurt, adultery, defamation, etc. As per S.320(3),

if the abetment of an offence is an offence and if the offence is compoundable then abetment is also compoundable. Only the person, who is specified in the classification tables in Section 320, has the right to compound the offence. The person is usually the victim. The offender cannot demand compounding as a right. However, when an offender has been committed to trial or when he has been convicted and his appeal is pending, compounding can only be done with the leave of the court to which he is committed or to which the trial is pending. If an offender is liable for enhanced punishment or a different punishment on account of a previous conviction, compounding cannot be done. High Court and Court of Session may, under their power of revision in **Section 401**, can allow any person to compound any compoundable offence.

In **Bhima Singh vs State of UP**, AIR 1974, SC held that when an offence is compoundable with the permission of the court, such permission may be granted by SC while an appeal is made against the conviction provided the parties have settled the matter amicably. In **Ram Lal vs State of J&K**, 1999, SC held that when an offence is declared non-compoundable by law, it cannot be compounded even with the permission of the court. However, the court may take the compromise into account while delivering judgment. The case of **B S Joshi vs State of Haryana**, AIR 2003 is interesting in this regard. The case was about the matter related to Section 498A, which is non-compoundable offence. In this case, the parties reached a compromise but the High Court refused to quash the FIR, on the ground that the offence is non-compoundable. However, SC held that in the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code, such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulate and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised. It further observed that in this case, the parties were not asking for compounding the offence but for quashing the FIR. It observed that since because of the amicable settlement, there is no chance of conviction and in such a case the court has the power to quash the proceeding.

**Q5. What is meant by First Information Report? What is the evidentiary value of FIR?**

**Ans.** The name FIR is given to the information given by any person about a cognizable offence and recorded by the police in accordance with **Section 154**. As per this section, every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. Supreme Court in the case of **State of Bombay vs Rusy Mistry**, AIR 1960, defined FIR as so - A FIR means the information, by whomsoever given, to the officer in charge of a police station in relation to the commission of a cognizable offence and which is first in point of time and on the strength of which the investigation into that offence is commenced. Thus, FIR is nothing but information of the nature of a complaint or accusation about a cognizable offence given by any person to the police so that the police can start investigation. When a person reports any information about a cognizable offence to the police, the police is bound to register a case and proceed with investigation. However, for police to investigate the matter, the offence must be a cognizable offence. The police is not allowed to investigate a non-cognizable offence without an order from a magistrate. So, once the duty officer is certain that the offence alleged to have been committed is a cognizable offence, he directs the complainant to put his statement in writing. In the presence of the complainant, the duty officer shall complete all the columns in the FIR register with the information given by the complainant. He shall then read out all the contents of the FIR registered to the complainant. Once the complainant is certain that all the details have been correctly written, he should sign the FIR.

FIR merely contains the facts of the offence as known by the informant. The FIR is a statement by the complainant of an alleged offence. The informant is not required to prove his allegations in any manner at the police station. It is the job of the police to ascertain facts, verify details and substantiate the charges or otherwise. However, the facts must not be vague. The facts must divulge at least some concrete information about the offence committed. In case of **Tapinder Singh vs State,** 1972, SC held that when a telephone message did not disclose the names of the accused nor did it disclose the commission of a cognizable offence, it cannot be called a FIR.

In case of **State of UP vs R K Shrivastava,** 1989, SC held that if the allegations made in an FIR do not constitute a cognizable offence, the criminal proceeding instituted on the basis of the FIR should be quashed. Sometimes multiple persons may report the same incident and in

such situation the police must use commonsense and record one statement as FIR. Usually, the statement that contains enough information to allow the police to proceed with investigation is recorded as FIR.

**Evidentiary Value**. An FIR is not substantive evidence that is, it is not evidence of the facts which it mentions. However, it is very important since it conveys the earliest information about the occurrence of an offence and it can be used to corroborate the information under Section 157 of Indian Evidence Act or to contradict him under Section 145 of Indian Evidence Act, if the informant is called as a witness in a trial. It is considered that FIR has a better corroborative value if it is recorded before there is time and opportunity to embellish or before the memory of the information becomes hazy. There must be a reasonable cause for the delay. For example, in case of **Harpal Singh vs State of HP**, 1981, involving rape, the FIR was registered after 10 days. It was held that the delay was reasonable because it involved considerable matter of honor for the family and that required time for the family to decide whether to take the matter to court or not. An FIR can also be used in cross examination of the informant. However, if the FIR is made by the accused himself, it cannot be used against him because of Section 25 of Evidence act which forbids any confession made to the police to be used against the accused. A FIR can also be used as a dying declaration under Section 32 of Indian Evidence Act.

**Unit-2**

**Q1. Explain the Rights of Arrested person with relevant provisions of Constitutional and Criminal Law.**

**Ans**. CrPC gives wide powers to the police for arresting a person. Such powers without appropriate safeguards for the arrested person will be harmful for the society. To ensure that this power is not used arbitrarily, several restraints have been put on it, which, indirectly, can be seen as recognition of the rights of a person being arrested. Further, once arrested, a person is already at a disadvantage because of his lack of freedom and so he cannot take appropriate steps to defend himself. Thus, to meet the needs of "fair trial", several provisions are given in CrPC, that give specific rights to an arrested person. These rights can be described as follows - 1. Right to know the **grounds of arrest** - Section **50(1)** - According this provision, every police officer or other person arresting any person without warrant shall forthwith communicate to him full particulars of the offence for which he is arrested or other

grounds for such arrest. Similarly, when a subordinate officer is deputed by a senior police officer to arrest a person under Section **55**, the subordinate officer must notify the person to be arrested of the substance of the written order given by the senior officer, which clearly specifies the offence for which he is being arrested. The same provision exists in case of an arrest made under a warrant in Section **75**. In this case, the police officer or any person making arrest under warrant must notify the substance of the warrant to the person being arrested and if required, must show the warrant. As held in **Satish Chandra Rai vs Jodu Nandan Singh,** ILR 26 Cal 748, if the substance of the warrant is not notified, the arrest would be unlawful. In **Udaybhan Shuki vs State of UP** 1999 CrLJ, All HC held that right to be notified of grounds of arrest is a precious right of the arrested person. This allows him to move the proper court for bail, make a writ petition for habeas corpus, or make appropriate arrangements for his defence. This right is also a fundamental right given by the Constitution in **Art 22(1),** which says, "No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.". It embodies two distinct rights - the right to be told of the grounds of arrest and the right to consult a legal practitioner of his choice. The second right of consulting a legal practitioner of his choice actually depends on the first right of being told about the grounds of arrest. If the person doesn't know why he is being arrested, he cannot consult a legal practitioner meaningfully. In **Harikishan vs State of Maharashtra** AIR 1962, SC held that the grounds of arrest must be communicated to the person in the language that he understands otherwise it would not amount to sufficient compliance of the constitutional requirement. 2. Right to be informed of the **provision for bail** - Section 50(2) - Some offences that are not very serious do not require the offender to be kept in custody. For such offences, Cr P C allows the offender to ask for bail as a matter of right. However, not every person knows about Cr P C and so they cannot know that they can get bail immediately. Thus, Section 50(2), provides that where a police officer arrests any person other than a person accused of a non-bailable offence without warrant, he shall inform the person arrested that he is entitled to be released on bail and that he may arrange for sureties on his behalf. 3. Right to be **taken to magistrate without delay** - Holding a person in custody without first proving that the person is guilty is a violation of human rights and is completely unfair. At the same time, holding a person in custody is necessary for the police to carry on their investigation of a crime. These two are contradictory requirements and a balance must be found between them. Since police has arrested the person, it cannot be the agency that determines whether person must be kept confined further.

This can only be decided by a competent judicial authority. This is exactly what is embodied in **Art 22(2)** that gives a fundamental right to the arrested person that he must be produced before a magistrate within 24 hours of arrest. It says, "Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate." Section **57** of CrPC also contains a similar provision for a person arrested without a warrant. It says, "No police officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under Section **167**, exceed twenty four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court." Section **76** contains a similar provision for a person arrested under a warrant. It says, "The police officer or other person executing a warrant of arrest shall (subject to the provisions of section 71 as to security) without unnecessary delay bring the person arrested before the court before which he is required by law to produce such person. Provided that such delay shall not, in any case, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court." Thus, it can be see that it is a very important right that is meant to prevent abuse of police power and to prevent the use of a police station as a prison. It prevents arrest merely for the purpose of extracting confessions. The arrested person gets to be heard by a judicial authority that is independent of the police. In **Khatri (II) vs State of Bihar** 1981 SCC, SC has strongly urged upon the State and its police to ensure that this constitutional and legal requirement of bringing an arrested person before a judicial magistrate within 24 hours be scrupulously met. This is a healthy provision that allows magistrates to keep a check on the police investigation. It is necessary that the magistrates should try to enforce this requirement and when they find it disobeyed, they should come heavily upon the police. Further, in **Sharifbai vs Abdul Razak,** AIR 1961, SC held that if a police officer fails to produce an arrested person before a magistrate within 24 hours, he shall be held guilty of wrongful detention. Constitutional Perspective on Art 22(2) - On the face of it, this article seems to be applicable on arrests with or without warrants. However, in **State of Punjab vs Ajiab Singh** AIR 1953, SC observed that it applies only to cases of arrests without warrant because in case of an arrest with warrant, the judicial mind has already been applied while issuing the warrant. So further safeguard is not required. This decision has been widely criticized. In any case, the proviso to Section 76 unmistakably provides that a person

arrested under a warrant must be produced before a magistrate within 24 hours. 4. Right to **consult Legal Practitioner - Art 22 (1) -** For conducting a fair trial it is absolutely necessary that the accused person is able to consult with a legal practitioner whom he trusts. Second part of Article 22(1) gives this fundamental right to an arrested person. It says that no person who is arrested shall be denied the right to consult, and to be defended by, a legal practitioner of his choice. However, this does not mean that the State must provide a legal practitioner of the person's choice. It is up to the arrested person to contact and appoint a such a legal practitioner. The State's responsibility is only to ensure that he is not prevented from doing so. The same right is also provide by CrPC under **Section 303**, which says, "Any person accused of offence before a Criminal Court or against whom proceedings are instituted under this Code, may of right be defended by a pleader of his choice." 5. Right to free **legal aid - Art 21 and Section 304** - A person who does not have the means to hire a legal practitioner is unable to defend himself appropriately. This casts a cloud on the fairness of the trial. Therefore, Section 304 provides that where, in a trial before the Court of Session, the accused is not represented by a pleader, and where appears to the Court that the accused has not sufficient means to engage a pleader, the Court shall assign a pleader for his defense at the expense of the State. In **Khatri (II) vs State of Bihar** 1981 SCC, Supreme Court has also held that access to a legal practitioner is implicit in Article 21, which gives fundamental right to life and liberty. The state is under constitutional mandate to provide free legal aid to an indigent accused person and this constitutional obligation arises not only when the trial is commenced but also when the person is first produced before a magistrate and also when he is remanded from time to time. In **Suk Das vs Union Territory of Arunachal Pradesh** 1986, SCC, SC has held that non-compliance of this requirement or failure to inform the accused of this right would vitiate the trial entailing setting aside of the conviction and sentence. The right of an accused person to consult his lawyer begins from the moment of his arrest. The consultation with the lawyer may be within the presence of a police officer but not within the police officer's hearing. SC also held that it is the duty on all courts and magistrates to inform the indigent person about his right to get free legal aid. 6. Right to be informed about the **right to inform of his arrest to his relative or friend** - In order to ensure a fair trial and to improve people-police relationship, the Supreme Court, in **Joginder Kumar vs State of UP** 1994, formulated the rules that make it mandatory on the police officer to inform one friend, relative, or any other person of the accused person's choice, about his arrest. These rules were later incorporated in CrPC under **section 50 A in 2005**. Section 50 A (1) provides that once the arrested person is brought to the police station, the

police officer must inform a relative or a friend, or any other person of the arrested person's choice, about his arrest. He must also tell the place where the arrested person has been kept. This is a very important step in ensuring justice with the arrested person because this allows the arrested person and his well wishers to take appropriate legal steps to secure his release. However, all this will amount to nothing if the arrested person does not even know about this very critical right. Thus, Section 50 A (2) provides that the police officer must inform the arrested person of this right. Further, as per Section 50 A (3) he must note down the name and address of the person who was informed about the arrest. To make sure that there is no violation of this right, section 50 A (4) makes it a duty of the magistrate to verify that the provisions of this section were complied with. 7. Right to be **examined by a medical practitioner** - While Section 53 allows a police officer to get the accused examined by a registered medical practitioner, Section 54(1) gives the accused a right to get himself examined by a registered medical practitioner. Section 54 (1) says thus, "When a person who is arrested, whether on a charge or otherwise, alleges, at the time when he is produced before a Magistrate or at any time during, the period of his detention in custody that the examination of his body will afford evidence which will disprove the commission by him of any offence or which Magistrate shall, if requested by the arrested person so to do direct the examination of' the body of such person by a registered medical practitioner unless the Magistrate considers that the request is made for the purpose of vexation or delay or for defeating the ends of Justice". While Section 53 is meant to aid the police in investigation, Section 54(1) is meant for the accused to prove his innocence. This right can also be used by the accused to prove that he was subjected to physical injury. In **Sheela Barse vs State of Maharashtra** 1983 SCC, SC held that the arrested accused person must be informed by the magistrate about his right to be medically examined in terms of Section 54(1).However, it is not clear in the section whether the medical person must be of the choice of the accused or shall be appointed by the magistrate. The section is also silent on who will bear the expense of the examination. Non compliance to this important provision prompted Delhi High court to issue directions that make it obligatory for the magistrates to ask the arrested person as to whether he has any complaint of torture or maltreatment in police custody.

