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# FAIRFIELD

# Institute of Management & Technology

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## Reference Material for Five Years

## Bachelor of Arts (Law)

## Code : 038

## Semester – VI

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

# INDEX

# SUBJECT- JURISPRUDENCE

## CODE – 302

**Q1. Define and explain the meaning of jurisprudence. What are the contents of jurisprudence?**

ANS1. The word jurisprudence has been derived from Latin word jurisprudential which is widest sense means, knowledge of law. The Latin word 'Juris' means law and prudentia means skill or knowledge thus jurisprudence signifies knowledge of law and its application .in the sense it covers the whole body of legal principles in the world.

DEFINITIONS OF JURISPRUDENCE- GIVEN BY FAMOUS JURIST

1. ULPAIN
2. PROF .GRAY
3. SALMOND
4. ARNOLD
5. AUSTIN

CONTENTS OF JURISPRUDENCE

1. SOURCES: It is well known that the basic feaes of a legal system are mainly to be found in its authoritative sources the nature and woking of the legal authority behind these sources.
2. LEGAL CONCEPT: Another are which concerns jurisprudence is the analysis of legal concepts such rights, property, ownership, possession, obligation, acts, negligence, legal- personality and related issues. Although all these concepts are equally studied in the ordinary branches of law but since each of them function in several different branches of law, jurisprudence tries to bring out a more comprehensive pictures of each concept as a whole. The study of these abstract legal concept furnishes a background for better understanding of law in its various forms.
3. LEGAL THEORY: Besides the sources and the forces operating behind them and various legal concept, legal theory also constitutes one of the main components of jurisprudence.

**Q2. Give the various definitions of the term law. Distinguish between the Law and a Law?**

ANS 2. Law in its most general and comprehensive sense means any rule of action and includes any standard or pattern to which actions are or ought to be conformed. In its judicial sense, law means a body of rules of conducted, action or behavior of person, made and enforced by the state. It expressed a rule of human action.

- DEFINITION OF LAW

**1.** Justinian
**2.** Ulpain
**3.** Blackstone
**4.** J.C gray
**5.** Roscoe pound
**6.** Salmond
**7.** Kelson
**8.** H.L.A hart
**9.** Paton

- DISTINCTION BETWEEN 'THE LAW' AND 'A LAW'

**Q3. Discuss the various kinds of law as given by salmond?**

ANS3. Salmond has referred to eight kinds of law which are as follows:

1. IMPERATIVE LAW: imperative law means are rule to which prescribes a general corese of action imposed by some authority which are enforces it by superior power either by physical forces or any forms law which defines law as command of sovereign which person obliged to obey. Thus imperative law has reference to the authority from which it proceed. It may be either
   i) Divine, or
   ii) Human

   The human law may be of three kinds:
   i) Civil law
   ii) Law of positive morality,and

iii) Law of nation which is also called international law.

2. PHYSICAL OR SCIENTIFIC LAW
3. NATURAL LAW OR MORAL LAW
4. CONVENTIONAL LAW
5. COMSTOMARY LAW
6. PRACTICAL OR TECHNICAL LAW
7. INTERNATIONAL LAW
8. CIVIL LAW.

**Q4. Discuss the various kinds of law as given by Dr. Holland?**

ANS4. DR. HOLLAND classified law into following categories:

I) Private and public law: private law is the adjustment of relation between person and person, whereas the public law deals with relationship between person and the state. Incase of private law, the parties to a case may either be natural or artificial person and the state only acts as an arbiter through its court. The law of property, contract, corporations, torts, trust etc are instances of private law.

Public law, on the other hand seeks to regulate the activities of the state. The important sub- division of public law are:

1. Constitution law
2. Administration law
3.

II) General and special law

General law , it means territorial law of a country. It consists of all person , things , acts and events within the territory of a country which are governed by it for eg: Indian law of crimes and law of contracts are the general laws of the country because they have a general application throughout the territory of india.

Special law: besides the general law, there are certain kinds of special law which the court are bond to know. They are called jus specile. The maxim ignorantia juris non excusat applies to special law in the same way as it applies incase of general law.

There are several kinds of special laws as follow:

1. Local law
2. Foreign law
3. Conventionl law
4. Autonomic law
5. Material law
6. International law as administered in prize courts
7. Mercantile law

**Q5. Explain the classification of law?**

Ans5. Law may be broadly divided into 2 classes:

1. International law
2. Municipal or national law

According to some jurist international law may be divided into classes

1. Public international and
2. Private international

I) PUBLIC INTERNATIONAL LAW; is that body of rules which govern he conduct and relations of the states with others.

Public law may be divided into 3 cases;

1. Constitutional law
2. Administrative law
3. Criminal law

II) PRIVATE INTERNATIONAL LAW: private international law means those rules and principle according to which the cases having foreign element are decided. This branch of law regulates and governs the relations of citizen with each other. The parties in such cases are private individuals and the state through its judicial organ adjudicates the matters in dispute between them.

A general classification is as follows:

1. The law of person
2. The law of property
3. The law of obligations
4. The conflict of laws

The law of obligations is divided into 3 classes:

i) Contract

ii) Quasi contract, and

iii) Tort

**Q6.when does custom become law? Point out the views of Austin in this regard critically? What do you understand by the term sources of law and what are its kinds? Discuss the importance of custom as sources of laws.**

ANS6. Requisites of a valid custom

A custom will only be considered a valid law with a binding force if these requirements are fulfilled :

- Immemorial (Antiquity) – A custom must be ancient or immemorial so that it may be considered as a valid binding custom.
- Certainty – The custom has to clearly defined, it cannot be vague and confusing.
- Reasonable – A custom must be within bounds of reason for it to be considered legally binding. Therefore, custom would be considered unreasonable if it opposes principles of justice, equality and good conscience.
- Compulsory Observance – For a custom to be considered valid, it must have been observed since ancient times without any interruptions and must be considered by the people following it as a binding rule of law.
- Conformity with Law and public morality – A custom must not go against public policy and law of the land. If the law makes it forbidden, it will not be considered a valid custom.
- The unanimity of Opinion – Only a universally accepted custom will be considered valid.

- Peaceable Enjoyment – When everyone follows and enjoys the custom in a peaceful manner, only then will it be considered valid.
- Consistency – There should be consistency between customs. Two customs that have opposing viewpoints cannot be considered valid.

KINDS OF SOURCES OF LAW ( ACCORDING TO SALMOND)

According to salmond sources of law can be divided into two parts:

i) Formal source and
ii) Material source

SOURCE OF LAW

FORMAL SOURCES MATERIAL SOURCES

LEGAL SOURCE

HISTORICAL

s 1. LEGISLATION

(Enacted law)

2. PRECEDENT

(case- law)

3.CUSTOMARY LAW

4.CONVENTIONAL

**Q7. Discuss the kelsen pure theory of law ? what are its main points of criticsm of this theory?**

ANS 7. The idea of a Pure Theory of Law was propounded by the formidable Austrian jurist and philosopher Hans Kelsen (1881–1973) (see the bibliographical note). Kelsen began his long career as a legal theorist at the beginning of the 20th century. The traditional legal philosophies at the time, were, Kelsen claimed, hopelessly contaminated with political ideology and moralizing on the one hand, or with attempts to reduce the law to natural or social sciences, on the other hand. He found both of these reductionist endeavors seriously flawed. Instead, Kelsen suggested a 'pure' theory of law which would avoid reductionism of any kind. The jurisprudence Kelsen propounded "characterizes itself as a 'pure' theory of law because it aims at cognition focused on the law alone" and this purity serves as its "basic methodological principle"

LAW AS NORMATIVE SCIENCE

Kelesn described law as a normative science as distinguishes from natural sciences which are based on cause and effect such as law of gravitation. The laws of nautal science are capabl of being accurately described determined and discovered in the form of is (dassein) but science of law is knowledge of what law ought to be (das sollen).

For eg if A commits a theft he ought to be punished.

Thus according to kelsen , law is a primary norm which stipulates sanction and not with idea law.

GRUNDNORM

Kelsen's pure theory of law is based on pyramidical structure of hierarchy of norms which derived their validity from the basic norm which he termed as Grundnorm.

PYRAMID OF NORMS

Kelsen consider legal science as pyramid of norms with grundnorms (basic norm) at the apex. The subordinate norms are controlled by the norms superior to them in hierarchical order. The basic norm is called grundnorm.

CRITICISM

Kelsen assertion that all the norms expecting the basic norms (grundnorm) are pure , has no logical basis.

**Q8. Explain the imperative theory of law?**

**Or**

**Austin resolved every law into a command of law giver, an obligation imposed thereby on the citizens and a sanction threatened in the event of disobedience. Do you agree with this view? Comment.**

ANS 8. Legal positivism is the most powerful school of thought in jurisprudence. The positivist movement began at the beginning of the 19th century. The analytical school is positive in its approach. The jurists of the school consider that the most important aspect of the law is its relation to the state. Law is treated as command emanating from the state. Due to this reason, this school is also known as the imperative school. Learn Analytical positivism here.

John Austin and Analytical Positivism

John Austin is the originator of the analytical school. He is the father of English Jurisprudence. The scientific treatment of Roman Law influenced Austin. For that reason, he started the scientific arrangement of English law. Like Bentham, Austin was of the opinion that 'law' is only an aggregate of individual laws. In his lecture book titled 'The Province of Jurisprudence Determined', Austin dealt with the nature of law, sources of law and showcased an analysis of the English legal system. The major thrust in Austinian positive law was on the separation of law from morals. Salmond has criticized Austin's theory of law which completely deprives law from morality.

Schools of Jurisprudence – Analytical Positivism

Meaning of Positivism

The term 'positivism' has 5 meanings:

1. Law commands.
2. The analysis of the legal concepts is distinct from the sociological and historical inquiries and critical evaluation.
3. Pre-determined rules can deduce decisions.
4. Moral judgments cannot be accepted or defended by rational arguments.
5. Law, as it is (actually), has to be kept separate from the law that ought to be.
6. The fifth meaning is correctly associated with positivism.

## Features of the Theory

- The purpose of the analytical school of jurisprudence is to analyze the first principles of law.
- The main task of the analytical school is the articulate and systematic exposition of the legal ideas.
- One motive of the analytical school is to gain an accurate and intimate understanding of the fundamental working concepts of all legal reasoning.
- The analytical school takes law as the command of the sovereign.
- It puts emphasis on legislation as the source of law. The whole system is based on its concept of law.

## Features

- The school considers law as a closed system of pure facts from which all norms and values are excluded.

- The ideals do not bother the analytical lawyer. He/she takes the law as a given matter created by the state.
- The significance of analytical jurisprudence lies in the fact that it brought about precision in legal thinking.
- CRITICISM



**Q9. Explain the benthem's theory?**

ANS9. Jeremy Bentham & Analytical Positivism

The founder of positivism is Jeremy Bentham. Austin owes much to Bentham and on many points, his prepositions are merely the 'paraphrasing of Bentham's Theory'. According to Betham, there are different aspects of the law.

1. Source
2. Subjects
3. Objects
4. Extent
5. Aspect
6. Force
7. Remedial appendages
8. Expression

Criticism of Bentham's Theory

There are two shortcomings of Bentham's theory.

1. Bentham's abstract and doctrinaire rationalism
2. Bentham's weakness to develop clearly his own conception of the balance between individual and community interests.

**Q10. A) Define Ratio Decidendi. What are three meaning?**

B) short note on obiter dicta. What is the value of obiter dicta of the supreme court of India?

C) Doctrine of precedents.

ANS10. *Ratio decidendi* is a legal phrase that translates from Latin to mean "the reason," or the motivation behind a legal decision. *Ratio* includes all of the principles a court relies on – be they moral, political, or social – to justify their reasoning for coming to a decision in a case. A *ratio* is comprised of the legal points made by all the parties to a case. All of the other statements in the case make up the obiter dicta, which are not legal arguments on which a case can stand.

Finding Examples of Ratio Decidendi

Finding *ratio decidendi* examples in a case is one of the hardest things a lawyer can face when referring to precedent while writing a legal brief. Some ways in which lawyers can better establish *ratio decidendi* examples in a case include:

- Reading the Entire Case – Skimming a Court decision isn't always going to cut it when trying to find the rationale behind it.
- Reading the Headnote – Sometimes all the *ratio decidendi* examples a lawyer needs – or at least most of them – he can find by simply reading the headnote.
- Finding the Epiphany Moment – While reading the case summary, a lawyer can pinpoint the rationale if he finds those key moments that ultimately convince the court of the defendant's guilt or innocence.

Ratio Decidendi Example Involving a Case from Scotland

An example of ratio decidendi is the case of *Donoghue v. Stevenson* (1932), otherwise known as the "snail in the bottle case." This case is a good *ratio decidendi* example because it explores the idea that a person can owe a duty of care to another person whom he can reasonably foresee will suffer effects as the result of his actions.

While the matter did not occur in the U.S., this case is a fundamental Western case because it essentially created the civil tort of negligence. It also implemented the idea that businesses owe a duty of care to their customers and should fulfill that duty or risk a lawsuit.

B) OBITER DICTA

The Latin term *obiter dicta* means "things said by the way," and is generally used in law to refer to an opinion or non-necessary remark made by a judge. In a legal ruling, made by a higher court, the actual decision becomes binding precedent. Remarks about such things as how the court came to its decision are not binding, and it is to these that the term refers. To explore this concept, consider the following obiter dicta definition.



What is Obiter Dicta

When a written judicial opinion is made, it contains two elements: (1) *ratio decidendi*, and (2) *obiter dicta*. *Ratio decidendi* is the Latin term meaning "the reason for the decision," and refers to statements of the critical facts and law of the case. These are vital to the court's decision itself. *Obiter dicta* are additional observations, remarks, and opinions on other issues made by the judge. These often explain the court's rationale in coming to its decision and, while they may offer guidance in similar matters in the future, they are not binding.

In reading a court's decision, *obiter dicta* may be recognized by such words as "introduced by way of analogy," or "by way of illustration." *Obiter dicta* may be as short as a brief aside or a hypothetical example, or as long as a thorough discussion of relevant law. In either case, the additional information is given to provide context for the judicial opinion.

Difference Between Ratio Decidendi and Obiter Dicta

The main difference between *ratio* and *obiter dicta* is the information under scrutiny. For example, *ratio decidendi* refers to the facts of the case, those things that no one can debate. *Obiter dicta*, on the other hand, is everything in between. *Obiter dicta* translates to "by the way," and refers to information that a person says, "in passing."

In other words, difference between *ratio* and *obiter dicta* lies in the fact that, while *ratio* is binding in its facts, *obiter dicta* refer to persuasive statements only. For instance, *obiter dicta* may include the statements a lawyer tells the jury in a criminal case to convince them of his client's innocence, in addition to the facts of the case.

C) PRECEDENT

In the modern legal system, the term *precedent* refers to a rule, or principle of law, that has been established by a previous ruling by a court of higher authority, such as an appeals court,

or a supreme court. Courts in the U.S. legal system place a high value on making judgments based on consistent rules in similar cases. In such a system, cases based on similar facts have a fair and predictable outcome. To explore this concept, consider the following precedent definition.

Definition of Precedent

1. A legal decision made by a court of authority, which serves as an authoritative rule in future, similar cases.
2. A rule of law established by a higher court that is subsequently referred to in deciding similar cases.

What is Precedent in law

Legal precedent means that a decision on a certain principle or question of law has already been made by a court of higher authority, such as an appeals or supreme court. Following such a decision, lower courts defer to, or adhere to, that prior decision in similar cases. The decisions of lower courts may be used as precedent for courts of similar jurisdiction, but higher courts are not bound by the decisions of lower courts.

In the U.S. legal system, there is a principle that compels judges to respect the precedent established by prior decisions on similar cases. This principle is known as "*stare decisis*" (Latin). This means that courts should adhere to precedent, and not stir the pot on matters already settled.

Binding Precedent

The use of legal precedent helps ensure court rulings remain consistent among similar cases. To this end, courts are bound to adhere to prior decisions made by a higher court on a similar legal matter. Because a judge is bound by these previously made decisions, this is referred to as *binding precedent*. Again, following the principle of *stare decisis*, binding precedent promotes the maintenance of answers to legal questions already established.

Decisions made by a low-level court do not become binding precedent on courts of higher jurisdiction. Because of this, binding precedent is usually the result of decisions made at the appellate court or supreme court level, though it may apply to decisions made by courts of even, or horizontal, jurisdiction. Binding precedent applies only among courts of the same

system, such as a state court hierarchy. Legal precedent set in the federal court system is not generally binding on any state court, though it is commonly used as persuasive precedent.

Precedent example:

The state court of Alabama rules in a civil lawsuit that a photographer must refund the entire amount charged to a client for a photo shoot, if the client is unhappy with *any* of the photos. If the photographer appeals the matter to a higher court, the appeals court has no obligation to defer to the lower court's decision. In other words, the lower court's decision is not bin

**Q11. Write a critical note on the historical school of jurisprudence.**

**Or**

**Critically examine the volksgeist theory, Montesquieu and assess his contribution.**

ANS11. The concept and meaning of Historical School of Jurisprudence

With the changing needs and nature of persons, the law should be changed. The historical school follows the concept of man-made laws. 'Law is formulated for the people and by the people' means that the law should be according to the changing needs of the people. And everyone understand their own need better than anyone else.

The basic source of the Historical School of Jurisprudence is the habits an custom of people which changes according to their needs and requirement. It is also called the continental school of Jurisprudence.

This school rejects the ideas of formation of law by judges and the origin from some divine relevance. In the words of Salmond, "That branch of legal philosophy which is termed historical jurisprudence is the general portion of legal history. It bears the same relation of to legal history at large as analytical jurisprudence bears the systematic exposition of the legal system. It deals, in the first place, with the general principles governing the origin and development of law, and with the influences that affect the law. It deals, in the second place, with the origin and development of those legal conceptions and principles which are so essential in their nature as to deserve a place in the philosophy of law- the same conceptions

and principles, that is to say, which are dealt with in another manner and from another point of view by analytical jurisprudence. Historical jurisprudence is the history of the first principles and conceptions of the legal system."

Reasons for the Origin of Historical School of Jurisprudence

The Historical School believe that law is made from people according to their changing needs. Habits and customs are the main sources of the Historical School of Jurisprudence. According to Dias, Historical school arose as a reaction against the natural law theories.

The reasons for the emergence of this school are:

- It came as a reaction to the natural school of law.

Natural school of law believes that the law is originated from some divine power. Natural law is also called the Eternal law. It exists since the beginning of the world. It is closely associated with the morality and intention of God. Indian constitution has some relevance of the natural law in its articles.

Historical school of Jurisprudence focuses on the formation of law by people not by some divine origin.

- It opposes the ideology of the analytical school of jurisprudence.

Jurists of Historical School of Jurisprudence

Montesquieu

According to Sir Henry Maine, the 1st Jurist to adopt the historical method of understanding the legal institution was Montesquieu. He laid the foundation of the historical school in France. According to him, it is irrelevant to discuss whether the law is good or bad because the law depends on social, political and environmental conditions prevailing in society. Montesquieu concluded that the "law is the creation of the climate, local situation, accident or imposture". He was of the view that law must change according to changing needs of the society. He did not establish any theory or philosophy of the relation between the law and

society. He suggested that the law should answer the needs of the place and should change according to time, place and needs of the people.

One of the best-known works of Montesquieu was his book 'The Spirit of laws'. In this book, he represents his beliefs in political Enlightenment ideas and suggests how the laws are required to modify according to the needs of people and society.

Savigny

Savigny is regarded as a father of the Historical school. He argued that the coherent nature of the legal system is the usually due to the failure to understand its history and origin. According to him, the law is " a product of times the germ of which like the germ of State, exists in the nature of men as being made for society and which develops from this germ various forms, according to the environing the influences which play upon it."

Savigny believes that the law cannot be borrowed from outside. And the main source of law is the consciousness of the people.

He was of the view that the law of the state grows with the strengthening of the state nationality and law dies or fade away when nationality loosens its strength in the state.

*Friedmann concludes the Savigny's theory*

- Law is like language which eventually grows.
- Law cannot be of universal validity nor be constructed on the basis of certain rational principles or eternal principles.
- Law is sui generis. Savigny argued that law is like the language having its own national character. So, it can't be universally applied and varies according to the people. He mentioned this in the self-written pamphlets "Vom Berufunserer Zeit für Gesetzgebungand Rechtswissenschaft (On the Vocation of Our Age for Legislation and Jurisprudence)."
- Law is found or discovered not made. It can't be made artificially like the invention of an object.
- Law is found on the basis of consciousness, customs and beliefs of the people.

*Basic Concept of Savigny's Volksgeist*

Volksgeist means "national character". According to Savignty's Volksgesit, the law is the product of general consciousness of the people or will. The concept of Volksgeist was served as a warning against the hasty legislation and introduce the revolutionary abstract ideas on the legal system. Unless they support the general will of the people.

Basically, Savigny was of the view that law should not be found from deliberate legislation but should be made and arises out of the general consciousness of the people.

*Criticism of Savigny's View*

The views of Savigny were criticized by many jurists:

Charles Allen

Charles Allen criticized Savigny's view that law should be found or based on the customs. Allen was of the view that customs are not the outcome of common consciousness of people. But they are the outcome of the interest of a powerful and strong of a ruling class. For example, slavery which was recognized and prevailed in certain societies by the powerful classes of society.

Prof. Stone

Prof. Stone criticized the Savigny and says that he (Savigny) ignored the efficiency of the legislation and planned law and social change. And over emphasized on the consciousness of people.

For example, In India, the abolition of Sati and widow's remarriage are brought in to change because of powerful and effective legislation.

**Q12. Write short notes of the following: a) Puchta**

**b) Henry Maine**

ANS12. Sir Henry Maine

Sir Henry Maine was the founder of the English Historical School of Law. Savigny's views of Historical school was carried forward in England by Sir Henry Maine.

*Major Works by Sir Henry Maine*

- The first work of Maine 'Ancient Law' was published in 1861.
- He also wrote Village Communities (1871),
- Early History of Institutions (1875)
- Dissertations of Early Law and Custom (1883).

Maine studied the Indian legal system deeply as he was law member in the Council of the Governor–General of India b/w 1861 to 1869. Maine's ideas were incorporated by the best things in the theories of Savigny and Montesquieu and he avoided what was abstract and unreal Romanticism.

Maine favored legislation and codification of law, unlike Savigny.

*Maine describes the development of law in four stages:*

- First stage

Rulers are believed to be acting under divine inspiration. And the laws are made on the commands of the rulers. For example, Themistes of ancient Greek. The judgment of the king was considered to be the judgment of God or some divine body. King was merely an executor of judgments of God, not the law-maker.

- Second stage

Then the commands of King converted into customary law. The custom prevails in the ruler or majority class. Customs seems to have succeeded to the right and authorities of the king.

- Third stage

The knowledge & administration of customs goes into the hands of a minority, Due to the weakening of the lawmaking power of the original law-makers like Priests the knowledge of customs goes into the hands of a minority class or ordinary class. And the ruler is superseded by a minority who obtain control over the law.

- Fourth stage

In the fourth and last stage, the law is codified and promulgated.

*Static and Progressive Society*

Static societies

Societies which does not progress and develop their legal structure after the fourth stage of development of law are Static society. Static societies don't progress beyond the era of codes.

Progressive Society

Societies which go on progressing after the fourth stage of development of law are Progressive Societies. They develop their laws with the help of these instruments:

- *Legal Fiction*

Legal Fiction changes the law according to the needs of the society without making any change in the letters of the law. Legal fiction harmonizes the legal order but made the law difficult to understand.

- *Equity*

According to Maine, "Equity is a body of rules existing by the side of the original civil law & founded on distinct principles". Equity helps to remove rigidity and injustice.

- *Legislation*

The legislation is the most effective and desirable method of legal change. Laws will be enacted and became operative officially.

Georg Friedrich Puchta

Puchta was a German Jurist. He was a disciple of Savigny and a great jurist of Historical school of Jurisprudence. Georg Friedrich Puchta's ideas were more logical and improved than Savigny's ideas. He traced the development and evolution of law from the very beginning. His ideas mainly focused on the situation when conflict arises between general

will and individual will. In the conflict between general will and individual will, the state came into existence. And find out the midway to resolve the conflict.

The main concept of Puchta's ideas was that "neither the people nor the state alone can make and formulate laws". Both State and individual are the sources of law.

Contribution of Puchta

- Puchta gave twofold aspects of human will and origin of the state.
- Despite some points of distinction Puchta and Savigny, he improved the views of Savigny and made them more logical.

PUCHTA CONTRIBUTION

Conflict between general and individual will bring law into law into existence : neither the people ,nor the state alone is sources of law- Savigny's disciple and his countryman puchta was also great jurist of the historical school. His ideas are mor4 logical and improved. He started from the origin of human race and traced the development an evolution of law. Men always lived in unity. This unity is not only physical but spiritual also. It causes unanimity among the members of society and constitutes the general will of the people.

Self interest causes a conflict between individual will and general will. This brings ot the idea of law. Then state comes into existence. The state delimits the sphere of the individual and it develops into a tangible and workable system.

Puchta made a valuable contribution to jurisprudence by giving the two fold aspects of the human will and the origin of state. There are some points of distinction between theories of savigny and puchta , but mostly. They are similar.

**Q13. Explain the meaning of legal wrongs and legal duties. Examine the essential elements of a legal rights?**

ANS13. Legal Rights and Duties

Legal rights are, clearly, rights which exist under the rules of legal systems or by virtue of decisions of suitably authoritative bodies within them.

According to positivists, legal rights are essentially those interests which have been legally recognized and protected. John Austin made a distinction between legal rights and other types of rights such as Natural rights or Moral rights. By legal rights, he meant *rights which are creatures of law, strictly or simply so called*. He said that other kind of rights are not armed with legal sanction and cannot be enforced judicially.

On the other hand, Salmond said that a legal right is an interest recognized and protected by rule of law and violation of such an interest would be a legal wrong. Salmond further said that:

1. A legal duty is an act that obliges to do something and act, the opposite of which would be a legal wrong.
2. Whenever law ascribes duty to a person, a corresponding right also exists with the person on whom the duty is imposed.

3. There are two kinds of duties: Moral Duty and Legal Duty.

4. Rights are said to be the benefits secured for persons by rules regulating relationships.

Salmond also believed that no right can exist without a corresponding duty. Every right or duty involves a bond of legal obligation by which two or more persons are bound together. Thus, there can be no duty unless there is someone to whom it is due; there can be no right unless is someone from whom it is claimed; and there can be no wrong unless there is someone who is wronged, that is to say, someone whose right has been violated.



On the other hand, Austin said that Duties can be of two types:

a. Relative Duty – There is a corresponding right existing in such duties.
b. Absolute Duty – There is no corresponding right existing.

Austin conceives this distinction to be the essence of a right that it should be vested in some determinate person and be enforceable by some form of legal process instituted by him. Austin thus starts from the assumption that a right cannot vest in an indeterminate, or a vague

entity like the society or the people. The second assumption with which Austin starts is that sovereign creates rights and can impose or change these rights at its will. Consequently, the sovereign cannot be the holder of such rights.

According to Salmond, there are five important characteristics of a Legal Right[3]:

1. It is vested in a person who may be distinguished as the owner of the right, the subject of it, the person entitled, or the person of inherence.

2. It avails against a person, upon whom lies the correlative duty. He may be distinguished as the person bound, or as the subject of duty, or as the person of incidence.

3. It obliges the person bound to an act or omission in favour of the person entitled. This may be termed the content of the right.

4. The act or omission relates to something (in the widest sense of that word), which may be termed the object or subject matter of the right.

5. Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner.

Some jurists hold that a right may not necessarily have a correlative duty. They say that legal rights are legal concepts and these legal concepts have their correlatives which may not necessarily be a duty.

Roscoe Pound also gave an analysis of such legal conceptions. He believed that legal rights are essentially interests recognized and administered by law and belong to the 'science of law' instead of 'law'. He proposed that such Rights are conceptions by which interests are given form in order to secure a legal order.

Hohfeld's System of Fundamental Legal Concepts or Jural Relations

| | 1 | 2 | 3 | 4 |
|---|---|---|---|---|
| Jural Opposites | Right<br>–<br>No Right | Privilege<br>–<br>Duty | Power<br>–<br>Disability | Immunity<br>–<br>Liability |
| Jural Correlatives | Right<br>–<br>Duty | Privilege<br>–<br>No Right | Power<br>–<br>Liability | Immunity<br>–<br>Disability |

Jural Correlatives represent the presence of in another. Thus, right is the presence of duty in another and liability is the presence of power in another.

Jural Opposites represent the absence of in oneself. Thus, no right is the absence of right in oneself and disability is the absence of power in oneself.

Conclusion derived from Hohfeld's System

a. As a person's right is an expression of a wish that the other person against whom the right or claim is expressed has a duty to obey his right or claim.

b. A person's freedom is an expression of a right that he may do something against other person to change his legal position.

c. A person's power is an expression of a right that he can alter other person's legal position.

d. A person's disability is an expression of a wish that another person must not alter the person's legal position.

A wrong is an act that is illegal Legal wrongs are usually quite clearly defined in the law of a state and/or jurisdiction They can be divided into civil wrong and crimes (or *criminal*

*offences*) in common law countries, while civil law countries tend to have some additional categories, such as contraventions.

Moral wrong is an underlying concept for legal wrong. Some moral wrongs are punishable by law, for example, rape or murder. Other moral wrongs have nothing to do with law. On the other hand, some legal wrongs, such as parking offences, could hardly be classified as moral wrongs.

**LEGAL WRONG**

In law, a wrong can be a legal injury, which is any damage resulting from a violation of a legal right. A legal wrong can also imply the state of being contrary to the principles of justice or law. It means that something is contrary to conscience or morality and results in treating others unjustly. If the loss caused by a wrong is minor enough, there is no compensation, which principle is known as *de minimis non curat lex*. Otherwise, damages apply.

**Q14. What is relationship between ownership and possession?**

ANS 14. Ownership

Salmond on Ownership

Ownership denotes the relationship between a person and an object forming the subject-matter of his ownership. It consists in a complex of rights, all of which are rights in rem, being good against the entire world and not merely against specific persons[4].

Incidence of Ownership

1. The owner has the right to possess things that he owns.
2. The owner normally has a right to use or enjoy the thing owned, the right to manage it, the right to decide how it shall be used and the right of income from it. However, Right to possess is not a right *strictu sensu* because such rights are in fact liberties as the owner has no duty towards others and he can use it in any way he likes and nobody can interfere with the enjoyment of his ownership.

3. The owner has the right to consume, destroy or alienate the things. The right to consume and destroy are again straight forward liberties. The right to alienate i.e. the right to transfer the existing rights involves the existence of power.

4. Ownership has the characteristic of being 'indeterminate in duration' and Ownership has a residuary character. Salmond contrasted the rights of the owner with the lesser rights of the possessor and encumbrancer by stating that *"the owner's rights are indeterminate and residuary in a way in which these other rights are not"*.

Austin's Concept of Ownership

Ownership or Property may be described accurately enough, in the following manner: *'the right to use or deal with some given subject, in a manner, or to an extent, which, though is not unlimited, is indefinite'*.

Now in this description it is necessarily implied, that the law will protect or relieve the owner against every disturbance of his right on the part of any other person. Changing the expression, all other persons are bound to forbear from acts which would prevent or hinder the enjoyment or exercise of the right.

Austin further said that "Ownership or Property, is, therefore, a species of *Jus in rem*. For ownership is a right residing in a person, over or to a person or thing, and availing against other persons universally or generally. It is a right implying and exclusively resting upon obligations which are at once universal and negative".

Dias on Ownership

After referring to the views of Salmond and other Jurists, Dias came to the conclusion that a person is owner of a thing when his interest will outlast the interests of other persons in the same thing. This is substantially the conclusion reached by many modern writers, who have variously described ownership as the 'residuary', the 'ultimate', or 'the most enduring interest'.

According to Dias, an owner may be divested of his claims, etc., to such an extent that he may be left with no immediate practical benefit. He remains owner nonetheless. This is because his interest in the thing, which is ownership, will outlast that of other persons, or if he is not presently exercising any of his claims, etc., these will revive as soon as those vested in other persons have come to an end.

In the case of land and chattels, if the owner is not in possession, ownership amounts to a better right to obtain the possession than that of the defendant. It is 'better' in that it lasts longer. It is apparent that the above view of Dias substantially agrees with that of Salmond. According to Dias it is the outlasting interest and according to Salmond, ownership has the characteristic of being indeterminate in duration and residuary in nature[5].