**Q2. When is a person declared Absconder? Explain the procedure for publication of proclamation for persons absconding.**

**Ans.** When a person is hiding from his place of residence so as to frustrate the execution of a warrant of arrest, he is said have absconded. A person may hide within his residence or

outside away from his residence. If a person comes to know about the issuance of a process against him or if he anticipates such a process and hides or quits the country, he is said to have absconded. In **Kartary vs State of UP**, 1994, All HC held that when in order to evade the process of law a person is hiding from (or even in) his place of residence, he is said to abscond. A person is not said to abscond merely when he has gone to a distant place before the issuance of a warrant. Similarly, it is necessary that the person is hiding himself and it is not sufficient that an inspector is unable to find him. Normally, if a person fails to appear before the court even after being served a summons, the court issues a warrant of arrest. However, if the person absconds to avoid the arrest, the drastic step of Proclamation for Persons Absconding needs to be taken, which is described in Section 82. **Proclamation for person absconding** (Section 82(1)) - If the court has reason to believe that a person has absconded to avoid the execution of his arrest warrant, the court may publish a written proclamation requiring such person to appear before it at the specified place and time. The date and time of appearance must not be less than thirty days from the date of proclamation. Procedure for Publication of the Proclamation (Section 82(2)) - As per section 82(2), the proclamation must be read in some conspicuous place of the town or village in which the person resides. It shall also be affixed to some conspicuous part of the house in which the person resides or to some conspicuous place of the town or village. Further, a copy of the same must also be affixed to some conspicuous part of the court house. The court may also direct a copy of the proclamation to be published in a daily newspaper circulating in the place is which such person ordinarily resides. The terms of Section 82 are mandatory and a proclamation cannot be issued without first issuing a warrant of arrest. Therefore, as held in **Bishnudayal vs Emperor** AIR 1943, if there is no authority to arrest, the issuing of proclamation would be illegal. **Consequences of Proclamation** Section 83 - Attachment of property of person absconding - The publication of proclamation in accordance with the procedure described in section 82, is the last of the steps taken to produce a person before the court. If the person still fails to appear before the court, Section 83 empowers the court to attach the property of the person who is absconding at any time. The court must record the reasons for doing so. The property can be movable or immovable. The property can be any property within the district or even outside the district of the District magistrate of the other district endorses the proclamation. Further, if, at the time of making proclamation, the court is satisfied that the person is about to dispose of his property or is about to move his property out of the jurisdiction of the court, it may order the attachment of the property simultaneously with the issue of proclamation. If the property to be attached is a debt or is

movable property, the attachment is done either by seizure, by the appointment of a receiver, by an order ins writing prohibiting the delivery of such property to the proclaimed person or to anyone on his behalf. Court can also use any one or more of these modes as it thinks fit. If the property is immovable, it can be attached by taking possession, by appointing a receiver, by an order prohibiting the payment of rent to the proclaimed persons or by any or all of these methods. Section 84 provides a means to protect the interests of any person other than the proclaimed person in the attached property. Any such person who has an interest in the attached property can claim it within six months from the date of attachment on the ground that the claimant has an interest in the property and the interest is not liable to be attached under section 83. The claim shall be inquired into and may be allowed or disallowed in whole or in part.(1) If any claim is preferred to, or objection made to the attachment of, any property attached under section 83, within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under section 83, the claim or objection shall be inquired into, and may be allowed or disallowed in whole or in part: Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by his legal representative.(2) Claims or objections under sub-section (1) may be preferred or made in the Court by which the order of attachment is issued, or, if the claim or objection is in respect of property attached under an order endorsed under sub-section (2) of section 83, in the Court of the Chief Judicial Magistrate of the district in which the attachment is made.(3) Every such claim or objection shall be inquired into by the Court in which it is preferred or made: Provided that, if it is preferred or made in the Court of a Chief Judicial Magistrate, he may make it over for disposal to any Magistrate subordinate to him.(4) Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (1) may, within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive. **Section 85** - Release, Sale, and restoration of the property -(1) If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment.(2) If the proclaimed person does not appear within the time specified in the proclamation, the property under the attachment shall be at the disposal of the State Government; but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under section 84 has been

disposed of under that section, unless it is subject to speedy and natural decay, or the Court considers that the sale would be for the benefit of the owner; in either of which cases the Court may cause it to be sold whenever it thinks fit.(3) If, within two years from the date of the attachment, any person whose property is or has been at the disposal of the State Government, under sub-section (2), appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein such property, or, if the same has been sold, the net proceeds of the sale, or, if part only thereof has been sold, the net proceeds of the sale, and the residue of the property, shall, after satisfying therefrom all costs incurred in consequence of the attachment, be delivered to him.

**Q3 What do you understand by Arrest? How is an arrest made? When can the police arrest a person without an order from a magistrate and/or without a warrant?**

**Ans. Arrest means** apprehension of a person by legal authority so as to cause deprivation of his liberty. Thus, after arrest, a person's liberty is in control of the arrester. Arrest is an important tool for bringing an accused before the court as well as to prevent a crime or prevent a person suspected of doing crime from running away from the law. Cr P C contemplates two types of arrests - an arrest that is made for the execution of a warrant issued by a magistrate and an arrest that is made without any warrant but in accordance with some legal provision that permits arrest. **Section 41 to 44** contain provisions that govern the arrest of a person by police and private citizens, while Section 46 describes how an arrest is a made. **Arrest without warrant** There are situations when a person may be arrested by a police officer, a magistrate or even private citizen without a warrant. These are described in Section 41, 42, 43, and 44 as follows - **Arrest by Police** - Section 41. When police may arrest without warrant (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person -(a) who has been concerned in any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been so concerned; or (b) who has in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking; or(c) who has been proclaimed as an offender either under this Code or by order of the State Government; or (d) in whose possession anything is found which may reasonably be suspected to be stolen property and who may

reasonably be suspected of having committed an offence with reference to such thing; or (e) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or (f) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or (g) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or (h) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 356; or (I) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition. (2) Any officer in charge of a police station may, in like manner, arrest or cause to be arrested any person, belonging to one or more of the categories of persons specified in section 109 or section 110. In the case of **Joginder Kumar vs State of UP**, CrLJ, 1994, it was held that no arrest can be made merely because it is lawful to do so. There must be a justifiable reason to arrest. Further, in **State vs Bhera**, CrLJ, 1997, it was held that the "reasonable suspicion" and "credible information" must relate to definite averments which must be considered by the Police Officer himself before he arrests the person. Section 42 allows a police officer to arrest a person for a non-cognizable offence, if he refuses to give his name and residence. As per Section 42(1), when any person who, in the presence of a police officer, has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained. However, as per sub clause (2), the person must be released when the true name and residence of such person have been ascertained. He may be required to execute a bond, with or without sureties, to appear before a Magistrate if necessary. Provided that, if such person is not resident in India, the bond shall be secured by a surety or sureties resident in India. Further, as per sub clause (3), should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction. **Arrest by Private**

**person** Even private persons are empowered to arrest a person for protection of peace in certain situations. This is important because police cannot be present at every nook and corner and it is up to private citizens to protect the society from disruptive elements or criminals. As per section 43(1), any private person may arrest or cause to be arrested any person who in his presence commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over or cause to be made over any person so arrested to a police officer, or, in the absence of a police officer, take such person or cause him to be taken in custody to the nearest police station. Thus, if a person is drunk and is committing assault on others, he may be rightly arrested by any citizen and taken to the nearest police station. However, it is important to note that this power can be exercised only when the person making an arrest is under a bona fide impression that a non-bailable and cognizable office is being committed in his presence. One does not have a right to arrest on mere suspicion or on mere opinion that an offence has been committed. **Procedure on arrest by private person** - As mentioned above, the private person must take the arrested person to the police officer or police station without any reasonable delay. If he keeps the person in his own custody, he will be guilty of wrongful confinement as given in Section 342 of IPC. As per section 43(2), If there is reason to believe that such person comes under the provisions of section 41, a police officer shall re-arrest him. Further, as per section 43(3), if there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 42; but if there is no sufficient reason to believe that he has committed any offence, he shall be at once released. A new provision has been incorporated as Section 50A, which makes it obligatory for the police officer or any other person making an arrest to give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information. Further, the police officer shall inform the arrested person of his rights under subsection as soon as he is brought to the police station. He must make an entry of the fact as to who has been informed of the arrest of such person in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government. It is the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of this section has been complied with in respect of such arrested person. **Arrest by Magistrate** As per Section 44(1), when any offence is committed in the presence of a Magistrate, whether

Executive or Judicial, within his local jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody. Further, (2) Any Magistrate, whether Executive or Judicial, may at any time arrest or direct the arrest, in his presence, within his local jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant. Important thing to note here is that magistrates have wider power than private citizen. A magistrate can arrest on the ground of any offence and not only on cognizable offence. As held in the case of **Swami Hariharanand Saraswati vs Jailer I/C Dist. Varanasi,** AIR 1954, the arrested person must be produced before another magistrate within 24 hours, otherwise his detention will be illegal. **Arrest how made** - Section 46 describes the way in which an arrest is actually made. As per Section 46(1), unless the person being arrested consents to the submission to custody by words or actions, the arrester shall actually touch or confine the body of the person to be arrested. Since arrest is a restraint on the liberty of the person, it is necessary for the person being arrested to either submit to custody or the arrester must touch and confine his body. Mere oral declaration of arrest by the arrester without getting submission to custody or physical touching to confine the body will not amount to arrest. The submission to custody maybe by express words or by action. For example, as held in the case of **Bharosa Ramdayal vs Emperor** AIR 1941, if a person makes a statement to the police accusing himself of committing an offence, he would be considered to have submitted to the custody of the police officer. Similarly, if the accused proceeds towards the police station as directed by the police officer, he has submitted to the custody. In such cases, physical contact is not required. In case of **Birendra Kumar Rai vs Union of India,** CrLJ, 1992, it was held that arrest need not be by handcuffing the person, and it can also be complete by spoken words if the person submits to custody. Section 46(2) If such person forcibly resists the endeavor to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest. Thus, if the person tries to runaway, the police officer can take actions to prevent his escape and in doing so, he can use physical force to immobilize the accused. However, as per Section 46(3), there is no right to cause the death of the person who is not accused of an offence punishable with death or with imprisonment for life, while arresting that person. Further, as per Section 49, an arrested person must not be subjected to more restraint than is necessary to prevent him from escaping. Due to concerns of violation of the rights of women, a new provision was inserted in Section 46(4) that forbids the arrest of women after sunset and before sunrise, except in exceptional circumstances, in which case the arrest can be done by

a woman police officer after making a written report and obtaining aprior permission from the concerned Judicial Magistrate of First class. In **Kultej Singh vs Circle Inspector of Police,** 1992, it was held that keeping a person in the police station or confining the movement of the person in the precincts of the police station amounts to arrest of the person.

**Q4. What is meant by Commencement of proceedings? When can a complaint be dismissed?**

**Ans.** "**Commencement of proceedings**" happens with the proceedings that take place after "taking of cognizance" of an offence by a magistrate under Section 190, which can happen either on a complaint by any person, a police report, any other source other than a police officer, or upon his own knowledge. However, when cognizance is take upon a complaint made by any person, it is critical to examine the complainant to ensure that the complaint is genuine before starting the trial and summoning an accused. According to **41st Law Report**, everyday experience of the court shows that a vast number of complaints to the magistrate are ill founded and therefore they should be carefully considered at the very start and those which are not very convincing on the face should be subjected to further scrutiny so that an accused person is summoned only in substantial cases. What this means is that frivolous and vexatious cases that are just meant to harass an accused must be weeded out. This is exactly the objective of Section 200, which implores a **magistrate to examine** the complainant under oath and any witnesses. **Section 200** says: A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate. Provided that, when the complaint is made in writing, the Magistrate **need not examine** the complainant and the witnesses-(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or (b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under **section 192**: Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them. In **Mac Culloch vs State,** 1974, it was held by SC that the provisions of section 200 are not a mere formality, but have been intended by the legislature to be given effect to for the protection of the accused persons against unwarranted complaints. It is also necessary that to start the trial process, the magistrate must be competent to take cognizance the alleged offence. **Section 201** says that if the magistrate is not competent to take cognizance of an offence, he shall (a)

if the complaint is in writing, return it for presentation to the proper Court with an endorsement to that effect; (b) if the complaint is not in writing, direct the complainant to the proper Court. To further protect a person from frivolous cases arising from complaints from private parties, **Section 202** empowers a magistrate to inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding and he can postpone the issue for process for this purpose. It is important to note that the "weeding" as envisaged by Section 200-203 is only applicable to cases where cognizance is taken by the magistrate upon a complaint by a private party. It is not applicable to cognizance taken upon a police report. Issue of Process (Section 204) Once it is determined that a prima facie case exists against the accused, the magistrate proceeds with the case as per Section 204 by the way of issuing a process. Which means: (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be - (a) a summons-case, he shall issue his summons for the attendance of the accused, or (b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) someother Magistrate having jurisdiction. (2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed. (3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint. (4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint. (5) Nothing in this section shall be deemed to affect the provisions of section 87 (Section 87: Issue of warrant in lieu of, or in addition to, summons).

**Dismissal of a Complaint** - Section 203 As mentioned before, upon receiving a complaint, a magistrate can conduct an inquiry or direct investigation of the complaint under Section 202(1). Section 203 empowers a magistrate to dismiss the complaint, if, after considering the statements on oath from the complainant or his witnesses or the result of the inquiry or investigation, he believes that there are no sufficient grounds for proceeding further. He must record the reasons for dismissal. The magistrate must apply his mind on the collected statements and inquiry report to determine whether there is any merit in the complaint. However, as held by SC in **Chandra Deo Singh vs Prokash Chandra Bose**, 1963, the test specified by Section 203 for dismissing a complaint is only whether sufficient grounds exist

for proceeding further and not whether sufficient grounds exist for conviction. Thus, even if the magistrate does not see sufficient grounds for conviction but sees sufficient ground for proceeding further with the trial, he must not dismiss the complaint. SC further observed that where there is a prima facie evidence against the accused, even though the accused might have a defence, the issue of process cannot be refused because the hearing of defence must be done at the appropriate stage and at appropriate forum.

**Q5. When and When not can Bail be granted?**

**Ans.** The purpose of Bail is to ensure the appearance of an accused before the court whenever required. However, granting bail is not advisable in all cases. For example, a murder, if let loose, may try to intimidate the witnesses, or he may even abscond altogether. This is very bad for the society in general and reflects bad on the justice system. Thus, various rules and procedures have been formulated to make sure that only the deserving are released on bail. They try to achieve a balance between the rights of the accused and the protection of the society and effectiveness of the justice system. The working of the bail system in India was highlighted in the case of **Hussainara Khaton vs Home Secretory**, 1980. It came to the courts attention for the first time that thousands of people were rotting in jails for 3 to 10 years for petty crimes which do not have punishment more than 6 months to one year. This was because they were unable to pay bond money for bail and the courts were too backlogged to hear their cases. In this respect, J Bhagwati observed that the courts must abandon the antiquated concept under which pretrial release is ordered only against bail with sureties. Thus, in general, the intention of the justice system is to give bail and not jail before the accused is convicted. It is said that since the accused is presumed innocence, he must be released so that he can fight for his defense. Thus, releasing a person on bail is a rule, while denying bail is an exception. Provisions for Bail can be categorized by the type of offence committed i.e. bailable offence or non-bailable offence - **Bail for Bailable offences** - A person accused of a bailable offence can demand to be released on bail as a matter of right. This is provided for by Section 436. **Section 436** - When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at, any, time while-in the custody of such officer or at any stage of the proceeding before such court to give bail, such person shall be released on bail. Further, such officer or court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance. Section 50(2) imposes an obligation on the police

officer to notify the detained person about his right to get bail if he is detained on a bail able offence. The right to bail cannot be nullified by imposing a very high amount for bail. Section 440(1) specifically provides that the amount of bail cannot be unreasonably high. An amendment to Section **436** mandates that an indigent person, who is unable to provide any bail amount, must be released. If a person is unable to provide bail amount for a week, then he can be considered indigent. Section **436 A** allows a person to be released on his own surety if he has already spent half the maximum sentence provided for the alleged crime in jail. However, this does not apply if death is one of the punishments specified for the offence. **Bail for Non-Bailable offences** - When a person is detained for a non-bailable offence, he cannot demand to be released on bail as a matter of right. He can, however, request the court to grant bail. The provisions in this case are governed by Section 437/**Section 437** - When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station or appears or is brought before a Court other than the High Court or Court of session, he may be released on bail. If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, the accused shall be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance. A police officer or the court may also release a person from custody if he feels that there are any special reasons. But he must record his reasons in writing. Supreme Court, in the case of **Narsimhulu**, AIR 1978, has given a set of **considerations that must be given while giving bail** in case of non-bailable offences. These are –

1. the nature of the crime
2. the nature of the charge, the evidence, and possible punishment
3. the possibility of interference with justice
4. the antecedents of the applicant
5. furtherance of the interest of justice
6. the intermediate acquittal of the accused
7. socio-geographical circumstances
8. prospective misconduct of the accused
9. the period already spent in prison
10. protective and curative conditions on which bail might be granted.

If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs. If, at any time, after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered. If the investigation is not done within 24 hours, the arrested person must be bought before the court and if required, the police must make a case to extend the detention. The court may extend the detention by 15 days. However, the detention cannot extend more than 60 days (or 90 days, if the offence is punishable by death or imprisonment for life), after which the accused must be released on bail. This provision applies for bailable as well as non-bailable offence. **Section 436** A allows a person to be released on his own surety if he has already spent half the maximum sentence provided for the alleged crime in jail. However, this does not apply if death is one of the punishments specified for the offence. **Conditions on Bail** As per Section 437, if any person accused of an offence punishable with 7 years or more of imprisonment is released on bail, the court may impose any condition on the bail to ensure that the person will attend the court in accordance with the bond executed by him, or to ensure that the person will not commit a similar offence or otherwise in interest of justice. **Special Powers** of Hight Court and Court of Session regarding Bail Section **439** gives special powers to High Court and Court of Session regarding bails. These are as follows –

1. A High Court or Court of Sessions may direct that any person accused of an offence and in custody be released on bail. It may also impose any condition which it considers necessary. It may set aside or modify any condition imposed by a Magistrate when releasing any person on bail.

2. The High Court or the Court of Sessions shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Sessions or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

3. A High Court or Court of Sessions may direct that any person who has been released on bail under this chapter be arrested and commit him to custody.

When can **bail be denied** - 1. As per Section 436(2), if a person has violated the conditions of the bail-bond earlier, the court may refuse to release him on bail, on a subsequent occasion in the same case. He can also be asked to pay penalty for not appearing before the court as per the conditions of the previous bail. 2. It is clear that the provision for bail in case of non-bailable offences gives a discretionary power to the police and court. However, this power is not totally without any restraint. **Section 437** disallows bail to be given in the following conditions. **1.** if there appears reasonable grounds for believing that the person has been guilty of an offence punishable with death or imprisonment for life **2.** if such offence is a cognizable offence and the person has been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence. The person may, however, be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm. **3.** Persons accused of Dowry Death.

**Cancellation of Bail** Although there was no provision for cancellation of the bail in the old code, the SC in Talib's case (AIR 1958) held the absence of such provision as a lacuna and recognized the power of High Court of cancellation of bail. In the new code, as per section 437 (5) any Court which has released a person on bail under section 437(1) or 437(2), may direct that such person be arrested and commit him to custody. This basically cancels the bail. However, it must be noted that only the court that has given the bail can cancel it. Thus, a bail given by a police officer cannot be canceled by a court under this section. To do so the special power of High Court or Court of Session under Section 439 has to be invoked. The new Section 439 explicitly gives the power to High Court and Court of Session to direct that any person who has been released on bail be arrested and to commit him to custody. The power given by Section 439 for cancellation has no riders. It is a discretionary power. It is not necessary that some new events should take place subsequent to the offender's release on bail for the Sessions Judge to cancel his bail, however, the court usually bases its decision of cancellation on subsequent events. For example, in the case of **Surendra Singh vs State of Bihar** 1990, Patna HC pointed out that a bail may be cancelled on following grounds - **1**. When the accused was found tampering with the evidence either during the investigation or during the trial **2**. when the accused on bail commits similar offence or any heinous offence during the period of bail. **3**.when the accused had absconded and trial of the case gets delayed on that account.**4**. when the offence so committed by the accused had caused serious law and order problem in the society.

**5.** if the high court finds that the lower court has exercised its power in granting bail wrongly

**6.** if the court finds that the accused has misused the privileges of bail. **7.** when the life of accused itself is in danger.

**Appeal Provision for Bail** It has been held that an order granting bail is an interlocutory order and so it cannot be challenged under the revisional jurisdiction of the Session Court or High Court. In general, there is no right of appeal against the decision of refusing the bail. However, a person can always file for Special Leave Petition to High Court or Supreme Court against such decision. Some acts, such as POTA, explicitly grant a right to appeal against a decision of refusal of bail to special courts.

**Unit-3**

**Q.1 What are the preliminary pleas that can be used to bar a trial? "Every offence shall ordinarily be inquired and tried by court within the local limits of whose jurisdiction it was committed." Explain the statement and state its exceptions, if any.**

**Ans.** When an accused appears or is brought before the court for a trial, he may raise certain pleas or objections to avoid the trial. For example, he may plead that the court does not have jurisdiction in the case or that the offence happened too long ago, or that he has already been tried and acquitted for the same offence. Such pleas are meant to stop the trial from proceeding further and discharge the accused. However, such pleas may also be raised by prosecution when the court does not have competency or jurisdiction in the case. Such pleas are supposed to be brought forth at the beginning of a trial or as soon as charges are framed. However, there is no explicit direction in Cr P C regarding the timing for such pleas. The following are the **pleas that can be raised** - 1. **Court without Jurisdiction** - Jurisdiction of criminal courts is of two kinds. One that determines the competency of the court to try a specific offence and the other that determines whether the offence happened in the territory of the court, which is also known as territorial jurisdiction. **Competency of the Court to try the offence** - Section 26 read with column 6 of the first schedule determines which court can try a given offence. For example, offences against public tranquility can be tried by any magistrate while the offence of counterfeiting a government stamp can be tried only by a Court of Session. Similarly, only the prescribed court or magistrate has the power for all the offences defined in IPC and other laws. Thus, any party to the proceeding can raise the plea that the court is not competent to try the concerned offence. Section 461 provides that it any magistrate, who is not empowered to try an offence, tries the offender for that offence, the proceedings shall be void. Also, an executive magistrate has no power to try for any offence. Further, as per Section 479, no magistrate or judge can try any case in which he is a party or

in which he is interested. If a trial is initiated in violation of this rule, a plea can be raised in this regard. **Territorial Jurisdiction** - This jurisdiction is determined according to Section 177 to 188 of CrPC. These rules have been enacted mainly for the purpose of convenience of the court, the investigating agency, the accused, and the victim. The general concept is that only the court in whose territory the offence or any part of offence has happened, can try that offence. In simple terms, an offence committed in Mumbai cannot be tried in a court in Delhi. However, most case are not as simple as that. For example, A hurts B by a knife in Dewas and D dies because of the wound in Indore. In this case, both the courts in Dewas and Indore have jurisdiction. However, if the victim B lives in Bhopal and if FIR of his death is filed in Bhopal, can A be tried in Bhopal? If not, and if A is tried in Bhopal, A can raise a pleas to bar the trial in Bhopal. Any violation of the rules of territorial jurisdiction does not ipso factor vitiate the trial unless it has in fact resulted in failure of justice. However, if a plea of territorial jurisdiction is raised in the beginning of the trial, then such objection must be sustained and the trial must be stopped. It cannot gain legitimacy under Section 462 in that case.

2. **Time barred proceedings** - Earlier, any offence committed could have been taken cognizance of after any number of years. This caused grave injustice to the accused as important witnesses became unavailable, or important evidence was destroyed by time. For these reasons, CrPC has now incorporated some general rules for taking cognizance of the crimes within a specific period of their happening. In general, the principle that offences punishable with only fine or with imprisonment up to 3 years should be tried within a limited time. The provisions regarding such limitations are contains in Section 467 to 473 and an accused can take advantage of the appropriate section to raise the plea that the case against him is barred by the prescribed period of limitation. Section 468 contains the basic rule which provides that no court shall take cognizance of an offence punishable with fine only or with imprisonment up to three yrs after the expiry of the period of limitation. The **period of limitations are** –

1. six months, if the offence is punishable by fine only.
2. one year, if the offence is punishable with imprisonment of a term not exceeding 1 yr.
3. three years, if the offence is punishable with imprisonment of a term not exceeding 3 yr.

These provisions are subject to any other provision which might have been created explicitly for any particular offence. Trial of offences of serious nature, i.e. offences which entail punishment of imprisonment of more than 3 years, or death, as of yet, are not barred by any time limitation.

3. **Plea of autrefois acquit and autrefois convict** - This means that if the offender has already been tried for the exact same offence before and he has been either acquitted or convict in that trial, he cannot be tried again on that offence. Art 20(2) of the constitution recognizes this principle as a fundamental right. It says that no person shall be prosecuted and punished for the same offence more than once. While the article gives this right only upon previous conviction, section 300 fully incorporates this principle.

4. **Disabilities of the accused** - Under the broad interpretation of Article 21 by Supreme Court, an accused has a fundamental right to be represented by a legal practitioner in his trial. If he is indigent, it is the responsibility of the state to provide a lawyer for him. Section 304 also requires the court to assign a pleader for the accused in certain situations. If this is not done, a plea can be raised in this regard. If the trial still proceeds, despite the objects, the trial is deemed to be vitiated.Further, when the accused is of unsound mind and consequently incapable of making his defence, the code requires the court to postpone the trial until the accused has ceased to be so. The accused can raise this plea for objecting the trial.

5. Principle of issue estoppel.

6. Application of res judicata.

**Q2. What is a Charge? What are the contents of a Charge? Discuss the effects of errors in a Charge?**

**Ans. Charge** As per Wharton's law Lexicon, Charge means to prefer an accusation against some one. To charge a person means to accuse that person of some offence. However, charge is not a mere accusation made by a complainant or an informant. A charge is a formal recognition of concrete accusations by a magistrate or a court based upon a complaint or information against the accused. A charge is drawn up by a court only when the court is satisfied by the prima facie evidence against the accused. The basic idea behind a charge is to make the accused understand what exactly he is accused of so that he can defend himself. A charge gives the accused accurate and precise information about the accusation against him. A charge is written in the language of the court and the fact that the charge is made means that every legal condition required by law to constitute the offence charged is fulfilled in the particular case. It is a **basic principle** of law that when a court summons a person to face a charge, the court must be equipped with at least prima facie material to show that the person being charged is guilty of the offences contained in the charge. Thus, while framing a charge, the court must apply its mind to the evidence presented to it and must frame a charge only if it is satisfy that a case exists against the accused. In the case of **State vs Ajit Kumar**

**Saha** 1988, the material on record did not show a prima facie case but the charges were still framed by the magistrate. Since there was no application of mind by the magistrate, the order framing the charges was set aside by the High Court. According to Section 2(b) of Cr P C, when a charge contains more than one heads, the head of charges is also a charge. **Contents of a Charge** Section **211** specifies the contents of a Charge as follows

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law that creates the offence gives it any specific name, the offence may be described in the charge by that name only. (3) If the law that creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged. (4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge. (5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case. (6) The charge shall be written in the language of the court. (7) If the accused, having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the court may think fit to award for the subsequent offence, the fact date and place of the previous, conviction shall be stated in the charge; and if such statement has been omitted, the court may add it at any time before sentence is passed.

A charge must list the offence with which the person is charged. It must specify the law and the section against which that offence has been done. For example, if a person is charged with Murder, the charge must specify Section 300 of Indian Penal Code. If the law gives a name to that offence, the charge must also specify that name and if the law does not specify any name for that offence, the charge must specify the detail of the offence from the definition of the offence so that the accused is given a clear idea of it. In many cases, on offender is given a bigger sentence for subsequent offence. In such cases, the charge must also state the date and place of previous conviction so that a bigger punishment may be given.

**Illustrations** - (a) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in sections 299 and 300 of the Indian Penal Code (45 of 1860); that it did not fall within any of the general exceptions of the said Code; and that it did not fall within any of the five exceptions to section 300, or that, if it did fall within Exception 1, one or other of the three provisos to that exception applied to it. (b) A is

charged under section 326 of the Indian Penal Code (45 of 1860) with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the said Code, and that the general exceptions did not apply to it.

**Time and Place of the offence** Further, as per section **212**, the charge must also specify the essential facts such as time, place, and person comprising the offence. For example, if a person is charged with Murder, the charge must specify the name of the victim and date and place of the murder. In case of **Shashidhara Kurup vs Union of India** 1994, no particulars of offence were stated in the charge. It was held that the particulars of offence are required to be stated in the charge so that the accused may take appropriate defence. Where this is not done and no opportunity is afforded to the accused to defend his case, the trial will be bad in law for being violate of the principles of natural justice. It is possible that exact dates may not be known and in such cases, the charge must specify information that is reasonably sufficient to give the accused the notice of the matter with which he is charged. In cases of criminal breach of trust, it will be enough to specify gross sum or the dates between which the offence was committed. **Manner of committing the offence** Some times, even the time and place do not provide sufficient notice of the offence which which a person is charged. In such situations, Section **213**, mandates that the manner in which the offence was made must also be specified in the charge. It says that when the nature of the case is such that the particulars mentioned in sections 211 and 212 do not give accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner is which the alleged offence was committed as will be sufficient for that Purpose.