**Types of Ownership**

| Corporeal Ownership | Incorporeal Ownership |
|---|---|
| 1. Corporeal Ownership signifies ownership in a physical object.<br>2. Corporeal things are things which can be perceived by senses. | 1. Incorporeal Ownership is a right or an interest.<br>2. Incorporeal things cannot be perceived by senses and are in tangible. |
| Sole Ownership | Co-Ownership |
| When an individual owns, it is sole ownership | When there is more than one person who owns the property |
| Trust Ownership | Beneficial Ownership |
| 1. There is no co-ownership.<br>2. The person on whom the responsibility lies for the benefit of the others is called the Trustee.<br>3. The trustee has no right to the beneficial enjoyment of the property.<br>4. Ownership is limited. A trustee is merely an agent upon whom the law has conferred the duty of administration of property.<br>5. Trusteeship may change hands. | 1. There can be co-ownership.<br>2. The person for whom the trust is created is called the Beneficiary.<br>3. The Beneficiary has the full rights to enjoy the property.<br>4. Ownership is complete.<br>5. Beneficial Owners remain the same. |
| Legal Ownership | Equitable Ownership |
| Legal ownership is that ownership which has its basis in common law. | Equitable ownership comes from equity divergence of common law. Thus, distinction between legal and equitable ownership is very thin. |
| Vested Ownership | Contingent Ownership |

| | |
|---|---|
| 1. Ownership is vested when the title is perfect.<br><br>2. Vested ownership is absolute. | 1. Ownership is contingent when it is capable of being perfect after fulfilment of certain condition.<br>2. Contingent ownership becomes vested when the conditions are fulfilled. |
| Absolute Ownership | Limited Ownership |
| Ownership is absolute when possession, enjoyment, disposal are complete and vested without restrictions save as restriction imposed by law. | Limited Ownership is subjected to the limitations of use, disposal or duration. |

Possession

Salmond on Possession

Salmond said that in the whole of legal theory there is no conception more difficult than that of possession. The legal consequences which flow from the acquisition and loss of possession are many and serious. Possession, for example, is evidence of ownership; the possessor of a thing is presumed to be the owner of it, and may put all other claimants to proof of their title. The transfer of possession is one of the chief methods of transferring ownership.

Salmond also said that possession is of such efficacy that a possessor may in many cases confer a good title on another, even though he has none himself.

He also made a distinction between possession in fact and possession in law.

1. Possession may and usually does exist both in fact and in law. The law recognizes as possession all that is such in fact, and nothing that is not such in fact, unless there is some special reason to the contrary.

2. Possession may exist in fact but not in law. Thus the possession by a servant of his master's property is for some purposes not recognized as such by the law, and he is then said to have detention or custody rather than possession.

3. Possession may exist in law but not in fact; that is to say, for some special reason the law attributed the advantages and results of possession to someone who as a matter of fact does not possess. The possession thus fictitiously attributed to him is termed *constructive*.

In Roman law, possession in fact is called *possessio naturalis*, and possession in law as *possessio civilis*.

It involves two distinct elements, one of which is mental or subjective, the other physical or objective.

Corporeal and Incorporeal Possession

Corporeal Possession is the possession of a material object and Incorporeal Possession is the possession of anything other than a material object.

Corporeal possession is termed in Roman law *possessio corporis*. Incorporeal possession is distinguished as *possessio juris*, the possession of a right, just as incorporeal ownership is the ownership of a right.

Salmond further said that *"corporeal possession is clearly some form of continuing relation between a person and a material object. It is equally clear that it is a relation of fact and not one of right"*.

What, then, is the exact nature of that continuing *de facto* relation between a person and a thing, which is known as possession?

According to Salmond, *the possession of a material object is the continuing exercise of a claim to the exclusive use of it.*

The mental element comprises of the intention of the possessor with respect to the thing possessed, while the physical element comprises of the external facts in which this intention has realised, embodied, or fulfilled itself.

The Romans called the mental element as *animus* and the subject element as *corpus*. The mental or subjective element is also called as *animus possidendi, animus sibi habendi*, or *animus domini*.

The A*nimus* Possidendi - The intent necessary to constitute possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material object. Salmond made following observations in this regard.

1. It is not necessarily a claim of right.
2. The claim of the possessor must be exclusive.
3. The *animus possidendi* need not amount to a claim of intent to use the thing as owner.
4. The *animus possidendi* need not be a claim on one's own behalf.
5. The *animus possidendi* need not be specific, but may be merely general. It does not necessarily involve any continuous or present knowledge of the particular thing possessed or of the possessor's relation to it.

The *Corpus Possessionis* – The claim of the possessor must be effectively realized in the facts; that is to say, it must be actually and continuously exercised. The *corpus possessionis* consists in nothing more than the continuing exclusion of alien interference, coupled with ability to use the thing oneself at will. Actual use of it is not essential.

Immediate and Mediate Possession

The possession held by one man through another may be termed *mediate*, while that which is acquired or retained directly or personally may be distinguished as *immediate* or *direct*.

There are three kinds of Mediate Possession:

1. Possession that is acquired through an agent or servant who claims no interest of his own.

2. The direct possession is in one who holds both on the actual possessor's account and on his own, but who recognizes the actual possessor's superior right to obtain from him the direct possession whenever he choose to demand it.

3. The immediate possession is in a person who claims it for himself until some time has elapsed or some condition has been fulfilled, but who acknowledges the title of another for whom he holds the thing, and to whom he is prepared to deliver it when his own temporary claim has come to an end.

Concurrent or Duplicate Possession

1. Mediate and Immediate Possession co-exist in respect of the same thing as already explained above.
2. Two or more persons may possess the same thing in common, just as they may own it in common. This also called as *compossessio*.

3. Corporeal and Incorporeal Possession may co-exist in respect of the same material object, just as corporeal and incorporeal ownership may.

Incorporeal Possession

In Incorporeal Possession as well, the same two elements required, namely the *animus* and the *corpus*. In the case of incorporeal things, continuing non-use is inconsistent with possession, though in the case of corporeal things it is consistent with it.

Incorporeal possession is commonly called the possession of a right, and corporeal possession is distinguished from it as the possession of a thing. The distinction between corporeal and incorporeal possession is clearly analogous to that between corporeal and incorporeal ownership.

Corporeal possession, like corporeal ownership, is that of a thing; while incorporeal possession, like incorporeal ownership, is that of a right. In essence, therefore, the two forms of possession are identical, just as the two forms of ownership are.

Hence, Possession in its full compass and generic application means the continuing exercise of any claim or right.

Paton on Possession

Paton said that even though Possession is a concept of law still it lacks a uniform approach by the jurists. Some jurists make a distinction between legal and lawful possession. Possession of a thief is legal, but not lawful. In some cases, where possession in the popular sense is meant, it is easy to use some such term as physical control. Possession is also regarded as *prima facie* evidence of Ownership.

According to Paton, for English law there is no need to talk of mediate and immediate possession. The Bailee and the tenant clearly have full possession: Salmond's analysis may he necessary for some other systems of law, but it is not needed in English law.

**Q15. Discuss the contribution and theories propounded by the following exponents of sociological school?**

A) RUDOLF VON IHERING
B) LEON DUGUIT
C) ROSCOE POUND

ANS 14. Ihering was educated at berlin in Germany . he was professor at basel. His spirit of law was published in four volumes during 1852-1856. Later , he published his principle work which translated as 'law As mean to an End' in 1913. In this work he criticized the nation of individual freedom and liberty as advocated by the Kant and Bentham as they had divorce legal theory from social realities. He thus opposed the doctrine of individualism which , in his view was incompatible to the cause of social justice.'

IHERING THEORY OF LAW (1818-1892)

Accoding to inhering , law is a part of human conduct and in the idea of purpose ,inhering foud the mainspring of law, which are only instruments for serving the needs of society. The problems of the society is to reconcile selfish with unselfish purpose and to suppress the former when they clash with the latters. Inhering stressed that law does not exist for the individual as end inhimself, but serves his interest with good of society in view.

He said , in orde to reconcile the individual with society , it is necessary to balance various interest , into 3 categories:-

1. Individual interest
2. State interest, and
3. Social interests.

B) LEON DUGUIT

Social Solidarity : Duguit

SOCIAL CRITERION OF THE VALIDITY OF LAW:

DUGUIT (1859- 1928)

Ø Duguit (1859- 1928) was a professor of Constitutional Law in the university of Bordeaux.

Ø He attacked traditional conceptions of state, sovereignty and law and sought (required, wanted) to fashion a new approach to these matters from the angle of society.

Ø He insisted Social life should be viewed as it is lived, so as to be able to extract the most accurate generalizations (overviews).

Ø The outstanding fact of society is the interdependence of men: This has always existed and becomes more and more widespread as life grows more complex and as Man's mastery of the world increases. People have common needs, which require concerted effort; they have dissimilar needs, which require mutual adjustment and accommodation.

No one can live at the present time without depending on a far-reaching web of services provided by his fellow- men. Water, food, housing, clothing, entertainment and so-on are dependent on other people.

Hence, this social interdependence is not a conjecture (guess, assumption), but an inescapable fact of human existence. Therefore, all organization should be directed towards smoother and fuller co-operation between people. This Duguit called the principle of SOCIAL SOLIDARITY.

From this platform he launched his assault (attack) on traditional conceptions of the state, sovereignty and law.

Ø All institutions are to be judged according to how they contribute towards social solidarity. The state can therefore claim no special position or privilege. It is not some mystical entity, but an organization of men, which can only be justified so far as it furthers social solidarity. When it ceases to do this there is a duty to revolt against it. It is worth pointing out that at no

stage did Duguit deny the existence of an organized unity known as the state. This is very much a fact and to deny it would be unreal. What he said was that it is not essential, nor entitled to special reverence (respect, admiration).

Ø The doctrine of sovereignty has likewise become meaningless. It used to be the personal attribute of a monarch (ruler, king), so such ideas as 'sovereignty of the people' and the like are inappropriate and empty. Decentralization (reorganization) makes it difficult to locate sovereignty. The use of the notion (idea, view) of delegation does not alter the fact that parts of sovereignty have been ceded (abandoned). Nor can sovereignty be reconciled (reunite, resolve) with the increasing responsibilities attaching to the state. For these reasons sovereignty fails to explain the kind of authority that governors now wield (exercise) over the governed.

Ø A better way of looking at it is that all power and organization are subject to the test of social solidarity. Their existence is functional and does not extend beyond the functions they perform in society. However, at this point, it might be noted that sovereignty is a term with many meanings and cannot be wholly expelled in this way. There has to be some ultimate source of authority, especially law-making authority, in every society.

Ø In Duguit's view, with the disappearance of sovereignty there disappears also the authority traditionally ascribed (recognized) to laws, for the basis on which these were thought to rest is then sapped (tired, shattered) of vitality (energy, strength, liveliness).

Ø If sovereignty is mythical (fairy tale), so too are the notions that a law is (a) the command of sovereign, single and indivisible (b) unchallengeable and (c) the product of a single creative act.

Ø Such is the core of Duguit's thesis: It contains some interesting implications. The first and most obvious is that the state is not indispensable.

He drew particular attention to the move towards decentralization and away from a central machinery of authority in view of the increasingly complex structure of modern society.

The state is a useful, though not an essential, organization but its power is restricted by social solidarity. Whether such a state of affairs is achieved through a constitution or judiciary, it is akin (similar) to the advocacy of a rule of law. The objection is simply that this is far from being the state of affairs in all countries.

Ø It will be remembered that Duguit's own initial contention was that life in society should be viewed as it is, so it would seem that his argument is only a plea for what it ought to be.

Ø Duguit proceeded to assert that when the state ceased to promote social solidarity there is a duty to revolt against it.

Ø Interdependence of men is a fact, but 'social solidarity' is an ideal: For, in the first place, in practice it becomes a matter of personal evaluation when the question to be decided is whether a given course of conduct is conducive (favorable) to social solidarity or not. Does a law imposing or forbidding racial segregation (discrimination) promote social solidarity? It is difficult to see how this can be answered objectively and otherwise than in the light of political, religious and moral evaluations. Secondly, whose evaluation of social solidarity is to prevail? There is evidence that the forces of social disruption are as potent as those of solidarity. It would appear that Duguit has unfortunately fallen into the error of enlarging a limited truth into an absolute.

Ø The most significant feature is the way in which Duguit used social solidarity as a criterion of the validity of laws. He asserted that a precept which does not further (add) social solidarity is not law, and denied that statutes and decisions make law in themselves.

There are 3 formative laws:

1. Respect for property

2. freedom of contract,

3. liability only for fault.

C. ROSCOE POUND

The contribution of roscoe pound to sociological jurisprudence may be studied under the following heads:

1. Emphasized of functional aspects of law
2. Pound's theory of social engineering
    a) Private interests
    b) Public interests
    c) Social interests
3. Jural postulates of roscoe pound

a) Jural postulates I
b) Jural postulates II
c) Jural postulates III
d) Jural postulates IV
e) Jural postulates v

**Q16. Examine the Concepts of justice? Discuss the importance and kinds of justice.**

ANS16. 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.

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.

- 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.

**Q17.Discuss the theories of Punishment?**

Ans 17. Administration of Justice

*Origin*

The administration of justice in modern civilized societies has evolved through 4 stages:-

1. Primitive stage- when society was primitive and private revenge and self-help were only the remedies available to the wrongdoer, one could easily get the wrong redressed with the help of his friends and relatives, 'an eye for an eye, a tooth for a tooth and a limb for a limb.'
2. Elementary/Infant stage- it has been considered that law and state were at infantry level during this stage, and the feeling of security as a responsibility by the state towards its individual and his property was absent. It didn't have the enforcing power through which it could punish the wrongdoer.
3. The growth of Administration of Justice- a change was about to witness where a sought of tariff schedules were fixed for different kinds of injury and offenses. And up to that time justice mold as private in nature without the compulsive force of the state.
4. The modernization- it was the developmental stage where the state geared its authority and took upon itself the responsibility of administrating justice and punishing the wrongdoer using its force whenever necessary. This stage owes its origin and growth to

the gradual evolution of the state and its political power. And with its transformation, private revenge and self-help got substituted by the administration of criminal and civil justice through law courts.

Concept

"Men being what they are-each keen to see his own interest and passionate to follow it-society can exist only under the shelter of the State, and the law and justice of the state is a permanent and necessary condition of peace order and civilization."(Salmond)

Driving from the words of Salmond it is clear that administration of justice means justice according to law. Physical force of the state is the sole or exclusive factor for a sound administration.

Administration of justice is the firmest pillar of government, and granting justice is said to be the ultimate end of law and the goal of society, which the judges of the courts have been pouring into law with new variants of justice in the form of contemporary values and need-based rights like freedom, liberty, dignity, equality and social justice as ordained in the constitutional document. Access to justice for the people is the foundation of the constitution.[State of Haryana v. Darshna Devi, AIR 1979 SC 855, per Justice Krishna Iyer]

Classification

Under the purview of administration of justice it is classified into two kinds:-

1. Civil justice

Blackstone called it as 'private wrong'. It has been defined as civil injuries where violation or infringement of civil or legal rights of an individual is taken into consideration. A civil case may result in an award of compensation or dismissal of the case. In jurisprudential term, the right of justice is enforced through the administration of civil justice which connotes enforcement and protection of rights as opposed to the punishment of wrongs.

The rights to be enforced under it may either be primary rights or secondary rights. Where the enforcement of Primary rights; is also called *specific performance* wherein the defendant is compelled to do the very act which is agreed upon to be done. For instance, payment of debt, or to perform a contract or restore land or property wrongfully taken or detained. It also connotes *remedial rights* under it, where the purpose may be either imposition of a pecuniary penalty upon the wrongdoer; or providing for pecuniary compensation to the plaintiff in respect of the damages which he has suffered from the defendant's wrongful act.

2. Criminal Justice

Blackstone stated it as ‘public wrong’. The main purpose of administration of criminal justice has always been to punish the offender, while in certain general exceptional cases the accused may get acquitted. The nature of the violation of public rights and duties which affects the community as a whole is called a crime and a criminal proceeding results in applying on punishment varying from sentence of death to a mere fine or binding over the lawbreaker to keep the peace or his release on probation after admonition.

Under this, the magistrate has to decide the guilt of the accused on the basis of the evidence before him.

Theories of Punishment

Various theories are advanced in justification for punishing the offender. The view regarding punishment also kept changing with the changes in the societal norms. They are of following kinds:-

1. Deterrent theory

The term ‘Deter’ means to abstain from doing an act. While the main purpose of this theory is to deter the criminals from doing the crime or repeating the same in the future. Under this theory, severe punishments get impose upon the offender so that he abstains from committing a crime while it would constitute as a lesson to the other member of the society.

In the words of Salmond- punishment is before all things deterrent and the chief aim of the law of crime is to make the evil-doer an example and warning to all who are like minded as him. He further stated that offenses are committed by reason of conflict of interest of the offender and the society.

2. Retributive theory

This theory is based on the principle-‘An eye for an eye, a tooth for a tooth…” here, retributive means to give in return. The object of the theory is to make the criminal realize the sufferings of the pain by subjecting him to the same kind of pain, as he had imposed on the victim. The theory has been regarded as an end in itself as it only aims at revenge taking rather than sound welfare and transformation.

Salmond puts his words stating that to suffer punishment is to pay a debt due to the law that has been violated. Revenge is the right of the injured person and the penalty for wrongdoing is a debt which the offender owes to the victim and when the punishment is given the debt is paid.

3. Preventive theory

The preventive theory is founded on the idea of preventing the repetition of crime by disabling the offender through measures such as imprisonment, forfeiture, death punishment, etc. In the words of Paton, 'this theory seeks to prevent the prisoners from committing the crime by disabling him.' It pre-supposes that need of punishment for crimes simply arises out of social necessities, as by doing so the community is protecting itself against anti-social acts which are endangering social order

4. Expiatory theory

This theory is solely based on the concept of morality, rather being much more concerned with legal concepts. It emphasizes more on ancient religious perceptions regarding crime and punishment when prisoners were placed in isolated cells to repent or expiate for their crime or guilty from their core of the heart and the one who succeeded in doing so were let off.

5. Reformative theory

This theory emphasizes the reformation of offenders through the method of individualization. It is based on the principle of humanistic principle that even if an offender commits a crime, he does not cease out to be a human being. And an effort should be made to reform him during the period of incarceration. This theory is based on the principle of 'hate the sin, not the sinner.'

**Q18. Explain the theory of Amartay Sen?**

ANS18. 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 original position 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.

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 impossibility theorem, 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'.

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.

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.

**Q19. Explain the concept the social and economic justice?**

Ans19. Defining Economic Justice and Social Justice

Defining Our Terms

One definition of justice is "giving to each what he or she is due." The problem is knowing what is "due".

Functionally, "justice" is a set of universal principles which guide people in judging what is right and what is wrong, no matter what culture and society they live in. Justice is one of the four "cardinal virtues" of classical moral philosophy, along with courage, temperance (self-control) and prudence (efficiency). (Faith, hope and charity are considered to be the three "religious" virtues.) Virtues or "good habits" help individuals to develop fully their human potentials, thus enabling them to serve their own self-interests as well as work in harmony with others for their common good.

The ultimate purpose of all the virtues is to elevate the dignity and sovereignty of the human person.

Distinguishing Justice From Charity

While often confused, justice is distinct from the virtue of charity. Charity, derived from the Latin word *caritas*, or "divine love," is the soul of justice. Justice supplies the material foundation for charity.

While justice deals with the substance and rules for guiding ordinary, everyday human interactions, charity deals with the spirit of human interactions and with those exceptional cases where strict application of the rules is not appropriate or sufficient. Charity offers expedients during times of hardship. Charity compels us to give to relieve the suffering of a person in need. The highest aim of charity is the same as the highest aim of justice: to elevate each person to where he does not need charity but can afford to become charitable himself.

True charity involves giving without any expectation of return. But it is not a substitute for justice.

Defining Social Justice

Social justice encompasses economic justice. Social justice is the virtue which guides us in creating those organized human interactions we call institutions. In turn, social institutions, when justly organized, provide us with access to what is good for the person, both individually and in our associations with others. Social justice also imposes on each of us a personal responsibility to collaborate with others, at whatever level of the "Common Good" in which we participate, to design and continually perfect our institutions as tools for personal and social development.

Defining Economic Justice

Economic justice, which touches the individual person as well as the social order, encompasses the moral principles which guide us in designing our economic institutions. These institutions determine how each person earns a living, enters into contracts, exchanges goods and services with others and otherwise produces an independent material foundation for his or her economic sustenance. The ultimate purpose of economic justice is to free each person to engage creatively in the unlimited work beyond economics, that of the mind and the spirit.

**Q20. Critically examine the revival of natural law theories in modern era?**

ANS20. There have been several disagreements over the meaning of natural law and its relation to positive law. Aristotle (384–322 BCE) held that what was "just by nature" was not always the same as what was "just by law," that there was a natural justice valid everywhere with the same force and "not existing by people's thinking this or that," and that appeal could be made to it from positive law. However, he drew his examples of natural law primarily from his observation of the Greeks in their city-states, who subordinated women to men, slaves to citizens, and "barbarians" to Hellenes. In contrast, the Stoics conceived of an entirely egalitarian law of nature in conformity with the logos (reason) inherent in the human mind.

THE MAIN CONTRIBUTOR OF NATURAL LAW

1. Hobbes
2. Locke
3. Kant

**Q21. Do the judges make law or only declare the existing law?**

ANS20. The function of a judge in any legal system remains a true phenomenon even today. Barristers, solicitors, law students and the general public often question the precise role of a judge – puzzled over whether judges are authoritarian law-makers, or if their profession makes them mere declarers or announcers of the law. Various valid opposing arguments exist in this on-going debate; authors, solicitors, professors, and prominent legal thinkers from earlier centuries have, on many occasions, stated their own views ensuring that either end of the argument is just as plausible as the other. In this essay I will consider a number of examples and cases which suggest that the statement is in fact valid. I will also review a number of specific cases where there is convincing evidence that the statement is incorrect and where new laws have indeed been made by judges. Therefore, my personal conclusion rests firmly in the notion that judges have the power, control and ability to not 'only' declare the law, but also in 'hard cases', also to make new law.

When considering either perception of a judge's role within the legal system it remains of the utmost importance never to lose sight of the difficulties, complexities and intricacies that judges are faced with in their individual cases on a daily basis. Judges do not have an easy job, they do exactly what the rest of the community seeks to constantly avoid – make decisions. Gone are the days when a Manhattan court judge could decide the defendant's jail sentence length simply on the toss of a coin. Judges have an indescribable, almost mysterious power and control over individuals' lives that cannot be paralleled with many others in contemporary society. They have to decide whether the defendant should go to prison, whether the plaintiff should receive compensation, whether a contract dispute is based upon valid documentation and precisely what it is that may constitute true and demonstrable slander. These are issues that judges constantly encounter – it is in their duty to stipulate the best, most appropriate ruling to the claimant:

*"They must not spin a coin or consult an astrologer, but must give reasons for their decisions.*

Thus, regardless of which argument any particular individual believes, it is generally perceived that a judge's main objective should be to apply legal reasoning, integrity and discretion when delivering any particular verdict. Whether this requires a derivation of the verdict from a statute or precedent, or whether it concentrates on a judge amending a law or even 'making' one, to me, a judge's primary aim remains to see that justice prevails and that fair treatment is given to the claimant.

# SUBJECT: INTERNATIONAL LAW

## PAPER CODE: LLB304

**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**

The International Court of Justice Statute defines customary international law in Article 38(1)(b) as "a general practice accepted as law". 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*).

The 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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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.

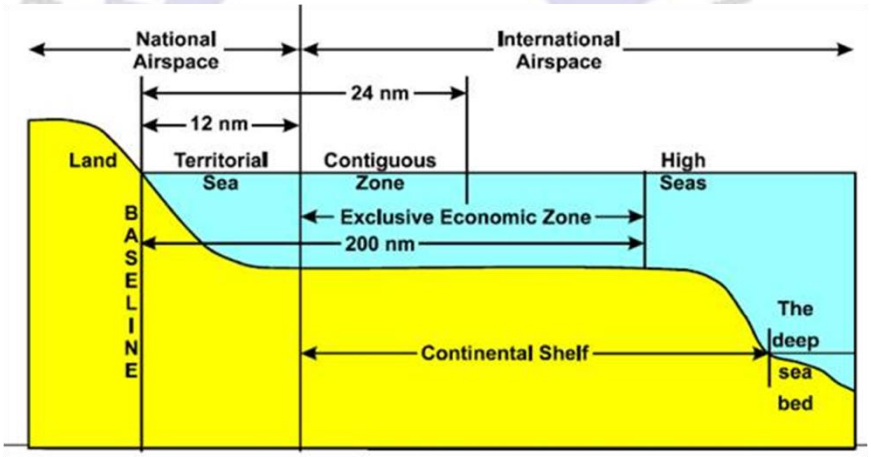
India which is home to one of the largest refugee population in South Asia has no specific law dealing with the issue of asylum and is yet to enact one. Refugee and asylum seekers in

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

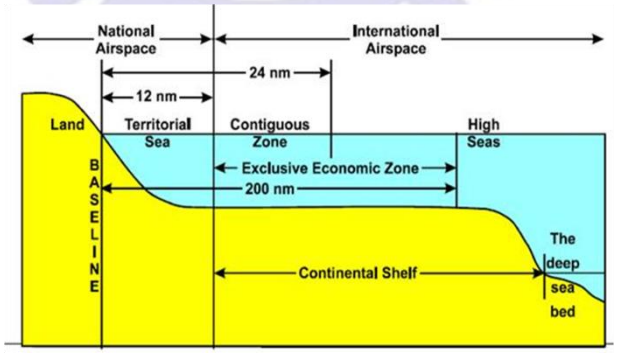
the sea floor or under the sea floors subsoil. These resources encompass both living and non-living resources.

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.

# SUBJECT- PROPERTY LAW

# CODE-LLB 306

**Q1 What do you mean by the term 'property' and what are the types of the property?**

Ans. Property has always been seen as an instrument of life and justified as an instrument to a full human life. Existence of mankind is not possible without the use of material goods like air, light, heat, water, housing food, clothing etc. Men in all societies exercise control over these things to satisfy their needs and in doing so, they make them their own property. In its widest sense, all animate or inanimate things belonging to a person are included within the meaning of the term property like for example a person's life, liberty and estate may also be considered as his property.

The term property is derived from the Latin term 'propertietat' and the French equivalent 'proprious' which mean 'a thing owned'. In looser sense, property may be defined as the sum total of man's fortune, including not only the object of which he is the owner, but also the value of any claims which he may have against other persons. In the limited sense, property covers only a person's proprietary rights as opposed to his personal rights. Thus land, chattels, share and debts due to him constitute his property.

In the modern times, the meaning of the term property has been further extended to include intangible or intellectual property also, for example patent, copyrights, trademarks, designs etc. are included in the definition of the term property.

In India, the word property as used in Article 19 (1) (f) or in Article 31 has wider connotation and is entitled to, liberal interpretation jurisprudentially as well as constitutionally. That is why our framers have included the right to hold and dispose of property as a fundamental right. They certainlyintended that the right to be available to every citizen. They enacted Article 39 (b) and (c) with a view to make the fundamental right to hold property a reality for the vast majority of people.

However, the fundamental right to hold, acquire and own the property was repealed vide the constitutional44$^{th}$ amendmentAct, making the right to property a constitutional right under article 300A in year 1978. After 1978, in the area of property, there are four conditional provisions ie. Art 31, 31B, 31 and 300 A. However, it is to be understood that Art 31A, 31B, 31C are included under Part III but they cannot be called as fundamental right in the real sense, as they do not confer fundamental right but impose certain restriction on right property. The main object was to provide immunity to various laws curtailing property rights.

Different types of property

Corporeal and incorporeal property

Corporeal property is also called tangible property as it has a tangible existence in the world. It relates to material things like land, house, money, ornaments, gold, silver, etc are corporeal property the existence of which be felt by the sense organs. Incorporeal property is also called intangible property as its existence is neither visible nor tangible like right of easement, copyright, patent, trademark etc.

Real and personal property

This difference is closely connected with the difference of moveable and immoveable property but not identical. This difference has no scientific basis and is a product of the history of the law of action of England. Real property means all rights over the land recognized by law. Personal property means all other proprietary rights, whether they are in rem or in personam.

Movable and immovable property

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, 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 but this definition is also not complete Moreover, theexpression things attached to the earth which is not defined in the General Clauses Act, has beendefined separately in Section 3 of the Transfer of Property Act The definition of things "attached tothe 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 toconsider the definition given in Section 3 of the Transfer of Property Act as well as the definition given in the General Clauses Act.

A property which is not immovable is movable. Moveable 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.

**Q.2 What do you mean by the 'transfer of property' in special reference of Transfer of Property Act?**

Ans. Section 5 defines 'Transfer of Property in the following words-

Transfer of Property' means on act by which a living person conveys property in present or in future to one or more other living person or to himself and to Transfer property is to perform such act. The analysis of thin definition, makes it clear that transfer of property is an act by which a living person, conveys in present or future, property, to another living person or to himself.

Transfer of Property is an Act

Transfer of Property is an activity or process. Under this activity something is done by the person who wants the Transfer of Property, it is not transferred automatically without transferor's act as is the case in wills or inheritance. Transferring property would mean doing of this act or performing such act. The legal effect of this act is passing of property from one person to another

Living Person

Transfer of property is to be made by a living person The person who makes the transfer is called the transferor. The transferor may be human person or a juristic person. Juristic persons are Companies, Firms, Corporation, University etc. which although are not human beings but law Incorporates personality to them. The living person to the transferor must be in existence of the time of making of the transfer. The Transferor must also be competent of the age of majority, of sound mind and not otherwise disqualified to transfer a property Second paragraph of Section makes it clear that transfer of may be one person or a class or group of persons. It may also be Association of persons or corporations Lo juristic persons.

Conveys

In a transfer of property the living person to the transferor conveys the property. His conveying is doing of the act which is called transfer. There must be conveyance in every transfer of property: Conveyance means any act by the transferor by which certain new titles or interests are created in favour of the transferee (to whom the property is being transferred) The word 'conveys Includes any form of assurance Inter vivos in which some now title or interest is created in favour of the transferee. It may be noted that in a transfer of property there is actually transfer of title or interests of that property. Before transfer of property, the transferee does not have that particular interest. After the transfer of property, the transferee gets that particular interest which is given by the transferor.

Anything done or any form of assurance by virtue of which transferee gets new title or interest which he did not have before the transfer, is called conveyance.

In present or future

A Transfer of Property may be made so as to take place with immediate effect or to place on a future date. The expression n present or in future governs the word conveys does not given property The transferor can make arrangement that the property is vested or accrues to the transfer immediately after the completion of the transfer. He may also make such arrangements in which the vesting of the interest of the property postponed to date. He is free to transfer a property also upon the fulfillment of certain conditions.

The conveyance may, therefore, be present, future or conditional

Property

The word property has been used in a comprehensive sense. It has a very wide meaning and includes properties of all descriptions. It means movable properties such as cars or tables. It means immovable properties such as lands or houses. It also means intangible properties like such as right to catch fish or an actionable claims or other beneficial interests in a property.

To another living person

There must also be another person to whom the property may be transferred. Such other persons is called transferee. Since transfer of property as defined under Section 5 is an act between two living persons, the transferee must also be a living person. The transferee need not be a competent person Transferee may be minor, insane or even a child en ventresa mere (child in mother's womb) But, the transferee must be in existence when the transfer is being made. Property cannot be transferred to a person who is not inexistence on the date of the transfer.

The transferee too may either be a human person or a juristic person. 'Another living person includes also juridical person such as firms, societies, companies, corporations etc. and property may be transferred to them. An idol is a juristic person capable of holding property but it is not a living person within the meaning of Section 5 of the Act.

It is noteworthy that a property can be transferred for the benefit of an unborn person (person not in existence even in mother's womb) subject to provisions of Section 13, 14, 15 and 16. Further, where a property is transferred to a child in womb, the transfer so subject to its being born alive Section 20).

**Q-3 What properties may be transferred? State its exceptions if any?**

Ans. As per Section 6 of Transfer of Property Act 1882, which lays down a general rule which says that every kind of property can be transferred. But following properties cannot be transferred:

Chance of heir apparent (Spessuccessionis)

This means an interest which has not arisen in future. It is in anticipation or hope of succeeding to an estate of a deceased person. Such a chance is not property and as such cannot be transferred, if it is transferred, the transfer is wholly void.
Example: A is the owner of the property and B is his son. B is the heir of A. This type of property which B hopes to get after the death of the father cannot be transferred, during the life time of A.

Right of re- entry

It means right of lessor to re-claim the leased property from lessee on breach of contract or express condition. It is personal benefit which can't be transferred.
Example: If A leases his property to B with a condition that if he sublets the leased land, A will have the right to re-enter, i.e., the lease will terminate. This right to re- enter is personal benefit available to A, which can't be transferred.

Transfer of easement

An easement means an interest in land owned by another that entitled his holders to a specific limited use or enjoyment. An easement cannot be transferred.

Example: If A, the owner of a house X, has a right of way over an adjoining plot of land belonging to B, he cannot transfer this right of way to C. But if A transfers the house itself to C, the easement is also transferred to C.

Restricted interest

Certain rights enjoyment of which is reserved for certain person. If it is so, it is known as restricted interest. Restricted interest can't be transferred to another person. It includes 'religious office'.
Example: The right of PUJARI in a temple to receive offering. The right of WIDOW under Hindu law to residence.

Right to future maintenance

Right to future maintenance is personal benefit to whom it is granted. However arrears of past maintenance can be transferred.
Example: The right of a Hindu widow to maintenance is a personal right which cannot be transferred.

Right to sue

A mere right to sue cannot be transferred. The right refers to a right to damages arising both out of contracts as well as torts.
Example: A commits an assault on B. B can file a suit to obtain damages; but he cannot as sign the right to C and allow him to obtain damages.

Transfer of public office

It is against public policy to transfer public offices, salary and pension. Pension and salary are given on personal basis, it can't be transferred.

Occupancy Rights

Transfer of occupancy rights of a tenant is prohibited.
Example:- Tenant can't transfer his right of tenancy and farmer can't transfer his right to land if he himself is a lease.