**Illustrations**- (a) A is accused of the theft of a certain article at a certain time and place the charge need not set out the manner in which the theft was effected (b) A is accused of cheating B at a given time and place. The charge must be set out the manner in which A cheated B. (c) A is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by A which is alleged to be false.

**Effects of errors in a Charge** In general, an error in a Charge is not material unless it can be shown that the error misled the accused or that the error caused injustice. Section 215 says, "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."

**Illustrations:** (a) A is charged under section 242 of the Indian Penal Code (45 of 1860), with "having, been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission, the error shall not be regarded as material. (b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses and gives his own account of the transaction. The court may infer from this that the omission to set out the manner of the cheating is not material. (c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. Court may infer from such facts that the omission to set out the manner of was, in the case, a material error.

**Section 464** further provides that an order, sentence, or finding of a court will not be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the court of appeal, confirmation, or revision, a failure of justice has in fact happened because of it. If such a court of appeal, confirmation, or revision find that a failure of justice has indeed happened, in case of omission, it may order that a charge be immediately framed and that the trial be recommenced from the point immediately after the framing of the charge, and in case of error, omission, or irregularity in the charge, it may order new trial to be held upon a charge framed in whatever manner it thinks fit. As is evident, the object of these sections is to prevent failure of justice where there has been only technical breach of rules that does not affect the root of the case as such. As held in the case of **Kailash Gir vs V K Khare**, Food Inspector, 1981, the above two sections read together lay down that whatever be the irregularity in framing the charge, it is not fatal unless there is prejudice caused to the accused.

**Q3. Explain the principle of separate charges for distinct offences. Are there any exceptions? When can multiple offences be charged separately, when can they be tried in the same/different trial? What do you understand by Joinder of charges?**

**Ans.** The initial requirement in conducting a fair trial in criminal cases is a precise statement of the charges of the accused. This requirement is ensured by CrPC through **Sections 211 to 214,** which define the contents of a charge. Precise formulation of charges will amount to nothing if numerous unconnected charges are clubbed together and tried together. To close

this gap, **Section 218** enunciates the basic principle that for every distinct offence there should be a separate charge and that every such charge must be tried separately. Section 218 says thus - (1) For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately: Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby the Magistrate may try together all or any number of the charges framed against such person.

**Illustration** A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

The **object of Section 218** is to save the accused from being frustrated in his defense if distinct offences are lumped together in one charge or in multiple charges but tried in the same trial. Another reason is that the court may become prejudiced against the accused if he were tried in one trial for multiple charges resting on different evidence since it might be difficult for the court not be get influenced on one charge by evidence against him on other charges. It must be noted that Section 218 says "distinct offences" must be charged and tried separated. It does not say "every offence" or "each offence". It has been held in **Banwarilal Jhunjhunwala vs Union of India** AIR 1963, that "distinct offence" is different from "every offence" and "each offence". Separate charge is required for distinct offence and not necessarily for every offence or each offence. Two offences are distinct if they are not identical and are not in any way interrelated. A distinct offence may distinguish from other offences by difference in time or place of commitment, victims of the offence, or by difference in the sections of the law which make the acts as offence. However, a strict observance to Section 218 will lead to multiplicity of trials, which is also not desirable. Therefore sections 219 to 223 provide certain exceptions to this basic rule. These are as follows –

**Exception 1**. **Three offences of the same kind within a year** - Section 219 - When a person is accused of more than one offences of the same kind within a span of twelve months, he may be charged and tried at one trial for any number of such offences not exceeding three. For example, if a person is accused of theft in three different homes in the span 12 months, he can be charged with all the three at once and tried at the same trial. The period of 12 months is counted from the occurrence of the first offence up to the last offence. An offence is considered to be of the same kind if it is punishable by the same amount of punishment under the same section of IPC or of the local or special law. Further, if the attempt to commit

an offence is an offence, then it is considered an offence of the same kind for the purpose of this section.

**Exception 2**. Offences **committed in the course of same transaction** - Section 220(1) - If a person commits multiple offences in a series of acts that constitutes one transaction, he may be charged with and tried in one trial for every such offence. The code does not define the meaning of the term transaction. However, it is well accepted that a precise definition of transaction is not possible and even Supreme Court has not attempted to define it. In case of **State of AP vs Cheemalapati Ganeshwara Rao**, AIR 1963, SC observed that, it would always be difficult to define precisely what the expression means. Whether a transaction is to be regarded as same would depend upon the facts of each case. But is is generally thought that were their is proximity of time, place, or unity of purpose and design or continuity of action in a series of acts, it may be possible that they form part of the same transaction. It is however not necessary that every one of these elements should coexist for considering the acts as part of the same transaction. For example, A commits house-breaking by day with intent to commit adultery, and commits in the house so entered, adultery with B's wife. A may be separately charged with, and convicted of, offences under **sections 454** (Lurking house trespass or house breaking with an intention to commit offence punishable with imprisonment) and 497(Adultery) of the Indian Penal Code.

**Exception 3** - Offences of criminal breach of trust or **dishonest misappropriation of property** and their companion offences of falsification of accounts - Section 220(2) - Usually the offence of criminal breach of trust or dishonest misappropriation of property is committed with the help of offence of falsification of accounts to conceal the main offence. This section allows such offences to be charged with and tried at one trial.

**Exception 4 - Same act falling under different definitions of offences** - Section 220(3) - If an act constitutes an offence under two or more separate definitions of any law in force, the person may be charged with and tried at one trial for each of the offences. For example, A wrongfully strikes B with a cane. This act constitutes an offence as per Section 323 (Voluntarily causing hurt) as well as Section 252 (Assault or criminal force other than on grave provocation). Thus, the person may be charged with both and tried for both the offences at the same trial.

**Exception 5** - Acts forming an offence, also constituting different offences when taken separately or in groups - Section 220(4) - When several acts together constitute an offence and those acts, which taken individually or in groups, also constitute another offence or offences, the person committing those acts may be be charged with and tried at one trial. For

example, A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged, with and convicted of offences under sections 323(Voluntarily causing hurt), 392(Robbery) and 394(Voluntarily causing hurt while committing robbery) of the Indian Penal Code.

**Exception 6 - Where it is doubtful what offence has been committed - Section 221** - If a single act or a series of acts is of such nature that it is doubtful which of the several offence the facts of the case will constitute, the accused may be charged with having committed all or any of such offences and all or any of such charges may be tried at once. Further, in such a situation, when a person is charged with an offence but according to evidence it appears that he committed another offence, he may be convicted of the offence which he is shown to have committed even if he is not charged with that offence. For example, A is accused of an, Act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property or criminal breach of trust or cheating. Further, in the same case mentioned, lets say, A is only charged with theft and it appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust of receiving stolen goods (as the case may be) though he was not charged with such offence. Another **illustration** is as follows - A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot to be proved which of these contradictory statements was false.

**Exception 7 - Certain persons may be charged jointly** - Section 223 - The following persons may be charged and tried together, namely:- (a) persons accused of the same offence committed in the course of the same transaction; (b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence; (c) persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months; (d) persons accused of different offences committed in the course of the same transaction; (e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last-named offence; (f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or

either of those sections in respect of stolen property the possession of which has been transferred by one offence; (g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges : Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the Magistrate may, if such persons by an application in writing, so desire, and if he is satisfied that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together.

**Q4. What do you meant by Doctrine of Fair Trial?**

**Ans. Introduction -'**Fair trial' is an oft-quoted phrase, the meaning and scope of which is hard to fathom. It has been used to describe prescriptions of both substantive and procedural law in a society that has its edifice on rule of law. Fair trial has been considered as a facet of "due process". The principle of **'due process'** is described to be an emanation from the Magna Carta doctrine that was accepted in American jurisprudence, and which, in turn, was subjected to comparison by the Indian courts while charting the contours of Article 21 of the Constitution. The concepts of 'due process' and the concept of a just, fair and reasonable law have been read by the Supreme Court into the guarantees under Articles 14 and 21 of our Constitution. A post Constitutional law also has to obey the injunction of Article 13, which is clear and explicit in 13(2) where it is ordained that 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 the extent of the contravention, be void.

**Due process of the law**, as understood worldwide, encompasses not only the right to a fair trial, but also the preservation of public confidence in the administration of justice. Justice should not only be done but must be seen to be done. Public confidence in the administration of justice, a sine qua non for any reasonable and acceptable system, is maintained in this way.

**Universal recognition of right to fair trial**

As per the International Commission of Jurists, the right to a fair trial is a long standing universally recognized human right and applies in relation to all criminal offences regardless of their heinous nature…. For this right to be realized, it is not sufficient that judicial bodies meet the required levels of independence, impartiality and competence or that the procedural

guarantees necessary for the due process of law are met, but, It is also necessary for the fundamental principles of contemporary criminal law concerning the legality of offences, the non-retroactivity of criminal law and individual or subjective criminal responsibility to be observed. Today, all of the above is considered to constitute what is known as the right to a fair trial. As described by the **Supreme Court** –

"Application of these principles involves a delicate judicial balancing of competing interests in a criminal trial - the interests of the accused and the public and to a great extent that of the victim have to be weighed not losing sight of the public interest involved in the prosecution of persons who commit offences…. The principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new changing circumstances, and exigencies of the situation-peculiar at times and related to the nature of crime, persons involved- directly or operating behind, social impact and societal needs and ever so many powerful balancing factors which may come in the way of administration of criminal justice system."

**Defining 'fair trial'** The Supreme Court has observed that there can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with….Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. This concept of fair trial may carry different connotations with reference to a country, the time in history, the place, the legal system being followed, the type of government, the religious and other norms acceptable to a society etc., so much so that any attempt to define the same may prove futile. For example, in some countries jury trial is a facet of fair trial while in others it is not. Even the concept of jury trial has not been the same if we peep into the annals of history. In the European context it has been described that the right to a fair trial is, in a way, an intuitive concept – each party is aware that he is entitled to a fair trial, and is subjectively convinced of his knowledge of his rights, as well as of the fact that it is always possible to 'apply to Strasbourg'. Giving a common definition, valid throughout the signatory States of the European Convention on Human Rights, is complicated, and the interpretation becomes even more complex due to the differences between the common law and civil law systems,

especially in the field of criminal law. The right to a fair trial is said to cover the entire proceedings, including the execution stage. It embodies all the basic principles of the Rule of Law in a democratic society. Consequently, it has to be recognised as a structured right, comprising several separate subjective fundamental rights. Its content shall therefore include not only all the guarantees mentioned in Article 6 of ECHR, but also those principles which are not explicitly mentioned, but can, according to the circumstances, be identified by the Court in exercising its decision-making function.

It is this reality of differences in standards between countries within Europe that has prompted principles like the 'Fourth Instance Doctrine' to be formulated. A principle, formulated and explained by the European Court of Human Rights jurisprudence, suggesting that it is not for the European Court to substitute its own assessment of the facts for that of the municipal courts and, as a general rule, it is for these municipal courts to assess the evidence before them. The European Court's task is to ascertain whether the proceedings in their entirety, including the way in which evidence was taken, were fair. Similar is the doctrine of 'Margin of Appreciation' formulated and applied by the European Court of Human Rights. It partakes the idea that each society is entitled to certain flexibility in resolving the inherent conflicts between individual rights and national interests or amongst different convictions, including moral ones.

**International documents on fair trial**

Internationally, the major legal provisions on fair trial are to be found in Article 14 of the International Covenant on Civil and Political Rights, Articles3, 7 and 26 of the African Charter on Human and Peoples' Rights, Article 8 of the American Convention on Human Rights and Articles 5, 6 and 7 of the European Convention on Human Rights and Articles 2 to 4 of the 7th Protocol to the Charter. Other rules to which reference could be made are the Statutes of the International Criminal Court and the International Criminal Tribunals for Rwanda and the former Yugoslavia. Additionally, the provisions of the Universal Declaration of Human Rights are generally considered declarative of customary international law. It may be of great importance as a binding customary law especially if a State has not ratified or acceded to the ICCPR, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or other regional human rights instrument. The most directly relevant Articles of the UDHR are 5, 9, 10 and 11. Customary international law is generally used as a supplementary source of a State's obligations in ensuring the right to a fair trial. Non-binding documents relevant to the conduct of criminal proceedings and to laying down fair trial standards include the Basic Principles for the Treatment of Prisoners, Standard

Minimum Rules for the Treatment of Prisoners, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Basic Principles on the Role of Lawyers, Basic Principles on the Independence of the Judiciary, UN Standard Minimum Rules for the Administration of Juvenile Justice, Code of Conduct for Law Enforcement Officials, Guidelines on the Role of Prosecutors, Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, UN Rules for the Protection of Juveniles Deprived of Their Liberty, etc.

**Adversarial nature of trial -** One of the persistent features prescribed in the instruments is that – it is a fundamental aspect of the right to a fair trial that criminal proceedings, including those relating to procedure, should be adversarial. There should be equality of arms between the prosecution and defence. The right to an adversarial trial means that both prosecution and defence must be given the opportunity to be aware of and confront the contentions raised and the evidence adduced by the other party. It may also require that the prosecution disclose to the defence all material evidence in their possession for or against the accused.The prosecutors may even be compelled to hand over evidence damaging the prosecution case since it is believed that the primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. As far as defense lawyer goes, she is bound by all fair and acceptable means to present every defense that the law of the land permits, to the result that no person may be deprived of life or liberty, but by due process of law.

**'Prejudice' as the test in determining fair trial compliance** Under the Indian legal dispensation, fair trial concepts have been discussed mostly in the context of any 'prejudice' that may be caused as a result of not adhering to the fair trial standards prescribed by the constitutional principles and statutory provisions. The basic principle on which the Code of Criminal Procedure in India is based was explained by the Supreme Court thus– the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities….The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood line that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the

trial is not vitiated unless the accused can show substantial prejudice. In judging a question of prejudice, as of guilt, courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial. At the same time, it is pointed out, it has to be borne in mind that it is procedure that spells much of the difference between rule of law and rule by whim and caprice. The object of the Code is to ensure for the accused a full and fair trial in accordance with the principles of natural justice. If there be substantial compliance with the requirements of law, a mere procedural irregularity would not vitiate the trial unless the same results in miscarriage of justice. It has been held that 'Prejudice' is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial and not matters falling beyond their scope. Once the accused is able to show that there is serious prejudice to either of these aspects and that the same has defeated the rights available to him under the criminal jurisprudence, then the accused can seek benefit under the orders of the court…. Right to fair trial, presumption of innocence until pronouncement of guilt and the standards of proof i.e. the prosecution must prove its case beyond reasonable doubt are the basic and crucial tenets of our criminal jurisprudence. The courts are required to examine both the contents of the allegation of prejudice as well as its extent in relation to these aspects of the case of the accused. It will neither be possible nor appropriate to state such principle with exactitude, as it will always depend on the facts and circumstances of a given case. Therefore, the court has to ensure that the ends of justice are met, as that alone is the goal of criminal adjudication.

**Q5. How to determine and appreciate evidence in Criminal cases?**

**Ans. Introduction**- In a criminal case, court determines the guilt of an accused on the basis of evidences produced before it. Indian Evidence Act provides the facts on which evidence can be produced before the court. It also provides admissibility and inadmissibility of evidence. Once the evidence is proved then comes the question of evidentiary value of the evidence produced before the court. If the evidential value of the evidences against the accused are strong enough to prove the guilt of an accused beyond reasonable doubt then only court can convict a person. Before understanding how different evidences are appreciated by court, it is necessary to understand some basic concepts of evidence law like what is an evidence, Facts on which evidence can be given, basic rules of evidence and appreciation of evidence.

As per **Section 3 of evidence act**, evidence means and includes both oral and written evidence. Oral evidence includes all the statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry. Documentary evidence includes all documents including electronic records produces for the inspection of court.

After understanding the meaning and scope of evidence, the next concept which needs to be looked upon is about the facts of which evidence can be given. **Section 5** of Indian evidence act provides that evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and relevant fact. Fact in issue means any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows. Relevant fact means one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

There are certain **rules of evidence** act which plays very important role in appreciation of evidence, conviction and acquittal of accused person. First and foremost rule of evidence is that an accused person can be convicted only if his guilt could be proved beyond reasonable doubt. Benefit of doubt is always given to the accused person. Next important rule is rule of probability. Section 3 of evidence act defines three ingredients of rule of probability i.e. proved, disproved and not proved. A fact is said to be proved when after considering a matter before it, the court either believes it to exist, or consider its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exist. A fact is said to be disproved when, after considering the matter before it, the court either believes that it does not exist or consider its existence so probable that a man of ordinary prudence ought under the circumstances of the particular case, to act upon the supposition that it does not exist. A fact is said not to be proved when it is neither proved nor disproved.

Another rule of **evidence is rule of presumption**. Section 3 of evidence act defines the ingredients of rule of presumption i.e. may presume, shall presume and conclusive proof. Where it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. Similarly when ever it is directed by this act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved. When one fact is declared by this Act to be

conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

"Falsus in uno falsus in omnibus" means false in one particular thing, false in all. This rule is a rule of caution and has not acquired the status of rule of law in India. Evidence to be weigh not to be counted is a rule which provides that its the quality of the evidence or the evidentiary value of the evidence which matter and not the quantity of the evidence. Best evidence rule provides that best evidence of the content of the document is the document itself . This is the rule provided under section 91 of the Act.

Another important aspect needs to be understood before knowing the evidentiary value of different evidences is the basic rules of appreciation of evidence. Statutes like **Evidence Act and Code of Criminal Procedure have laid down the basic rules for the appreciation** of various evidences. Judiciary has also played vital role in clarifying the rules of appreciation of evidences on the points where statutes were silent. These rules of appreciation of evidences laid down by judiciary does not have universal application but needs to be applied in the light of facts and circumstances of the case. Courts have been granted sufficient discretion in appreciation of evidences to do justice in the case pending before them.

**Admission**:

It's a statement made orally or in writing suggesting an inference as to fact in issue or relevant fact by any of the following persons: party to proceeding, agent to party to suit or, suitor in representative suit or party interested in subject matter or person from whom parties have derived their interest or person whose position is relevant or person referred for information **Evidentiary Value of Admission**:

Indian Evidence Act under Section 31 deals with the evidential value of admission. Admission is not the conclusive proof of the matter admitted. It is good evidence against the maker but maker not bound by it and can disprove it on following grounds: mistake of fact, made under threat, inducement or fraud . But if on the admission, the other party has altered his position then admission can't be disprove and it may operate as an estoppel against its maker.

**Confession:**

Confession must either admit in terms the offence or at any rate substantially all the facts which constitute offence. For example if an accused person says that he committed theft or he dishonestly without the permission of owner of car took away his car then it amounts to confession as in both the statements he either admitted the offence of theft expressly or all the ingredients of the offence of the theft.

**Evidentiary Value of Confession** of Accused: Judicial confession to magistrate during **investigation u/s 164 CrPC** or during trial when charges framed, is reliable evidence and it can be a sole basis of conviction. Extra-judicial confession means confession to any person other than magistrate. It's a weak piece of evidence. It can be a sole basis of conviction if proved to be voluntarily made. Retracted Confession means confession made before trial begins and repudiated at trial. It's a very weak piece of evidence. It can lead to conviction if proved to be made voluntarily & corroborated by an independent witness.

Evidentiary value of **confession of co-accused**:

It has been provided under section 30 of Indian Evidence Act. When more than one person jointly tried for same offence confesses affecting himself and other, if Proved, may be taken into consideration. It's a week evidence of corroborating value only. It can't be sole basis of conviction.

Evidentiary Value of Confession to Police:

Confession made to police by virtue of section 25 cannot be proved so no evidential value. If confession made in police custody in immediate presence of magistrate then it can be proved and has evidentiary value of judicial confession. So confession to magistrate in police custody can lead to conviction if proved to be made voluntarily.

Evidentiary **Value of Discovery Statement**:

If deposition whether amounting to confession or not by accused while in police custody leads to discovery is a relevant fact against accused. It can't be a sole basis of conviction. It has only corroborating value.

Evidentiary **Value of Statement to police:**

**Statement to police u/s 161 CrPC** can't be used for any purpose as per sec. 162 but there are certain exceptions to it which are as follows:

-Statement to police by prosecution witness can be used for contradicting under section 145 of Indian Evidence Act. -Statement made while in police custody leading to discovery can be used under section 27 of Indian Evidence Act. -Statement to police by a person who is dead can be used as his dying declaration under section 32 of Indian Evidence Act.

Evidential **Value of Dying Declaration:** It is dealt with under section 32(1) of Indian Evidence Act. It's a statement as to cause of his death and circumstances leading to his death. It's an exception to general rule that oral evidence must be direct. As it is not recorded on oath so there is no scope of cross examination. It is relied on only after careful scrutiny. Out of caution court seeks corroboration from other circumstances. But it can be a sole ground of conviction if recorded with all precautions & made in fit state of mind.

Evidential Value of dying declaration if its maker survives:

**Dying Declaration** to magistrate can be used if its maker survives for corroboration u/s 157 and for contradiction u/s 145 of Indian Evidence Act. Dying Declaration to police can't be used if its maker survives for corroboration u/s 157 due to bar of section 162 CrPC but can be used for contradiction u/s 145 Indian Evidence Act due to **exception of 162 CrPC.**

**Unit-4**

**Q1. Discuss the concept of Plea Bargaining under Criminal justice system.**

**Ans. Introduction** In India, Plea Bargaining has certainly changed the face of the Indian Criminal Justice System. It is applicable in respect of those offences for which punishment is up to a period of 7 years. Moreover, it does not apply to cases where the offence committed is a Socio-Economic offence or where the offence is committed against a woman or a child below the age of 14 years. Also once the court passes an order in the case of Plea Bargaining no appeal shall lie to any court against that order.

**Meaning and Definition**

While searching for the dictionary meaning one can get meanings only after connecting the two words together, that are a plea, meaning to bring forward one's excuse, justification, defence, and bargaining, ways to arrive at an agreement of favorable purchase. A "plea bargain" is a practice whereby the accused forgoes his right to plead not guilty and demand a full trial and instead uses a right to negotiate for a benefit.

In other words, plea bargaining means the accused's plea of guilty has been bargained for, and some consideration has been received for it. Plea Bargaining is an arrangement between prosecutor and defendant whereby the defendant pleads guilty to a lesser charge in exchange for a more lenient sentence or an arrangement to drop other charges. In State of Uttar Pradesh v. Chandrika (**AIR 2000 SC 164**), the Supreme Court held that it is settled law that by plea bargaining Court cannot dispose of the criminal cases. The Court has to decide it on merits.

Salient **Features** of Plea Bargaining

a. It is applicable in respect of those offences for which punishment is up to a period of 7 years.
b. It does not apply to cases where offence is committed against a woman or a child below the age of 14 years.
c. When court passes an order in the case of plea bargaining no appeal shall lie to any court against that order.

d. It reduces the charge. It drops multiple counts and presses only one charge.
e. It makes a recommendation to the courts about punishment or sentence.

**Types** of Plea Bargaining

There are three main types of Plea Bargaining namely

**Charge Bargain**

**Sentence Bargain**

**Fact Bargain**

**Object** of Plea Bargaining

By introducing the concept of Plea Bargaining in the Criminal Procedure the object of the legislature is to-

a. reduce the pending litigation.
b. decrees the number of undertrial prisoners.
c. make provision of compensation to the victim of crimes by the accused.
d. cut delay the disposal of criminal cases.

**Drawbacks** of Plea Bargaining

Some of the major drawbacks of the concept of Plea Bargaining as is recognized in India are as under;

a. A threat to the right to fair trial.
b. Involving the Police in Plea Bargaining process would invite coercion.
c. By involving the court in Plea Bargaining process the court impartially is impugned.
d. Involving the victim in Plea Bargaining process would invite corruption.
e. If the plead guilty application of the accused in reject then the accused would face great hardship to prove himself innocent.

**Requirements**

To ensure fair justice, Plea Bargaining must encompass the following minimum requirements namely-

a. The hearing must take place in court.
b. The court must satisfy itself that the accused is pleading guilty knowingly and voluntarily.
c. Any court order rejecting a Plea Bargaining application must be kept confidential to prevent prejudice to the accused.

**Sections 265A to 265L** are incorporated in the Code of Criminal Procedure by Amendment Act with effect from 5th of July, 2006 to give effect to the system of "Plea Bargaining".

- The accused is entitled to avail the benefit of "plea bargaining" both in the cases instituted on the police report as well as by way of a private complaint under Section 200 Cr.P.C.
- The benefit of "plea bargaining" is available to the accused that is not guilty of committing an offence punishable by death or life sentence and not exceeding seven The benefit also does not apply if the crime affects the socio-economic conditions of the society and also to the crimes committed against woman or child below the age of 14 years. Plea bargaining is not applicable to juvenile offenders.
- The accused should make an application. The court should conduct in camera inquiry to ascertain that the application is voluntary and without duress. The Court should notify the public prosecutor and the victim to arrive at final disposition.
- On the admission of guilt, the Court should impose One-Fourth of the sentence prescribed for the offence. In case the offence is punishable for minimum imprisonment half of such imprisonment is to be imposed. In both the situations, the Court can award compensation to the victim after productive negotiations with the accused and the victim.
- The accused is entitled to the benefit of Probation of Offenders Act, the benefit of let off under section 428 Cr.P.C. and benefit of bail.
- The accused convicted in the system of a plea of bargaining has no right of appeal, but the remedy of writ jurisdiction under Articles 226 and 227 and Special Leave Petition under Article 136 of the Constitution of India is not barred.

**Conclusion**

Plea bargaining is undoubted, a disputed concept. Few people have welcomed it while others have abandoned it. It is true that plea bargaining speeds up caseload disposition. The criminal courts are too overburdened to allow each case to go to trial. In such situation, the system is left with no other choice but to adopt this technique.

**Q2. What is meant by Appellate jurisdiction under Criminal Justice System.**

**Ans. Appellate Process- Introduction:**

The criminal justice processes have serious repercussions for an individual's right to life and personal liberty and therefore, the decisions of lower courts should be scrutinized to obviate

any miscarriage of justice. Every institution created by humans is fallible and so is true of courts. It is this realization that demands that the laws on criminal procedures contain specific provisions on appeal against a judgment or order of the courts.

The Code of Criminal Procedure, 1973 (CrPC), contains elaborate provisions on appeals against a judgment or order of the criminal courts. However, CrPC provisions are not the only provisions wherein one can find the process pertaining to appeals. **Several of special and local legislations** incorporate appellate process which may mark a departure from the general appellate process contained in CrPC.

It is to be noted though, that there is no vested right to appeal unless specifically provided under the relevant statutory provision. However, an **amendment made to Section 372** of CrPC in the year 2009 added a proviso conferring upon victims of crime a right to appeal in certain circumstances. This amendment shall govern appeals to all the courts including the High Court and the Supreme Court.

Moreover, in view of Sections 265G, 375 and 376 of CrPC there may be circumstances when no appeal shall lie against the order of conviction.

we shall discuss the appellate process at three different levels namely-

Appeals to the Sessions Court and to the High Court are largely governed by the same set of rules and procedure. But the High Court being the highest appellate court within a state, has been given primacy in many cases where appeal is permissible. The Supreme Court, being the appellate court of last resort, enjoys very wide plenary and discretionary powers in the matters of appeal.

**Appeals to the Sessions Court:**

A Sessions Court is the highest court within the Sessions Division. This in no way means that appeals against the decisions of the criminal courts shall lie straight to the Sessions Court. An appeal against a conviction recorded by a Magistrate of the Second Class may be heard and decided by an Assistant Sessions Judge or a Chief Judicial Magistrate. However, an Additional Sessions Judge, an Assistant Sessions Judge or a Chief Judicial Magistrate shall hear only such appeals as the Sessions Judge may make over to him or as the High Court may, by special order direct him to hear. This shows that even the **first appeal** is subject to statutory limitation and there is no right to appeal as such. The rationale being that courts which try a case are competent and there shall be a presumption that the trial has been fair.