**Q-4 What are the conditions restraining alienation or transfer as contemplated in the Transfer of Property Act 1882?**

Ans. Section 10, 11 and 12 provides for the conditions which provides for the conditions which if imposed by the transferor upon the transfree shall not affect the transfer.

Restraint on transfer - Section 10

If any property is transferred subject to a condition or limitation which absolutely restrains the transferee from parting with or disposing of his interest in the property such condition or limitation and not the transfer itself is void. Restraint on alienation of property may be either absolute or partial. Absolute restraint is void and transfer is valid, while partial restraint as regard to time, place or person is valid.

Absolute restraint: If A transfers property to B and his heirs with a condition that if the property is alienated, it should revert back to A. Such a condition, being absolute, is void. Partial restraint: A transfer property to B with condition that he should not alienate it in favour of D who is his trade competitor. It contains partial restraint and therefore valid.

Exceptions to rule of restraint on transfer:

In case of lease transition, lessor can impose condition that the lessee shall not sub lease it. In case of married woman, a condition that she will not have right during her marriage, to transfer the property.

Restraint on enjoyment - Section 11

When property is transferred absolutely, transferee has right to enjoy property as he likes. When transferor place restriction on the enjoyment of property which is transferred to transferee, restriction is treated as clog on property and such restriction is void. Example: A sells his house to B with condition that only B shall reside in the house. The condition is invalid.

Exception to Section11:-If a person transfers a property to another keeping some other

property for himself, he can impose certain condition which may interfere with the rights of enjoyment of the transferee.Example:-A person has two adjoining houses, one of which is transferred, he may impose a condition not to construct a second floor on a property because transferor will not able to enjoy sunlight.

Condition as to insolvency - Section 12

If person transfer property to another person with condition that property will be revert to transferor if transferee becomes insolvent, It is invalid condition. Exception: If lessor reserve right to get back leased property on declaration of lessee as insolvent, it is valid condition.

**Q.5 Define the Doctrine of Election as provided by Section 35 of the Transfer of Property Act? What are the modes of election? Or No one can blow hot and cold at the same time?**

Ans. Section 35 of the Transfer of Property Act provides Doctrine of Election. The foundation of Election is that a person taking the benefit of an instrument must also bear the burden.Election means choosing between two inconsistent or alternative rights . Under any instrument if two rights are conferred on a person in such a manner that one right is lieu of the other, he is bound to elect only one of them. For example A offer Rs 100 to B in lieu of transfer his house, B can elect only one, either he can retain the money and transfer his house or deny the money, he cannot enjoy the both.

This doctrine is based on equitable principle under which a person may not be allowed to approve that of an instrument which is beneficial to him and disapprove its that part which goes against him. Means no one can approbate and reprobate at the same time. In other words where a person takes some benefit under a deed or instrument he must also bear its burden.In Cooper v/s Cooper, Held that the Doctrine of Election, applies on every instrument and every type of property movable or immovable.

Application of Election

- When a person professes to transfer a property not his own
- In lieu of the property the transferor confers certain benefits to the owner of the property
- Transfer of benefit and confer of benefit to be part of the same property

When a person professes to transfer a property not his own

Professes means to purports or make contract, for a property which is not his own but he can make contract for the same. A may profess to transfer a property B, which is owned by C, and also confers a benefit Rs 1000 to C.

Here A is not transferring the C's Property to B but simply profess or contract a property which he does not own.Knowledge of the fact that transferor has no authority to transfer the property is immaterial for applicability of the rule of election.

Benefit confer on the owner of the property

Doctrine says owner must condensate or confers the benefit for his ownership on the property.The word Ownership is a wide connotation, it include a person having vested interest, or contingent interest and also a person who has ever reversionary or remote interest in the property.

Part of the same transition

This Doctrine only applicable when transfer and benefit a part form the same transition. Means the benefit and transition are interdependent and inseparable they form part of the same transition.

Owner's duty

Owner are duty bound to either accept or reject the offer benefits. He has two act in a same capacity means he may accept the benefit in one capacity and reject the other part of instrument in the same capacity not vise versa.

Mode of Election

It can be express or impliedowner can express his intention in clear and specific word, once the election has done it is final and conclusive.Election is implied when the owner of property having aware of his duty to elect and accept the benefits. When owner has enjoyed the benefit for two years without doing any act of refusal or dissent of the transaction. When the owner of the property exhausts or consume the benefits.

Requisition to Elect

This is the special procedure for expediting election, after the expiry of one year, if the owner of property does not elect, neither confirm his dissents the transaction, it deem to elect in favour of transferee.

**Q-6 Write a short note on the Doctrine Of Transfer By Ostensible Owner as provided under Section 41 of Transfer of Property Act?**

Ans.

Doctrine of transfer by ostensible owner is an exception to the rule that a person cannot confer a better title than what

hehas.Whereownerofpropertypermits(expresslyorimpliedly)anotherpersonwhois notownerofthepropertytoholdhimselfasownerofpropertyandthirdparty dealing goodfaithwithpersonspermitted,suchthirdpartyacquiregoodtitle as against trueowner.

Ostensible Owner- a person is not the real owner of the property, while he appeared to be the real one it may be found that although his name appears in the record and he also possesses the property but he never intended to own it. It is difficult to ascertain who is the real owner and who is ostensible owner as the ostensible owner possess all the characteristic of real owner, the main difference is the intention to hold the property or purchase the property is note there.

Test of Ostensible Owner

In JayadayalPoddar v/s BibiHazara – SC laid down the parameters to ascertain the Ostensible owner.

- Source of purchase money, who paid the price.
- Nature of possession after purchase.
- Motive of giving benamicolour to the transaction. Why the property purchased in the name of another person.
- Relationship between the parties, they are related to each other or they are stranger.
- Conduct of parties in dealing with the property
- Custody of the title deed.

Effect of Transaction made by Ostensible owner

The general rule of TPA is one who is not the real owner cannot transfer, but this section is the exception of this rule subject to fulfillments of conditions laid down in the section.If a person purchases form a Benamidar / Ostensible owner, the real owner cannot recover, provided other conditions are fulfilled

A purchased a property on her B, and B acted as his agent or care taker of the property, B Mortgage the property to C. It was held that Silence of A on mortgage created by B made B as ostensible owner and hence A cannot deny the mortgage.

Ingredients of S41

Consent of true Owner.
It is one of the important condition, that apparent ownership must have been created or permitted by the real owner of the property, either by express or implied consent.

Reasonable Care

it is also important that the transferee before taking effect of any transition he made reasonable care which a ordinary man do and enquiries to ascertain the transferor had the power to transfer.

Good Faith
The last condition is the transfer must be in a good faith there should not be any malafied intentions.

Protection of Bona fide purchaser when disputed land.

Example

AmadeagiftofpropertytoBbutcontinuedinpossessionofthegiftedproperty.He purportedtoexerciseapowerofrevocationandthentransferredthepropertyto theC.Thegift,however,wasnotrevocableasitwasanunconditionalgift.Bseeksto recoverpossessionfromtheC.CcangetprotectionunderSection41.

**Q.7 What Is The Doctrine Of Feeding The Grant Of Estoppel as provided under Section 43?**

Ans. The doctrine of feeding the grant by estoppel is based on the maxim '*nemodat quod nonhabet* which implies that no one can give to another, which he himself does not possess'. Section 43 of the Transfer of Property Act lays down "where a person fraudulently or erroneously represents that he is authorized to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists".
This general rule lays down that no property can be transferred by any person who is not authorised to do so. Thus if a person does not have a title to property, he cannot validly transfer the same to another. But this rule has been relaxed in practice due to "adjustment of equities" between such person and the transferee. One of such exceptions to this rule is provided in sec. 43, T.P. Act.

The principle of law on which the provisions of sec.43 rest is a well known rule of estoppel, sometimes referred to as 'feeding the grant by estoppel'. This means that if a person who although has no title to a property, yet grants it to another by conveyance, fraudulently causing loss to the other, will loose his subsequent interest in the property to the other, in case of any subsequent transfer of such property in his favour. An estoppel arises against the transferor for his conduct, and the law obliges him to 'feed' that estoppel by reason of his subsequent acquisition. Thus the principle underlying this section is based partly on doctrine of estoppel and partly on the equitable doctrine that a man who had promised more than he can give, ought to give when he acquires what he initially claimed.

The doctrine of feeding the grant by estoppel compels a man to perform when the performance becomes possible. It does give the transferor the option of going ahead with the transfer, it then completely depends upon the transferee if he is still willing to go ahead with the transfer after the transfer becomes a viable option.

Essential Requisites of the doctrine of 'feeding the grant by estoppel' –

A fraudulent or erroneous representation of ownership

The estoppel rests on the representation(express or implied) made by the transferor that he is authorized to transfer, which representation subsequently turns out to be erroneous. It makes no difference that the transferor had no interest whatsoever in the property or the interest therein that of an expectant heir. Further, it is immaterial whether the transferor acts bona fide or fraudulently in making the representation. What is material is that he did make a representation and the transferee acted on it and thus has been misled. In other words the doctrine applies only when the transferee has been misled into believing a false representation and not otherwise. The doctrine also applies in cases where the transferor has a duty to speak and he fails to do so. Where a person sold the property as an agent of the widow, and later became her heir, the doctrine did not apply, as there was no erroneous representation (PeyareLal v Misri AIR 1940 All 453)

A transfer for consideration

The doctrine of 'feeding the grant by estoppel' is applicableonly to the transfers of properties for value. This section is not applicable where the transfer is gratuitous, i.e. without consideration. Thus, the provisions of this section are not applicable to transfer of property by way of a gift where the donor has no present fixed right at the date of transfer, making it a void transaction.

*At the option of the transferee*

The transfer becomes valid when the transferee exercises the option and the title of the transferor becomes perfect. Where the official receiver transfers property before it vests in him, the implied covenant will be treated as erroneous representation, and the purchaser's title would be complete as soon as the property vests in him. Similarly where a partner sells the property of a firm in his right and subsequently on the dissolution of the firm is allotted the same property, the transferee gets the benefit of such allotment. Further, the interest acquired by the transferor does not automatically pass on to the transferee but only when he claims his interest in such property

*A subsisting contract of transfer*

The option of the transfer can only be exercised in respect of an interest acquired by the transferee whilst the contract of transfer "still subsists". If the transferee (purchaser) had repudiated or cancelled that transaction, or had recovered his purchase money, or if the transaction were one of mortgage and the mortgage money had been repaid, then the relation of the transferor and the transferee has ceased to exist, and no claim in respect of the property can be made by the latter.

Exceptions to the doctrine of 'feeding the grant by estoppel'-

*When the transferee is aware of the true transaction*

The benefit of this section cannot be claimed by the transferee if he did not believe in or act upon the representation. There doctrine of estoppel does not operate when both the parties are aware of the true transaction. Accordingly, if he is aware of the defect in title of the transferor, he cannot get the benefit of Sec. 43. Thus, when an undivided Hindu father had two sons A and B. A who was entitled only to 1/3 of property, mortgaged ½ of property to C, who knew that A was entitled to 1/3.Later, A's father died and A having become entitled to a half share, C sued on the mortgage seeking to make A's half share liable, it was held that C could avail only 1/3 share.

*When the transfer is forbidden by law*

The provisions of sec. 43 does not apply if the transfer is invalid as being forbidden by law or contrary to public policy. Section 43 does not operate on illegal transactions. Transfer by a minor or lunatic also do not qualify for the application of sec. 43.

**Q.8 Write in detail a note on Doctrine of LisPendens as contemplated in Section 52 of Transfer of Property Act?**

Ans. The term Les means Litigation and Pendens meaning Pending. Thus it means pending litigation, it express in the maxim- pendente tie nihilinnovature. Means during pendency of litigation nothing new should be introduced. This doctrine prohibit any creation of new title or transfer of property during pendency of litigation, which means this doctrine is prohibited in nature.

Basis of Doctrine-

The basis of doctrine is necessary rather than actual or constructive notice, because constructive notice is the presumption of law that under such circumstances the transferee knowledge of such les pendency.

It is the duty of the transferee he must enquire about the les pendency of the property.

Having being the actual or constructive notice the transferee are made any transaction related to les pendent property it treated the abuse of court of law. And it is in the interest of public policy, there for it is necessity

Essentials of les Pendens.

- There is a pendency of a suit or proceeding
- The suit or proceeding must be pending in a court of competent jurisdiction
- A right to immovable property is directly and specifically involved in the suit
- The suit or proceeding must not be collusive
- The property in dispute must be transferred or otherwise dealt with by any party to suit
- The transfer must affect the rights of the other party to litigation

Right to immovable property is directly and specifically Involved- mere representation of immovable property in the plaint is not enough right in respect of immovable property must in questioned. For ex- A suit is pending before the court of law between a landlord and tenant regarding rent, and if the during the proceeding the landlord transfer the property it would not violate the Doctrine of Les Pendens as the right on immovable property is not questioned.

Following are the suit regard in this section

1. A suit for partition
2. A suit on mortgage
3. A suit for pre-emption
4. Easement suit

Suit most not be collusive In nature- means there should not be mala fide intention, means there is no dispute just for the mala fide intention it evolve.

Exception-

A transfer during the pendency of a suit may be sanctioned by the court in which the suit is pending, provided the order must not obtain fraudulently.

Effect of Doctrine-

The transferee is bound by the order of court.

**Q9. What do you mean by fraudulent transfers as per provisions of Transfer of Property Act?**

Ans. Every owner of property has right to transfer his property as he likes, but the transfer must be made with bona fide intention. When any transfer made with the intention to defeating the interest of creditor or interest of any subsequent transferee.

Nature

When the transfer is made with fraudulent intention, the object of transfer is mala fide in the eye of equity and justice though it is valid in law. It is not void but voidable.But S53(1) does not apply where the transfer is in itself void. This section makes a valid transfer void at the option of creditor after the property had already vested in transferee. The suit under this section must accept the validity of the transfer first and then proceed to get it invalidated.

Essential Conditions of Fraudulent Transfers.

1. There is a transfer of immovable property
2. The transfer if fraudulent

There is a transfer of immovable property - The doctrine applies only when there is a transfer of property within the meaning of S5.

However, Relinquishment is not transfer of property. Dissolution of partnership is also not regarded as a transfer under this section. A deed of wakf executed with the object of making the property inalienable and beyond the reach of creditor was held a transfer within the meaning of this section.Partition also not cover under transfer so this section does not apply on it.Sham, Benamitransaction are also out of the purview of this section as the sham transfer means fictitious transfer, which is not real a fake transfer.

The transfer is fraudulent- this section applies only when there is fraudulent transfer.

Intent to defeat or delay- the transfer made with the intention to defeating or delaying the interest of creditor, the only interest of creditor in the debtor ‘s property is that he can recover his money form that property in case the debtor fails to repay it personally.

Preference to one creditor-if there are several creditor, and transfer in favour of one creditor does not amout to an intention to defeat or delay in other creaditor.

Exp- A , who has taken load from B, C and D, and transfers certain property in favour of B, it does not mean he is with intent to delay with other creditor.

Transfer is voidable by creditors-The option remain with creditor to make the transation void, if he deem fit to continue the transfer the transfer remain valid till.

Burden of proof- the burden of proof lies with creditors.

Transferee in good faith- This section also protect the right of transferee if he acted in a good faith.

Example

A takes a loan from the C and fails to pay the loan. C sues him in a Court to get back his debt. A knows that his property will be applied by court for repayment of his loan. Meantime, he transfers his property to a friend who simply holds the property on behalf of the transferor. Here, property is transferred to his friend with fraudulentintention.

**Q-10 Write down a short note on the doctrine of Part Performance ?**

Ans. Doctrine of part performance is an equitable doctrine, it based on the Maxim equity looks on that as done which ought to have been done.
Means equity treats the 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, form the movement the agreement has been made , though all the legal formalities for example registration of contract have not been yet completed.

This doctrine protect the transferee who has done his part or willing to perform his part, he can not be distitle on the basis of the legal formalities has not been done.

For example –

A sale his house to B, and get the consideration against the house and B also takes the possession of the house a sale deed has been made but it not being registered. A again Sale his house to C, and C get it registered, and now C try to eject B. Here law would not help to B, but equity would help him.

Part performance before 1929

Before 1929, English equity of part performance was neither certain nor uniform, In Mohamman Musa v/s AghorekumarGangualy, Privy Council applied this doctrine in the matter of Razinama of Land distribution.

But in Arrif v/s Jadunath, Privy Council, changed his opinion and held the equity of part performance can not be overruled of Indian Registration Act.

Scope in India

It is an enacted law in India, but it is not an application of English Equity, it is almost same as PC laid down in Mohammad Musa case, with certain restrictions, in two aspects

1. English equity also protect the interest of such defendant who has taken possession on the basis of oral agreement, while in S53 A, the Agreement must be in writing.
2. EQ, also gives a right of action against the evictor but S53A, gives no such rights.

Essentials

1. Written contract for the transfer of immovable property ( Transfer for consideration, for Movable property, and must be valid contract)
2. Transferee takes possession of the property under the contract ( the possession must be in furtherance of contract, some act in furtherance of contract, taking possession is not only the method of part performance of contract. If the transferee is already in possession of the property then, after the contract of transfer, he has to do some further act in part performance of that contract. In order to attached S53A)
3. The transferee either performed his part or willing to perform.

Nature of transferee rights

No title or interest in property

- The section doe not confer any interest or title, just protect the right of transferee form ejection if the property in his possession.
- ***It is a statutory bar on the transferor that he cannot dispossess the transferee if he possess the property***

***Passive equity no right of action***

- ***section does not give to the transferee any rights of action. It provides merely a right of defense. It is shield not a sword***

***Right of subsequent transferee for value***

***Section protect the interest of subsequent transferee for value without notice of previous transferee's right of part performance. A own a land and contract to sale to B, the contract is unregistered and in part performance B possessed the land, the transferor and or any other person cannot dispossess B form that land.***

***But when A sale this land to C, and C dully registered the sale deed, C has a right to dispossess to B form such land, if C has not knowledge of B's part performance.***

**Q.11 Explain the concept of Mortgage as provided under Transfer Of Property Act? And how mortgages are made?**

Ans. 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.

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.

**Q12 Explain the various modes of mortgage as provided under the Act of 1882?**

Ans. Various types of mortgages as provided under the Transfer of Property Act are as follows:-

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.

**Q.13 Write down a short note on mortgagor's right of redemption and clog on redemption?**

Ans. Right of redemption.--

The most important right possessed by the mortgagor is the right to redeem the mortgage. Under this section, at any time after the principal money has become due, the mortgagor has a right on payment or tender of the mortgage-money to require the mortgagee to reconvey the mortgage property to him. The right conferred by this section has been called the right to redeem and a suit to enforce this right has been called a suit for redemption. In English Law, the mortgagor's right to redemption contained in for Equity of redemption.

This remedy is available to the mortgagor only before the mortgagee has filed a suit for enforcement of the mortgage. Subsequent to the filing of the suit, this remedy is not available.

Clog on Redemption.

The right of redemption is, therefore, invadable in the sense that it cannot be denied to the mortgagor even though he may by express contract abandon his right to redeem the property. Equity in its insistence upon the principle that a mortgage is intended merely to afford security to the lender, has held an agreement which prevents redemption as void.

It should be noted that the doctrine of clog on redemption applies only to dealings which take place between the parties to a mortgage at the time when the contract of mortgage is entered into. It does not apply where they subsequently vary the terms upon which the

mortgage may be redeemed.

Redemption involves two things : (a) re-transfer of the interest which had been originally transferred to the mortgagee, and (b) delivery of the possession. Both these things are done by virtue of the terms of mortgage, and in pursuance of an agreement between the parties. Thus, the re-transfer of the interest is also by virtue of an agreement.

Under the Indian Law, the right of redemption is a statutory right which cannot be fettered by any condition which impedes or prevents redemption. Any such condition is void as a clog on redemption. The Legislature has quite advisedly not used any such words as "in the absence of a contract to the contrary" in Section 60 with a view to prevent the mortgagor from contracting himself out of his right of redemption at the time of the mortgage. It is, therefore, manifest that the right cannot be clogged.

Clog on equity of redemption is a matter of fact in each case.

(1) Condition of sale in default.-- The courts will ignore any contract the effect of which is to deprive the mortgagor of his right to redeem the mortgage. Accordingly, if one of the terms of the mortgage is that on the failure of the mortgagor to redeem the mortgage within the specified period, the mortgagor will have no claim over the mortgaged property and the mortgage deed will be deemed to be a deed of sale in favour of the mortgagee, it cannot be given effect to. It plainly takes away altogether the mortgagor's right to redeem the mortgage after the specified period. This is not permissible for " once a mortgage always a mortgage" and therefore always redeemable.

(2) Long term for redemption.-- A long term is not necessarily a clog on redemption. In Gangadhar v. Shankarlala, it was held by the Supreme Court of India that the terms in the mortgage that it will not be redeemable until the expiry of 85 years was not a clog in the circumstances of the case.

(3) Stipulation barring mortgagor's right of redemption after certain period.
If there is a stipulation which bars mortgagor's right of redemption after certain period, the stipulation is treated as a "clog" on the mortgagor's equitable right of redemption.

(4) Condition postponing redemption in case of default. --
In Mohammad Sher Khan vs. Seth Swami Dayal, the mortgage was for a term of five years with a condition that if the money was not paid, the mortgagee might enter into possession for a period of twelve years during which the mortgagor could not redeem. It was held that such a condition was a clog because it hindered an existing right to redeem.

(5) Restraint on alienation.--
A stipulation that the mortgagor shall not alienate the mortgaged property or shall not take loan on the security of the mortgaged property has been held to be a clog.

(6) Redemption restricted to Mortgagor.--
An agreement that redemption should be available to the mortgagor, and not to his heirs has been held as a clog.

(7) Penalty in case of default.--
Stipulation to charge at enhanced rate of interest from the date of mortgage, in case of

default in payment, has been held to be a clog.

There is now no rule in equity which precludes a mortgagee.... from stipulating for any collateral advantage: provided, such collateral advantage is not either (i) unfair and unfair and unconscionable; or (ii) in the nature of a penalty clogging the equity of redemption, or (iii) inconsistent with the legal or equitable right to redeem."

It is a right of the mortgagor on redemption, by reason of the very nature of the mortgage, to get back the subject of the mortgage and to hold and enjoy as he was entitled to hold and enjoy it before the mortgage. If he is prevented from doing so or is prevented from redeeming the mortgage, such prevention is bad in law. If he is so prevented, the equity of redemption is affected by that whether aptly or not, and it has always been termed as a clog. Such a clog is inequitable. This does not countenance it. Long term for redemption by itself, is not a clog on equity of redemption.

Whether or not in a particular transaction there is a clog on the equity of redemption, depends primarily upon the period of redemption, the circumstances under which the mortgage was created, the economic and financial position of the mortgagor, and his relationship vis-a-vis him and the mortgagee, the economic and social conditions in a particular country at a particular point of time, custom if any, prevalent in the community or the society in which the transaction takes place, and the totality of the parties, the time, the situation, the clauses for redemption either for payment of interest or any other sum, the obligations of the mortgagee to construct or repair or maintain the mortgaged property in cases of usufructuary mortgage, to manage as a matter of prudent management, these factors must be correlated to each other and viewed in a comprehensive conspectus in the background of the facts and the circumstances of each case, to determine whether these are clogs on equity of redemption.

Exercise of the right of redemption

The mortgagor's right of redemption exercised,--
(i) by paying or tendering mortgage-money to the mortgagee outside the court, i.e. Privately;
(ii) By depositing the amount in the court; and
(iii) By a suit for redemption, payment or tender.
Before redemption can be claimed the mortgage money must have been : (i) Paid, or (ii) tendered and the payment or tender must have been made at the proper time and place. Payment may be made on the mortgage himself or his authorized agent. When there are several mortgagees, the payment should be made to all of them jointly.
Tender means an unconditional offer to pay the money under such circumstances that the mortgagee may receive the money there.

Mortgagor's rights on redemption

The mortgagor's rights on redemption are, -

(i) delivery of the mortgage-deed and documents of title relating to the mortgaged property,
(ii) Possession, and
(iii) reconveyance or acknowledgment.

**Q.14 What are the rights and liabilities of mortgagor and mortgagee?**

Ans. Rights of Mortgagor - Rights of Mortgagor arc

I Right to Redeem -- It includes the three reliefs which the mortgagor is entitled to under Cls. (a) (b) and (c) of S. 60..un payment or tender at proper time and place of the mortgage money. Thus italo any of the reliefs enumerated under clauses (a) (b) and (c) of S. 60 S claimed in a suit, the suit can be taken as suit for redemption.

2. Mortgagor may Require the Mortgagee to Assign the Marriage to a Third Person - According to S. 60 (a) where a mortgagor is entitled lo redemption, he on the fulfilment of any condition on the fulfilment of which he would he entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage debt and transfer the mortgage property to such third person mortgage may direct and the mortgage shall be bound to assign and transfer accordingly, the

3. Right to Inspection and Production of Documents. According toS. 60 (b) a mortgagor has a right to inspection and copies of deeds of title relating to the mortgaged property which are in the custody of the mortgagee. The cases which denied this right of inspection are no longer good law

4. Right to Redeem Separately or Simultaneously -- According to S. 61, a mortgagor who has executed two or more mortgages in favor of the same mortgagee shall, in the absence of a contract to the contrary, when the principle money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage separately, or any two or more of such mortgages together.

5. Right of Usufructuary Mortgagor to Recover Possession-S. 62 provides that where the mortgage is authorised to pay himself the mortgage-money out of the rents and profits of the property, the mortgagor can recover possession only when such money is paid, not by him in cash or otherwise but out of the usufruct of the property. In such a mortgage, no term can possibly be fixed because none can say with any precision as to when the mortgage debt will be paid off out of the usufruct.

If therefore, is entitled to recover possession even before the expiry of the term if he can show that the mortgage-debt is already paid off is fixed at all, it is not of the essence of contract, and the mortgagor is entitled to recover possession even before the expiry of the term if he can show that the mortgage debt is already paid off.

6. Right to Receive Accession to Mortgaged Property-S. 63 refers to the mortgagor's right to accessions made by the mortgagee. The section deals with (0) Natural accessions. (ii) Acquired accessions which are separable. (ii) Acquired accessions which are not separable.

(i) Natural Accessions - They are additions to the security and becoming incorporated in it and are subject to redemption. For instance, where the area of village mortgaged without stipulation of boundaries was increased at a survey settlement, the mortgagor was on redemption entitled to the increase.

(ii) Acquired Accessions which can be Separated - The rule as regards the accessions

acquired by the mortgagor depends upon whether they are separable or inseparable from the mortgaged property. If they are separable, the mortgagor is not bound to take them. But if he chooses to take them, he must pay the mortgagee the expense of acquiring them.

(iii) Acquired Accessions which cannot be Separated - If they are inseparable, the mortgagor cannot help but taking them on redemption. In such a case, however, the mortgagor is not always liable to pay for them.

Where the acquisition was necessary to preserve the property from destruction, forfeiture or sale or was made with his consent, he is bound to pay its cost. For Example, if a mortgagor, makes necessary repairs to a well with the consent of the mortgagor, the later must pay the cost of the repairs.

7. Improvements to Mortgaged Property-According to S. 63(a)the mortgagor is liable to pay the cost of the improvements only if they were:

(i) Necessary to preserve the properly from destruction or deterioration; or
(ii) Necessary to prevent the security from being inadequate; or
(iii) Done under the orders of a public authority such as a Municipality or Town Area Committee, GaonSabha etc.

In any of these cases, the mortgagor will also be liable, as in the case of accession, to pay interest on the cost of the improvements at the rate payable on the principle debt, or where no rate is fixed, at nine percent per annum.

8. Renewal of Mortgaged Lease-According to S. 64 where the mortgaged property is a lease, and the mortgage obtain a renewal of the lease, the mortgagor, upon redemption, shall in the absence of a contract by him to the contrary, have the benefit of the new lease.

Mortgager's Liabilities - With regard to the liabilities of mortgagor, they are all grouped together in two sections of the Act. Viz. 65 and 66. The liabilities arise out of covenants specified US. 65 and deemed to be implied in every mortgage unless, as in the case of implied covenants by a vendor U/S. 55, all or any of these covenants are excluded by the terms of the mortgage. The covenants are for 1) title; (ii) defence of title: (iii) payment of public charges so long as the mortgage is not in possession; (iv) lease; and (v) payment of interest on the prior mortgage and discharge of such encumbrance at the proper time where the mortgage is a second or subsequent mortgage. All these covenants run with the land and can be enforceable by every person in whom the interest of the mortgagee is from time to time vested.

Liability for Waste-S. 66 imposes an imperative duty on the mortgagor while in possession of the mortgaged property not to commit acts of waste as to reduce the value of the security below the standard fixed in the Explanation annexed to the section. This duty is absolute and cannot be displaced by the parties to the mortgage agreeing to the contrary,

S.67 deals with the right of mortgagee. Such rights and liabilities have been given from Ss. 67 to 77 of the Act. The mortgagee has been empowered to recover back his money with interest. Where the mortgagor failed to pay it within the stipulated date the mortgagee becomes entitled to recover the same out of the security.

The following rights have been conferred upon the mortgagee to recover the money

(i) Right to foreclosure or sale. (S. 67)
(ii) Right to sue for the mortgage money. (S. 68)
(iii) Right to exercise the power of sale, if so given. (S. 69)
(iv) Right to get a receiver appointed where sale is to be executed.(S. 69-A)

(v) Right to appropriate the accession to the mortgaged property,(S. 70)
(vi) Right to get the benefit of the renewed lease of the mortgage property in lease-hold. (S.
71).

**Q.15 Difference between mortgage and sale and mortgage and charge?**

Ans. Distinction between Mortgage and charge

1. A mortgage is a security for the payment of debt, chriscurity for the payment of money, supply money may or may not be a deta There may be a covenant to nay in a mortgage but not so ina charge The creation of a charge docs not necessarily imply this content a mortgage docs.

2. A mortgage may be security for the performance of an solo a pecuniary liability but that is not the case with a charge.

3. A charge docs not operate to transfer to the charge-holder any interest in specific immovable property as a mortgage does. It merely gives the charge-holder the right to have a claim satisfied out of a particular property without transferring the property to him. It is only decree for sale that an interest in the property, is transferred in the case of a charge. There is thus, well-marked distinction between the two, that a mortgage docs, whereas a charge does not involve a transfer of an interest in specific immovable property.

4. A mortgage must be executed in respect of a specified property, but a charge may be created upon the wealth and property of a person, i.e. unspecified.
5. A mortgage can only be made by act of parties, whereas a charge may arise cipher by act of parties or by operation of law.

6. A mortgage gives rise to a right in rem but a charge docs not create any such right; the latter is available only against a particular set of persons i.e., persons who are affected with notice of the charge. In some cases a charge becomes a right in rem only when a decree has been obtained to that effect, but this view is not open to criticism and a Full Bench decision of the Oudh Court has held that there is no difference in principle between a charge by a decree and one created by a contract.

7. A charge is not, like a mortgage, subject to redemption of foreclosure.

Distinction Between Mortgage and Sale:

1. The form of the transaction is not the final test of determining whether it is sale or mortgage. The true test is the intention of the parties in entering into the transaction. The court must find substance behind the form.

2. If the parties intended a permanent transfer, the transaction would be a sale even though the deed happens to be in form of mortgage.

3. The question whether a deed is mortgage or sale is purely one of fact. In the determination of this question on the construction of the deed very little assistance can be derived from the construction put on different documents by the courts in decided cases.

4. A mortgage is nonetheless a mortgage because its terms are onerous.

5. A mortgage does not cease to be a mortgage because its terms are such as to render redemption impossible.

**Q.16 Define the concept of Lease as provided in the Transfer of Property Act?**

Ans. As per Section 105 of transfer of property act 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 it 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.

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 recognizes 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.

**Q-17 Write down a short note on determination of a lease?**

Ans. Determination of Lease-According to S. 111 a lease may be determined the following circumstances:-

1. By lapse of time – Lease is transfer of demise for a certain period of time. After the expiry of the period specified in the lease, the lease is automatically determined. However, if there is a stipulation for its renewal the lease continues even after expiry of

the fixed period. A lease with stipulation for renewal continues as long as the conditions for its renewal are being fulfilled.

2. By Happening of Specified Event - The term of a lease may be made subject to certain condition such as happening of some specified event. If the term is limited conditionally on the happening of a future event, the lease determines upon the happening of that event. For Instance, where a lease is made for a term of thirty years or upon the death of lessee whichever is earlier, the lease shall come to an end if lessee dies before expiry of thirty years. A lease for the life of tenant determines upon the death of the tenant. A lease for the period of war' comes to an end upon declaration of peace.

3. Termination of Lessor's Interest - Where the lessor's own interest in immovable property is limited, the lease comes to an end upon the termination of lessor's interest. Thus, where a lessee sub-lets the property, the sub-lease comes to an end upon the death of lessee.

4. By Merger- Merger means meeting of one interest with another interest. When a limited interest becomes absolute interest, there is merger because smaller interest merges with larger interest. During tenancy, a tenant has only a limited interest namely, 'right to enjoy the property (house). If the landlord makes gift of or, sells the tenanted house to the tenant, the tenant does not remain a tenant; he becomes owner of the house.