**Appeal against inadequacy of sentence or acquittal**:

In all cases, other than those where the trial has been held by the High Court, where the State is not satisfied with the adequacy of the sentence passed by the trial Court, it may issue

directions to the Public Prosecutor to prefer an appeal to the Sessions Court and to the High Court against the sentence on the ground that the sentence awarded is inadequate. Even the Central Government may direct the Public Prosecutor to present such an appeal in all cases where the investigating agency was an agency of the Center viz. CBI or NIA.

Even the victims of crime shall have a right to appeal against acquittal in view of the amendments made to **Section 372 of CrPC in 2009**. Accordingly, a victim shall have a right to appeal against an order of acquittal or conviction for a lesser offence or an imposition of inadequate compensation, to the court where appeal ordinarily lies against such order of conviction. Evidently, a victim has no right to appeal against inadequacy of sentence.

Under **Section 378(4)** of the CrPC a complainant may prefer an appeal against order of acquittal, if special leave is granted by the High Court. However, in all cases the State and the victim may present appeal against order of acquittal. Also, the District Magistrate, being the Head of the Criminal Justice Administration in a district, may direct the Public Prosecutor to appeal to the Sessions Court against an order of acquittal passed by a Magistrate in a cognizable and non-bailable case. Also the State Government can direct the Public Prosecutor to appeal against acquittal passed by any court other than the High Court. These powers may be exercised by the Central Government in those cases where the investigation has been done by a Central Agency such as CBI and NIA. However, such an appeal can be entertained only with the leave of the High Court, to be exercised judiciously. If the High Court refused to grant **special leave to appeal** to the complainant, no appeal from that order of acquittal could be filed by the State or the agency contemplated in Section 378(2) of CrPC.

However, a victim may also be a **complainant (in complaint cases)** and therefore a question arises as to the application of Section 378 (4), CrPC to an appeal preferred by a victim who is also a complainant. A Full Bench of Gujarat High Court in **Bhavuben Dineshbhai Makwana v State of Gujarat** observed that if the victim also happens to be the complainant and the appeal is against acquittal, s/he is required to take leave as provided in Section 378 (4) of the CrPC but if s/he is not the complainant, s/he is not required to apply for or obtain any leave. For the appeal against inadequacy of compensation or punishment for a lesser offence, no leave is necessary at the instance of a victim, whether s/he is the complainant or not. This interpretation of Section 372 & 378(4) of CrPC is not logical as it abridges the victim's right to appeal against acquittals by bringing in an additional requirement of special leave of the High Court and seems to be contrary to the legislative intent. In **Balasaheb Rangnath Khade v State of Maharashtra,** there was a difference of opinion between the two Judges of a Division Bench of the Bombay High Court and, therefore, the matter was

referred to a third Judge on the question whether a victim can file an appeal against the order of acquittal passed by the trial Court without filing an application for leave to file appeal. The third Judge was of the view that the victim was not required to apply for or obtain leave of the Court to file any of the appeals under the proviso to Section 372 of CrPC.

It was observed in **Dhanna v State of M.P**. that "though the CrPC does not make any distinction between an appeal from acquittal and an appeal from conviction so far as powers of the appellate Courts are concerned, certain unwritten rules of adjudication have consistently been followed by judges while dealing with appeals against acquittal. No doubt, the High Court has full power to review the evidence and to arrive at its own independent conclusions whether the appeal is against conviction or acquittal. It is important to note that there is a general presumption in favour of the innocence of the person accused in criminal cases and that presumption is only strengthened by the acquittal. Also, every accused is entitled to the benefit of reasonable doubt regarding his guilt and when the trial Court acquitted him he would retain that benefit in the appellate Court also. Thus, appellate Court in appeals against acquittals has to proceed more cautiously and only if there is absolute assurance of the guilt of the accused, upon the evidence on record, that the order of acquittal is liable to be interfered with or disturbed."

As the decision to prefer an appeal is usually taken by the executive, the **Supreme Court** found it pertinent to devise a mechanism against the abuse or misuse of such discretion and has laid that:

(i) There is no limitation on the part of the appellate Court to review the entire evidence upon which the order of acquittal is founded.

(ii) The appellate Court in an appeal against acquittal can review the entire evidence and come to its own conclusions.

(iii) The appellate Court can also review trial Court's conclusion with respect to both facts and law.

(iv) While dealing with the appeal preferred by the State, it is the duty of the appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons set aside the judgment of acquittal.

(v) An order of acquittal is to be interfered with only when there are 'compelling and substantial reasons' for doing so. If the order is 'clearly unreasonable', it is a compelling reason for interference.

(vi) While sitting in judgment over an acquittal the appellate Court is first required to seek an answer to the question whether findings of the trial Court are palpably wrong, manifestly

erroneous or demonstrably unsustainable. If the appellate Court answers the above question in the negative the order of acquittal is not to be disturbed. Conversely, if the appellate Court holds, for reasons to be recorded, that the order of acquittal cannot at all be sustained in view of any of the above infirmities, it can reappraise the evidence to arrive at its own conclusion.

(vii) When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate Court is competent to reverse the decision of the trial Court depending on the materials placed."

**Manner and form of appeal to the Sessions Court:**

Ordinarily, appeals made to the Court of Session or a Sessions Judge are heard by the Sessions Judge or Additional Sessions Judge. However, where the conviction has been recorded by a Magistrate of the Second Class, it may be heard and disposed of by an Assistant Sessions Judge or a Chief Judicial Magistrate. Every such appeal shall be made in the form of a petition in writing presented by the appellant or his pleader and every such petition shall be accompanied by a copy of the order or judgment of the court appealed against, unless otherwise directed by the appellate Court. If the **appellant is in jail**, he may appeal to the appropriate appellate Court by submitting his petition of appeal to the concerned officer in charge of the jail who shall forward the said petition to the appellate Court.

**Appeals to the High Court:**

In view of **Section 374 (2),** CrPC, any person, convicted on a trial held by a Sessions Judge or Additional Sessions Judge or any other court whereby a sentence of more than seven years has been passed against him or any other person convicted at the same trial, may appeal to the High Court concerned.

For every accused person sentenced to death by a Sessions Judge or Additional Sessions Judge in a trial held before him, there is a right of first appeal on facts to the High court under Section 374 (2) of the CrPC. Independent of that right of appeal, the CrPC contains an in-built mechanism for an automatic appeal on facts to the High Court under Section 366 of the CrPC and this right of appeal is not dependent upon the option of the accused to prefer an appeal or not. This right of appeal has to be compulsorily afforded to the accused by the Court of Sessions by making a reference under Section 366, CrPC.

When a **reference under Section 366** of the CrPC for confirmation of death sentence is made and an appeal under Section 374(2) has also been preferred, they are to be heard together. But if the appeal is preferred within the prescribed time, the reference will by itself constitute the first appeal on facts. Hence, as against an order of confirmation of death

sentence passed under Section 368 of the CrPC, there is and there can be no further right of first appeal on facts to the Supreme Court unless the High Court in exercise of its powers under Article 134(1) (c) grants leave to appeal to the Supreme Court or the Supreme Court grants special leave under Article 136(1) of the Constitution for an appeal being preferred. **Special legislations** may also provide for appeals directly to the High Court from the decisions of trial courts.

**Appeal against inadequate sentence or acquittal:**

Generally the State and not the individual victim initiate the criminal process against the accused. The plain language of Section 377(1) of CrPC makes it clear that the State Government can file an appeal to the High Court "against the sentence on the ground of its inadequacy". In a case where the conviction is recorded by the trial Court but instead of awarding sentence of imprisonment the convict is released on probation under the provisions of the relevant special law then it is a case where no sentence at all has been awarded and as such the provisions of Section 377(1) are not attracted. Recently, speaking on the issue of appeal against inadequate sentence or acquittal preferred by a complainant, the Supreme Court in **Subhash Chand v State (Delhi Administration),** has observed that "Sub-section (4) of Section 378 of CrPC makes provisions for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of 'special leave' as against sub-section (3) relating to other appeals which speaks of 'leave'. Thus, complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for 'special leave' by the complainant. **It grants six months period of limitation to a complainant who is a public servant and sixty days in every other case for filing application."** In the opinion of the **Supreme Court**, sub-section (6) of Section 378, CrPC further provides that "if 'special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate nor the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation." Thus if in a case instituted on a complaint an order of acquittal is passed, whether the offence be bailable or non-bailable, cognizable or non-cognizable, the complainant can file an application under **Section 378(4) for special leave to appeal** against it in the High Court. Section 378(4) places no restriction on the complainant. So far as the State is concerned, as per Section 378 (1) (b),

it can in any case, that is even in a case instituted on a complaint, direct the public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than High Court. But there is an important inbuilt and categorical restriction on the State's power. It cannot direct the Public prosecutor to present an appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. In such a case the District Magistrate may under Section 378(1) (a) direct the Public Prosecutor to file an appeal to the Sessions Court." The amendment made through Act XXV of 2005 to Section 378 brought about a major change in the CrPC. "It introduced Section 378(1) (a) which permitted the District Magistrate, in any case, to direct the Public Prosecutor to present an appeal to the Court of Sessions from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence. For the first time a provision was introduced whereunder appeal against an order of acquittal could be filed in the Sessions Court. Such appeals were restricted to orders passed by a Magistrate in cognizable and non-bailable offences. Section 378(1) (b) specifically and in clear words placed a restriction on the State's right to file such appeals." Thus, in any case it cannot be said that the words 'State Government may' preserve the State's right to file appeal against acquittal orders of all types or that if the complainant has not preferred an appeal against acquittal, the State Government can file the same in public interest.

Therefore, it is clear that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court. He cannot file such appeal in the Sessions Court.

**Appeals to the Supreme Court:**

**Ordinary Appellate Jurisdiction**: The appellate process usually culminates with an appeal to the Supreme Court of India which is primarily a court of appeal. The Supreme Court, therefore, enjoys extensive appellate jurisdiction. However, every decision of the High Court may not be appealable in the Supreme Court. In order to restrict the flow of the criminal appeals to the Supreme Court and in recognition of the important place which the High Court enjoy in the appeals hierarchy, Article 134 of the Constitution regulates criminal appeals to the Supreme Court in such a manner that only **important criminal appeals reach the Supreme Court**.

Thus, an appeal lies to the Supreme Court from a judgment, final order or sentence of the High Court where the High Court has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death. The Supreme Court has said that the sub-clause (1) of Article 134 clothes an accused person, who has been acquitted by the trial Court but

sentenced to death at the appellate level, or has been tried by the High Court by withdrawal of the case from any other Court subordinate to it and in such trial has been visited with death sentence, or has secured a certificate that his case is of such great moment as to qualify for pronouncement by the Supreme Court. Moreover, exercising its powers granted under Article 134 (2**), the Parliament has passed the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970**, under which the Supreme Court may also hear criminal appeals firstly, if the High Court has on appeal reversed an order of acquittal of an accused and sentenced him to imprisonment for life or for a period of not less than 10 years and secondly, if the High Court has withdrawn for trial before itself any case from a subordinate court and has convicted the accused and sentenced him to imprisonment for life or for a period of not less than 10 years.

**Section 379 of CrPC** also makes provisions for appeals to the Supreme Court from certain orders of the High Court. The resultant position of law from the conjoined reading of Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 and Articles 134(1), 134A of the Constitution and the CrPC is as follows:

"(1) Under sub-clause (a) of Article134(1) an appeal lies as of right to the Supreme Court in a case where the High Court has reversed an order of acquittal of an accused person and sentenced him to death.

(2) Under sub-clause (b) of Article 134(1) an appeal lies as of right to the Supreme Court in a case where the High Court has withdrawn the case for trial before itself from any Court subordinate to its authority and sentenced him to death.

(3) Under Section 2(a) of the Act of 1970 an appeal lies as of right to the Supreme Court in a case where the High Court has reversed an order of an acquittal of an accused person and sentenced him to imprisonment for life or imprisonment for a period of not less than 10 years.

(4) Under Section 2(b) of the Act of 1970 an appeal lies as of right to the Supreme Court in a case where the High Court has withdrawn for trial before itself any case from any Court subordinate to its authority and has in such trial convicted the accused person and sentenced him to imprisonment for life or imprisonment for a period of not less than 10 years.

(5) Under Section 379 of the CrPC, an appeal lies as of right to the Supreme Court in a case where the High Court has on appeal reversed an order of acquittal of an appeal of an accused person and convicted and sentenced him either to death or to imprisonment for life or imprisonment for a term of 10 years or more.

(6) In cases not covered by Article 134(1) (a) and (b) or Section 2(a) and (b) of the Act of 1970 or by Section 379 of the CrPC an appeal will lie only either on a certificate granted by

the High Court under Article 134(1) (c) or by grant of special leave by the Supreme Court under Article136."

The right of appeal given under Section379 of the CrPC is in line with Article134 (1) (a) and (b) and Section 2(a) and (b) of the Act of 1970. Article 132 makes it possible for a criminal appeal to be made to the Supreme Court if the High Court certifies under Article 134 A that the case involves a substantial question of law as to the interpretation of the Constitution.

Additionally, any person convicted by the High Court in exercise of its extraordinary original criminal jurisdiction may appeal to the Supreme Court.

Thus, under Clause (2) of Article 134, an accused who has been convicted for an offence of murder can prefer an appeal to the Supreme Court as a matter of right.

**Extra-ordinary Appellate Jurisdiction:**

Under Article 136 of the Constitution, the Supreme Court also enjoys a plenary jurisdiction in matters of appeal. However, Article 136 is not a regular forum of appeal at all. It is a residual provision which enables the Supreme Court to interfere with the judgment or order of any court or tribunal in India in its discretion. Article 136 does not confer a right of appeal upon any party but merely vests discretion in the Supreme Court to interfere in exceptional cases. Though the discretionary power vested in the Supreme Court under Article 136 is apparently not subject to any limitation, the Supreme Court has itself imposed certain limitations upon its own powers. The Supreme Court has laid down that this power has to be exercised sparingly and only in exceptional cases.

The discretionary power of the Supreme Court is plenary in the sense that there are no words in Article 136 itself qualifying that power. The power is permitted to be invoked not in a routine fashion but in very exceptional circumstances as when a **question of law** of general public importance arises or a decision sought to be impugned before the Supreme Court shocks the conscience. This overriding and exceptional power has been vested in the Supreme Court to be exercised sparingly and only in furtherance of the cause of justice in the Supreme Court in exceptional cases only when special circumstances are shown to exist.