5. By Express Surrender-Surrender is opposite of merger. In a merger, a larger interest is merged with smaller interest whereas in surrender the smaller interest unites with larger one. But, in both, the lease is determined because two interests premises before expiry of the term, lessee's smaller interest (right to enjoy property) reverts back to lessor's reversion (larger interest).

6. By Implied Surrender-Surrender is implied if it takes place by operation of law. By operation of law, there is surrender (1) by creationa new lease or, (ii) by relinquishment of possession. When a lessee acces from the lessor a new lease of the same property which is already leased to him, there is implied surrender of the earlier lease. The former lease i thereby impliedly determined. When a lessee accepts an office inconsistent with lease, there is implied surrender because any possession by servant is treated as possession by his master.

For implied surrender, delivery of possession by the lessee is necessary. The possession must be left by lessee and accepted by the lessor The delivery of possession may either be actual or constructive, For Example, there is some dispute between a landlord and the tenant then hands over the keys of the house to landlord who takes it. This is implied surrender and the tenancy is determined.

7. By Forfeiture - Forfeiture of a lease means loss of lessee's right to use the property by some fault on his part. A lease is determined by forfeiture on the following grounds:

(a) Breach of express condition by lessee.

(b) Denial of landlord's title.

(c) Insolvency of the lessee.

In the above-mentioned cases, there is forfeiture but the lease is not determined ipso facto. When the lessee commits any lapse on his part, the lessor gets right to forfeit the lease before expiry of the term. But, for determination of lease, written notice by lessor must be given to the lessee.

8. By Expiry of Notice to Quit.-U/S. 106 it is provided that for termination of periodical leases e.g., leases from year to year or month to month, notice is necessary. Where the term is fixed, no notice is required because such leases determine by expiry of the term under Clause (a) of S. 111.In permanent lease, no question of determination arises. Where notice is necessary to terminate the lease, the lease is determined after expiry of the notice to quit. In year to year leases the notice expires after six months and in month to month leases, the notice expires after fifteen days.

**Q.18. Explain the concept of Sale as provided under Transfer of Property Act?**

Ans. 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 asale there is transfer of all the right sin the property sold, no rights in respect of property are lifewith 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 totransferee.

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 ofhis 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 ascompared to the market value of property.

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 calledpurchaser. 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. Theseller 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 theproperty. Since only ownership may be transferred in a sale, therefore, the seller must be ownerof property at the time of effecting the sale. A tenant is not competent to sell the property underhis 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 totransfer a non-transferable property.

The purchaser may be any person provided he is not disqualified to purchase a propertyunder any law enforced in India. For example, a Judge, a legal practitioner or an official of theCourt is incompetent to purchase actionable claims under Section 136 of this Act. Althoughminor is not competent to contract but, he is a competent purchaser. Sale in favour of minorvalid.

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. 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 pricemust be fixed or referred in the sale deed Its payment is not necessary for completion of thetransfer but its reference is necessary. The price may be paid at the time of execution of thesale deed. It may be paid in advance or after execution of the deed. Some part of it may also bepaid 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 aregistered sale deed may not be regarded as sale.

Conveyance: Mode of Transfer

Sale is transfer of ownership of an immovable property. Property therefore must betransferred from seller to purchaser. Part two of Section 54 provides two modes of Transfer ofProperty: (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 notessential. 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 ofsale of tangible immovable property of value less than rupees one hundred has beenprovided 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.

**Q.19 What are the rights and liabilities of buyer and seller?**

Ans. Rights and duties of seller and buyer: section 55

Section 55 deals with the respective rights and liabilities of seller and buyer in the absence any contract to the contrary That is to say the rights and liabilities as alven 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) Disclosure of Material Defects (Section 55 )

Before completion of sale, the seller is bound to disclose to the buyer and latentmaterial 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 isknown 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 caveatemptor (purchaser be aware) shall apply. Under this section the seller has duty todisclose only latent material defect. Defect is latent when it cannot be seen or discoveredby a man exercising ordinary prudence and care. A latent defect is hidden or concealeddefect For instance, underground drain which gasses through the land sold would be alatent 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.

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, Inthe.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 the sunny Technically, this is known as linezolid covenanted title

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 thedocuments with him.

b) Where the whole of such property is sold to several buyers the person whopurchases 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 beneficialinterests of the property. It may be mentioned thal sale is completed only upon

the transfer ofownership. Until ownership is transferred, the seller continues to be owner and as such hehas 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 ofsale 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 rightto recover the unpaid purchase money from out of the property. This is called as a statutorycharge 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 :

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, tho 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 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

**Q.20 Define the concept of Gift as contemplated under TPA and can it be revoked any time ?**

Ans. A gift is generally considered as the exchange or transfer of ownership of any property from one person to another where the sender willingly transfers his/her property to the receiver without any compensation i.e., without considering any monetary value. A gift may become revoked and void by law when the essential elements of a gift are not implemented properly.

According to Section 122 of Transfer of Property Act,1882 -*"A Gift is the transfer of* certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor or guarantor or sender, to another, called the donor, and accepted by or on behalf of the donee or guarantee or receiver." Any gift may be void and suspended if the rules and regulations of giving and taking a gift are not

observed properly. For Example: If the receiver or donee of any gift dies before accepting it although the sender or donor have done proper intention and delivery to give that gift to the donee then that gift may be void by law because of lack of acceptance of the done

But, the term "Gift" is defined differently in Mohammedan Law (Muslim Law in India) from Transfer of Property Act, 1882.

Essential elements or Conditions of a gift:
Some essential elements or conditions are required to make a gift legally approved. These are:

1. Absence of Consideration:

A gift should be legally approved when the donor or guarantor gives the gift to the donee or gurantee without any consideration i.e., without taking any compensation or monetary value. Example: Mr. X wants to gift his private car to his employee Mr. Y for his good job performance without taking any cash or monetary value for that car.

2. Parties of a Gift:

According to law, there should be two legal parties for giving and taking a gift. These are:

i) Donor or Guarantor:

The person who is involving in giving a gift is known as donor or guarantor. Example: Mr. X has given a Nokia N8 Smartphone as a gift to Mr. M at his birthday. Here, Mr. X is the donor of the gift of Nokia N8 Smartphone.

ii) Donee or Guarantee:

The person who is involving in taking a gift from donor is known as donee or guarantee. Example: Mr. X has given a Nokia N8 Smartphone as a gift to Mr. M at his birthday. Here, Mr. M is the donee of the gift of Nokia N8 Smartphone.

3. Subject matter of the gift:

The object which is to be given as a gift to the done by the donor is considered as the subject matter of the gift. The subject matter of the gift must be in form of moveable property or immovable property. A future property shall not be considered as the subject matter of the gift.

i) Moveable Property as a Gift:
Moveableproperty is a kind of object which can be moved from one place to another. It can also be called personal property or private property. Any donor can legally gift his/her personal moveable property to the donee. It may be tangible in nature such as Mobile Phone, Private Car etc or intangible in nature such as Share, Bond etc.

ii) Immoveable Property as a Gift:

Immoveableproperty is a kind of object which can't be moved or transferred from one place to another. For Example: Land, Building etc real estate based object. Any donor can legally gift immoveable property to the donee by a written deed or agreement without taking any compensation.

4. Intention or Declaration of the donor:

When the donor of any gift will have the intention or declaration to give any moveable or immovable property as a gift to the done then that gift will be legally approved. If the donor wants to give a gift in future to the donee, then he/she have to make a promise to the donee by making a legal contract or agreement. For Example: Mr. B has an intention to give a HP Laptop to his son Master C (currently 16 years old) during 18th birthday celebration of Master C. Thus, Mr.B can't give HP Laptop as a gift to his son until his son's 18th birthday appears.

5. Proper delivery or Transferability of the gift:

A gift should be legally valid when the donor of any gift shall deliver or transfer the gift according to his/her intention to the done within the promised time. For Example: Mr. B who has an intention to give a HP Laptop to his son Master C(currently 16 years old) during n birthday celebration of Master C should be legally valid when that laptop will be delivered or transferred to his son on 18th birthday of his son.

6. Acceptance of the gift by the donee:

When the donee of any gift will accept the gift from intention and delivery made by the donor on the promised time then that gift should be legally valid. Otherwise, that gift should be legally invalid.

Reasons of Revoking or Suspending or Voiding a Gift by Law:

A donee or donor can revoke or suspend any future gift but a gift which is already delivered and accepted can't be revoked or suspended or void. According to Section 126 of the Transfer of Property Act, 1882,-Any gift may become revoked or suspended or void for following reasons:

- If donee want to get a gift like Laptop from donor on a specific event like Birthday but the donor has not have intention to give any Laptop on birthday of the done but has been forced to give that gift then that gift shall become legally revoked or suspended or void.

- If the donee does not want to get any gift from the donor but has been forced to get that gift by the donor then that that gift shall become legally revoked or suspended or void.

- If the subject matter of the gift is illegal and full of debts then that gift shall become legally revoked or suspended or void.

- If both donor and donee have intention to suspend any gift then that gift shall become legally revoked or suspended or void

- If any gift is presented to the donee with misrepresentation and fraud information made by the donor then that gift shall be legally revoked or void or suspended.

- If any gift contains compensation or consideration made by donor or donee then that gift shall be legally revoked or void or suspended.

- If the donor of any gift dies before delivery then that gift shall be legally revoked or void or suspended.

- If the donor or the donee of any gift is minor or disqualified person then that gift shall be legally revoked or void or suspended.

Thus, any gift may become legally void or suspended or revoked.

# INVESTMENT & COMPETITION LAW-308

## UNIT 1

**Question 1.Write a note on recognition of stock exchange under Securities Contract (Regulation) Act 1956.**

**Ans** - A stock exchange is that organization consisting of various people which was created to achieve the objective of the controlling, assisting or regulating the dealing, purchasing or selling the securities in the market. Such a body may or may not get incorporated.

Further, SEBI and SCRA are required to provide recognition to such a body so that it can fulfil various essentials such as by-laws, constitution, having a governing body, procedure for application, filing of periodicals, rules and regulations to list a few.

RECOGNITION OF STOCK EXCHANGE

According to sec 3, as provided in the Securities Contract Regulation Act, 1956, there are certain requirements for getting a stock exchange recognized. It has to comply with the procedure laid down such as making an application to the central government according to the format as prescribed. After the central government receives an application from the stock exchanges to get recognized, inquiry can be conducted by the government along with the other conditions as laid down by the Act.

The government has to announce the recognition of stock exchange with the help of getting this news published in the Official Gazette. If the application is to be rejected, the chance should be provided to the applicant to represent his/ her matter and henceforth, complying with the Principles of Natural Justice. There can be no amendment in any matter relating to the securities exchange without getting the opinion of the central government with respect to that particular matter.

APPLICATION OF RECOGNITION OF STOCK EXCHANGE

For getting any stock exchange recognised, an application as per the prescribed mode has to be made to the central government. Such applications with the subject head of recognition of stock exchange should be attached with a copy consisting of all the bye-laws, which were drafted to regulate and control the contracts entered by it along with a copy of other rules which speaks about the constitution of the exchange in general but limited to the following in particular:

Duties and powers of those who are in possession of some office of the stock exchange

Constitution of the body that will be used to govern the stock exchange

Powers vested with the management of the exchange and the procedure which is to be followed while getting a business transacted

Procedure for getting the various class of people admitted into the stock exchange as well as their membership, qualifications, expulsion, suspension, readmission and exclusion of members there into or therefrom

The manner through which the partnerships are getting registered as the members of the stock exchange majorly in those matters where the laws lay down for the membership, appointment of authorised clerks, representatives and their nomination

FEES FOR APPLICATION

Whenever there is an application for getting the stock exchange recognized, it has to be accompanied with some fees. The amount as required by such fee is Rs five hundred and it is to be done in the SBI or treasury or RBI.

GRANT OF RECOGNITION TO STOCK EXCHANGE

According to section 4(1) of Securities Contract Regulation Act, 1956, after the receipt of the said application, the central government may conduct an inquiry in connection with the application and upon the receipt of further information, it might find the requirement of the following:

That the by-laws as well as the rules, which were drafted for the stock exchange, are in line with those conditions that are prescribed for simultaneously fulfilling the objective of safeguarding the investors and ensuring fair dealing.

That the stock exchange is ready to work according to any other constraint put by the government, which can be done only when the body that governs the stock exchange is consulted. Further, after considering the area that the stock exchange will serve, nature and type of the securities that will be dealt by the stock exchange, its standing and any other parameter depending upon the requirement that can get imposed for fulfilling the objects as stated by this Act

That by providing any stock exchange with the status of 'recognised stock exchange', the purpose of interests of the general public, as well as that of the trade, is fulfilled. It may also provide the stock exchanges with recognition after fulfilling all the conditions that are attached to it.

The conditions that are prescribed by the central government by virtue of clause (a) of subsection (1) for making the stock exchanges as the recognised one may lead to the inclusion of various other conditions. Some of them are as follows:

Qualification required for getting the membership of the stock exchange

The mode through which the contracts will be entered into and gets enforced between the members of the stock exchange

The central government can represent itself in any stock exchange by stating some individuals that must not exceed three and who will be nominated by the central government

The audit of the exchange and their account is required to be maintained by an individual, who is a chartered accountant by profession. The audit is conducted on the discretion of the government.

WITHDRAWAL OF RECOGNITION

If the central government finds that the withdrawal of recognition granted to any stock exchange as per the provisions of this Act will serve the interests of public or trade in a better way, then a written notice will be served by the central government to the body that governs the management of the stock exchange.

The reason for withdrawal has to be stated in the notice and an opportunity has to be provided to the governing body to make a representation of its case and henceforth, it is a mandate for the central government to follow the rules laid down by the principles of natural justice.

The central government has to make an official and public announcement of the withdrawal of the recognised status by publishing it as a notification in the official gazette of India. The authority to withdraw the status of 'recognised' from any stock exchange is granted to the central government by virtue of sec 5 of the Securities Contract Regulation Act, 1956.

POWERS PROVIDED TO STOCK EXCHANGES

Power to make direct enquiries and to call for returns

By virtue of sec 6 of the Securities Contract Regulation Act, 1956, it is a mandate for every stock exchange to keep the books of accounts preserved for a minimum period of five years. This mandate can be subjected to various inspections conducted by SEBI.

All the stock exchanges with the recognition of central government are required to furnish the periodical returns that relate to its affairs to SEBI. It has been vested with the power to make a call for any explanation or any other information in relation to the stock exchanges as per the necessity.

Further, an enquiry relating to the affairs of the stock exchange and its members can be conducted by people, who are appointed by SEBI and they have to make a report for the same that has to be submitted to SEBI.

Establishment of the trading floor

As per the various terms and conditions that are prescribed by SEBI, any stock exchange can get the additional trading floor established only after getting the prior approval of SEBI.

The power vested with stock exchanges to draft bye-laws for the purposes of regulations and management

The stock exchanges are granted with the power of making bye-laws so that their management can function in a proper way. These bye-laws will also help in getting the contracts regulated and controlled. This power is vested with it by virtue of sec 9 of the Securities Contract Regulation Act, 1956.

PENALTIES AND PROCEDURES

A list containing various acts is prescribed under sec 23 of the securities contract regulation act. Any individual, who ends up doing such acts, is liable to some penalty that gets fixed by

adjudicating officer or a fine up to a maximum limit of twenty-five crore rupees or imprisonment with a maximum period of 10 years. Some of the penalties are as follows:

when an individual fails to enter into agreements with the client

If a person, who was entrusted with the duty of entering into agreements with clients by virtue of any bye-law or this act, defaults on the same, he/ she is liable for some amount of penalty for such a default.

Failure to furnish returns, information etc

There is a class of individuals that are required to provide any document, information, report or returns to any recognised stock exchange as well as to maintain the books of accounts. If they failed to comply with this provision, they become liable for the penalty under the Act.

Failure to redress the grievances of investors

There is a duty vested upon stockbrokers to redress all the grievances that are brought by its members within the stipulated time. If there is any default with respect to this duty, a penalty will be imposed on the stock exchange for the same.

Segregate the money or securities of clients

Any stockbroker with the status of the 'registered stockbroker' has to bear with the consequences if there is any failure on its part to get the money or securities of one or more than one clients segregated. Further, it is barred to use the money collected by virtue of the trading in securities for personal use.

Failure to get the provisions of delisting conditions and listing conditions complied

All the companies have to comply with all the regulations passed by SEBI and other laws of the land. In case, any stock exchange fails to comply with the same has to be penalized.

Failure of acts for which there is no distinct penalty under the SCRA

If an individual ends up doing some act which is not in line with any direction or regulation passed by SEBI, the bye-laws or regulations or rules of any of the recognised stock exchanges or any of the sections of this Act, he becomes liable for the imposition of penalty with a minimum amount of 1 lakh rupees while a maximum of 1 crore rupees.

SEBI is required to appoint an officer, who is possessing the officer not below the rank of division- chief of SEBI. Such an officer will be serving the role of adjudicating officer for conducting an inquiry in the manner as prescribed by the Act. The inquiry will get commenced only when the reasonable opportunity to make the representation of the case is provided.

SAT or Securities Appellate Tribunal is the authority to provide relief against the appeal of any person who is aggrieved by any order passed by SEBI or decision of adjudicating officer or any of the recognised stock exchanges. SAT is required to get the matter disposed of within the period of six months.

**Question 2. Write a note on Regulation of Contracts and Options in Securities.**

**Ans-** A contract that related to or for the sale or purchase of securities is termed as 'contract' according to the Sec 2(a) of the Securities Contract (Regulation) Act, 1956. On the other hand, a contract which entitles a person to sell or buy or deal in securities provides a person with the rights to sell and buy, and also contains a mandi, a teji, a Galli, a teji mandi, a call, a put or a call and put insecurities. Such a contract is known as 'option on securities' as per the sec 2(d) of the Securities Contract (Regulation) Act, 1956.



CONTRACTS IN NOTIFIED AREAS ILLEGAL IN CERTAIN CIRCUMSTANCES

When the volume or nature of the transactions in securities in either of the states in India or any part of India as it may deem necessary is as per the satisfaction of the Central Government or SEBI, it has the power to make sec 13 of SCRA applicable in such parts or states of India. This application has to be done by passing a notification in the Official Gazette of India.

If any of these states or a state or such parts that are not notified in the gazette are not permitted to enter into a contract with any member unless these members belong to any of the recognised stock exchanges. The contract entered by them with any other member will be considered illegal.

The contract entered into by these notified states or areas with the members of one or more than one recognized stock exchanges established in such states or areas are also subject to some terms and conditions. These conditions are as follows:

These contracts will be regulated by those terms and conditions as specified by the stock exchanges in these notified states or areas. They get the power to issue these conditions only after getting the prior approval from the Securities and Exchange Board of India;

There is a requirement of prior approval from the concerned stock exchange which, in turn, is required to take prior approval from SEBI.

These conditions prescribing the procedure for entering into contracts by these states or areas that got notified in the Official Gazette are provided in sec 13 of Securities Contract (Regulation) Act, 1956



ADDITIONAL TRADING FLOOR

Any recognized stock exchange provides the facility to trade in the form of a trading ring outside the area of operation of that exchange. This extra facility is provided to make the investors capable to sell, buy or deal in securities with the help of this trading floor according to the regulatory framework of that exchange. Such an additional facility provided to trade in securities is known as an additional trading floor.

If the stock exchange takes prior recognition of SEBI according to those terms and conditions that are laid down by the said Board, the stock exchange has the power to establish an additional trading floor.

CONTRACTS IN NOTIFIED AREAS HELD TO BE VOID IN SOME CIRCUMSTANCES

If any of these states or areas that got notified in the gazette enters into any contract, which is not in consonance with any of the bye-laws stipulated for these purposes will be held to be void. The extent of these void contracts is as follows:

With respect to the rights of any of the members of the recognized stock exchanges if they had entered into any contract that is not in line with the any of the guidelines, bye-laws, regulations and so on;

With respect to the rights of that particular individual who has participated in the securities market or traded in the securities. While participating in the market, he/ she had full knowledge that these securities are violating the regulations or bye-laws or any other condition as prescribed by the stock exchange or Board.

However, the scope of these void contracts does not extend to cover the right of any other person, who is not a member of these notified stock exchanges, for the recovery of any sum under or for the enforcement of any such contract or with regards to such contracts. If such a person does not have any knowledge in relation to the transactions that are not in consonance with any of the bye-laws, then he will not fall under the domain covered by the void contracts.

MEMBERS MAY NOT ACT AS PRINCIPALS IN CERTAIN CIRCUMSTANCES

A member of any of the recognized stock exchanges is not permitted to enter into any contract in relation to any securities in the form of a principal with any other person, who is not a member of any recognized stock exchange.

However, if any member of the recognized stock exchanges wants to enter into contract in the form of a principal with some person other than the member of any recognized stock exchange, then he has to take the prior approval of such other person and then, he is also required to disclose it in the agreement, memorandum or note for purchase or sale that he is entering into the agreement as a principal. He/ she is also required to secure the consent of another party in writing and within a period of thirty days from the date on which the contract is entered into.

Further according to sec 15 of Securities Contract (Regulation) Act, 1956, there is no requirement of any authority or consent in writing of such other person for closing out any of the outstanding contracts that have been entered into by such other person is not in contravention with any of the bye-laws. This provision is applicable only if the member has already disclosed that he is acting as a principal with respect to such closing out in the agreement, memorandum or note of purchase or sale.

POWERS OF CENTRAL GOVERNMENT OT PROHIBIT CONTRACTS IN CERTAIN CASES

These powers are also exercised by SEBI and RBI. These authorities may prohibit the public of the notified areas or states from entering into any contract for purchase or sale or dealing into any kind of securities only if these authorities are of the opinion that there is no necessity to do away with the undesirable speculations in the securities in any of the notified states or areas.

For this prohibition, the authorities are required to pass a notification in the official gazette. If any contract is entered into after the date of notification issued by the RBI or SEBI shall be deemed to be illegal if it is not in consonance with the above-mentioned guidelines. However, if any person wants to enter into a contract that is not in line with the guidelines, he/ she has to take the approval of the central government.

LICENSING OF DEALERS IN SECURITIES IN CERTAIN CASES

It is barred for any person to carry on the trade to deal in securities either on his own behalf or on behalf of any other person under Sec 17 of securities Contract (Regulation) Act, 1956 is applied on those areas which have not been notified under sec 13 of Securities Contract (Regulation) Act, 1956. However, if any person is willing to trade in the securities, he/ she is required to take the permission of SEBI for the same.

Any notification for the above mentioned will be issued as per the satisfaction of the central government. The conditions that are imposed relating to the trade in the securities will not be applicable to the tasks undertaken by or on behalf of a member of any of the recognized stock exchanges.

CONTRACTS IN DERIVATIVE

The contracts in derivative will be held valid as well as legal only in the context of certain events. Some of the events that are provided by the sec 18A of Securities Contract (Regulation) Act, 1956are as follows:

If a contract is entered into for the purpose of trade on any recognized stock exchange

If a contract has been settled on the clearinghouse of any of the recognized stock exchanges

If the contract is entered between those parties and on those terms that are notified under the official gazette and those which are in line with the bye-laws and the rules of such stock exchanges.

STOCK EXCHANGE OTHER THAN RECOGNISED STOCK EXCHANGE PROHIBITED

Without the prior consent of the central government, it is not permissible for any person to organize or extend his assistance for organizing any event with the motive of performing any contract, assisting in or entering into any kind of securities.

This can be done only by those people who are the members of any recognized stock exchange as per sec 19 of Securities Contract (Regulation) Act, 1956. This provision will be in effect only in those areas or those states that are notified by the central government with the help of the official gazette.

**Question 3. Write a note on listing of securities underSecurities Contract (Regulation) Act 1956.**

**Ans:-** The stock exchange releases a list of various companies that are eligible to trade in the securities. When a company gets itself registered in such a list in order to qualify as a recognized entity to deal with the securities, it is said that the company is a listed company.

The listing of the company sends a positive message to those who are willing to invest their money in the securities market. It is assumed that if a company is listed on any of the recognized stock exchanges, it is financially sound, profit-making and many other impressions favouring the company.

The central government has made a mandate for public limited companies by virtue of Section 21 as of the Securities Contracts (Regulation) Act to get all of its securities listed on any of the stock exchanges in India. This was done with the motive of protecting the interests of the general public that is interested in investing their money in the securities market.

**LISTING OF SECURITIES**

If a company shows interest in getting the securities listed on the stock exchange, an application as per the prescribed format is to be filed with the exchange. This has to be filed before the Offer of Sale, if the mode of issuing securities is an offer of sale or before the prospectus gets issued if the mode to issue securities in the prospectus.

It is important for the company to comply with all the provisions of Companies Act, various forms on the listing of securities provided by SEBI time and again and any other condition, norms and other requirements which are in force and other conditions provided by various Regulation and Bye-laws issued by the government. These compliances have to be made to get the securities qualified for listing as well as continuous listing on the stock exchanges.

APPLICATION IN RESPECT OF OFFERS FOR SALE OR BOOK BUILDING OR NEW ISSUES

Applications or tenders for purchase or book- building or subscription for any kind of offer of sale or any new issue of any security is required to be submitted only if the one, who offers or issues the securities, provides an equal and fair chance to of buying or subscribing. In addition to this, it also offers brokerage to all the members involved in trading on the same terms and conditions.

Before the offering securities or securities for sale are issued, it is required that the offerer or the issuer has to get an in-principal approval for getting these securities listed on the Exchange. This approval has to be obtained from the exchange.

## LISTING CONDITIONS AND REQUIREMENTS

It is the duty of Relevant Authority or Managing Director or Governing Board to make sure that permission for getting the securities listed and trading in the securities has to be given only if the issuer of the securities is in compliance with all the norms or requirements, conditions as provided by all the relevant regulations from time to time. Along with this, it is necessary for the issuers to get the credit of Demat shares and all the physical share certificates despatched to the accounts of those who hold the security and maintain depositories as well.

An issuer of the securities has to comply with the various conditions for listing, norms, and requirements as provided under Companies Act, SCRR, SCRA, Bye-laws, Rules, and Regulations of the stock exchange and the other norms that are provided by SEBI or any other Exchange from time to time. If the issuer has not followed the above-mentioned requirements, the Relevant Authority or Managing Director or Governing Board may refuse to grant permission regarding the admission, dealings or trading in the Exchange.

If the decision on the basis of allotment is taken after consulting with some stock exchange, it is required by the Relevant Authority or Managing Director or Governing Board of such a stock exchange to make the depositories aware about the approval that has been granted for admission to deal in any security on any of the exchanges.

Before the application of the company for getting itself listed gets approved, the company shall get a Listing Agreement executed with the Exchange ion the prescribed form. Companies are also required to make any kind of amendment or addition in the provisions of the Listing Agreements as per the scheme prescribed by the Exchanges or SEBI. These changes, whether amendment or addition, will be applied to the Company only if the provisions of these Listing Agreements contained any of these additions or amendments.

If an issuer offers a scheme of further issue or new issue, the Relevant Authority or Managing Director or Governing Board has the sole authority to grant the permission to trade in the securities on any of the recognized stock exchanges on the same day on all other stock exchanges where securities were admitted to dealings and given permission to trade.

## WHEN ISSUERS ARE REGISTERED OUTSIDE INDIA

The admission of a company to deal with the securities on the Exchange is granted to a body corporate that is funded or to any other entity that is formed or registered outside India is dependent on two conditions. These conditions are as follows:

If such admission will adequately serve the public interest in India; and

If the fund or body corporate or any other entity is ready to follow the provisions of the applicable statute that are in force and any other requirement as prescribed by the Reserve Bank of India or SEBI or the Exchange or any other body formed under any statute.

## APPLICABILITY OF LISTING CONDITIONS AND REQUIREMENTS

Whenever there is a matter related to those funds or body corporates or any other entity that is formed or registered outside India, Relevant Authority or Managing Director or Governing Board are empowered to dispense with or waive any provision of getting the conditions listed in Bye-laws, and Regulations or listing conditions enforced in a strict manner.

This power has to be used only after providing the appropriate reason for doing so. Further, the securities of any fund or body corporate or any other entity, which is not registered in India, are admitted for dealings on any of the stock exchanges only if it is capable to serve any of the public interest or if it is in the interest of trade as per the opinion of the Relevant Authority or Managing Director or Governing Board.

LISTING APPROVAL

The approval may be granted to the issuer by the Exchange for those securities that are supposed to be listed on the Exchange. This approval is subject to the compliance of requirements and norms and the fulfilment of listing conditions and other guidelines issued by the Exchange at the end of the issuer. This form of security is known as listed security.

ADMISSION TO DEALINGS

When a stock exchange grants permission to securities to begin the trade on ATS of the Exchange according to the provisions specified in these Bye-laws or any other Regulation relevant to the trading of securities. Such an event where permission is granted to the securities is known as admission to dealings.

LISTING FEES

The relevant authority of the Exchange or the Board is empowered to fix the fees for getting the securities listed. It depends on the discretion of the Board to determine the value of the rates for listing securities.

DEPOSITS OR FEES TO BE PAID BY ISSUER

There are a lot of people whose securities have been granted admission to dealings. Such issuers are required to pay deposits and listing fees within a stipulated time period. This time period is prescribed by the stock exchange from time to time.

CONSEQUENCES OF NON- COMPLIANCE BY ISSUER

The Relevant Authority or Managing Director or Governing Board has the power to shift the mode of trading to trade- for- trade basis from a normal basis or to pass the suspension of the admission to dealings on any of the recognized stock exchanges that have been granted to the securities.

It is a mandate for the Relevant Authority or Managing Director or Governing Board to provide reasons in writing for the decision taken by them. Further, it is done on account of non- compliance or the breach of any of the guidelines laid down for admission to dealings or for manipulating trading or for manipulating the prices of securities or for any other reason.

The decision taken by the authorities is applicable for the duration as determined by the adjudicating officer. When the period of suspension is about to end, the dealings in the security may be reinstated by the Relevant Authority or Managing Director or Governing Board. The decision taken by the authority will always remain subject to the provisions of SCRR and SCRA.

The decision of getting the trade in any security on the stock exchange suspended or shift in trade to trade- for- trade basis from normal basis has to be taken by Relevant Authority or

Managing Director or Governing Board only when there is a violation of any of the provisions prescribed by the Listing Agreement or due to any action of surveillance or for any other reason. Such a decision has to be made communicated by the Exchange to other stock exchanges on which the securities were listed.

## VOLUNTARY DELISTING BY COMPANY

There is a provision that allows companies to delist their securities from the recognized stock exchange where it was listed i.e. they are allowed to withdraw from the admission to dealings. This provision is subject to the various guidelines, provisions, procedures, and norms that are laid down by the SEBI or Central Listing Authority or Central government to govern the activities of listing or delisting and suspension or trading in securities. These above guidelines have to be complied with.

## BUY-BACK OF SECURITIES BY COMPANY

The Companies Act allows a company or body corporate to buy- back its securities that it has issued earlier. This provision of the buyback is subjected to certain guidelines, requirements, and conditions issued by the Central Government or SEBI on this behalf.

A company that is willing to buy- back its securities has to adhere to these guidelines, norms, requirements, and conditions in a very strict manner. If there is any non- compliance or breach on the part of the company will make it liable for any penalty or action that the authorities of Exchange may deem fit.

## DELISTING ON THE EXCHANGE OR WITHDRAWAL OF ADMISSION TO DEALINGS

The relevant Authority or Managing Director or Governing Board has the authority to take away the admission to dealings on any of the stock exchanges given to any company. The withdrawal of admission to dealings can be done on the ground of non- compliance with or breach of any of the conditions required for continuous listing or on any other ground, which might be prescribed by the regulations or guidelines issued from time to time.

The authorities are required to follow the principles of Natural Justice. They have to provide a reasonable opportunity to the company to represent their case and thus, complying with the principle of audi altrem partem. Further, they are also required to record the reasons for their adjudication in writing and hence, complying with the principle of speaking orders.

## RIGHT TO APPEAL AGAINST DELISTING

Any person, who is affected by or aggrieved from the decisions taken by the authorities of Exchange such as the order to get the securities of a company that has been admitted to dealings on the Exchange delisted, has the right to appeal to SEBI.

The appeal can be filed within a period of thirty days that is to be calculated from the date on which the decision of exchange was notified to the company.

**Question 4:- Write a note on insider trading.**

**Answer :-** Insider Trading is prohibited activity by virtue of subsection (d) of section 12, which is further included in the wide ambit of subsection (e). Even though it cannot be interpreted as criminal activity under the instance of fraudulent and unfair trading such as back running/ front running, it interferes with the trading in the best interest of the company, thereby opposing the object of corporate laws in India.

To ensure the fulfilment of that particular object and prohibit the transfer of price-sensitive information, India regulates the securities market with the help of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992. The principal Insider Trading Regulations were published in the Gazette of India on 19.11.1992 vide S. O. LE/ 6308/ 92 (E).

Since the Act does not specifically define the meaning of 'insider trading' we interpret the prohibition [prescribed in subsection (e)] as a deal involving securities and communications in such a manner which is not in consonance with the provisions of this Act or regulations or rules made thereunder. To make the interpretations further specific we refer to the world wide control of Insider Trading.

The prohibition imposed by Regulation 3 of PIT Regulations is as follows:

On insiders from dealing in securities while they possess unpublished price sensitive information;

On insiders from counselling or communicating such unpublished price sensitive information to any other individual except in the ordinary course of employment, business or profession or under any other law."[2]

Prohibition is also imposed on procuring the unpublished and price-sensitive information in circumstances other than ordinary course of employment, business or profession or under any other law.[3]

Further, there are various regulations against insider trading under Regulation 3B of PIT Regulations and sec 15G of the SEBI Act, 1992. To safeguard the interest of other stakeholders in the company, in context of the 'prohibition on a company possessing unpublished price sensitive information to deal in securities of another company', there are two defences available viz., the defence of takeover complaint acquisition and Chinese wall. However, the burden of proof of the availability of defences is on the entities.

INSIDER

PIT Regulations throws light on the definition of insider such as the person who is in possession of unpublished price sensitive information. Under Regulation 3A of PIT Regulations, a company, which is in possession of any unpublished price sensitive information, is restricted to deal with the associate of some other company or to deal in the securities of some other company.[4]

Further, a connected person is also defined by these regulations as a person who is deemed to be a director of the company or a director of the company.[5] The ambit of the 'connected persons' includes not only employees and officers of the company but also those people who have any kind of business or professional relationship with the company if there is a suspicion that they can be in possession of any such information which is price sensitive in nature. PIT Regulations provide a list of people who are deemed to be connected with a company.[6]

According to the constructive interpretation done by SEBI in the matter of KLG Capital Services Ltd.,[7] insider includes all those persons who are, or were in connection with the company or was deemed to have been connected with the company; and

is reasonably expected that any unpublished price sensitive information in the context of securities of a company is accessible to them, or

have had access to or have received such information that is price sensitive in nature.

PRICE SENSITIVE INFORMATION

As per PIT Regulation, price-sensitive information includes that information which is the connection with a company either directly or indirectly and if such information is published, it is likely that such publication will affect the prices of the securities of the company materially.[8] A list of information that can be considered as price-sensitive is also provided by PIT Regulations.

The context of unpublished price sensitive information is explained by SAT as that information, which is not in knowledge of the people but if it is known, it is capable to affect the price of the scrip of a company, is known as unpublished price sensitive information.

This is inclusive of mergers, amalgamations, takeovers, financial results of the company and intended declaration of dividends- both final as well as interim.[9] The ambit of price-sensitive information also includes that price, which is agreed to be paid to the shareholder of the target company by the acquirer for the substantial acquisition of shares and takeovers.[10]

UNPUBLISHED

Before the amendment brought by SEBI (Insider Trading) (Amendment) Regulations, 2002, both the expressions 'price sensitive information' as well as 'unpublished' were defined together.

It was observed in the matter of Hindustan Lever Ltd. v SEBI,[11] in light of the market speculation on merger as indicated by a large number of press releases during that period, there exist very strong reasons to believe that the impending merger, though not published or formally acknowledged, was in one sense known generally and denial of knowledge by UTI cannot be understood as indicative of market, in general, had no information in this context.

As per the amendment which came in 2002, speculative reports specifically fall under the purview of publication while the concept of 'generally known' is excluded from its domain.

Typically, when the public has access to any information, it is known as published information and this publication can be done through various modes. SEBI prefers when the publication is done with the help of stock exchanges as it is more meaningful and reliable.[12]

MOTIVE IRRELEVANT FOR INSIDER TRADING

It was argued in Hindustan Lever Limited v SEBI[13] that in order to prove insider trading, it is a requirement to establish beyond a reasonable doubt that the transaction was undertaken with the motive of making a profit, gain in order to avoid any loss or to get an advantage.

This argument finds its root on Sec 15J that speaks about the factors which are relevant for quantifying the penalty is the amount of unfair advantage or disproportionate gain. However, the Appellate Authority rejected this contention and agreed with the views of SEBI that there is no bearing of Section 15J on the breach of Regulation 3(1) of PIT Regulations and there is no necessity of avoiding loss or making a profit for proving the charges of insider trading.

On the other hand, in the matter of Rakesh Agarwal v. SEBI[14], it was observed by SAT that it is essential to prove the motive for the charges of insider trading. The above observation was set aside by the Supreme Court in the matter of SEBI v. Shriram Mutual Funds.[15] It was stated that no question arises on the mens rea or the proof of intention by the appellants and it is not an important element to impose a penalty under the SEBI Act or any of its regulations.

PREVENTION OF INSIDER TRADING

Besides the prohibition against unauthorised communication of inside information or insider trading, it is also sought by PIT Regulations to prevent the same and the model codes have been prescribed for prevention of insider trading for the listed companies as well as other organisations, which are associated with the securities market.

These model codes are comprised of various provisions such as the appointment of the compliance officer, pre-clearance of trades above a threshold limit, notification of grey/ restricted list and prevention and preservation of misuse of information being price sensitive in nature.

For regulation of trade in the securities of the market by the employees and officers, a trading period is known as the trading window has to be made available for, during which the employees and officers of the company indulge in trade in the securities of the market.

The penalty is imposed on those who fail to comply with or implement the modal code of conduct.[16] On the other hand, a concept of grey/ restricted list is introduced in the model code that is prescribed for entities other than listed companies.[17]

According to this provision, if any entity or intermediary is handling an assignment in connection with a listed company and is privy to some price-sensitive information, the trading in the securities of such a company is restricted. It is prescribed that any security that

is either being purchased or being sold or even if it is under consideration for sale or purchase by the entity on behalf of the scheme of mutual funds/ its clients, has to be a part of the grey list.

Any organisation is restricted to trade in the securities of the company that is included in the grey list. It was observed that the ambit of the words 'being considered for purchase or sale' is so wide that it is inclusive of all those cases where advice is given for their purchase.[18] The provisions of PIT Regulations are violated if there is a breach of code of conduct.

SAT has observed that model codes are an inalienable part of PIT Regulations. The code cannot be understood as unenforceable or something separate. If the arguments presented by the notice have to be accepted then it would amount to ordaining the status of a lame duck to the board that is vested with the powers only for the stipulation of code of conduct but is deprived of any means to get it enforced on the people

**References**

[1] Sameer C Arora v. SEBI, Appeal No. 83/ 2004, SAT Order dated 15.10.2004

[2] AO Order No. PB/AO- 15/ 2011. In respect of Mr Naval Choudhary, dated 28.02.2011 where a husband (insider) was penalized for communicating the information to his wife.

[3] Technically, Regulation 3 of PIT Regulation is drafted in a manner that 'procuring' unpublished price sensitive information may be argued that no person should be prohibited other than the one who is procuring the information is an insider. But such inconsistency may be ignored with the help of purposive construction. For instance, SEBI Order No. WTM/ KMA/ ISD/ 167/ 11/ 2009, In the matter of soliciting insider information, dated 18.11.2009, where a person used to solicit unpublished price sensitive information on his blog in return for a share in the profits between Rs. 10k and Rs. 1 Lakhs.

[4] The requirement of this separate provision was questioned as a company is a 'person', which is covered within the ambit of Regulation 3 of SEBI (Prohibition of Insider Trading) Regulation, 1992.

[5] Regulation 2(c) of SEBI (Prohibition of Insider Trading) Regulation, 1992.

[6] Regulation 2(h) of SEBI (Prohibition of Insider Trading) Regulation, 1992. See also, DSQ Holdings Ltd. v SEBI, Appeal No. PB/ AO- 16/ 2011, In respect of Mr Neeraj Jain, dated 28.02.2011

[7] SEBI Order No. WTM/ MMS/ ISD/ 18/ 2009, In the matter of KLG Capital Services Limited, dated 22.09.2009. SAT, in appeal, has remanded the matter in Praveen Mohnot v SEBI, Appeal No. 191/ 2009, SAT Order dated 21.20.2010

[8] Regulation 2(ha) of SEBI (Prohibition of Insider Trading) Regulation, 1992.

[9] Rajiv B Gandhi & Ors. v SEBI, Appeal No. 50/ 2007, SAT Order dated 09.05.2008; Supreme court dismissed an appeal in CA No. 5302/ 2008 vides order dated 11. 09.2008.

[10] S Ramesh and S Padmalat Asis Bhaumik v SEBI, [2005] 59 SCL 521 (SAT).

[11] [1998] 18 SCL 311 (AA)

[12] AO Order No. PKB/ AO- 77/2010, Against Manmohan Shetty, dated 09.06.2010

[13] [1998] 18 SCL 311 (AA)

[14] Appeal No. 33/ 2001, SAT Order dated 03.11.2003

[15] AIR 2006 SC 2287

[16] AO Order No. PKK/ AO/ 126/ 2011, Against Shri Raj Kumar Shekhani, dated 20.06.2011. The penalty was also imposed on account of violation of Regulation 3(i) of the SEBI (Prohibition of Insider Trading) Regulation, 1992.

[17] AO Order No. PKB/ AO- 77/ 2010, Against Manmohan Shetty, dated 09.06.2010. See also, AO Order, in the matter of IQ Infotech Ltd., dated 30. 12. 2010.

[18] Informal guidance No. IVD/ ID1/ PKN/ JJ/ 06 dated 08.08. 2006 issued to M/s Prodigy Investment Management.

[19] AO Order No. PKB/ AO- 77/ 2010, Against Manmohan Shetty, dated 09.06.2010 which got upheld in Manmohan Shetty v. SEBI, Appeal No. 132/ 2010, SAT Order dated 27.05.2011.

**Question 5:- Write a note on dematerialization of shares under depositories act 1996.**

**Answer**:- Dematerialized securities are securities that are not on paper and a certificate to that effect does not exist. They exist in the form of entries in the book of depositories. Essentially, unlike the traditional method of possessing a share certificate to the effect of ownership of shares, in the demat system, the shares are held in a dematerialized form. This system works through a depository who is registered with the Securities and Exchange Board of India (SEBI) to perform the functions of a depository as regulated by SEBI.

Under Section 68 B of the Companies Act, inserted by the Companies (Amendment) Act, 2000, it is mandated that every initial public offer made by a listed company in the excess of Rs 10 Crores has to be issued in dematerialized form by complying with the requisite provisions of the Depositories Act, 1996.

Depository system

A major weakness in the Indian stock market has been the lack of depository services on modern lines . Depositories provide for maintenance of ownership records in a book entry form. Before the Depositories Ordinance introduced the depositories system in India, every share transfer required to be accomplished by a physical movement of share certificates to, and the registration with the company concerned.

The two models of the depository system are:

1. Dematerialization, wherein, by operation, there is no physical scrip in existence as neither the individual who owns the shares nor the depository keeps scrips. The depository maintains the electronic ledger of the securities under his control.

2. Immobilization, wherein the physical scrips are held in the depository vaults, supporting the book entry records kept on the computer.

Two types of ownership are contemplated under the depository system and can be briefly put forth as follows:

1. A registered owner is the depository who holds the securities in his name.

2. A beneficial owner is the person whose name is recorded as such with the depository. Though the securities are registered in the name of the depository actually holding them, the rights, benefits and liabilities in respect of the securities held by the depository vest in the beneficial owner.

The depository model is based on the deposit of securities by the owner of the securities with a certified depository. Subsequently, an entry is made in the name of the said owner, manifesting his ownership of the securities upon which the person depositing the securities becomes the beneficial owner in respect of the said securities. The service provided in relation to this by the depository is that of recording of allotment of securities or transfer of ownership of securities in the record of the depositor.

Process of conversion of securities into the demat form

Securities specified as being eligible for dematerialization by the depository in its bye laws and as under the SEBI (Depositories and Participants) Regulations, 1996 (the Regulations) can be converted or issued in a dematerialized form. The process of conversion of securities into a dematerialized form or the issuance of the same in a dematerialized form can be explained thus:

1. Firstly, the issuer company, whose securities are eligible for dematerialization, has to enter into an agreement with a depository for dematerialization of securities already issued, or proposed to be issued to the public or existing shareholders .

2. The investor is given an option to hold the securities in a dematerialized form and it is his prerogative to exercise the option to hold the securities in that manner.

3. The depository enters into an agreement with the participants who are the agents of the depository and co-functionaries in the process of dematerialization of securities .

4. Any person can then enter into an agreement, through the participant, with the depository for availing the services provided by the depository.

5. Upon the entering into such agreement with the depository, the person has to surrender the certificate pertaining to the securities sought to be dematerialized to the issuer. This surrender is effected in the following manner:

(i) The person (beneficial owner) who has entered into an agreement with the participant for dematerialization of the securities has to inform the participant about the details of the certificate of such securities.

(ii) The beneficial owner has to then surrender the said certificate to the participant.

(iii) The participant informs the depository about the particulars of the securities to be dematerialized and the agreement entered into between him and the beneficial owner.

(iv) The participant then transfers the certificate pertaining to the said securities to the issuer along with the details and particulars of the securities.

(v) These certificates are mutilated upon receipt by the issuer and substituted in the records against the name of the depository, who is the registered owner of the said securities. A certificate to this effect is sent to the depository and all stock exchanges where the security is listed.

(vi) Subsequent to this, the depository enters the name of the person who has surrendered the certificate of security as the beneficial owner of the dematerialized securities.

(vii) The depository also enters the name of the participant through whom the process has been carried out and sends an intimation of the same to the said participant.

6. Once the aforesaid process of dematerialization is carried out, the depository has the responsibility to maintain all the records pertaining to the securities that have been dematerialized.

Advantages of Dematerialization

The advantages of dematerialization of securities can be summarized as follows:

A. Share certificates, on dematerialization, are cancelled and the same will not be sent back to the investor. The shares, represented by dematerialized share certificates are fungible and, therefore, certificate numbers and distinctive numbers are cancelled and become non-operative. The depository system and dematerialized securities offer paperless trading and transfer of shares through the use of technology.

B. It enables processing of share trading and transfers electronically without involving share certificates and transfer deeds, thus eliminating the paper work involved in scrip-based trading and share transfer system.

C. Transfer of dematerialized securities is immediate and unlike in the case of physical transfer where the change of ownership has to be informed to the company in order to be

registered as such, in case of transfer in dematerialized form, beneficial ownership will be transferred as soon as the shares are transferred from one account to another.

D. The investor is also relieved of problems like bad delivery, fake certificates, shares under litigation, signature difference of transferor and the like.

E. There is no need to fill a transfer form for transfer of shares and affix share transfer stamps.

F. There is saving in time and cost on account of elimination of posting of certificates.

G. The threat of loss of certificates or fraudulent interception of certificates in transit that causes anxiety to the investors, are eliminated.

Disadvantages of Dematerialization

The disadvantages of dematerialization of securities can be summarized as follows:

A. Trading in securities may become uncontrolled in case of dematerialized securities.

B. It is incumbent upon the capital market regulator to keep a close watch on the trading in dematerialized securities and see to it that trading does not act as a detriment to investors. The role of key market players in case of dematerialized securities, such as stock-brokers, needs to be supervised as they have the capability of manipulating the market.

C. Multiple regulatory frameworks have to be confirmed to, including the Depositories Act, Regulations and the various Bye Laws of various depositories. Additionally, agreements are entered at various levels in the process of dematerialization. These may cause anxiety to the investor desirous of simplicity in terms of transactions in dematerialized securities.

However, the advantages of dematerialization outweigh its disadvantages and the changes ushered in by SEBI and the Central Government in terms of compulsory dematerialization of securities are important for developing the securities market to a degree of advancement. Freely traded securities are an essential component of such an advanced market and dematerialization addresses such issues and is a step towards the advancement of the market.

## UNIT II

**Question 6-Whatmain objectives of the SARFAESI Act.**

Answer:- The SARFAESI Act gives detailed provisions for the formation and activities of Asset Securitization Companies (SCs)and Reconstruction Companies (RCs). Scope of their activities, capital requirements, funding etc. are given by the Act. RBI is the regulator for these institutions.

As a legal mechanism to insulate assets, the Act addresses the interests of secured creditors (like banks). Several provisions of the Act give directives and powers to various institutions to manage the bad asset problem. Following are the main objectives of the SARFAESI Act.

The Act provides the legal framework for securitization activities in India

It gives the procedures for the transfer of NPAs to asset reconstruction companies for the reconstruction of the assets.

The Act enforces the security interest without Court's intervention

The Act give powers to banks and financial institutions to take over the immovable property that is hypothecated or charged to enforce the recovery of debt.

Major feature of SARFAESI is that it promotes the setting up of asset reconstruction (RCs) and asset securitization companies (SCs) to deal with NPAs accumulated with the banks and financial institutions. The Act provides three methods for recovery of NPAs, viz:

(i) Securitization;

(ii) Asset Reconstruction; and

(iii) Enforcement of Security without the intervention of the Court.

The Act, thus brings three important tools/powers into asset management of financial banks and institutions – securitization of assets, reconstruction of assets and powers for enforcement of security interests (means asset security interests). To understand the SARFAESI Act, we should know the meaning of these terms as well.

**Question 7:- What is Securitization?**

**Answer-** Securitization is the process of pooling and repackaging of financial assets (like loans given) into marketable securities that can be sold to investors.

In the context of bad asset management, securitization is the process of conversion of existing less liquid assets (loans) into marketable securities. The securitization company takes custody of the underlying mortgaged assets of the loan taker. It can initiate the following steps:

i. Acquisition of financial assets from any originator (bank), and

ii. Raising of funds from qualified institutional buyers by issue of security receipts (for raising money) for acquiring the financial assets or

iii. Raising of funds in any prescribed manner, and

iv. acquisition of financial asset may be coupled with taking custody of the mortgaged land, building etc.

**Question 8:-What is asset reconstruction?**

**Answer:-** Asset reconstruction is the activity of converting a bad or non-performing asset into performing asset. The process of asset reconstruction involves several steps including purchasing of bad asset by a dedicated asset reconstruction company (ARC) including the underlying hypothecated asset, financing of the bad asset conversion into good asset using bonds, debentures, securities and cash, realization of returns from the hypothecated assets etc.

Reconstruction, is to be done with the RBI regulations and the SARFAESI Act gives the following components for reconstruction of assets: –

a) taking over or changing 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.

**Question 9:- What is mean by 'enforcement of security interests'?**

The Act empowers the lender (banker), when the borrower defaults, to issue notice tothe defaulting borrower and guarantor, calling to repay the debt within60 days from the date of the notice. If the borrower fails to comply with the notice, the bank other financial institution may enforce security interests (means interest of the bank/creditor) by following the provisions of the Act:

a) Take possession of the security;

b) Sale or lease or assign the right over the security;

c) Appoint Manager to manage the security;

d) Ask any debtors of the borrower to pay any sum due to the borrower.

If there are more than one secured creditors, the decision about the enforcement of SARFEASI provisions will be applicable only if 75% of them are agreeing.

**Question 10:- What is Sale of Assets under SARFAESI Act**

**Answer**:- Sale of Assets by the Bank under the provisions of SARFAESI Act, 2002 is often criticized by the borrowers. In some cases, the auction process is hurriedly completed and it would be extremely difficult for the borrowers to get the transaction set-aside though the DRT is empowered to do so under section 17.

It is the responsibility of the Bank to ensure that they get the maximum possible price for the property in Public Auction as they are the trustees of the property and as the balance sale consideration, after adjustments, goes to the borrower. There is lot of complication in this process and it is very difficult for the borrowers at times to fight with the Banks and it has something to do with the issue of lack of proper understanding of procedures and law under SARFAESI Act, 2002. Not only while auctioning the properties under SARFAESI Act, 2002, the Bank exercise enormous amount of discretion when many properties are available for auction and the disposal of a property chosen by the borrower clears the debt. Even from the point of view of the bidder or purchaser, there can be issues. There may be cases where the bidder or the purchaser paid the entire sale consideration and litigation coming to Courts leading to non-conferment of complete ownership right. If the delay between the payment of sale consideration and actual conferment of clear title is more, the bidder or purchaser is also in trouble as he will only get a minimum interest over his investment if the Sale is finally set-aside and the Bank is asked to repay the Sale Consideration to the auction-purchaser.

Dealing with the rights of the borrower in getting maximum possible price to the property in a public auction conducted by the Bank and the vis a vis responsibility of the Banks, the Hon'ble Madras High Court in K. Raamaselvam & Others Vs. Indian Overseas Bank, 2009 (5) CTC 385, 2009 (5) LW 127, 2010 (1) MLJ 313, 2010 AIR (Mad) 93, was pleased to observe as follows: "For example, if the secured creditor, on the basis of the relevant materials, comes to a conclusion that the highest bid offered, even though higher than the reserve price, does not reflect the true market value and there has been any collusion among the bidders, the secured creditor in its discretion may refuse to confirm such highest bid notwithstanding the fact that the highest bid is more than the upset price. This is because the secured creditor is not only interested to realise its debt, but also expected to act as a trustee on behalf of the borrower so that the highest possible amount can be generated and surplus if any can be refunded to the borrower. The first proviso in no uncertain terms makes it clear that no sale can be confirmed by the authorised officer, if the amount offered is less than the reserve price specified under the Rule 8(5).

However, the subsequent proviso gives discretion to the authorised officer to confirm such sale even if the bid is less than the reserve price, provided the borrower and the secured creditor agree that the sale may be effected at such price which is not above the reserve price. This is obviously so because the property belongs to the borrower and as security for the secured creditor and both of them would be obviously interested to see that the property is sold at a price higher than the reserve price. However, if both of them agree that the property can be sold, even it has not fetched a price more than the reserve price; the authorised officer in its discretion may confirm such auction."

## UNIT III

**Question 11:- Difference between FEMA and FERA**

| BASIS FOR COMPARISON | FERA | FEMA |
|---|---|---|
| Meaning | An act promulgated, to regulate payments and foreign exchange in India, is FERA | FEMA an act initiated to facilitate external trade and payments and to promote orderly management of the forex market in the country. |
| Enactment | Old | New |
| Number of sections | 81 | 49 |
| Introduced when | Foreign exchange reserves were low | Foreign exchange position was satisfactory. |
| Approach towards forex transactions | Rigid | Flexible |
| Basis for determining residential status | Citizenship | More than 6 months stay in India |
| Violation | Criminal offence | Civil offence |
| Punishment for contravention | Imprisonment | Fine or imprisonment (if fine not paid in the stipulated time) |

**About FERA**

Foreign Exchange Regulation Act, shortly known as FERA, was introduced in the year 1973. The act came into force, to regulate foreign payments, securities, currency import and export and purchase of fixed assets by foreigners. The act was promulgated in India when the position of foreign reserves wasn't satisfactory. It aimed at conserving foreign exchange and its optimum utilisation in the development of the economy.

The act applies to the whole country. Therefore, all the citizens of the country, inside or outside India are covered under this act. The act extends to branches and agencies of the Indian multinationals operating outside the country, which is owned or controlled by the person who is the resident of India.

**About FEMA**

FEMA expands to Foreign Exchange Management Act, which was promulgated in the year 1999, to repeal and replace the earlier act. The act applies to the whole country and to all the branches and agencies of the body corporate operating outside India, whose owner or controller is an Indian resident and also any violation committed by the person covered under the Act, outside India.

The main objective of the act is to facilitate foreign trade and to encourage systematic development and maintenance of forex market in the country. There are total seven chapters contained in the act which are divided into 49 sections, out of which 12 sections deal with the operational part while the remaining 37 sections cover penalties, contravention, appeals, adjudication and so on.

Key Differences Between FERA and FEMA

The primary differences between FERA and FEMA are explained in the following points:

FERA is an act which is enacted to regulate payments and foreign exchange in India, is FERA. FEMA an act initiated to facilitate external trade and payments and to promote orderly management of the forex market in the country.

FEMA came out as an extension of the earlier foreign exchange act FERA.

FERA is lengthier than FEMA, regarding sections.

FERA came into force when the foreign exchange reserve position in the country wasn't good while at the time of introduction of FEMA, the forex reserve position was satisfactory.

The approach of FERA, towards forex transaction, is quite conservative and restrictive, but in the case of FEMA, the approach is flexible.

Violation of FERA is a non-compoundable offence in the eyes of law. In contrast violation of FEMA is a compoundable offence and the charges can be removed.

Citizenship of a person is the basis for determining residential status of a person in FERA, whereas in FEMA the person's stay in India should not be less than six months.

Contravening the provision of FERA may result in imprisonment. Conversely, the punishment for violating the provisions of FEMA is a monetary penalty, which may turn into imprisonment if the fine is not paid on time.

Conclusion

The economic policy of liberalisation was first time introduced in India in the year 1991 that opened gates for foreign investment in many sectors. In the year 1997, the Tarapore Committee recommended changes in the present legislation that regulate foreign exchange in the country. After which FERA was replaced by FEMA in the country.

**Question 12:-What are the main Features of Foreign Exchange Management Act, 1999**

Answer:-s The main Features of Foreign Exchange Management Act, 1999 are:-

It gives powers to the Central Government to regulate the flow of payments to and from a person situated outside the country.

All financial transactions concerning foreign securities or exchange cannot be carried out without the approval of FEMA. All transactions must be carried out through "Authorised Persons."

In the general interest of the public, the Government of India can restrict an authorised individual from carrying out foreign exchange deals within the current account.

Empowers RBI to place restrictions on transactions from capital Account even if it is carried out via an authorized individual.

As per this act, Indians residing in India, have the permission to conduct a foreign exchange, foreign security transactions or the right to hold or own immovable property in a foreign country in case security, property or currency was acquired, or owned when the individual was based outside of the country, or when they inherit the property from individual staying outside the country.

**Question 13:- what are the authorities and enforcement machinery under FEMA?**

**Ans:-** FEMA in itself is not an independent and isolated law. The provisions of FEMA are spread at different places and so are there regulatory bodies. Reserve Bank of India (RBI) makes regulations for FEMA and the rules are made by Central Government.

Though RBI is the overall controlling authority in respect of FEMA, enforcement of FEMA has been entrusted to a separate "Directorate of Enforcement" formed for this purpose. (Section 36)

Authorities governing the enforcement of FEMA:

Foreign Exchange Department of Reserve Bank of India (RBI)

Directorate of Enforcement, Department of Revenue, Ministry of Finance-

Capital Markets Division, Department of Economic Affairs, Ministry of

Foreign Trade Division, Department of Economic Affairs, Ministry of

**Machinery responsible for various aspects of FEMA is:**

Enforcement Directorate – To investigate provisions of the Act, the Central Government have established the Directorate of Enforcement with Director and other officers as officers of the Enforcement. It is mainly concerned with the enforcement of the provisions of the Foreign Exchange Management Act to prevent leakage of foreign exchange which occurs through malpractices. Directorate has to detect cases of violation and also perform substantial adjudicatory functions to curb malpractices.

The Enforcement Directorate is an attached office of the Ministry of Finance, Department of Revenue. Prior to 1st May, 1956, the responsibility for enforcement of exchange control laws under FERA 1947 was discharged by the Investigation and Enforcement Section in the Exchange Control Department of the R.B.I.

This Directorate is under the administrative control of the Department of Revenue for operational purposes; the policy aspect of the Act and its legislation and its amendments are however within the purview of the Department of Economic Affairs. The background of keeping the policy aspects relating to the Act in the Department of Economic Affairs is that –

(i) the Department of Economic Affairs is more closely involved in the formulation of policy responses at the macro level to the changing economic scenario; and

(ii) the Department of Economic Affairs coordinates with RBI in respect of trade and invisible transactions and banking aspects of the Act

Adjudicating Authority – The adjudicating authority will issue a notice to the person who has contravened the provisions of the Foreign Exchange Management Act, Rules, Regulations, Notifications or any directions issued by the RBI.

Special Director (Appeals) – Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement can prefer an appeal to the Special Director (Appeals).

Appellate Tribunal – Any person aggrieved by an order made by the Adjudicating Authority, or the Special Director (Appeals) can prefer an appeal to the Appellate Tribunal

Foreign Exchange Department of RBI (Earlier till 31.1.04, known as Exchange Control Department) – The Foreign Exchange Department of the Reserve Bank administers Foreign Exchange Management Act, 1999, (FEMA) which has replaced the earlier Act , FERA, with effect from June 1, 2000. For purchase of foreign exchange for most of the current account transaction, with exception of those listed in Schedule III to the Government of India Notification G.S.R. No 381(E) dated May 3, 2000; no permission from the Reserve Bank is required. Extensive powers are available to banks authorised to deal in foreign exchange, known as authorised dealers. As a result, foreign exchange can be purchased for practically all transactions which are of current account nature.

Foreign Investment Implementation Authority (FIIA)- Government of India has set up the Foreign Investment Implementation Authority (FIIA) to facilitate quick translation of Foreign Direct Investment (FDI) approvals into implementation, to provide a pro-active one stop after care service to foreign investors by helping them obtain necessary approvals, sort out operational problems and meet with various Government agencies to find solution to their problems.

Foreign Investment Promotion Board- The Foreign Investment Promotion Board (FIPB) is a government body that offers a single window clearance for proposals on Foreign Direct Investment (FDI) in India that are not allowed access through the automatic route. FIPB comprises of Secretaries drawn from different ministries with Secretary, Department of Economic Affairs, MoF in the chair. This inter-ministerial body examines and discusses proposals for foreign investments in the country for sectors with caps, sources and instruments that require approval under the extant FDI Policy on a regular basis. The Minister of Finance, considers the recommendations of the FIPB on proposals for foreign investment

up to 1200 crore. Proposals involving foreign investment of more than 1200 crore require the approval of the Cabinet Committee on Economic Affairs (CCEA).

FIPB is mandated to play an important role in the administration and implementation of the Government's FDI policy. It has a strong record of actively encouraging the flow of FDI into the country through speedy and transparent processing of applications, and providing on-line clarification. In case of ambiguity or a conflict of interpretation, the FIPB has always stepped in with an investor-friendly approach.

The Authority for Advance Rulings (AAR) pronounces rulings on the applications of the non-resident/residents submitted in the prescribed form following prescribed procedure and such rulings are binding both on the applicant and the income-tax department.

**Question 14:- what are the regulation and management of foreign exchange?**

**Answer:-** Foreign Exchange refers to money denominated in the currency of another nation or group of nations like Euro. Foreign exchange can be cash, funds available on credit cards and debit cards, traveler's checks, bank deposits, or other short-term claims. Section 2(n) of FEMA states that "foreign exchange" means foreign currency and includes,-

(i) deposits, credits and balances payable in any foreign currency,

(ii) drafts, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,

(iii) drafts, travelers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency;

FEMA prohibits:

Dealing in or transfer of Foreign Exchange or Foreign Security to any person other than Authorised Person

Make any payment otherwise through an authorized person to or for the credit of any person resident outside India in any manner

receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner.

enter into any financial transaction in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person

**Manner of receipt in Foreign Exchange**

Payment for Export can be received:

in form of Draft, cheque, foreign currency notes/travelers cheque etc. provided the foreign currency so received is surrendered within the specified time period

by debit to FCNR /NRE Account

In rupees from the credit card servicing bank in India where payment is made via credit card

From a rupee account held in the name of exchange house with an authorised dealer if the amount does not exceed Rs 2 lacs

In the form of precious metals

Payment can be received in cash from Foreign Travelers in India if the same foreign exchange is duly surrendered

RBI also permits offsetting of export proceeds against import payables etc. after obtaining prescribed certificate from CA/Cost Accountant in this regard

Payment shall be made in a currency appropriate to the country of shipment of goods

Drawal of Foreign Currency means drawal from an authorised person and includes opening of letter of credit, use of international credit card etc. which has an effect of creating foreign exchange liability

**Repatriation of Foreign Exchange**

"Repatriate to India" means bringing into India the realized foreign exchange and-

the selling of such foreign exchange to an authorized person in India in exchange for rupees, or

the holding of realized amount in an account with an authorized person in India to the extent notified by the Reserve Bank,

It includes use of the realized amount for discharge of a debt or liability denominated in foreign exchange

**Manner of Repatriation** -It can be done in the following manner:

Sell it to Authorised Person in India in exchange for Rupees

Retain in an account with an authorised dealer

Use it for discharge of a debt or liability denominated in foreign exchange in the manner specified by RBI

**Surrender of Foreign Exchange**

Any Foreign Exchange earned by a person other than person resident in India not used for permissible purposes should be surrendered within 60 days of such acquisition / purchase

However if acquired for Foreign Travel within 90 days if the exchange is in currency and coins and 180 days if it is in traveler's cheque or if the same is acquired by person resident in India

These provisions are not applicable to Foreign Currencies of Nepal and Bhutan

**Question 15:- What are the transactions covered under FEMA?**

**Answer:-** Section 6(1) – Capital Account Transaction - Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction. Section 6(2)(a) - The RBI may, in consultation with the Centralv Government specify any class or classes of capital account transactions, involving debt instruments, which are permissible, the limit up to which FE shall be admissible for such transactions, and any conditions which may be placed. (This is introduced by Finance Act 2015 with effect from date yet to be notified).

Section 6(2A) - CG may, in consultation with the RBI specify anyv class or classes of capital account transactions, not involving debt instruments, which are permissible, the limit up to which FE shall be admissible for such transactions, and any conditions which may be placed. (This is introduced by Finance Act 2015 with effect from date yet to be notified).

Once notified, all Capital Account transactions, except involving debt instruments will be regulated by the CG, which are currently being regulated by the RBI. From Section 6(1) it is clear that a person can only sell orv draw foreign exchange from an authorised person only for capital account transactions. Dealing in foreign exchange other than through Authorized Person is not permitted.

Section 3(a) also prohibits- dealing in or transferring of anyv foreign exchange to any person other than by authorised person.

Section 2(e) - Capital Account transaction means a transaction which alters assets or liabilities including contingent liabilities, outside India of person resident in India or assets and liabilities in India of persons resident outside India and includes transactions referred to in sub-section (3) of Section 6.