**Difference in Ordinary and Extra-ordinary Jurisdiction of the Supreme Court:**

Unlike the ordinary appellate jurisdiction of the Supreme Court in criminal matters, the extra-ordinary jurisdiction is not fettered with any limitations. Following are the chief distinctions between the two:

Under Article 136, an appeal may lie even against an 'interlocutory order' whereas under Article 134, only final orders are appealable.

Appeals against the orders from 'any court' can lie to the Supreme Court under Article 136, whereas, under Article 134 orders only from High Court can be appealed against.

It is to be noted that the Supreme Court does not act as a regular court of appeal in every criminal matter. Normally, a High Court's decision shall attain finality and the Supreme Court has only special jurisdiction. Also, the Supreme Court does not normally interfere with the concurrent findings of the subordinate courts unless there appears to be a manifest injustice viz. where the decision is not based on any evidence or inadmissible evidence or where the finding is such that no reasonable person shall arrive at or where a very vital piece of evidence has been discarded that would have titled the balance in favour of the convict. The Supreme Court can also correct mistakes of law committed by the High Court in appreciating the evidences and basing its decision on conjectures and surmises. It can do so even if the trial had been a protracted one and the accused was acquitted by the High Court.

**Conclusion**:

The appellate process provides an opportunity to correct any possible factual or legal errors in a judgment or order. However, appeals against the judgment, order or sentence of a Court can be preferred only when specifically provided for. Usually the right to appeal is a very constricted right as it has to be exercised within the statutory framework of the CrPC or some other special and local legislation. Decision to appeal is completely discretionary except in the case where the accused has been sentenced to death by the Sessions Court. Moreover, appeals may not be allowed in certain cases and the judgment/order/sentence of the Court shall attain finality after it is delivered. The procedure for preferring an appeal to the Sessions Court and to the High Court is largely governed by the same set of rules under CrPC. Appeals to the Supreme Court are governed by the Constitution of India, the CrPC and the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

**Q3. Describe the revisional jurisdiction under Code of criminal procedure.**

**Ans. Introduction: Review Process- Revision :** The revisional jurisdiction as provided under Criminal Procedure Court confers power upon superior criminal courts, a kind of **paternal or supervisory jurisdiction**, in order to correct a miscarriage of justice arising from a misconception of law, irregularity of procedure, neglect of proper precaution or apparent harshness of treatment which has resulted in some undeserved hardships to individuals. This **controlling power** of the superior courts is discretionary and is exercised in the interest of justice with regard to all facts and circumstances of each particular case which vary greatly from case to case. The revisional jurisdiction is normally to be exercised only in

exceptional cases where there is a glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a **flagrant miscarriage of justice.**

In an appropriate case, where the concurrent findings of fact are grossly incorrect and perverse, nothing can stop the High Court and the Session Court from invoking the revisional jurisdiction of superintendence and correction to interfere with such grossly erroneous or perverse findings of fact. For deciding the crucial question whether the findings of fact rendered are so grossly erroneous or perverse as to warrant revisional interference, no court of revision can afford to ignore the fact that normally respect and regard must be given to the findings of fact concurrently affirmed by two courts. The object as explained by the Supreme Court in **Om KR Dhankar v. State of Haryana,** is to set right patent defect or error and to scrutinize the orders. Both High Court and Session Court have been empowered to call for the record either on the application of the party or on its own motion. Even the Court can act on any information received through newspaper or unanimous letter.

**When a Revision can be Filed?**

A revisional power can be exercised by the High Court or any Sessions Judge if the following conditions are satisfied:-

The proceeding must be that of a criminal court; Such court must be an inferior court; Such court must be situated within the local limits of the jurisdiction of the revision court; and The purpose for which the records are called for should be one to enable the revision court to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of such inferior court.

**'Proceeding'**: Meaning

The term "proceeding" as mentioned above cannot necessarily be said to have any reference by itself to the commission or trial of an offence, for instance Sections 125, 126,133,144 etc. The word "proceeding" cannot be given such a restrictive significance, so as to include only judicial proceeding pertaining to the commission and trial of an offence and thus will include any judicial proceeding taken before any inferior criminal court. Therefore, the test is not the nature of the proceeding, but the nature of the court in which that proceeding is held. Further, the words "finding", "sentence", "order", "proceedings" cover everything which may be remedied in revision. No part of the subject matter of revision falls outside these words. There is nothing capable of revision, which is not either a finding, or a sentence, or an order, or a proceeding.

**' Inferior Court'**: Meaning

"Inferior criminal court" mean judicially inferior to the High Court/ Session Judge. All Magistrates, whether executive or judicial, and whether exercising original or appellate jurisdiction shall be deemed to be inferior to the Session Judge and further such courts including Court of Session are inferior to the High Court.

'**Any finding, sentence or order':** Meaning

The word 'finding, sentence or order' are three separate matters and are separated by the disjunctive conjunction 'or'. 'Finding' includes a finding of conviction or acquittal. 'Sentence' means a direction by which punishment is prescribed and meted out. 'Order' covers commands or directions that something shall be done, discontinued or suffered, but it does not include 'sentence' or 'finding', e.g. order of dismissal and discharge, refusal to commit, refusal to stay or to quash proceedings.

'**Correctness, legality and propriety'** : Meaning

The words 'legality' and 'propriety' both include question of law as to whether a finding, sentence or order is legal or proper having regard to the evidence. The word 'correctness' does not mean that the Sessions Judge or the High Court may inquire whether the finding was acceptable to it on a balance of the evidence recorded in the trial court. The 'correctness' of the finding, sentence or order also implies a legal defence, such as the finding being based on an entire want of evidence or being incorrect in the sense that the witness may have given a different statement to what the court may have recorded. Thus, if there is an evidence of whatever character on which a finding of fact may be based, the revisional Court is precluded from interfering with that finding, but re-appraisal of evidence is permissible when the material evidence has been overlooked or materials relevant to decision but not supported by facts on record have been taken into consideration.

**Scope of Revision:**

The revisional powers are not limited to the powers mentioned in the above sections which merely describe some of the reliefs which the High Court may grant. These powers are not exhaustive and it includes all the powers of an appellate court and more, to be fairly exercised only in exceptional cases when there is a glaring defect in the procedure and there is manifest error of point of law and consequently there has been a flagrant miscarriage of justice.

Jurisdiction can be **Exercised on its own:**

From the nature of the powers given to the revisional courts it seems to follow that the revisional court can act either on its own motion or on the motion of even a stranger who may be instrumental in bringing to the knowledge of the revisional court a matter which otherwise

the revisional court may not have known. Of course, the normal course of the High Court or Court of Session to be seized of a matter is either at the instance of the prosecution or the accused or the High Court or Court of Session itself, but in some rare cases information may be received by the High Court or Court of Session even from a stranger. Thus, the revisional court can interfere with the information contained in the newspaper or a placard on a wall or on an anonymous postcard, provided it considers that sufficient ground has been established to justify its doing so. In **Pratap v. State of U.P. and K.Sudhakaran v. State of Kerala**, it was affirmed by the Supreme Court that the stranger's revision petition would be maintainable . But in such case it becomes the duty of the revisional court to see that a stranger to proceedings does not employ his information as an instrument of vengeance on the accused or attempt to serve his own private end.

**Concurrent revisional jurisdiction of High Court and Sessions Court:**

Section 397(1) of the Code of Criminal Procedure, 1973 gives an option for an aggrieved party to approach High Court or the Session Judge and 397(3) places a restriction that no further application by the same person shall be entertained by the other of them . According to Apex Court in Jagir Singh v. Ranbir Singh & Another the object of this restriction is to prevent a multiple exercise of revisional powers and to secure early finality in order. Though either of the court, i.e High Court and Session Court can be approached at first instance, however, a learned Judge of MP High Court in Sridhar Shastri v. Prakashwat,held that in view of the extraordinary jurisdiction of the High Court under Section 482, Cr.P.C., it might still be profitable for an applicant to first approach the Sessions Court for the purpose.

**Revisional Powers of the High Court and Sessions Judge:**

Under Section 399(1) the Session Judge, in the case of any proceeding the record of which is called for by himself under Section 397(1), may exercise all or any of the powers which are exercisable by the High Court under Section 401(1), and Section 401(1) enables the High Court to exercise in its revisional jurisdiction any of the powers conferred on a court of appeal by Sections 386, 389 and 391. But, as far the powers of Session Court is concerned two pertinent aspects to be mentioned are, firstly, it does not have the power to order summoning of a person discharged by the Magistrate, and, secondly, though the Session Judge has no power to entertain any appeal against an order of acquittal under Section 378, or for enhancement of the sentence under Section 377, he can entertain applications for revision against acquittal or for enhancement of sentence from the complainant or from any person or the aggrieved party. Further, in such cases, the Sessions Judge can invoke revisional jurisdiction even suo motu without any application from such party. The Kerala High Court

in T.Jayarajan v. P.R. Mohammed, explained that while under Section 401 the High Court can exercise its revision jurisdiction suo motu, the Sessions Court under Section 399 has power of revision on being approached by a party. The Supreme Court in **Sheetala Prasad v. Sri Kant, and State of Haryana v. Rajmal**, reiterated that revisional jurisdiction can be exercised by the High Court at the instance of a private complainant in exceptional cases:

a. Where the trial court has wrongly shut out evidence which the prosecution wished to produce;
b. Where the admissible evidence is wrongly brushed aside as inadmissible;
c. Where the trial court has no jurisdiction to try the case and has still acquitted;
d. Where the material evidence has been overlooked either by the trial court or the appellate court, or the order is passed by considering irrelevant evidence; and Where the acquittal is based on the compounding of the offence which is invalid under the law.

Further, the limitations on the exercise of the revisional powers of the High Court as contained in sub-section (2), (3), and (4) of Section 401, and the enabling provision for treating the application of revision as a petition of appeal under circumstances as contained in Section 401(5), have all been made applicable by Section 399(2) to every proceeding by way of revision commenced before a Sessions Judge under Section 399(1).

**Limitations to Revisional powers:**

Revision is not right of litigant; it is only a procedural facility available to party. Though the powers of revision conferred on the higher courts are very wide and are purely discretionary but still have been circumscribed by certain limitations which are:

a. In cases where an appeal lies, but no appeal is brought, ordinarily no proceeding by way of revision shall be entertained at the instance of the party who could have appealed ;
b. The revisional powers are not exercisable in relation to any interlocutory order passed in any appeal, inquiry or trial;
c. The court exercising revisional powers is not authorized to convert a finding of acquittal into one of conviction;
d. A person is allowed to file only one application for revision either to the Court of Session or to the High Court, if once, such an application is made to one court, no further application by the same person shall be entertained by the other court.

Revisional court is, however, not expected to act as if it hears an appeal and the jurisdiction is not to be ordinarily invoked or used merely because the lower court has taken a wrong view

of the law or misappropriated the evidence on record. The revisional court would not interfere with the order of the lower court, unless it is shown to be perverse, or without evidence or not tenable in law. Thus, the trial court and appellate court on an appreciation of the evidence if reaches the concurrent finding, the High Court would not interfere with the concurrent finding of the court below by re-appreciating the evidence in its revisional court.

**Correction by High Court under revisional jurisdiction and Article 227 of the Constitution : a comparison;** An error of law apparent on the face of the record, is also subject to correction by the High Court exercising its powers under Art. 227 of the Constitution. However, this power does not justify an interference with concurrent findings of fact. While exercising when exercising its power under section 397, Cr.P.C., the High Court can consider the correctness legality or propriety of any finding, sentence or order, recorded or passed and the regularity of any proceedings of such inferior Court. There is no conflict, real or apparent between the provisions of S. 397 Cr.P.C. and Art. 227 of the Constitution. Under Article 227 of the Constitution, the High Court exercises superintendence over all courts and tribunals and has the power to interfere and to see that the courts and tribunals exercise their functions within the limits of their authority. Under Art. 227 of the constitution, the High Court exercises a supervisory and not an appellate jurisdiction, and considers the area of the inferior jurisdiction and the qualifications and conditions of its exercise. But undoubtedly, the Code has barred a second revision at the instance of the party who may have moved the Sessions Judge in a revision in the first instance. The legislative policy of not allowing a second revision before the High Court at the instance of the party who has lost in the first revision cannot be relied upon to affect the jurisdiction of the High Court under Art. 227 of the Constitution. It has been pointed out by the Supreme Court in the case of **Swaran Singh v. State of Punjab,** as: "The writ jurisdiction extends only to cases where orders are passed by inferior courts or tribunals in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction in them or they act illegally or improperly in the exercise of their jurisdiction causing a grave miscarriage of justice".

**Conclusion:**

Sundara Iyar, J., observed in National Bank of India v. Kothandarama, " I would be strongly inclined to hold that no hard and fast imitation should be placed on the exercise of powers of superintendence over the proceedings of the inferior court". The underlying wide scope was also confirmed by Woodroffe, J. in Lekhraj Ram v. Debi Prasad, stating that –" …there are no species of injustice which this court would be powerless to correct under the Charter

where its interference is called for…..The High Court has plenary powers of interference under this Charter, where it is needed to correct injustice".

Though the revisional jurisdiction confers very wide powers on the High Court and Sessions Court, but such jurisdiction should be exercised within the four corners of S. 397, and only in exceptional cases where there is a glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice.

**Q4. Describe the law related to transfer of Criminal Cases.**

**Ans.** Criminal law in India is mainly governed by Indian Penal Code, 1860 and Code of Criminal Procedure, 1973. Former defines offences and punishments thereof while later lays down the procedure to be mandatorily followed while pursuing a case. **Chapter XXXI (Section 406 to Section 412)** of Code of Criminal Procedure deals with Transfer of Criminal Cases by the courts.

**Power of Supreme Court to transfer cases and appeals: Section 406 of Cr.P.C.**

Whenever it is made to appear to supreme court that an order under this section is expedient from the ends of justice, it may direct that any particular case or appeal to transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction to another High Court.

The Supreme Court may act under this section only on the **application of Attorney General of India or of a party interested,** and every such application shall be made by motion, which shall, except when the applicant is the Attorney General of India or Advocate General of the State, be supported by affidavit or affirmation. Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may if it is of opinion the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case.

**A case is transferred** if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that it is an apprehension that justice will not be done in a given case does not suffice. The court has further to see whether the apprehension is reasonable or not.