Section 6(3) – Lists the Capital Account Transactions that are prohibited, restricted or regulated by RBI (capital account transactions as also referred to in definition of Capital Account Transaction in Section 2(e)]

a) Transfer or issue of any security by a person resident in India

b) Transfer or issue of any security by a person resident outside India.

c) Transfer or issue of any security or foreign security by any branch, office or agency in India to a person resident outside India.

d) Any borrowing or lending in foreign exchange in whatever form or by whatever name called.

e) Any borrowing or lending in Indian rupees in whatever form or by whatever name called between person resident in India and a person resident outside India.

f) Deposits between persons resident in India and persons resident outside India g) Export, import or holding of currency or currency notes.

h) Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident outside India

i) Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India.

j) Giving of a guarantee or surety in respect of any debt, obligation or other liability incurred –

By a person resident in India and owed to a person resident outside India; or

By a person resident outside India.

Apart from above transactions, RBI has made FEM (Capital Account Transactions) Regulations, 2000. Schedules I and II of this regulation specify the classes of capital account transactions of resident and non-residents for which foreign exchange may drawn or sold to an authorised person.

**Schedule I [Regulation 3(1)(A)]:** Classes of capital account transactions of persons resident in India

a) Investment by a person resident in India in foreign securities

b) Foreign currency loans raised in India and abroad by a person resident in India

c) Transfer of immovable property outside India by a person resident in India

d) Guarantees issued by a person resident in India in favour of a person resident outside India

e) Export, import and holding of currency/currency notes

f) Loans and overdrafts (borrowings) by a person resident in India from a person resident outside India

g) Maintenance of foreign currency accounts in India and outside India by a person resident in India

h) Taking out of insurance policy by a person resident in India from an insurance company outside India.

i) Loans and overdrafts by a person resident in India to a person resident outside India.

j) Remittance outside India of capital assets of a person resident in India.

k) Sale and purchase of foreign exchange derivatives in India and abroad and commodity derivatives abroad by a person resident in India.

**Schedule II [Regulation 3(1)(B)]:** Classes of capital account transactions of persons resident outside India

a) Investment in India by a person resident outside India, that is to say,

i. Issue of security by a body corporate or an entity in India and investment therein by a person resident outside India; &

ii. Investment by way of contribution by a person resident outside India to the capital of a firm or a proprietorship concern or an association of persons in India.

b) Acquisition and transfer of immovable property in India by a person resident outside India.

c) Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India.

d) Import and export of currency/currency notes into/from India by a person resident outside India.

e) Deposits between a person resident in India and a person resident outside India.

f) Foreign currency accounts in India of a person resident outside India.

g) Remittance outside India of capital assets in India of a person resident outside India.

**Cap A/c Transaction and Contingent liability**

Guarantee by Person Resident Outside India:

The definition of Cap A/c Transaction does not include contingentv liability of a person resident outside India. However, Sec 6(3)(j) & Schedule II (c) to Notification 1 includes in the list of capital account transaction guarantee given by a person resident outside India to any person resident in India.

Further in terms of amended Regulation 3A of Notification 8v (Guarantees), Indian companies require prior approval of RBI for 'domestic rupee denominated structured obligations' (wef 26.09.2011) leading to credit enhancement in the form of guarantee by JV partners, Intl banks etc.

Master Direction on ECB, TC & Structured Obligations dt 26.03.2019:

Para 19- Domestic rupee borrowing between two Residents based on guarantee of NR doesn't have any FEMA implications until the guarantee is invoked.

Upon invocation of Guaranteev& payment by NR, such NR can enforce recovery and also repatriate such sum, if remitted from abroad or paid out of NRE/FCNR a/c.- General Permission

**6(4) and 6(5) – Whether out of purview of FEMA?**

Section 6(4) – a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency,

security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India

Section 6(5) – a person resident outside India may hold,ν own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India

Capital Account Transaction under Section 6(4)

RBI has vide its A.P. (DIR Series) Circular No. 90 dated January 9, 2014 clarified that the following transactions shall be covered under section 6(4) of FEMA, 1999:

a) Foreign currency accounts opened and maintained by such a person when he was resident outside India;

b) Income earned through employment or business or vocation outside India taken up or commenced, or from investments made, or from gift or inheritance received while such a person was resident outside India;

c) Foreign exchange including any income arising there from, and conversion or replacement or accrual to the same, held outside India acquired by way of inheritance from a person resident outside India;

d) A person resident in India may freely utilize all their eligible assets abroad as well as income on such assets or sale proceeds thereof received after their return to India for making any payments or to make any fresh investments abroad without approval of RBI.

**Current Account Transaction**

Section 2(j) - Current Account transaction is transaction other than a capital account transaction and generally includes:

i.Payments due in connection with foreign trade, Short term banking and credit facilities.

ii. Payment due as interest on loan and income from investment.

iii. Remittances for living expenses of parent, spouse and children residing abroad.

iv. Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Current account transaction is a transaction other than a capital account transaction.

Current account transactions are governed by Foreignν Exchange Management (Current Account Transaction) Rules, 2000 ("Current Account Transactions Rules").

India is signatory to WTO Agreement and in terms of Articlev VIII; it states that ".....no member shall, without the approval of the Fund (IMF), impose restrictions on the making of payments and transfers for current international transaction.

Current account transactions are divided into 3 schedules in Current Account Transactions Rules:-

Schedule I – Prohibited Transactions

Schedule II – Transactions requiring prior approval of Government of India

Schedule III – Transactions requiring prior approval of RBI Drawal of foreign exchange is prohibited for –

Transactions specified in Schedule I; or

Travel to Nepal and / or Bhutan; or

Transaction with person resident in Nepal or Bhutan (this prohibition may be relaxed by special approval)

Schedule I (Rule 3): Transactions which are prohibited Remittance out of lottery winnings (*)

Remittance of income from racing/riding etc., or any other hobby

Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes etc.

Payment of commission on exports made towards equity investment in JV/WOS abroad of Indian companies.

Payment of commission on exports under Rupee State Credit route except commission up to 10% of invoice value of exports of tea and tobacco.

Payment related to 'Call Back Services' of telephones

Remittance of interest income of funds held in Non-resident Special Rupee Scheme A/c.

(NOT PERMISSIBLE EVEN FROM RFC and EEFC ACCOUNT) * - In terms of FDI Policy even technology collaboration (franchise, trademark, brand name, management contract is prohibited for lottery business and gambling and betting)

Schedule II (Rule 4) Transactions requiring prior approval of Government:

| Purpose of remittance | Ministry/Department of Govt. of India |
|---|---|
| Cultural tours | Ministry of Human resources Development |
| Advertisement in foreign print media for purpose other than promotion of tourism, foreign investments and international bidding | Ministry of Finance |

| | |
|---|---|
| (exceeding USD 10,000) by a State Government and its Public sector undertaking | |
| Remittance of freight of vessel charted by a PSU | Ministry of Surface Transport |
| Payment of import [through ocean transport] by a Govt. department or a PSU on CIF basis | Ministry of Surface Transport |
| Multimodal transport operators making remittance to their agents abroad | Registration Certificate from the Director General of Shipping |
| Remittance of hiring charges of transporters by TV channels, internet service providers | Ministry of Information and Broadcasting, Ministry of Communication and Information technology |
| Remittance of container detention charges exceeding rate prescribed by Director General of Shipping | Ministry of Surface Transport |
| Remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State Level sports bodies if the amount involved exceeds USD 1,00,000 | Ministry of Human Resources Development (Department of Youth Affairs and Sports) |
| Remittance for membership of P&I club (Association of Marine Insurance provider) | Remittance for membership of P&I club (Association of Marine Insurance provider) |

Schedule III (Rule 5):

Prior Approval of RBI Facilities for Individuals –

Individuals can make remittance within limit of USD 2,50,000 for following facilities. However, any additional remittance in excess of said limit shall require RBI approval.

i.Private visits to any country (except Nepal and Bhutan)

ii. Gift or donation

iii. Going abroad for employment

iv. Emigration

v. Maintenance of close relatives abroad

vi. Travel for business, or attending a conference or specialised training or for meeting expenses for meeting medical expenses, or check up abroad, or for accompanying as attendant to a patient gong abroad for medical treatment/check up.

vii. Expenses in connection with medical treatment abroad

viii.Studies abroad

ix. Any other current account transaction.

For items mentioned at (iv), (vii) and (viii), individual may remit amount in excess of USD 2,50,000 if it is so required by a country of emigration, medical institute offering treatment or the university.

A person who is resident but not permanently resident and is:

A citizen of a foreign state other than Pakistan; or

Is a citizen of India, who is on deputation to the office or branchθ of a foreign company or subsidiary or joint venture in India of such foreign company

may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions.

[for purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident]

An entity in India may remit PF or pension in respect of its employees who are resident in India but not permanently resident in India (Regulation 5 of Notification 13R)

Facilities for persons other than individuals – Following remittances by persons other than individuals shall require prior approval of RBI

Donations exceeding 1% of their foreign exchange earnings during the three financial years or USD 5,00,000 whichever is less.

Commission per transaction to agents abroad for sale of residential♣ flats or commercial plots in India exceeding USD 25,000 or 5% of inward remittance whichever is more.

Remittances exceeding USD 10 million per project for any consultancy services in respect of infrastructure projects and USD 1 million per project for other consultancy services procured from outside India.

Infrastructure shall mean as defined in Explanation to para 1(iv)(A)(a) of Schedule I of FEMA 3.

'Infrastructure Sector' has the same meaning as given in the¬ Harmonised Master List of Infrastructure sub-sectors approved by Government of India vide Notification F. No. 13/06/2009-INF dated March 27, 2012 as amended / updated from time to time. Thus infrastructure sector and sub-sectors for the purpose of ECB include (Para 1(iv)(A)(a) of Schedule I of FEMA 3):

a. Energy

b. Communication

c. Transport

d. Water and Sanitation

e. Mining, exploration and refining

f. Social and commercial infrastructure (includes Hospitals/Hotels)

Current Account Transaction : Pre-incorporation Exps

Remittances exceeding 5% of investment brought into India or USD 1,00,000 whichever is higher for reimbursement of pre incorporation expenses by entity in India.

Current Account Transaction

Unincorporated Joint Ventures - Co-operation Agreements/Strategic Alliances

It's a contractual relationship/arrangement like a cooperationv agreement or a strategic alliance wherein the parties agree to collaborate as independent contractors rather than shareholders in a company or partners in a legal partnership.

Co-operation agreements / strategic alliances can be employed forv the following types of business activities:

Technology transfer agreements

Joint product development

Purchasing agreements

Distribution agreements

Marketing and promotional collaboration

Intellectual advice In such a JV the rights, duties and obligations of the

parties as between themselves.

Royalties and Lump Sum Fees

Earlier there were monetary caps on remittances (both lumpsum fees and royalties) made for technology collaborations and license or use of trademark / brand name.

Now there are no restrictions and the payments towards the lumpsum fees or royalties for technology collaborations and license or use of trademark / brand name can be made under the automatic route, without any monetary cap.

The limits were there in Schedule II which read as under: Remittances under technical collaboration agreements where payments of royalty exceeds 5% on local sales and 8% on exports and lump sum payments exceeds USD 2 million. This has been removed w.e.f. 16/12/2009.

Advance against exports of goods can be received by an exporter from a buyer or third party named in export declaration. Interest can be paid on advance payment (rate of interest shall notv exceed LIBOR plus 100 basis points). Shipment of goods needs to be made within one year from the datev of receipt of Advance. In case of advance against export of services, there is no specificv inward remittance purpose code and hence poses practical difficulties.

## UNIT IV

**Question 16:- what are anti-competitive agreements?**

**Answer:-** The Act under Section 3(1) prevents any enterprise or association from entering into any agreement which causes or is likely to cause an appreciable adverse effect on competition (AAEC) within India. The Act clearly envisages that an agreement which is contravention of Section 3(1) shall be void.

How to determine AAEC?

The Act provides that any agreement including cartels, which-

Directly or indirectly determines purchase or sale prices;

Limits production, supply, technical development or provision of services in market;

Results in bid rigging or collusive bidding

Shall be presumed to have an appreciable adverse effect on competition in India

Proviso to Section 3 of the Act provides that the aforesaid criteria shall not apply to joint ventures entered with the aim to increase efficiency in production, supply, distribution, acquisition and control of goods or services.

Anti-competitive agreements are further classified into Horizontal agreements and Vertical agreements.

What are Horizontal Agreements?

HORIZONTAL AGREEMENTS- Horizontal agreements are arrangements between enterprises at the same stage of production. Section 3(3) of the Act provides that such agreements includes cartels, engaged in identical or similar trade of goods or provision of services, which-

Directly or indirectly determines purchase or sale prices

Limits or controls production, supply

Shares the market or source of production

Directly or indirectly results in bid rigging or collusive bidding

Under the Act horizontal agreements are placed in a special category and are subject to the adverse presumption of being anti-competitive. This is also known as 'per se' rule. This implies that if there exists a horizontal agreement under Section 3(3) of the Act, then it will be presumed that such an agreement is anti-competitive and has an appreciable adverse effect on competition1.

What are Vertical Agreements?

VERTICAL AGREEMENTS- Vertical agreements are those agreements which are entered into between two or more enterprises operating at different levels of production2. For instance between suppliers and dealers. Other examples of anti-competitive vertical agreements include:

Exclusive supply agreement & refusal to deal

Resale price maintenance

Tie-in-arrangements

Exclusive distribution agreement

The 'per se' rule as applicable for horizontal agreements does not apply for vertical agreements. Hence, a vertical agreement is not per se anti-competitive or does not have an appreciable adverse effect on competition.

The Act under Section 3 of the Act also prohibits any agreement amongst enterprises which materialize in:

Tie-in arrangement

What is a tie-in arrangement? According to the Statute it includes any agreement requiring purchaser of goods, as a condition of purchase, to purchase some other goods. In the case of Sonam Sharma v. Apple & Ors., the CCI stated that in order to have a tying arrangement, the following ingredients must be present:

There must be two products that the seller can tie together. Further, there must be a sale or an agreement to sell one product or service on the condition that the buyer purchases the other product or service. In other words, the requirement is that purchase of a commodity is conditioned upon the purchase of another commodity.

The seller must have sufficient market power with respect to the tying product to appreciably restrain free competition in the market for the tied product. That is, the seller has to have such power in the market for the tying product that it can force the buyer to purchase the tied product; and

The tying arrangement must affect a "not insubstantial" amount of commerce. Tying arrangements are generally not perceived as being anti- competitive when substantial portion of market is not affected.

Exclusive supply agreement- The Act defines such agreements to include any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.

Exclusive distribution agreement- This includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of goods.

Refusal to deal- The Act states that this criteria includes agreement which restricts by any method the persons or classes of persons to whom the goods are sold or from whom goods are bought.

Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors- Important case law on Anti-competitive Agreements

In the case of Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors3, the concept of vertical agreements including exclusive supply agreements, exclusive distribution agreements and refusal to deal were deliberated by the Commission.

Facts– The informant in the case had alleged anti-competitive practices on part of the Opposite Parties (OPs) whereby the genuine spare parts of automobiles manufactured by some of the OPs were not made freely available in the open market and most of the OEMs (original equipment suppliers) and the authorized dealers had clauses in their agreements requiring the authorized dealers to source spare parts only from the OEMs and their authorized vendors only.

CCI's decision– The Commission held that such agreements were in the nature of exclusive supply, exclusive distribution agreements and refusal to deal under Section 3(4) of the Act and hence the Commission had to determine whether such agreements would have an AAEC in India.

The Commission held the impugned agreements were in contravention of Section 3 of the Act and remarked that the network of such agreements allowed the OEMs to become monopolistic players in the aftermarkets for their model of cars, create entry barriers and foreclose competition from the independent service providers.

The Commission further stated that such a distribution structure allowed the OEMs to seek exploitative prices from their locked-in consumers, enhance revenue margin form the sale of auto component parts as compared to the automobiles themselves besides having potential long term anti-competitive structural effects on the automobile market in India.

Resale price maintenance

What is resale price maintenance? It includes any agreement to sell goods on condition that the prices be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

The concept of resale price maintenance was discussed by the Commission in the case of Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Limited4. In the case, the Informant had alleged that according to the agreement with Hyundai, dealers were mandated to procure all automobile parts and accessories from Hyundai or through their vendors only. While collaborating on alleged anti-competitive practices of Hyundai, the Informant stated that Hyundai imposed a "Discount Control Mechanism", whereby dealers were only permitted to provide a maximum permissible discount and dealers were also not authorized to give discount beyond a recommended range, thereby amounting to "resale price maintenance" in contravention of Section 3(4)(e) of the Act.

The CCI in the case observed that Hyundai through exclusive agreements and arrangements contravened provisions of Section 3(4)(e) read with Section 3(1) of the Act through arrangements which resulted into Resale Price Maintenance. The CCI while imposing penalty of INR 87 Crore on Hyundai noted that the infringing anti-competitive conduct of Hyundai in the case included putting in place arrangements, which resulted into Resale Price Maintenance by way of monitoring maximum permissible discount level through a Discount Control Mechanism and also a penalty mechanism for non-compliance of the discount scheme.

ANTI-COMPETITIVE AGREEMENTS AND IPR EXEMPTION UNDER SECTION 3(5) OF THE ACT

Section 3(5) of the Competition Act envisages that nothing contained in Section 3 (prohibiting anti-competitive agreements) shall restrict the right of any person to prevent infringement or imposing of reasonable conditions that may be necessary for protecting his/her intellectual property rights i.e. copyright, trademark, patent, designs and geographical indications.

In the aforesaid context, CCI states that any 'reasonable condition' imposed for protection of IPR would not attract Section 3, however, imposition of 'unreasonable condition' to protect IPR would contravene Section 3 of the Act. The CCI provides an illustrative list of practices/agreements which though entered into for protection of IPR may contravene Section 3 of the Act5. Such practices/agreements are:

Patent pooling- may be a restrictive practice if pooling firms decide not to grant license to third parties;

Tie-in arrangement– If under the tying arrangement, licensee is required to acquire particular goods solely from the patentee then it may be a restrictive practice;

Agreement to continue payment of royalty even after the patent has expired;

Clause restricting competition in R & D;

Licensee may be subjected to a condition not to challenge the validity of IPR in question.

Licensor fixes the price at which the licensee should sell.

A licensee may be coerced by the licensor to take several licenses in intellectual property even though the Licensee may not need all of them.

Condition imposing quality control on the licensed patented product beyond those necessary.

Restricting licensee's right to sell the product of the licensed know-how to persons other than those designated by the licensor.

Undue restriction on licensee's business could be anticompetitive.

Limiting the maximum amount of use the licensee may make of the patented invention may affect competition.

Condition imposed on the licensee to employ or use staff designated by the licensor.

Shamsher Kataria's case elaborately dealt with provision of IPR exemption under Section 3(5) of the Act. In the case the OPs had claimed IPR exemption under Section 3(5) of the Act and stated that the restrictions imposed upon the OESs (original equipment suppliers) from undertaking sales of their proprietary parts to third parties without seeking prior consent would fall within the ambit of reasonable condition to prevent infringements of their IPRs. The Commission observed that in order to determine whether an exemption under Section 3(5) of the Act is available or not, it was necessary to consider:

a) Whether the right which is put forward is correctly characterized as protecting an intellectual property?

b) Whether the requirements of the law granting the IPRs are in fact being satisfied?

The CCI in view of the facts and circumstances prevailing in the case held that the exemption enshrined under Section 3(5) of the Act was not available to those OEMs (original equipment manufacturers) who had failed to submit the relevant documents evidencing grant of the applicable IPRs in India, with respect to the various spare parts.

The CCI also stated that the OEMs had failed to show that the impugned restrictions amounted to imposition of reasonable conditions, as may be necessary for protection any of their rights.

The CCI in the case also rendered the clarification that though registration of an IPR does not automatically entitle a company to seek exemption under Section 3(5)(i) of the Act and the essential criteria for determining whether the exemption under Section 3(5)(i) is available or not is to assess whether the condition imposed by the IPR holder can be termed as "imposition of a reasonable conditions, as may be necessary for the protection of any of his rights".

**Footnotes;-**

1Neeraj Malhotra vs Deustche Post Bank Home Finance

2Fx Enterprise Solutions India v. Hyundai Motor India Limited, CCI (Case no. 36 &42 of 2014)

3Case No. 03/2011

4Case Nos. 36 & 82 of 2014

5Competition Commission of India; Advocacy Booklet on Intellectual Property Rights under the Competition Act, 2002

**Question 17:- what is abuse of dominant position under competition act?**

**Answer:-** Section 4 of the Competition Act, 2002 prevents any enterprise or group from abusing its dominant position. The Act also provides circumstances under which there is abuse of dominant position. Section 4(2) of Act prevents following acts resulting in abuse of dominant position:

1. Impose unfair or discriminatory condition or price in sale and purchase of goods or services;

2. Limit or restrict;

3. Production of goods or services

4. Technical or scientific development relating to goods or services to the prejudice of consumers;

Indulges in practice resulting in denial of market access;

1. Make conclusion of contracts subject to acceptance by other parties;

2. Use its dominant position in one market to enter into other relevant market;

Definition of Dominant position and Predatory pricing

According to the Act, dominant position means a position of strength, enjoyed by an enterprise in the relevant market in India which enables it to:

1.Operate independently of competitive forces in relevant market

2. Affect competitors, consumers or relevant market in its favour

Predatory price means sale of goods or services at a price which is below the cost as may be with the view to reduce competition or eliminate competitors.

The term abuse of dominant position refers to anticompetitive business practices in which a dominant firm may engage in order to maintain or increase its position in the market.

Judicial Dicta on Abuse of Dominant Position

What does dominant position imply?

In the case of, Shri Neeraj Malhotra, Advocates v. North Delhi Power Ltd., the CCI observed that Section 4 of the Competition Act does not prohibit an enterprise from holding a dominant position in a market, it does place a special responsibility on such enterprises, in requiring them not to abuse their dominant position. The CCI further held that Section 4 does not contain an exhaustive list of activities that would amount to contravention of its provisions. The actions, practices and conduct of an enterprise in a dominant position have to be examined in view of the facts and circumstances of each case to determine whether or not the same constitutes an abuse of dominance in terms of Section 4 of the Competition Act.

In substance, `dominant position' means the position of strength enjoyed by an enterprise that enables it to act independently of competitive forces prevailing in the relevant market. Such an enterprise will be in a position to disregard market forces and unilaterally impose trading conditions, fix prices, etc. The abuse may result in the restriction of competition, or the elimination of effective competition.

How to examine dominant position of an enterprise?

In a recent case Fast Track Call Cab Pvt. Ltd. and Meru Travel Solutions Pvt. Ltd v. ANI Technologies Pvt. Ltd., the CCI while determining whether the OP (OLA) held a dominant position in relevant market or not remarked that abuse of dominant position under Section 4 would be attracted only when the entity under scrutiny holds a dominant position in the relevant market. CCI also elaborated on the concept of dominant position and stated dominant position as a position of economic strength enjoyed by the enterprise in the relevant market, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitor or consumer or the relevant market in its favour. Such ability of the enterprise to behave independently of competitive forces needs to be assessed in light of all relevant circumstances and the factors enlisted under Section 19(4) of the Act. The CCI in the case while determining dominance of OLA took the following factors into consideration:

Market shares of OLA;

Its competitors in relevant markrt;

Annual and monthly number of trips in the relevant market during the period of investigation;

What is relevant market?

While discussing the concept of dominant position, one of the most intriguing questions which lingers our minds what does relevant market connote? 'Relevant market' is one of the primary concerns while determining dominant position as well as abuse of dominant position by an enterprise.

Section 2(r) of the Competition Act renders an exclusive definition for the term 'relevant market'. It states that it means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both markets.

Relevant product market is defined as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

Relevant geographic market refers to a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.

M/s Saint Gobain Glass India Ltd. v. M/s Gujrat Gas Company Limited– In this case, the CCI in order to determine the 'relevant market' took note of factors to be considered while determining relevant product market and relevant geographic market. The CCI stated that to determine the "relevant product market", the Commission is to have due regard to all or any of the following factors viz., physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products, in terms of the provisions contained in .

To determine the "relevant geographic market", the Commission shall have due regard to all or any of the following factors viz., regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services, in terms of the provisions contained in Section 19(6) of the Act.

Section 19(6) enlists the factors to be considered by CCI while determining 'relevant geographic market':

1. Regulatory trade barriers;

2. Local specification requirements;

National procedure policies;

1. Adequate distribution facilities;

2. Transport costs;

3. Language;

Consumer preferences;

Need for secure or regular supplies

Section 19(7) of the Act enlists the factors to be considered by the CCI while determining 'relevant product market':

1. Physical characteristics or end-use of goods;

2. Price of goods or services;

Consumer preferences;

1. Exclusion of in-house production;

2. Existence of specialized producers;

3. Classification of industrial products;

When does an enterprise engage in an abusive conduct or abuse its dominant position?

An undertaking in a dominant position is entitled also to pursue its own interests. However, such an undertaking engages in abusive conduct when it makes use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition. For the purposes of this section, the conduct of a party would be tested on the basis of the end effect i.e. whether access to a market has been denied not. In other words, the same conduct by different parties may attract provisions of Section 4(2) of Act depending on whether the conduct of the parties results into denial of market access in any manner. As per Section 4(2)(c) of Act of the Act, there shall be an abuse of dominant position if any enterprise indulges in a practice resulting in denial of market access in any manner.

In the case of Jupiter Gaming Solutions Pvt. Ltd. v. Government of Goa & Ors , the CCI while determining alleged abuse of dominance by Government of Goa stated that dominance per se is not bad, but its abuse is bad in Competition Law in India. CCI further opined that abuse is said to occur when an enterprise uses its dominant position in the relevant market in an exclusionary or /and an exploitative manner. In the case the Government's tender bid of lottery contained certain conditions which apparently restricted the size of bidders such as, minimum gross turnover of the participating entity, participating entity should have experience of at least three years. The CCI held that the Government of Goa by imposing such conditions abused its dominant position denial/restriction of market access to the other parties in the relevant market.

**Question 18:- Regulation of combination under Competition Act.**

**Answer:-**

INTRODUCTION

The Competition Act, 2002 (as amended), [the Act], follows the philosophy of modern competition laws and aims at fostering competition and protecting Indian markets against anti-competitive practices. The Act prohibits anti-competitive agreements, abuse of dominant

position and regulates combinations (mergers and acquisitions) with a view to ensure that there is no adverse effect on competition in India. The provisions of the Act relating to regulation of combinations have been enforced with effect from 1st June, 2011 .

WHAT IS COMBINATION?

Broadly, combination under the Act means acquisition of control, shares, voting rights or assets, acquisition of control by a person over an enterprise where such person has direct or indirect control over another enterprise engaged in competing businesses, and mergers and amalgamations between or amongst enterprises when the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and abroad. The words combination and merger are used interchangeably here.

Entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is prohibited and such combination shall be void.

THRESHOLDS FOR COMBINATIONS UNDER THE ACT

India is one of the fastest growing economies in the world. The growth process is driven both by organic and inorganic (through the mergers and acquisition route) growth of enterprises. It is neither feasible nor advisable to review all the mergers and acquisitions. It is natural to presume that in the case of small size combinations there is less likelihood of appreciable adverse effect on competition in markets in India. The Act provides for sufficiently high thresholds in terms of assets/turnover, for mandatory notification to the Commission.

The Act also provides for revision of the threshold limits every two years by the government, in consultation with the Commission, through notification, based on the changes in Wholesale Price Index (WPI) or fluctuations in exchange rates of rupee or foreign currencies .

Vide notification S.O. 480 (E) dated 4th March, 2011, the government has enhanced the value of assets and turnover mentioned in section 5, by fifty percent. The current thresholds for the combined assets/turnover of the combining parties are as follows:

Individual: Either the combined assets of the enterprises would value more than (INR) 1,500 crores in India or the combined turnover of the enterprise is more than (INR) 4,500 crores in India. In case either or both of the enterprises have assets/turnover outside India also, then the combined assets of the enterprises value more than US$ 750 millions, including at least (INR) 750 crores in India, or turnover is more than US$ 2250 millions, including at least (INR) 2,250 crores in India.

Group: The group to which the enterprise whose control, shares, assets or voting rights are being acquired would belong after the acquisition or the group to which the enterprise remaining the merger or amalgamation would belong has either assets of value of more than (INR) 6000 crores in India or turnover more than (INR) 18000 crores in India. Where the group has presence in India as well as outside India then the group has assets more than US$

3 billion including at least INR 750 crores in India or turnover more than US$ 9 billion including at least INR 2250 crores in India. The term Group has been explained in the Act. Two enterprises belong to a "Group" if one is in position to exercise at least 26 per cent voting rights or appoint at least 50 per cent of the directors or controls the management or affairs in the other3 . Vide notification S.O. 481 (E) dated 4th March, 2011, the government has exempted "Group" exercising less than fifty per cent of voting rights in other enterprise from the provisions of section 5 of the Act for a period of five years.

The turnover shall be determined by taking into account the values of sales of goods or services. The value of assets shall be determined by taking the book value of the assets as shown in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation. The value of assets shall include the brand value, value of goodwill, or Intellectual Property Rights etc. referred to in explanation (c) to section 5 of the Act.

EXEMPTION NOTIFICATIONS

In exercise of the powers conferred by clause (a) of Section 54 of the Act, the Central Government, in public interest, has exempted: a an enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than INR 250 crore in India or turnover of not more than INR 750 crore in India from the provisions of Section 5 of the said Act for a period of five years.

A banking company in respect of which the Central Government has issued a notification under Section 45 of the Banking Regulation Act, 1949, from the application of the provisions of Sections 5 and 6 of the Act for a period of five years.

COMBINATIONS IN RESPECT OF WHICH NOTICE NEED NOT NORMALLY BE FILED

The Combination Regulations provide that notice in respect of certain combinations, specified under Schedule I, need not normally be filed with the Commission as those transactions are ordinarily not likely to cause appreciable adverse effect on competition in India.

SCHEDULE I TO THE COMBINATION REGULATIONS

(1) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold twenty five per cent (25%) or more of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly, or in accordance with the execution of any document including a share holders' agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.

(1A) An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, not resulting in gross acquisition of more than five per cent (5%) of the shares or voting rights of such enterprise in a financial year, where the acquirer or its group, prior to acquisition, already holds twenty five per cent (25%) or more shares or voting rights of the enterprise, but does not hold fifty per cent (50%) or more of the shares or voting rights of the enterprise, either prior to or after such acquisition:

Provided that such acquisition does not result in acquisition of sole or joint control of such enterprise by the acquirer or its group.

(2) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in the cases where the transaction results in transfer from joint control to sole control.

(3) An acquisition of assets, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.

(4) An amended or renewed tender offer where a notice to the Commission has been filed by the party making the offer, prior to such amendment or renewal of the offer: Provided that the compliance with regulation 16 relating to intimation of any change is duly made.

(5) An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business.

(6) An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to acquisition of control.

(7) Any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be.

(8) An acquisition of shares or voting rights or assets, by one person or enterprise, of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group.

(9) A merger or amalgamation of two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting

rights in each of such enterprises are held by enterprise(s) within the same group: Provided that the transaction does not result in transfer from joint control to sole control.

(10) A combination referred to in section 5 of the Act taking place entirely outside India with insignificant local nexus and effect on markets in India.

COMBINATION NOTICE

The review process for combination under the Act involves mandatory pre-combination notification to the Commission. Any person or enterprise proposing to enter into a combination shall give notice to the Commission in the specified form disclosing the details of the proposed combination within 30 days of the approval of the proposal relating to merger or amalgamation by the board of directors or of the execution of any agreement or other document in relation to the acquisition, as the case may be.

In case, a notifiable combination is not notified, the Commission has the power to inquire into it within one year of the taking into effect of the combination. The Commission also has the power to impose a fine which may extend to one per cent of the total turnover or the assets of the combination, whichever is higher, for failure to give notice to the Commission of the combination. Any combination for which notice has been filed with the Commission would not take effect for a period of 210 days from the date of notification or till the Commission passes an order, whichever is earlier. If the Commission does not pass an order during the said period of 210 days, the combination shall be deemed to have been approved.

ACQUISITION OR FINANCING FACILITY BY PFIs, VCFs Etc.

In case of share subscription or financing facility or any acquisition, inter alia, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement, details of such acquisition are required to be filed with the Commission within seven days from the date of acquisition.

PROCEDURE FOR INVESTIGATION OF COMBINAtIONS

As per the Combination Regulations, the Commission shall form its prima facie opinion as to whether the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market in India within 30 days from the receipt of the notice. If the Commission is prima facie of the opinion that a combination has caused or is likely to cause adverse effect on competition in Indian markets, it shall issue a notice to show cause to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if Commission is of the prima facie opinion that the combination has or is likely to have appreciable adverse effect on competition, the Commission shall deal with the notice as per the provisions of the Act

EVALUATION OF 'APPRECIABLE ADVERSE EFFECT ON COMPETITION'

The Act envisages appreciable adverse effect on competition in the relevant market in India as the criterion for regulation of combinations. In order to evaluate appreciable adverse effect on competition, the Act empowers the Commission to evaluate the effect of Combination on the basis of factors mentioned in sub section (4) of section 20.

Factors to be considered by the Commission while evaluating appreciable adverse effect of Combinations on competition in the relevant market:

(a) actual and potential level of competition through imports in the market;

(b) extent of barriers to entry into the market;

(c) level of concentration in the market ;

(d) degree of countervailing power in the market; (e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;

(f) extent of effective competition likely to sustain in a market;

(g) extent to which substitutes are available or are likely to be available in the market;

(h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;

(i) likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market;

(j) nature and extent of vertical integration in the market;

(k) possibility of a failing business;

(l) nature and extent of innovation;

(m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;

(n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

APPEALS

Under the relevant provisions of the Act, an appeal to Competition Appellate Tribunal (COMPAT) now NCLAT(National Company Law Tribunal) may be filed within 60 days of receipt of the order /direction/decision of the Commission.

The Commission also has the power to impose a fine which may extend to one per cent of the total turnover or the assets of the combination, whichever is higher, for failure to give notice to the Commission of the combination.

**Question 19:- Extra territorial jurisdiction of competition act and effects doctrine.**

**Answer:-** The Competition Act, 2002 (Act) was enacted to replace the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act), which dealt primarily with the control of monopolies and the prohibition of monopolistic and restrictive trade practices. The much delayed passing of the Act is touted by many as the final signs of the Indian economy maturing and in the process delivering the final blow in unshackling the past of the license raj in India. The very intent of the Act is to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India. In keeping with this intent, not only is the Competition Commission of India (CCI) vested with powers to monitor anticompetitive behaviour taking place within the country but under Section 32 of the Act also empowered to take cognisance of an act taking place outside India but having an adverse effect on competition within India.

Section 32 states that notwithstanding the event/ violation/act taking place outside India, the CCI shall have the power to inquire into any such agreement(s) or abuse of dominant position or combination if such agreement(s) or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India. It appears that this Section has been categorically introduced so as to address the lacuna in the MRTP Act whereby the Supreme Court held that the Commission constituted under the MRTP Act did not have extraterritorial jurisdiction given the wording of the provisions of the MRTP Act. This answer attempts to analyses the grant of power to the CCI under Section 32 and the consequences thereof.

Effects Doctrine in India

In relation to competition law, the concept of the "Effects Doctrine" was first raised in India when the Alkali Manufacturers Association of India filed a complaint and also an application for grant of temporary injunction before the MRTP Commission alleging that American Natural Soda Ash Corporation (ANSAC), consisting of six producer of natural soda ash, had joined hands together to form an export cartel by virtue of membership agreement amongst them. According to the complainant, ANSAC was a cartel of American ash soda producers and was likely to affect maintenance of prices at reasonable and realistic levels in India and with a view to adversely affect the local production and availability of the soda ash. The MRTP Commission instituted an enquiry and passed an ad interim injunction which was subsequently confirmed by it, directing ANSAC not to indulge in the practice of cartelisation by exporting soda ash to India in the form of cartel directly or indirectly. Simultaneously, in a separate petition, the All India Float Glass Manufacturers' Association (AIFGMA) filed a somewhat similar complaint against three Indonesian companies, which resulted in a similar injunction against such imports.

Aggrieved by the order passed by the MRTP Commission, both cases went in appeal to the Supreme Court, the Appellants being ANSAC in the first case, and Haridas Exports (the Indian importer of the float glass consignment) in the second case. The Supreme Court of India clubbed both cases (Haridas case) and set aside both the injunctions on the grounds that

the MRTP Commission lacked jurisdiction. In the case of the AIFGMA, the Court held that the MRTP Act had no extra-territorial operation, and the effects doctrine became applicable only with respect to a restrictive trade practice (RTP) after the goods were imported into India. Whereas in the ANSAC case the Court ruled that the MRTP Commission's reach could not extend to the formation of a foreign cartel, unless a member of the cartel carries out business in India. Critics have long argued that the limitation of the MRTP Act lies in its insistence on agreements involving an Indian party, which was further compounded by the decision of the Supreme Court in the Haridas case which effectively deprived the MRTP Act of any extraterritorial operation and thus made it almost impossible for it to take action against anti-competitive conduct involving imports, and foreign cartels in particular.

Therefore, to overcome this shortcoming under the MRTP Act, it appears that Section 32 has been categorically incorporated in the Act allowing it to exercise extraterritorial jurisdiction on the basis of the effects doctrine, thus removing the restriction which prohibited the MRTP Commission to act in the Haridas Case. Therefore, CCI now has power to take action against a foreign entity in a similar situation. Power of the CCI Section 32 allows the CCI to inquire into any agreement or abuse of dominant position or combination if such agreement or dominant position or combination that has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of the Act.

This power has been coupled along with the power to conduct enquiry as well the procedure for investigation under Sections 19, 20, 26, 29 and 30 of the Act , which lays down the power as well as the procedure to be followed by the CCI in its inquiry into any alleged anticompetitive agreements or any abuse of dominant position or any acquisition or acquiring of control or merger or amalgamation, and inquire into whether such an agreement/combination has caused or is likely to cause an appreciable adverse effect on competition in India. Keeping in mind the shortcomings of extraterritorial jurisdiction and the hiccups involved in the enforcements of private international law, Section 18 of the Act also empowers the CCI to enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country in order to discharge its duty under the provision of this Act.

**Question 20:- Competition Law and Leniency Provisions.**

**Answer:-** Most competition laws either exempt specific sectors and/ or types of economic activity, and /or have provision s for the granting of such exemptions in given situations. It is worth observing that there generally tend to be fewer exemptions in countries which have recently adopted competition laws (mainly developing and transition market economies) as compared with more industrialized nations. In India the Competition Commission of India ,While passing orders in respect of cartels , the Commission is vested with the discretion to impose a proportionate /lesser penalty than leviable under the Act upon a producer, seller, distributor, trader or service providers, provided the following conditions are met;

1. Such producer, seller, distributor, trader or service provider included in the cartel had made full and true disclosure in respect of the alleged violations and such disclosure is vital.

2. Such disclosure has been made before receipt of DG report on investigation order under section 26 of the Act

3. The party making disclosures continues to co-operate with the Commission till the completion of proceedings before the commission.

4. The party making disclosures has;

a) Complied with the condition of which the lesser penalty was imposed and

b) Not given false evidence.

It is noteworthy that the above leniency may be reversed if during the course of proceedings, the Commission is satisfied that any producer , seller , distributor , trader or service provider included in cartel had;

a) Not complied with the condition on which the lesser penalty was imposed.

b) Given false evidence and;

c) The disclosure made was not vital. In such an eventuality, such producer, seller, distributor, trader or service provider may be tried for the offence and de-hors the lesser penalty imposed shall be liable to the imposition of penalty to which such person is liable.

It is noteworthy the jurisdiction of the Civil Courts to entertain any suit or proceeding in respect of any matter which the commission or the Appellate Tribunal is empowered by or under the Act. The Act specifically bars the Courts and any other authority from granting any injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act305. It is worth to note that the Commission does not have any power to grant any compensation to the affected party . Moreover, the Director General does not have any suo moto powers to initiate any inquiry as is the case with OFT under the UK Competition law.

# CODE 310

# CODE OF CRIMINAL PROCEDURE

**QUES 1 : GIVE THE BRIEF INTRODUCTION OF CODE OF CRIMINAL PROCEDURE ACT,1973.**

In medieval India, after the Muslim conquest, the 'Mohammedan criminal law' came into prevalence. Subsequent to this, The British passed the 'Regulating Act of 1773' which led to the establishment of Supreme courts in three presidency towns of Calcutta, Bombay, and Madras. The effect of the statute was to apply British procedural law while deciding upon the cases of Crown's subjects. After 1857 Revolt, the crown took over the Indian administration. The British parliament passed the Criminal Procedure Code, 1861 which continued till the post-Independence era and was amended in 1969. It was finally replaced in 1972.

The Code of Criminal Procedure Code, 1973 (Act No. 2 of 1974) is the main legislation on the procedure for administration on substantive criminal law in India which provides the machinery for the investigation of crime, apprehension of suspected criminals, collection of evidence, determination of guilt or innocence of the accused person and the determination of punishment of the guilty. Additionally, it also deals with public nuisance, prevention of offenses and maintenance of wife and children. The Act consists of 484 sections, which are further divided into 38 chapters, 2 schedules, and 56 forms.

Territorial extent, scope, and applicability of this act: It is applicable to the whole of India except the state of Jammu and Kashmir as the parliament's power to legislate in respect of the said state is curtailed by Article 370 of Constitution of India. Provided that the provisions of this code, other than those relating to chapters VIII, X and XI thereof, shall not apply:

To the state of Nagaland

To the tribal areas in Assam

But the concerned State Government may, by notification, apply such provisions or any of them to the whole or part of the state of Nagaland or such tribal areas, as the case may be specified in the notification.

**QUES 2 : WRITE A SHORT NOTE ON FUNCTIONARIES UNDER THE CODE**.

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:**

**a) 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 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 the power to make an 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."

**b) 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 the 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.

**c) Defense Counsel**:

Defense Counsel:

According to section 303, any person accused of an offense 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.

**d) 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 the 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.

## QUES 3: EXPLAIN THE RATIONALE OF CRIMINAL PROCEDURE

The rationale of criminal procedure:

Importance of a fair trial:

One of the primary goals of criminal law is to protect society by punishing offenders. However, justice and fair play require that no one is punished without a fair trial. A person might be under a thick cloud of suspicion of guilt, he might have been caught red-handed, and yet he is not to be punished unless and until he is tried and adjudged to be guilty by a competent court. In the administration of justice, it is of prime importance that justice should not only be done but must also appear to have been done. Further, it is one of the most important principles of criminal law that everyone is presumed to be innocent unless his guilt is proved beyond reasonable doubt in a trial before an impartial and competent court.

Therefore it becomes absolutely necessary that every person accused of a crime is brought before the court for trial and that all the evidence appearing against him is made available to the court for deciding as to his guilt or innocence.

b) Constitutional perspectives:

Articles 20 and 22 of the constitution of India provide for certain safeguards to the persons accused of offenses. Article 20 secures the protection of the accused persons, in respect of conviction for offenses, from Ex post facto laws, double jeopardy and prohibition against self-incrimination. Similarly, Article 21 of the constitution of India ensures the protection of life and liberty which reads as "no person shall be deprived of his life or personal liberty except according to the procedure established by law. This right may be affected in cases of preventive detention under preventive detention laws. As such, Constitutional protection against arrest and detention is ensured under Article 22(1) to (7) of the constitution of India.

**QUES 4: EXPLAIN TRAIL UNDER THE CODE.**

The criminal procedure in India is governed by the CrPC 1973. It divides the procedure to be followed for the administration of criminal justice into three stages namely-

Investigation- where evidences are to be collected.

Inquiry- a judicial proceeding where the judge ensures for himself before going on trial, that there are reasonable grounds to believe that the person is guilty.

Trial- the judicial adjudication of a person's guilt or innocence.

According to the provisions of CrPC, there are three types of criminal trial:

**(A) Trial of Warrant cases**

Relates to offenses punishable with death, imprisonment for life or imprisonment for a term exceeding two years.

Employed in most offenses such as theft, Rape, Murder, Kidnapping, cheating etc. except in cases of defamation.

The trial procedure in respect of these offenses is contained in Sections 238-250.

The CrPC provides for two types of procedure for the trial of warrant cases by a Magistrate, viz. those instituted upon a police report where a lot of records made during investigations by the police is made available to the court and to the accused person and those instituted upon complaint i.e. otherwise than on police report where such record cannot be available.

**(B) Trial of Summons cases**

A summon case means a case relating to an offense, and not being a warrant case. These cases are tried with much less formality than warrant cases, the manner of their trial is less elaborated and the method of preparing the record (of evidence) is less formal.

An abridged form of warrants trial, where some proceedings are omitted to ensure swift process but at the same time basic postulates of a fair trial are retained.

Cases relating to an offense punishable with imprisonment not exceeding 2 years.

If a magistrate, after examining the case, does not find it fit to be called as a summons case, he may convert it into a warrant case.

The trial procedure prescribed for these cases is contained in sections 251-259.

In respect to these cases, there is no need to frame a charge. The session court gives the substance of the accusation (notice) to the accused when the person appears in pursuance to the summons.

The court has the power to convert a summons case into a warrant case if the magistrate thinks that it is in the interest of justice.

**(C) Summary Trial**

The trial procedure for these cases is contained in sections 260-265.

An abridged form of regular trial and is resorted to in order to save time in trying petty cases.

Section 260(2) of the code lists certain offenses which may be tried summarily by any Chief Judicial Magistrate, any Metropolitan Magistrate or any Judicial Magistrate First Class. A First class Magistrate must first be authorized by the respective High court to that effect before he may try cases summarily under this section.

**Offenses triable in a summary way**:

Offenses not punishable with death, life imprisonment, or imprisonment for a term exceeding 2 years.

Theft under section 379, 380, and 381 of the IPC provided that the value of the stolen property is below Rs 2000.
Receiving or retaining stolen property under section 411 of the IPC where the value of the stolen property is below Rs 2000.

Assisting in the concealment or disposal of stolen property, under section 414 of the IPC, the value of the stolen property being below Rs 2000.

Lurking house-trespass (section 454 of the IPC) and house-breaking(section 456 of the IPC) by night.

Abetment of any of the above-mentioned offenses.
Attempt to commit any of the above-mentioned offenses.
Offences with respect to which complaints may be made under section 20 of the Cattle Trespass Act, 1871.

Apart from the above, a Second Class Magistrate may, if so empowered by the High court, summarily try an offense punishable with fine or with imprisonment not exceeding 6 months or the abetment or attempt to commit such an offense. A summary trial tried by a magistrate without being empowered to do so is void. The maximum sentence that may be awarded by way of a summary trial is three months with or without fine.

**QUES 5: EXPLAIN THE STAGES OF THE CRIME.**

Stages of Criminal Trial in India

**(i) Registration of F.I.R**

Lodged under section 154 of the code which provides for the manner in which such information is to be recorded.

Statement of the informant as recorded under section 154 is said to be the First Information Report. Its main object is to set the criminal law in motion.

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.

Its evidentiary value: – It is not substantive evidence i.e. not the evidence of the facts which it mentions. Its importance as conveying the earliest information regarding the occurrence cannot be doubted. It can be used to corroborate the informant under section 157 of the Indian Evidence Act, 1872, or to contradict him under section 145 of the Act, if the informant is called as a witness at the time of trial.

**ii) Commencement of investigation**

It includes all the efforts of a police officer for collection of evidence: Proceeding to the spot; ascertaining facts and circumstances; discovery and arrest of the suspected offender; collection of evidence relating to the commission of offence, which may consist of the examination of various persons including the accused and taking of their statements in writing and the search of places or seizure of things considered necessary for their investigation and to be produced at the trial; formation of opinion as to whether on the basis of the material collected there is a case to place the accused before a magistrate for trial and if so, taking the necessary steps for the charge-sheet.

Investigation ends in a police report to the magistrate.

It leads an investigating officer to reach a conclusion whether a charge-sheet has to be filed or a closure report has to be filed.

**iii) Framing of charges**

If a person is not discharged, trial begins by framing a charge (nothing but a specific accusation against the accused) and reading and explaining it to him (so that he knows what he is to force).

**iv) Conviction on plea of guilty**

After framing of charges the judge proceeds to take the ‘plea of guilt’ which is an opportuni

After framing of charges the judge proceeds to take the ‘plea of guilt’ which is an opportunity to the accused to acknowledge that he pleads guilty and does not wish to contest the case. Here the judge responsibility is onerous- a. to ensure that the plea of guilt is free and

voluntary, b. He has to ensure that if there had been no plead of guilt- was the prosecution version if unrebutted-would have led to a conviction. If both the requirements are met-then judge can record and accept the plea of guilt and convict the accused after listening to him on sentence.

**v) Recording of the prosecution Evidence:**

Examination of a prosecution witness by the police prosecutor, marking of exhibits and cross examination by defense counsel.

**vi) Statement of the Accused:**

Section 313 of the Criminal procedure empowers the court to ask for an explanation from the accused if any. The basic idea is to give an opportunity of being heard to an accused and explain the facts and circumstances appearing in the evidence against him. Under this section, an accused shall not be administered an oath and the accused may refuse to answer the questions so asked. The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him.

**vii) Evidence of Defense**:

In cases of accused not being acquitted by the court, the defense is given an opportunity to present any defense evidence in support of the accused. The defense can also produce its witnesses and the said witnesses are cross- examined by the prosecution. However, in India, the defense does not provide defense evidence as the criminal justice systemputs burden of proof on the prosecution to prove that a person is guilty of an offence beyond the reasonable doubt.

**viii) Final arguments on both the sides**

once the public prosecutor and the defense counsel present their arguments, the court generally reserve its jugdement.

**ix) Judgment**

Judgement is the final reasoned decision of the court as to the guilt or innocence of the accused. After application of judicial mind, the judge delivers a final judgement holding an accused guilty of an offence or acquitting him of the particular offence. If a person is acquitted, the prosecution is given time to file an appeal and if a person is convicted of a

particular offence, then the date is fixed for arguments on sentence. Once a person is convicted of an offence, both the sides present their arguments on what punishment should be awarded to an accused. This is done in cases which are punished with death or life imprisonment. After the arguments on sentence, the court finally decides what should be the punishment for the accused. While punishing a person, the courts consider various theories of punishment for the accused. While punishing a person, the courts consider various theories of punishment like the deterrent theory of punishment and reformative theory of punishment. Court considers the age, background and history of an accused and the judgement is pronounced accordingly.

**QUES 6:EXPLAIN THE BASIC CONCEPT IN CRPC.**

**BAILABLE OFFENCE AND NON-BAILABLE OFFENCE**

A bailable offence is one, in which, bail is a matter of right, and non bailable offence is one, in which granting of bail is discretion of the court.

BAILABLE OFFENCE

In case of bailable offence, the grant of bail is a mater of right. It may be either given by a police officer who is having the custody of Accused or by the court.

The accused may be released on bail, on executing a bond, know as “bail bond”, with or without furnishing sureties.

The “bail Bond” may contain certain terms and conditions, such as:

The accused will not leave the territorial jurisdiction of the state without permission of court or police officer.

The Accused shall give his presence before police officer every time, he is required to do so.

The Accused will not tamper with any evidence whatsoever, considered by police in the investigation.

The court is empowered to refuse bail to an accused person even if the offence is bailable, where the person granted bail fails to comply with the conditions of the bail bond.

EXAMPLES OF BAILABLE OFFENCE

Although even in case of bailable offence, the bail may be refused, if credit of the accused is doubtful. However following are some offences which are classified as "Bailable offence" by the code itself:

-Being a member of an unlawful Assembly

-Rioting, armed with deadly weapon

-Public servant disobeying a direction of the law with intent to cause injury to any person.

-Wearing Garb or carrying token used by public servant with fraudulent intents

-Bribery in relation to elections.
False statement in connection with elections.

Refusing oath when duly required to take oath by a public servant.

Obstructing public Servant in discharge of his public functions.

Giving or fabricating false evidence in a judicial proceeding.

Selling any food or drink as food and drink, knowing the same to be noxious.

Causing a disturbance to an assembly engaged in religious worship.

NON BAILABLE OFFENCE

A non-bailable offence is one in which the grant of Bail is not a matter of right. Here the Accused will have to apply to the court, and it will be the discretion of the court to grant Bail or not.

Again, the court may require the accused to execute a "Bail-Bond with some stringent conditions.

The court may generally refuse the Bail, if:

"Bail Bond" has not been duly executed , or

if the offence committed is one, which imposes punishment of death or Life imprisonment, such as "Murder " or "Rape" or

The accused has attempted to abscond, and his credentials are doubtful.

The application for bail shall be filed before the Magistrate, who is conducting the trial.

The application after being filed is usually listed on the next day. On such day, the application will be heard, and the police shall also present the accused in court. The magistrate may pass such orders, as he thinks fit.

If the bail is granted, the accused will have to execute a "Bail Bond".

On execution of bail-bond the accused is out of prison only on such terms and conditions, as contained in the "Bail-Bond".

The amount of every bond, i.e. the security shall be reasonable, and no excessive ( sec 440)

If, at any point of time, the terms and conditions of bail are not fulfilled, the "Bond" shall be forfeited.

The application for Bail shall be made in the form, prescribed and the designation of judge / Magistrate, should be clearly mentioned.

The application shall also contain an undertaking, that the accused, shall fulfill all the conditions as contained in the Bail- Bond.

**PROCEDURE ONCE BAIL IS GRANTED**

When the bail has been granted the accused shall, execute a "Bail-Bond", and furnish sureties, and security for amount as required.

When the bond has been duly executed, the accused shall be released, and if he is in prison, then an order of Release shall be issued to the officer in charge.

If the accused is charged for two separate offences, then, he shall have to execute and satisfy Bail Bond for both of them.

**WHEN BAIL MAY BE REVOKED OR BAIL BOND BE FORFEITED**

Following are the instances, when a bail may be revoked, or Bail Bond is forfeited:

Where, the accused fails to fulfill or commits, breach of any terms and conditions of the bond.

Where the accused, fails to furnish the required number of sureties or fails to deposit the security amount

Where, the sureties accepted at the time of bail, or turn out afterwards to be insufficient, fraud or has been accepted under mistake.
Where any of he sureties to the bail bond, applies to the magistrate for his own discharge

Where one of the original surety dies or becomes insolvent, and if accused fails to bring another surety.

In all these cases, the magistrate or court has power to remand the accused to prison, until fresh bond and fresh terms are executed.

**APPEAL FROM FORFEITURE OF BOND**

Where, a bond has been forfeited, or bail has been cancelled, an appeal can be made against such an order.

Where an order has been made by a magistrate an appeal shall lie to a sessions judge or

Where an order has been made by a court of sessions then appeal shall lie to the same court, where ordinarily– appeal would lie against sessions judge.

**COGNIZABLE AND NON COGNIZABLE OFFENCE**

Offences can also be classified on the basis of "Cognizable offence", and "Non-cognizable" offence. In brief the difference between these two is

Cognizable offences: An offence, where a police offer can arrest without a warrant.

Non-cognizable offences: An offence, where a police officer can arrest only with a warrant.

COGNIZABLE OFFENCE

Cognizable offences are those where a police officer can arrest without warrant.

And such cases, after arrest has been made, the accused will be produced before a magistrate, and he may require the police officer to investigate the matter.

After investigation, if the case is made out, i.e. charge sheet filed goes against accused, the magistrate can order for arrest.

During the pendency of trial, bail application can be moved before the concerned magistrate. Cognizable offences are both bailable, and non-bailable.

EXAMPLES OF COGNIZABLE OFFENCES ARE

- Offences of waging or attempting to wage war, or abetting the waging of war against the government of India.
- Wearing the dress or carrying any token used by a soldier, sailor or airman with intent that it may be believed that he is such a soldier, sailor or airman.
- Rioting armed with deadly weapon.
- Hiring, engaging or employing person to take part in an unlawful assembly or taking part in self.
- Being or expecting to be a public servant, and taking, and taking a gratification other than legal remuneration in respect of an official act.
- Public servant obtaining any valuable thinks, without consideration, from a person concerned in any proceeding or business transacted by such public servant.
- Counterfeiting, or performing any pat of the process of counterfeiting Indian coin.
- Having possession of a counterfeit government stamp.
- Making or selling false weights or measures for fraudulent use.
- Negligently doing any act known to be likely to spread infection of any disease dangerous to life.
- Causing a disturbance to an assembly engaged in religious worships.

NON- COGNIZABLE OFFENCE

Non cognizable offences are those, where a police officer cannot arrest without a warrant.

In such offences for arrest, all the steps have to be followed like

Filing of complaint/F.I.R.
Investigation
Charge sheet,
Charge sheet to be filed in court
Trial
Final order of arrest if case has been made out.

EXAMPLES OF NON-COGNIZABLE OFFENCES ARE

Following are some examples of non-cognizable offences.

- Owner or occupier of land not giving information of riot etc.
- A public servant disobeying a direction of the law with intent to cause injury to any person.
- A public servant unlawfully engaging in trade.
- Bribery during elections.
- Making any false statement in connection with an election.
- Absconding to avoid service of summons or other proceeding from a public servant, like where summons or notice require attendance in person etc, in a court of justice.
- Refusing to take oath when duly required taking oath by a pubic servant.
- Obstructing public servant in discharge of his public functions.
- Giving or fabricating false evidence in a judicial proceeding.
- False claim in a court of justice.
- Fraudulent use of false instrument for weighting.
- Selling any food or drink as food and drink knowing the same to be noxious.
- Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.
- Voluntarily causing hurt on grave and sudden provocation, not intending to hurt any other than the person, who gave the provocation. Buying or disposing of any person as a slave.
- Dishonest misappropriation of movable property, or converting it to one's own use.

**COMPOUNDABLE AND NON COMPOUNDABLE OFFENCES**

Criminal offences can also be classified as compoundable and non-compounable offences.

COMOUNDABLE OFFENCES

Compoundable offences are those offences where, the complainant (one who has filed the case, i.e. the victim), enter into a compromise, and agrees to have the charges dropped against the accused. However such a compromise, should be a "Bonafide," and not for any consideration to which the complainant is not entitled to.

Application for compounding the offence shall be made before the same court before which the trial is proceeding. Once an offence has been compounded it shall have the same effect, as if, the accused has been acquitted of the charges.
The code of criminal procedure lays down, i.e. bifurcated, the offences, which are compoundble, and which are non-compoundable.

EXAMPLES OF COMPOUNABLE OFFENCES:

- Uttering words etc, with deliberate intent to wound the religious feelings of any person causing hurt.
- Criminal or house trespass Criminal breach of contract of service.
- Printing or engraving matters, knowing it to be defamatory.
- There are some offences, which although are compoundable, but, they can be compounded only with the permission of the court.
- These offences should be compounded before trial begins.
- Also where accused has already been convicted, and an appeal is pending, permission of the court is required for compounding of such offences.
- The reason for seeking permission of the court, is that these offences are grievous in nature, and are bad example in society

EXAMPLE OF COMPOUNDABLE OFFENCES (WHERE PERMISSION OF COURT IS REQUIRED)

- Voluntarily causing hurt by dangerous weapons or means.
- Causing grievous hurt by doing on act so rashly and negligently as to endanger human life or the personal safety of others.
- Wrongfully confining a person for three days or more.
- Assault or criminal force to woman with intent to outrage per modesty.
- Dishonest misappropriation of property.
- Criminal breach of trust by a cannier— wharfinger– etc, where the value of the property does not exceed two hundred and fifty rupees.
- Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.
- Fraudulent execution of deed of transfer containing false statement of consideration.

- Mischief by killing or maiming cattle etc of any value of fifty rupees or upwards.
- Counterfeiting a trade or property mark used by another.
- Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman.

NON COMPOUNDABLE OFFENCES

There are some offences, which cannot be compounded. They can only be quashed. The reason for this is, because the nature of offence is so grave and criminal, that the Accused cannot be allowed to go scot-free. Here, in these types of cases generally, it is the "state", i.e. police, who has filed the case, and hence the question of complainant entering into compromise does not arise.

All those offences, which are not mentioned in the list under section (320) of CrPC, are non-compoundable offences.

**HOW IS A CRIMINAL PROCEEDING INITIATED**

For every different type of Criminal proceeding a separate procedure is involved. However in general, a brief procedure, as to how a criminal case commences, is as follows:

**COMPLAINT (154)**

The fist step for initiation of any Criminal case is the complaint. The victim is called a complainant, and complainant should lodge his complaint to the police station of that area, where the offence has been committed, or where he resides. A complaint can be on behalf of the victim also.

Generally, the complaint should be lodged within 24 hour of the commission of offence. However, the limitation time is different for some offences.

THIS COMPLAINT CAN BE TREATED AS F.I.R BY THE POLICE OFFICER I.E. FIRST INFORMATION REPORT ON RECEIPT OF INFORMATION (155).

On receipt of such information, the concerned police officer shall record the information in writing and the person giving information shall sign it.

IN CASE OF NON COGNIZABLE OFFENCE

In case of receipt of information pertaining to Non-Cognizable offence the police officer will have to take permission of the Magistrate.

The Magistrate may either quash the information or grant power to investigate.

On receipt of orders to investigate from the Magistrate, the police officer shall start the investigation.

IN CASE OF COGNIZABLE OFFENCE

In case of information received, in any cognizable offence, the Police officer shall/can start the investigation without any permission/order from the Magistrate.

**INVESTIGATION**

The investigation in respect of Cognizable offence, and order to investigate in non-cognizable offence shall commence on the same line.

The only difference is that, in case of cognizable offence, the police officer can arrest without warrant, during investigation. In case of non-Cognizable offence, the police officer will have to apply for warrant from Magistrate, for making any arrest.

Even in respect of cognizable offence, the police officer shall send a report to the Magistrate.

During the course of investigation the Police Officer may acquire any other person, to appear, and be examined as witness.

Any such statements made by the witness, including the complainant, shall be recorded in writing.

Such statements, which are recorded, should not be signed by the person making a statement, and such statements, shall only be used for the purpose of further investigation.

Also, these statements can be used as evidence, in trial, only with the permission of the magistrate.

While the statement is being recorded, the police officer shall not cause any threat inducement or any promise, to the witness.

A metropolitan Magistrate or a judicial magistrate can also record any confession or statement of any witness, during the course of trial.

SEARCH AND PRODUCTION OF DOCUMENTS

If, the police officer believes that, some search has to be made, during investigation, he is authorised to do so.

He can also issue, an order to the person, to produce any relevant documents.

If, during search, the police officer is of the opinion that, any one might cause or refuse to search a place or property, then the police officer can obtain a search warrant from the magistrate of that area.

On conducting the search if police officer finds some things useful for the trial or Further investigation, then police officer can take such Articles in his possession

ARREST DURING INVESTIGATION

Where, the Accused is arrested by the police officer, during investigation; he shall have to be produced before a Magistrate within 24 hours.

Where, the period of investigation extends beyond, 24 hours, and the investigation has revealed sufficient grounds against the accused, then if he is still in the custody, the concerned police officer shall produce the accused before the Magistrate alongwith copy of the entries made in diary during investigation.

The Magistrate may either order for release of the Accused till investigation or order for further detention.

In case of further detention, the Accused shall have to be brought before the Magistrate every fifteen days.

DURING SUCH DETENTION PERIOD, THE ACCUSED CAN APPLY FOR BAIL.

If during or after investigation, the police officer comes to a finding, that there is not sufficient evidence to produce the accused before Magistrate, then such accused shall be released on executing a bond.

However, if required by Magistrate he will have to appear on such date and time as directed.

On the other hand, if police officer comes to a finding that the case is fit for trial, he shall forward the accused under custody to the Magistrate, to take cognizance.

On completion of investigation

**TRIAL**

On receipt of the police report, the Magistrate shall take cognizance of the case, and proceedings shall be initiated.

**SUMMONS**

If, the Accused is already under custody, then he shall be produced before the Magistrate on the date of hearing.

If, he is not in custody, then summons shall be issued to him, to appear before the Magistrate.

If required, summons shall also be issued to any witness to appear on the date fixed for hearing.

**DATE OF HEARING**

On the date of hearing, the police officer/report shall be represented by " Public Prosecutor". He shall present his case on the basis of investigation and police report. On that day the accused may be heard or given some time to set up his defence.

**EVIDENCE**

All the material collected by Police officer during investigation shall also be produced.

On the dates fixed for evidence, the witnesses will be examined and cross-examined.

Both, the public prosecutor and the accused shall have right to produce their own witnesses, and material things.

**FINAL ORDER**

On the date fixed for final hearing, the Magistrate shall pass the order after considering, the evidence produced, and having heard the parties.

The order passed may either acquit or convict the accused.

With this final order, the criminal trial comes to an end.

CRIMINAL PROCEEDINGS IN CASES OF PERSON INVOLVED IN OFFENCES RELATING TO NARCOTIC DRUGS

Narcotic drugs or Psychotropic substances mean the following;

Ganja

Opium

Co Ca Leaf

Cocaine and etc.

Any person who is not authorised by central Government or who uses any of such drugs for any purpose other than medical or scientific purpose, will be committing a criminal offence, under " Narcotic Drugs & Psycho tropic substances Act, 1985".

Any offence committed in relation to Narcotic Drugs, is "Cognizable", i.e. Police officer can arrest without warrant, and is also "Non-bailable", in cases, where the term of punishment exceeds 5 years of more.

HOW ARE PROCEEDINGS CONDUCTED

Following persons can issue a search or arrest warrant, where there is a suspicion or complaint or information that narcotic drugs are being dealt in:

A metropolitan or Ist or IInd Class Magistrate

Police officer

Officer of Revenue, drugs control excise department.

On the search being conducted, if any person is found in illegal possession of narcotic drugs, he can be arrested there and then.

Every such person arrested shall be forwarded to a Magistrate or police officer, who issued a warrant.

DEVIATION FROM CRIMINAL PROCEDURE CODE: (36 A of Narcotic Drugs & Phsy sub. Act, 85)

Generally, a Magistrate, can order a detention of accused for more than 15 days, if investigation is not completed within 24 hours.

However in relation to Narcotic Drugs, the procedure is bit different. It is as follows:

If the Magistrate is a judicial Magistrate he can only remand for a period of 15 days, and If the Magistrate is an executive Magistrate, he can remand only for a period of 7 days.

However if the Magistrate wants to remand on accused for a period of more days than above, then he will have to forward such person ( accused) before the "special court" Also where the Magistrate, considers the detention unnecessary he will still have to forward such accused before the " Special court".

A "Special court", will have all the powers to conduct the criminal trial, which the Magistrate has, under the CrPC.