**Powers of High Court to transfer cases and appeals**: Section 407 of Cr.P.C.

1) whenever it is made to appear to the High Court-

a. that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto; or

b. that some question of law of unusual difficulty is likely to arise; or

c. that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice,

It may order-

i. that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

ii. that any particular case or appeal, or class of cases and appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

iii. that any particular case be committed for trial to a Court of Sessions; or

iv. that any particular case or appeal be transferred to and tried before itself.

2) the High Court may act either on the report of the lower court, or on the application of a party interested, or on its own initiative:

Provided that no application should lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

3) Every application of an order under sub-section 1) shall be made by motion, which shall, except when the applicant is Advocate General of the State, be supported by an affidavit or affirmation.

4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section 7)

5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with copy of the grounds on which it is made and; and no order shall be made on the merits of the application unless at least twenty four hours have elapsed between the giving of such notice and the hearing of the application.

6) Where the application is for the transfer of a case or appeal from any subordinate court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that pending the disposal of the application, the proceedings in the subordinate court shall be stayed, on such terms as the High Court may fit to impose

Provided that such stay shall not affect the subordinate court's power of remand under section 309

7) Where an application for an order under sub-section 1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

8) When the High Court orders under sub-section 1) that a case can be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

9) Nothing in this section shall be deemed to affect any order of government under section 197.

A **Full Bench of Madras High** Court has held that where an offence consists of several acts done in different local areas the High Court when it is made to appear to it that the circumstances contemplated under cl. (a), (b) or (c) of sub-section (1) exist, may order to the case to be inquired into or tried by a Court having jurisdiction over any such local areas.

**Power of session's judge to transfer cases and appeals**: Section 408 of Cr.P.C.

1. Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case can be transferred from one Criminal Court to another Criminal Court in his sessions divisions.
2. The Sessions Judge may act either on the report of the lower court, or on the application of a party interested, or on his own initiative.
3. the provisions of sub-section (3), (4), (5), (6), (7) and (9) of section (7) can apply in relation to an application to the Sessions Judge for an order under subsection (1) as they apply in relation to an application to the Sessions Judge for an order under subsection (1) of section 407, except that the sub-section (7) of that section shall so apply as if for the words "one thousand rupees" occurring herein, the words "two hundred and fifty" were substituted.

The provisions of sub-section (3), (4), (5), (6), (7) and (9) of section (7) and (9) of s.407 becomes applicable in case of the application to the Sessions Judge also, with the difference that for frivolous or vexatious application for transfer he can award maximum compensation of Rs. 250 only. Where the Sessions Judge has transferred the case u/s 408 to the Court of the Additional Sessions Judge, who has already begun the trial, a subsequent trial of the same case before the Sessions Judge was illegal and beyond his jurisdiction.

**Withdrawal of cases and appeals by Sessions Judge:** Section 409 of Cr.P.C.

1. A Sessions Judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him.
2. At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.
3. Where a Sessions Judge withdraws or recalls case or appeal under subsection (1) or subsection (2) he may either try case in his own court or appeal himself, or make it in accordance with the provisions of this court to another court for trial or hearing, as the case may be.

A Sessions Judge cannot withdraw or recall a case or an appeal pending before a Judge which has been partly head by him. A case cannot be withdrawn and proceeded with under s. 409(1) after the trial has commenced. Recital of a wrong section does not invalidate an order which is otherwise within the power of the authority making it.

**Withdrawal of cases by Judicial Magistrates:** Section 410 of Cr.P.C.

1. Any Chief Judicial Magistrate may withdraw case from, or recall any case which he has made over to, any Magistrate subordinate to him and may inquire or try such case himself, or refer it for inquiry or trial to any other such magistrate competent to inquire into or try the same.
2. Any Judicial Magistrate may recall any case made over by him under subsection (2) of section 192 to any other magistrate and may inquire into or try such case himself.

After considering the plea of not guilty of the accused, the magistrate posted the case for trial. Consequently, on re-organization on the jurisdiction of the courts, the case was transferred to another Magistrate under section 410. The transferee Magistrate is bound by the order of his predecessor and cannot go behind the pre-cognizance stage.

**Making over or withdrawal of cases by Executive Magistrate**: Section 411 of Cr.P.C.

Any District Magistrate or Sub-divisional Magistrate may-

1. Makeover for disposal, any proceeding which has been started before him, to any Magistrate subordinate to him
2. withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and dispose of such proceeding himself or refer it for disposal to any other Magistrate.

Any District Magistrate or Sub-divisional magistrate has right to make over to or withdraw from any magistrate subordinate to him cases which have been made over to any magistrate subordinate to him respectively vide s.411. Any case u/s 411 means any proceeding or inquiry before an Executive Magistrate such as cases under section 107, 108, 109, 110, 132, 144, 145, 146 and 176.

The powers given by this section are very large and for that reason, they should be most carefully exercised. The magistrate in the district should use the extensive discretion given to them to divert the course of the procedure from its ordinary channel only when it is absolutely necessary for interests of justice that they should do so.

**Reasons to be recorded:** Section 412 of Cr.P.C.

A Sessions Judge or Magistrate making an order under section 408, section 409, section 410, section 411 shall record his reasons for making it.

This section makes it incumbent on a Sessions Judge or a Magistrate to record reasons for passing an order for transfer or recalling of the case or appeal under the preceding sections.

**Q5. Inherent power of Court. Comment.**

**Ans. Introduction :** The essential object of criminal law is to protect society against criminals and law- breakers. For this purpose, the law holds out threats of punishments to prospective lawbreakers as well as attempts to make the actual offenders suffer the prescribed the punishment for their crimes.

Therefore, criminal law, in its wider sense, consists of both the substantive criminal law as well as

the procedural criminal law. Substantive criminal law defines offences and prescribes punishments for the same, while the procedural law is to administer the substantive law.

Our legal system's law of crime is mainly contained in the Code of Criminal Procedure, 1973 which has come into force from April 1, 1974. It provides the machinery for the detection of

crime, apprehension of suspected criminals, collection of evidence, determination of the guilt or
innocence of the suspected person and the imposition of suitable punishment on the guilty person.

In addition, this Code also deals with the prevention of offences (Sections 106- 124, 129- 132 and
144- 153), maintenance of wives, children and parents (Sections 125- 128) and public nuisances
(Sections 133- 143).

The Code also controls and regulates the working of the machinery set up for the investigation and trial of offences. On the one hand it has to give adequately wide powers to make the investigation and adjudicatory processes strong, effective and efficient, and on the other hand, it has to take precautions against errors of judgment and human failures and to provide safeguards against probable abuse of powers by the police or judicial officers. This often involves a "nice balancing of conflicting considerations, a delicate weighing of opposing claims clamoring for recognition and the extremely difficult task of deciding which of them should predominate".

The Code has obviously tried to make itself exhaustive and complete in every respect; and it has
generally succeeded in this attempt. However, if the Court finds that the Code has not made specific provision to meet the exigencies of any situation, the court of law has inherent power to
mould the procedure to enable it to pass such orders as the ends of justice may require.

It has however been declared by the Supreme Court that the subordinate courts do not have any
inherent powers. The High Court has inherent powers and they have been given partial statutory
recognition by enacting **Section 482** of this Code.

**Foundation** of Section 482:-

The power to quash an FIR (First Information Report) is among the inherent powers of the High
Courts of India. Courts possessed this power even before the Criminal Procedure Code (CrPC) was enacted. Added as Section 482 by an amendment in 1923, it is a reproduction of the section 561(A) of the 1898 code. Since high courts could not render justice even in cases

in which the illegal was apparent, the section was created as a reminder to the courts that they exist to prevent injustice done by a subordinate court.

"Nothing in this code shall be deemed to limit or effect the inherent powers of the High Court to

make such orders as may be necessary to give effect to any order under the code, or to prevent

abuse of the process of any court or otherwise to secure the ends of justice"

Exercise **of power under Section 482 Cr.P.C**. is the exception and not rule – Inherent jurisdiction of

High Court under Section 482 Cr.P.C. may be exercised :-

1. To give effect to an order under the Code.
2. To prevent abuse of the process of Court.
3. To otherwise secure the ends of justice.

According to Sec 26 of CrPC 1973 Offences below the Criminal Procedure Code (hereinafter the

CrPC) are divided into:

1. Offences under Indian Penal Code (IPC) (triable by HC Sessions Court and other court shown in the 1st Schedule to the CrPC)
2. Offences under any other law (empowers HC when no court is mentioned for any offence under any law other than IPC to attempt such offences)

S.482 deals with Inherent powers of the Court. It is under the 37th Chapter of the Code titled Miscellaneous. It comes into action when the court acts judicially and passes an order. If order is passed by Executive officer of State in administrative capacity it has no application. Therefore persons aggrieved by such order cannot arrive to HC to exercise its inherent power under this section. As the Inherent powers are vested in HC by law within meaning of Art 21 of Constitution consequently any order of HC in violation of any right under Art 21 is not ultra vires.

Eg. Cancelling of bail bond by HC thereby depriving a person's personal liberty.

**Objects** behind its incorporation:-

This section makes it clear that the provisions of the Code are as intended to limit or affect the

inherent powers of the High Courts. Obviously the inherent power can be exercised only for either of the three purposes specifically mentioned in the section. This inherent power cannot naturally be invoked in respect of any matter covered by the specific provisions of the Code.

It cannot also be invoked if its exercise would be inconsistent with any of the specific provisions of the Code. It is only if the matter in question is not covered by any specific provision of the Code that Section 482 can come into operation, subject further to the requirement that the exercise of such power must serve either of the three purposes mentioned in the said section. In prescribing rules of procedure legislature undoubtedly attempts to provide for all the cases that are likely to arise; but it is not possible that any legislative enactment dealing with the procedure, however carefully it may be drafted, would succeed in providing for all the cases that may possibly arise in the future.

Loopholes are sometimes discovered in procedural law and it is for the purpose of covering such

lacunae and dealing with such cases where such lacunae are discovered that procedural law invariably recognizes the existence of inherent powers in courts.

Here it is extremely important to be noticed that it is only the High Court whose inherent power

has been recognized by Section 482, and even in regard to the High Court's inherent power definite statutory safeguards have been laid down as to its exercise. It is only where the High Court is satisfied either that an order passed under the Code would be rendered ineffective or that the process of any court would be abused or that the ends of justice would not be secured that the High Court can and must exercise its inherent powers under Section 482 of this Code.

It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases which may possibly arise. It has also been held that Section 482 cannot be invoked in non- criminal proceedings such as those under the Customs Act.

"Inherent jurisdiction", "to prevent abuse of process", "to secure the ends of justice" are terms

incapable of definition or enumeration, and capable at the most of test, according to well

established principles of criminal jurisprudence. "Process" is a general word meaning in effect

anything done by the court. The framers of the Code could not have provided all the cases that

should be included within the meaning of abuse of process of court. It is for the court to take decision in particular cases.

**Requisites for Use** of Inherent Power:-

There are several conditions laid down by various cases that indicate the circumstances under

which this inherent power may be used. These conditions may be enumerated as follows:

1. The jurisdiction is completely discretionary. The High Court can refuse to use the power.

2. The jurisdiction is not limited to cases that are pending before the High Court. It can consider any case that comes to its notice (in appeal, revision or otherwise).

3. This power can be invoked only in an event when the aggrieved party is being unnecessarily
harassed and has no other remedy open to it.

4. The High Court, under section 482, does not conduct a trial or appreciate evidence. The exercise of this power (although it has a wide scope) is limited to cases that compel it to intervene for preventing a palpable abuse of a legal process.

5. The High Court has the power to provide relief to the accused even if s/he has not filed a petition under section 482.

6. This power cannot be exercised if the trial is pending before the apex court and it has directed
the session judge to issue a non- bailable warrant for arresting the petitioners.

7. The power under Section 482 is not intended to scuttle justice at the threshold but to secure justice.

8. This power has to be exercised sparingly with circumspection and in the rarest of rare cases, but cannot be held that it should be exercised in the rarest of rare cases – The expression rarest of rare case may be exercised where death penalty is to be imposed under Section 302 of IPC but this expression cannot be extended to a petition under Section 482 CrPC.

9. So long as inherent power of Section 482 CrPC is in statute, the exercise of such power is not
impermissible.

10. In exercise of the powers court would be justified to quash any proceeding if it finds that initiation or continuance of it amounts to abuse of the process of Court or quashing of these proceedings would otherwise serve the ends of justice.

11. Where the accused would be harassed unnecessarily if the trial is allowed to linger when prima facie it appears to Court that the trial would likely to be ended in acquittal.

12. In proceedings instituted on complaint, exercise of inherent powers under Section 482 CrPC to quash the proceedings is called for only in a case where the complaint does not disclose any

offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not
constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same.

13. When a complaint is sought to be quashed, it is permissible to look into the materials to assess
what the complainant has alleged and whether any offence is made out even if the allegations are
accepted in toto.

14. All Courts, whether civil or criminal possess, in the absence of any express provisions, as inherent in their constitution, all such powers as are necessary to do the right and to undo a wrong
in course of administration of justice.

"**To prevent abuse of process of any court"**

Ordinarily HC will not interfere at an interlocutory stage of criminal proceeding in subordinate
court but, HC is under an obligation to interfere if there is harassment of any person (Indian citizen) by illegal prosecution. It would also do so when there is any exceptional or extraordinary reasons for doing so.

**"To secure ends of justice"**

Eg. When a clear statutory provision of law is violated- HC can interfere. It is of vital importance in the administration of justice, and ensure proper freedom and independence of Judges must be
maintained and allowed to perform their functions freely and fearlessly without undue influence
on anyone, even SC. At the same time Judges and Magistrate should act with a certain amount of
justice and fair play.

The SC in **Madhu Limaye v. Maharashtra,** has held the following principles would govern the exrcise of inherent jurisdiction of the HC:

1. Power is not to be resorted to if there is specific provision in code for redress of grievances of
aggrieved party

2. It should be exercised sparingly to prevent abuse of process of any Court or otherwise to secure
ends of justice
3. It should not be exercised against the express bar of the law engrafted in any other provision of
the code.
It is neither feasible nor practicable to lay down exhaustively as to on what ground the jurisdiction
of the High Court under Section 482 of the Code of Criminal Procedure should be exercised. But
some attempts have been made in that behalf in some of the decisions of this Court.