A "Special court", can also take direct cognizance of an offence, without being committed to if for trial, on perusal of a police report, or complaint made by concerned officer.

BAIL AND BONDS

For all such offences relating to Narcotic Drugs, the Bail Application can be applied only before the special court trying the offence. Provisions and Rules of Bail as contained in CrPC will apply similarly before special court also.

POWER OF SPECIAL COURT

A "Special Court" is established by the Government for different areas, for conduction trial, relating to Narcotic Drugs.

The special court shall consist of a single judge, who is either a "session Judge" or "Additional Sessions Judge".

The Special court, will have all the power of Magistrate as granted by Code of Criminal Code, and will be treated as "Court of Sessions".

APPEAL AND REVISION

Any appeal or revision, arising from an order of "special court" will lie before "HIGH COURT".

**QUES 7: EXPLAIN ARREST AND RIGHT OF ARRESTED PERSON.**

In Indian Criminal procedural law, CrPc 1973, chapter V (Section 41 to 60) talks about Arrest of a person but ironically has not defined arrest anywhere.

Arrest means the apprehension of a person by legal authority resulting in deprivation of his liberty. An arrest consists of taking into custody of another person's authority empowered by law for the purpose of holding or detaining him to answer a criminal charge and preventing the commission of the criminal offense,

An arrest can be made by

(I) A Police officer,

(II) A Magistrate (Sec. 44) or

(III) A Private Person.

U/Sec. 43 of CrPc, a private person including me and you can also arrest a person in case the person committed a non-bailable and cognizable offense or if that person is a Proclaimed Offender (sec.82) .The most common form of an arrest is the arrest made by police, under sec. 41 police officer can make an arrest without a warrant in any cognizable offenses and with a warrant in non-cognizable offenses. Cognizable offenses are more of serious nature as compared to non-cognizable offenses i.e. Murder, Kidnapping, etc.

**Sec. 46** describes the mode in which arrests are to be made (whether with or without the warrant). In making an arrest the police officer /other person making the same actually touches or confines the body of the person to be arrested unless there be a submission to custody by words or action.

**RIGHTS OF THE ARRESTED PERSON: -**

In Criminal Law, there is a principle that "Presumption of innocence unless proven guilty". So, an arrest of a person doesn't make him guilty. He has a right to be treated with 'humanity, dignity and respect'. Hereare the following rights:-

• Right to be informed of the grounds of arrest under sec. 50 of CrPc and article 22 of Indian Constitution, it's a fundamental right to be informed. It is the duty of the police officer to inform you and also tell whether the offense is bailable or non-bailable. Normally, Bailable offenses are those where bailable can be granted and it is right of the person to be granted bail and Non- bailable offenses are where bail can't be granted generally and it's the discretion of the court.

• In non- cognizable cases, arrests are made with a warrant and the person going to be arrested has a right to see the warrant under Sec. 75 of CrPc. Warrant of arrest should fulfill certain requirements such as it should be in writing such as signed by the presiding officer, should have the seal of the court, Name and address of the accused and offense under which arrest is made. If any of these is missing, the warrant is illegal.

• U/ sec. 41, police have the power to arrest a person without a warrant for a prompt and immediate arrest is needed, no time to approach magistrate and obtain a warrant for example in a case where a serious crime has been perpetrated by a dangerous person or where chances of that person absconding unless immediately arrested. Not in all cases arrest in necessary, Notice of appearance before police officer can be made if reasonable complaint has been made, credible information has been received and suspicion exists of cognizable offence and if concerned person continues to comply with such notice and appears, then arrest is not necessary but he if he doesn't, then arrest can be made.( sec 41A)

• The police officer must be wearing a clear, visible and clear identification of his name which facilitates easy identification. A memo of arrest must be prepared at the time of arrest – (i) attested by least one witness, it can be a family member or member of the locality where an arrest is made (ii) countersigned by arrested person.

• Right of arrested person to meet an advocate of his choice during interrogation U/sec. 41D and sec. 303 CrPc.

• An arrested person has a right to inform a family member, relative or friend about his arrest U/ sec 50 of CrPc.

• An arrested person have right not to be detained for more than 24hrs, without being presented before a magistrate, it is to prevent unlawful and illegal arrests. This right is a fundamental right under article 22 of the Indian constitution and U/sec. 57 and 76 of CrPc.

• An arrested person has the right to be medically examined (Sec 54,55A).

• An arrested person has a right to remain silent U/Sec. 20(3) of Indian constitution so that

police can't extract self – incriminating statement from a person without a will or without his consent.

PROTECTION TO FEMALES -:

- The General rule is that females are not be arrested without the presence of a lady constable and no female be arrested after sun-set but there are exceptions in some cases, where crime is very serious and arrest is important then the arrest can be made with special orders and it depends on facts and circumstances of each case. Separate lock ups to be provided for them. [State of Maharashtra Vs Christian Community Welfare Council of India [(2003) 8 SCC 546]

CONCLUSION: -

Although, there have been many safeguards provided by the code and Constitution of India as mentioned above but the fact remain that the power of arrest is being wrongly and illegally used in large no. of cases all over the country. By going through Law Commission paper on Law of arrest, we can read with data's that how the power of arrest is being misused and more because of unawareness of people about their rights. This report shows high percentages of arrests are made even in bailable offenses, bails are not granted to those where getting bail is one's right. An arrest has a diminishing and demoralizing effect on the personality. He is outraged, alienated and becomes hostile. But there needs to be a balance between security of the state on one hand and individual freedom on the other hand. There need to be some checks on this power and more awareness needs to be created among the people about their rights so that balanced system can be formed.

**QUES 8: EXPLAIN PROVSION OF BAIL UNDER CRPC.**

The object of arrest and detention of the accused person is primarily to secure his appearance at the time of trial and to ensure that in case he is found guilty he is available to receive the sentence. If his presence at the trial could be reasonably ensured otherwise than by his arrest and detention, it would be unjust and unfair to deprive the accused of his liberty during the pendency of the criminal proceedings against him.

The provisions regarding the release of the accused person on bail are aimed at ensuring the presence of accused at his trial but without unreasonably and unjustifiably interfering with his liberty. There is no definition of bail in the Code, although the terms "bailable offence" and "non-bailable offence" have been defined. (sec. 2a)

"Bail" has been defined in the Law Lexicon as security for the appearance of the accused person on giving which he is released pending trial or investigation. Govind Prasad v. State of West Bengal,

**Bail in case of bailable offence**

The Code of Criminal Procedure, 1973 contains elaborate provisions relating to bails. Section 436 provides for the release on bail of a person accused of a bailable offense.

436. In what cases bail to be taken.

(1) 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: Provided that 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 as hereinafter provided: Provided further that nothing in this section shall be deemed to affect the provisions of sub- section (3) of section 116 or section 446A 1.

(2) Notwithstanding anything contained in sub- section (1), where a person has failed to comply with the conditions of the bail- bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446.

However, by Criminal Procedure (Amendment) Act, 2005 sub-section (1) Section 436 was amended to make a mandatory provision that if the arrested person is accused of a bailable offense is an indigent and cannot furnish surety, the courts shall release him on his execution of a bond without sureties. Legislature by Criminal Procedure (Amendment) Act,

2005 inserted Section 436A which lays down the maximum period for which an under trial prisoner can be detained.

**Bail in case of Non-bailable offence**

Provisions, as to bail in case of non-bailable offence, is laid down in Section 437 of the code. This section gives the Court or a police officer power to release an accused on bail in a non-bailable case, unless there appear reasonable grounds that the accused has been guilty of an offence punishable with death or with imprisonment for life.

But

(1) a person under the age of sixteen years

(2) a woman; or

(3) a sick or infirm person may be released on bail even if the offence charged is punishable with death or imprisonment for life.

Where a person is charged with a non-bailable offence, but it appears in the course of the trial that he is not guilty of such offence, he can be immediately released on bail pending further inquiry.

The same may be done after the conclusion of a trial and before judgment is pronounced, if the person is believed not to be guilty of a non bailable offence. As a safeguard, the section provides for review of the order by the Court which has released the person on bail. The power of the Magistrate under this section cannot be treated at par with the powers of the Sessions Court and the High Court under Section 439.

Grant of bail is the rule and its refusal is an exception. But while granting it the Court has to be satisfied that the order to be passed is in the interest of justice. (Mazahar Ali v. State)

**Anticipatory Bail: Section 438**

Anticipatory bail means bail in anticipation of an arrest. Any person who apprehends arrest under a non-bailable offence in India can apply for Anticipatory Bail under the provisions of section 438 of The Code of Criminal Procedure, 1973.

It is basically bail before arrest, a person arrested cannot seek Anticipatory Bail, he would have to move for a regular bail. The words anticipatory bail is neither found in section 438

nor in its marginal note. In fact, anticipatory bail is a misnomer. When a court grants anticipatory bail, what it does is to make an order that in the event of arrest, the person shall be released on bail.

The legislature in its wisdom incorporated this provision for grant of bail to a person apprehending arrest is to prevent disgrace of being jailed or remaining in custody before he can be released on bail. The old code of criminal procedure did not have any provision for the same and the lawmakers realized that false and frivolous cases are filed against some people and such persons have to necessarily be arrested before they could seek bail. Thus a mechanism for preventing undue harassment and disgrace from arrest and detention was devised.

In the landmark Gurubaksh Singh Sibbia case, the apex court opined that "It is conceptualized on the idea of protecting personal liberty guaranteed under the Constitution of India". This said, it is a discretionary power and is not a matter of right. The court would use the discretion according to the facts and circumstances of the case and under stipulated guidelines.

**Cancellation of Bail**

Rejection of Bail is different from the cancellation of bail. (Aslam Desai v. State of Maharashtra,

The Code of Criminal Procedure, 1973 contains two provisions for cancellation of Bail. The first one is laid down in Section 437(5) and the other in section 439(2). According to Section 437(5) "any court which has released a person on bail under sub-section (1) or sub-section (2) of Section 437, may if it considers it necessary so to direct such person to be arrested, and committed to custody". Thus under this section a Magistrate does not have an authority to cancel bail granted by a police officer.

For cancellation of bail in such situation, power of the High Court or the Court of Session under Section 439(2) will have to be invoked. Section 439(2) lays down that a High Court or a Court of Session may direct that any person who has been released on bail under this chapter be arrested and commit him to custody. Thus the power given to the High Court and court of Session is very wide.

441. Bond of accused and sureties.

(1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.

(2) Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.

(3) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

(4) For the purpose of determining whether the sureties are fit or sufficient, the Court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or, if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the Court, as to such sufficiency of fitness

**QUES 9: EXPALIN PROCESS TO COMPEL PRODUCTION OF PERSON.**

There are six ways of process to compel a person to appear in court, viz. (1) Summons; (2) Warrant; (3) Warrant in lieu of summons; (4) Proclamation of an absconder; (5) Attachment of his property; and (6) Bond, with or without sureties, to appear before a court on a certain date.

(1) Summons:

It is a document issued from the office of a court of justice calling upon the person to whom it is directed to attend before a judge or officer of the court. Section 61 of the Code requires that every summons issued by a court shall be in writing in duplicate signed and sealed by the presiding officer of such court.

It states in clear terms the title of the court, the place at which and the day or time of the day when the attendance of the person summoned is required.

The summons shall be served by a police officer or an officer of the court issuing it or other public servant. [Section 62]

The summons has to be served personally on the person, summoned by delivering a duplicate copy of the summons, who signs receipt therefore on the back of the other (duplicate). (Section 62)

**Service on a corporation**:

Service of a summons on an incorporated company may be affected by serving it on the secretary, local manager or other principal officer of the corporation or by registered post letter addressed to the chief officer of the corporation in India. (Section 63).

Where the person summoned not found:

Where the person summoned cannot be found, the summons may be served by leaving one of the duplicates for him with some adult member of his family residing with him, and the person with whom the summons is so left shall sign a receipt therefore on the back of the other duplicate. (Section 64). A servant is not a member of the family within the meaning of Section 64.

If service in the manner mentioned above in Sections 62, 63 and 64 cannot be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides, and thereupon the Court after making such inquiries as it thinks fit, may either declare that the summons has been duly served or order fresh service in such manner as it considers proper. This is called substituted service. (Section 65).

**Service on Government servant:**

If a Government servant has to be summoned, the summons shall be sent by the court in duplicate to the head of the office in which such person is employed, and such head shall thereupon cause the summons to be served personally on the person summoned and shall return a duplicate copy to the court under his signature with the endorsement of receipt effected thereon. (Section 66).

**Service of summons outside local limits:**

Where a summons is to be served outside the local limits of jurisdiction of the court issuing it, service has to be effected by sending it in duplicate to the Magistrate within whose jurisdiction the person summoned resides.

Service of summons on witness by post:

Notwithstanding anything contained in the preceding sections of this chapter, a Court issuing a summons to a witness may in addition to and simultaneously with the issue of such summons, direct a copy of the summons to be served by registered post addressed to the witness at the place where he ordinarily resides or carries on business or personally works for gain.

When an acknowledgment purporting to be signed by the witness or an endorsement purporting to be made by a postal employee that the witness refused to take delivery of the summons has been received, the Court issuing the summons may declare that the summons has been duly served. (Section 69).

**(2) Warrant of Arrest**:

The second method of securing attendance

of a person is by means of a warrant of arrest. The warrant is an order addressed to a certain person directing him to arrest the accused and to produce him before the court.

It is executed by a Magistrate on good and legal ground only. Section 70 of the Code gives the essentials of a warrant of arrest. It lays down that every warrant of arrest issued by a court shall be in writing, signed by the presiding officer of such court, and shall bear the seal of the court.

From a reading of the above it is clear that in order to be valid a warrant must fulfil the following requisites:

It must be in writing;

(ii) It must be signed by the presiding officer;

(iii) It must bear the name and designation of the police officer or other person who is to execute it;

(iv) It must give full particulars of the person to be arrested so as to identify him clearly;

(v) It must specify the olfences charged; and

(vi) It must be scaled.

Continuance of the warrant of arrest

Every warrant shall remain in force until it is cancelled by the court which issued it or until it is executed. A warrant of arrest does not become invalid on the expiry of the date fixed for return of the warrant.

Warrants are of two kinds: bailable and non-bailable. Section 71 deals with bailable warrant and lays down that a warrant may contain a direction of the court that if the person to be arrested executes a bond with sufficient sureties for his attendance before the court at a specified time, the serving officer shall take such security and release him from custody.

Such a bailable warrant shall also state the number of sureties, the amount of the bond and the time at which the arrested person is to attend the court.

A warrant of arrest shall ordinarily be directed to one or more police officers, but the court issuing such a warrant may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons and such person or persons shall execute the same. (Section 72).

The Chief Judicial Magistrate or a Magistrate of the first class may direct a warrant to any person within his local jurisdiction for the arrest of any escaped convict, offender or person accused of a non-bailable offence, or a proclaimed offender evading arrest. (Section 73)

The police officer or any other person executing a warrant has to notify the substance thereof to the person to be arrested, and if so required, to show him the warrant (Section 75).

The police officer or other person executing a warrant shall (subject to the provisions of Section 71 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 24 hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's court. (Section 76).

A warrant of arrest may be executed at any place in India. (Section 77).

(3) Warrant in lieu of summons

A court may issue a warrant in lieu of or in addition to a summons for the appearance of any person in the following three cases:

(i) Where the court believes that the person summoned has absconded or will not obey the summons;

(ii) Where although the summons is proved to have been served in time, the person summoned without reasonable cause fails to appear; and

(iii) On breach of a bond for appearance.

A Magistrate ought not to issue a warrant either in lieu of or in addition to summons in a summons case unless he has previously recorded the reason for his so doing. (Sections, 87, 89).

(4) And (5) Proclamation for person absconding and attachment:

The fourth and fifth processes of compelling the appearance of a person before a court are by a proclamation and attachment. If a court has reasons to believe that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such court may publish a written proclamation requiring him to appear at a specified place and time not less than thirty days from the date of publishing such proclamation.

The proclamation shall be published: (i) by publicly reading in some conspicuous place of the town or village in which such person ordinarily resides, (ii) by affixing it to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village; and (iii) by affixing a copy thereof to some conspicuous part of the court-house. The court may also, if it thinks fit, direct a copy of the proclamation to be published in daily newspaper circulating in the place in which such person ordinarily resides. (Section 82).

Before the issue of a proclamation the Magistrate should be satisfied that the accused was absconding or concealing himself for the purpose of avoiding the service of a warrant. The proclamation also should direct appearance of the person concerned within thirty days, and if the date fixed for the appearance is less than thirty days, it is illegal.

The court issuing a proclamation may for reasons to be recorded in writing at any time order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person. There may even be a simultaneous order of attachment along with the order of proclamation

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The court issuing a proclamation may for reasons to be recorded in writing at any time order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person. There may even be a simultaneous order of attachment along with the order of proclamation (SECTION 83).

**Modes of attachment:**

If the property ordered to be attached is a debt or other movable property, the attachment may be made—(i) by seizure, or (ii) by the appointment of a receiver; or (iii) by an order in writing prohibiting the delivery of such property to the proclaimed person or to anyone on his behalf; or (iv) by all or any two of such methods, as the court thinks fit.

If the property ordered to be attached is immovable, the attachment shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situated.

If the immovable property is not the land paying revenue to the State Government, the attachment shall be: (i) by taking possession; or (ii) by the appointment of a receiver; or (iii) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to anyone on his behalf, or by all or any two of such methods, as the court thinks fit.

If the property to be attached consists of livestock or is of a perishable nature, the court may order its immediate sale. (Section 83).

Objections to attachment by third person:

Any person other than the proclaimed person may prefer a claim or make an objection to the attachment of property within six months from the date of attachment on the ground that the claimant or objector has an interest in the attached property and that such interest is not liable to attachment.

Every such claim or objection shall be inquired into by the court in which it is preferred and may be allowed or disallowed. If the claim or objection is disallowed in whole or in part, the claimant or objector may within a period of one year institute a suit to establish his right in respect of the property in dispute, but subject to the result of such suit, if any, the order of the court disallowing the claim shall be conclusive. (Section 84).

If the proclaimed person appears within the time specified in the proclamation, the court shall make an order releasing the property from attachment. If, however, he does not appear within such specified time, the property under attachment shall be at the disposal of the State Government and shall not be sold before six months from the date of the attachment and until the disposal of any claim or objection made by a person other than the proclaimed offender.

But if the property is subject to speedy and natural decay or if the court considers that the sale would be for the benefit of the owner, the court may cause it to be sold whenever it thinks fit. (Section 85).

**Restoration of attached property:**

If the proclaimed person appears within two years from the date of the attachment and satisfies the court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant and that he had no notice of the proclamation, the property or net proceeds of the sale after deducting the cost of the attachment shall be delivered to him. (Section 85).

**6. Bond of appearance:**

The sixth method of securing attendance of a person in court is to require him to execute a bond, with or without sureties, for his appearance in court. When a person for whose appearance or arrest the officer presiding in any court is empowered to issue a summons or warrant is present in such court, he may require such person to execute a bond, with or without sureties for his appearance in such court. When the person so bound by any bond to appear before a court does not appear, the presiding officer may issue a warrant directing that such person be arrested and produced before him. (Ss. 88-89)

**QUES 10: EXPLAIN PROCESS OF PRODUCION OF A THING.**

**A. Summons to produce**

91. Summons to produce document or other thing

(1) Whenever any Court or any officer-in-charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed -
(a) to affect sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Banker's Books Evidence Act, 1891(13 of 1891); or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegram authority.

92. Procedure as to letters and telegrams

(1) If any document, parcel or thing in the custody of a postal or telegraph authority is, in the opinion of the District Magistrate, Chief Judicial Magistrate, Court of Session or High Court wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the postal or telegraph authority, as the case may be, to deliver the document, parcel or thing to such person as the Magistrate or Court directs.

2) If any such document, parcel or thing is, in the opinion of any other Magistrate, whether Executive or Judicial, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the postal or telegraph authority, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the order of a District Magistrate, Chief Judicial Magistrate or Court under sub-section (1).

**B - Search-warrants**

93. When search-warrant may be issued

(1) (a) Where any Court has reason to believe that a person to whom a summons or order under section 91 or a requisition under sub-section (1) of Section 92 has been, or might be, addressed, will not or would not produce the document or thing as required by such summons or requisition, or

(b) where such document or thing is not known to the Court to be in the possession of any person, or(c) where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

(3) Nothing contained in this section shall authorise any Magistrate other than a District Magistrate or Chief Judicial Magistrate to grant a warrant to search for a document, parcel or

other thing in the custody of the postal or telegraph authority.

94. Search of place suspected to contain stolen property, forged documents, etc
(1) If a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property, or for the deposit, sale or production of any objectionable article to which this section applies, or that any such objectionable article is deposited in any place, he may by warrant authorise any police officer above the rank of a constable -

(a) to enter, with such assistance as may be required, such place,

(b) to search the same in the manner specified in the warrant,

(c) to take possession of any property or article therein found which he reasonably suspects to be stolen property or objectionable article to which this section applies,

(d) to convey such property or article before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise dispose of it in some place of safety,

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or production of any such property or article knowing or having reasonable cause to suspect it to be stolen property or, as the case may be, objectionable article to which this section applies.

(2) The objectionable articles to which this section applies are -

(a) counterfeit coin;

(b) pieces of metal made in contravention of the Metal Tokens Act, 1889 (1 of 1889), or brought into India in contravention of any notification for the time being in force under section 11 of the Customs Act, 1962 (52 of 1962);
(c) counterfeit currency note; counterfeit stamps;

(d) forged documents;

(e) false seals;

(f) obscene objects referred to in section 292 of the Indian Penal Code (45 of 1860);

(g) instruments or materials used for the production of any of the articles mentioned in clauses (a) to (f).

95. Power to declare certain publications forfeited and to issue search- warrants for the same
(1) Where -

(a) any newspaper, or book, or

(b) any document, wherever printed, appears to the State Government to contain any matter the publication of which is punishable under section 124-A
or section 153-A or section 153-B or section 292 or section 293 or section 295-A of the Indian Penal Code (45 of 1860), the State Government may, by notification, stating the grounds of its opinion, declare every copy of the issue of the newspaper containing such matter, and every copy of such book or other document to be forfeited to Government, and thereupon any police officer may seize the same wherever found in India and any Magistrate may by warrant authorise any police officer not below the rank of sub-inspector to enter upon and search for the same in any premises where any copy of such issue or any such book or other document may be or may be reasonably suspected to be.

(2) In this section and in section 96, -

(a) "newspaper" and "book" have the same meaning as in the Press and Registration of Books Act, 1867 (25 of 1867);
(b) "document" includes any painting, drawing or photograph, or other visible representation.

(3) No order passed or action taken under this section shall be called in question in any Court otherwise than in accordance with the provisions of section 96.

96. Application to High Court to set aside declaration of forfeiture

(1) Any person having any interest in any newspaper, book or other document, in respect of which a declaration of forfeiture has been made under section 95, may, within two months from the date of publication in the official Gazette of such declaration, apply to the High Court to set aside such declaration on the ground that the issue of the newspaper, or the book or other document, in respect of which the declaration was made, did not contain any such matter as is referred to in sub-section (1) of section 95.

(2) Every such application shall, where the High Court consists of three or more Judges, be heard and determined by a Special Bench of the High Court composed of three Judges and where the High Court consists of less than three Judges, such Special Bench shall be composed of all the Judges of that High Court.

(3) On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the declaration of forfeiture was made.

(4) The High Court shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained any such matter as is referred to in sub-section (1) of section 95, set aside the declaration of forfeiture.

(5) Where there is a difference of opinion among the Judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

97. Search for persons wrongfully confined

If any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amount to an offence, he may issue a search-warrant, and the persons to whom such warrant is directed may search for the person so confined; and search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

98. Power to compel restoration of abducted females. - Upon complaint made on oath of the abduction or unlawful detention of a woman, or a female child under the age of eighteen years, for any unlawful purpose, a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary. C. General provisions relating to search

99. Direction, etc. of search-warrants

The provisions of sections 38, 70, 72, 74, 77, 78 and 79 shall, so far as may be, apply to all search warrants issued under section 93, section 94, section 95 or section 97.

100. Persons in charge of closed place to allow search

(1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of, such place, shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

(2) If ingress into such place cannot be so obtained, the officer or other persons executing the warrant may proceed in the manner provided by sub- section (2) of section 47.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched and if such person is a woman, the search shall be made by another woman with strict regard to decency.

(4) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more independent and respectable inhabitants of the locality in which the place to be searched is situate or of any other locality if no such inhabitant of the said locality is available or is willing to be a witness to the search, to attend and witness the search and may issue an order in writing to them or any of them so to do.

(5) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(6) The occupant of the place searched, or some person in his behalf, shall, in every instance be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person.

(7) When any person is searched under sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person.

(8) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code (45 of 1860).

## S-101. Disposal of things found in search beyond jurisdiction

When, in the execution of a search-warrant at any place beyond the local jurisdiction of the Court which issued the same, any of the things for which search is made, are found, such things, together with the list of the same prepared under the provisions hereinafter contained, shall be immediately taken before the Court issuing the warrant, unless such place is nearer to the Magistrate having jurisdiction therein than to such Court, in which case the list and things shall be immediately taken before such Magistrate; and unless there be good cause to the contrary, such Magistrate shall make an order authorising them to be taken to such Court.

D. **Miscellaneous**

S-102. Power of police officer to seize certain property

(1) Any police officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence.

(2) Such police officer, if subordinate to the officer-in-charge of a police station, shall forthwith report the seizure to that officer.

[(3) Every police officer acting under sub-section (1) shall forthwith report the seizure to the Magistrate having jurisdiction and where the property seized is such that it cannot be conveniently transported to the Court, [or where there is difficulty in securing proper accommodation for the custody of such property, or where the continue retention of the property in police custody may not be considered necessary for the purpose of investigation], he may give custody thereof to any person on his executing a bond undertaking to produce the property before the Court as and when required and to give effect to the further orders of the Court as to the disposal of the same.]

[Provided that where the property seized under sub-section (1) is subject to speedy and natural decay and if the person entitled to the possession of such property is unknown or absent and the value of such property is less than five hundred rupees, it may forthwith be sold by auction under the orders of the Superintendent of Police and the provisions of Sections 457 and 458 shall, as nearly as may be practicable, apply to the net proceeds of such sales.]

103. Magistrate may direct search in his presence

Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant.

104. Power to impound document, etc., produced
Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

105. Reciprocal arrangements regarding processes

(1) Where a Court in the territories to which this Code extends (hereafter in this section referred to as the said territories) desires that -a) a summons to an accused person, or

(b) a warrant for the arrest of an accused person, or

(c) a summons to any person requiring him to attend and produce a document or other thing, or to produce it, or

(d) a search-warrant,

[issued by it shall be served or executed at any place, -

(i) within the local jurisdiction of a Court in any State or area in India outside the said territories, it

may send such summons or warrant in duplicate by post or otherwise, to the presiding officer of that Court to be served or executed; and where any summons referred to in clause (a) or clause (c) has been so served, the provisions of section 68 shall apply in relation to such summons as if the presiding officer of the Court to whom it is sent were a Magistrate in the said territories;

(ii) in any country of place outside India in respect of which arrangements have been made by the Central Government with the Government of such country or place for service or execution of summons or warrant in relation to criminal matters (hereafter in this section referred to as the contracting State), it may send such summons or warrant in duplicate in such form, directed to such Court, Judge or Magistrate, and sent to such authority for transmission, as the Central Government may, by notification, specify in this behalf;]

(2) Where a Court in the said territories has received for service or execution -

(a) a summons to an accused person, or

(b) a warrant for the arrest of an accused person, or

(c) a summons to any person requiring him to attend and produce a document or other thin or to product it, or

(d) a search-warrant,

[issued by -

(i) a Court in any State or are in India outside the said territories;

(ii) a Court, Judge or Magistrate in a contracting State, it shall cause the same to be served or executed] as if it were a summons or warrant received by it from another Court in the said territories for service or execution within its local jurisdiction; and where -

(i) a warrant of arrest has been executed, the person arrested shall, so far as possible, be dealt with in accordance with the procedure prescribed by Sections 80 and 81;

(ii) a search-warrant has been executed, the things found in the search shall, so far as possible, be dealt with in accordance with the procedure prescribed by Section 101 :

[Provided that in a case where a summons or search warrant received from a contracting State has been executed, the documents or things produced or things found in the search shall he forwarded to the Court issuing the summons or search warrant through such authority as the Central Government may, by notification, specify in this behalf.]

**QUES 11: DESCRIBE THE PROCEDURE FOR FILLING COMPLIAIN UNDER CRPC?**

The procedure has been enunciated in Section 200. For the purpose of explain the main points in a nutshell for practical use, I'll state them in bullet points.

The complaint has to be filed with the magistrate who has the jurisdiction to try the offence complained of. However in cases where the complaint is accidentally filed with the

magistrate not having the jurisdiction, the magistrate is duty bound to return the complaint to be presented to the appropriate magistrate by stating the necessary details thereof.

The complaint may be made orally or in writing. However it is always better to furnish it in writing.

Unlike the filing of the FIR, whereafter the police straightaway proceed to investigate the offence complained of and arrest the suspects, in case of the complaint the magistrate will not proceed with it without examining the complainant and witnesses (note-only the witnesses who are present at the time of filing such complaint).

Thereafter the magistrate will make a written report of the examination and sign it himself as well as get it signed by the complainant and the witnesses.

Thereafter if the magistrate is satisfied that the complaint coupled with the examination discloses an offence he shall proceed with taking "cognizance" of the offence (which simply means that he would summon the accused suspects for the purpose of trial)

However if the magistrate is not satisfied that the complaint (and examination) discloses any offence, he may take one of the two options available to him: he may either dismiss the complaint or he may order the police to undertake some further investigation under Section 202 of the Code.

After the police officer reports back to the magistrate his findings the magistrate may proceed with either of the steps stated in point 5 and point 6 (minus the investigation order, of course, which has already been given).

## QUES 12: EXPLAIN CHARGES AND JOINDER OF CHARGES?

There is some criticism in some trial courts that the important task of framing charge is being entrusted to stenos by the trial judges. A fortiori, inasmuch as the Supreme Court laid down that the purpose of framing a charge is to give intimation to the accused of clear, unambiguous and precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial, it is primary duty of a judicial officer to remove such criticism from the minds of litigant public. This article may be helpful to newly recruited Junior Civil Judges as to this aspect.

The purpose of framing a charge is to give intimation to the accused of clear, unambiguous and precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial. (See V.C. Shukla v. State Through C.B.I.,1980 Supplementary SCC 92 at page 150 and paragraph 110 of the report). Either it is a warrant case or a summons case, the point is that a prima facie case

must be made out before a charge can be framed. Basically, there are three pairs of sections in the Code of Criminal Procedure, 1973. Those are Sections 227 and 228 which relating to sessions trial; Sections 239 and 240 relatable to trial of warrant cases; and Sections 245(1) and (2) qua trial of summons cases. The Hon'ble Supreme Court, in Mohan Singh v. State of Bihar, has examined the law relating to charge while highlighting the purpose of framing a charge against the accused in criminal cases.

Strict Comply Of Section 226 Of Cr.P.C:

Trial Judge must insist the prosecution to comply with section 226 of Cr.P.C. if this be done, accused can be discharged in case of there is no prima facie case. thus, arrears of cases can be cleared quickly.

Before invoking provisions of Sections 227 and 228 dealing with trials before the Court of Session, Courts shall take note of Section 226 which obliges the prosecution to describe the charge brought against the accused and state by what evidence the guilt of the accused would be proved.

In Satish Mehra v. Delhi Administration and Another [(1996) 9 SCC 766], a two judge Bench judgment, it was observed that if the accused succeeds in producing any reliable material at the stage of taking cognizance or framing of charge which might fatally affect even the very sustainability of the case, it is unjust to suggest that no such material should be looked into by the court at that stage. It was held that the object of providing an opportunity to the accused of making submissions as envisaged in Section 227 of the Code of Criminal Procedure, 1973 (for short, 'the Code') is to enable the court to decide whether it is necessary to proceed to conduct the trial. If the materials produced by the accused even at that early stage would clinch the issue, why should the court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial proceedings. It was further observed that there is nothing in the Code which shrinks the scope of such audience to oral arguments and, therefore, the trial court would be within its power to consider even material which the accused may produce at the stage contemplated in Section 227 of the Code.

The Hon'ble Supreme Court in [(1996) 9 SCC 766], essayed on the rationale of Section 226 thus:

Section 226 of the Code obliges the prosecution to describe the charge brought against the accused and to state by what evidence the guilt of the accused would be proved. The Next provisions enjoins on the Session Judge to decide whether there is sufficient ground to proceed against the accused. In so deciding the Judge has to consider (1) the record of the case and (2) the documents produced therewith. He has then to hear the submissions of the accused as well as the prosecution on the limited question whether there is sufficient ground to proceed.

The Hon'ble Supreme Court in [(1996) 9 SCC 766], essayed on the rationale of Section 227 thus:

The object of providing such an opportunity as is envisaged in Section 227 of the code is to enable the Court to decide whether it is necessary to proceed to conduct the trial. If the case ends there it gains a lot of time of the Court and saves much human efforts and cost. If the materials produced by the accused even at that early stage would clinch the issue, why should the Court shut it out saying that such documents need be produced only after wasting a lot more time in the name of trial proceedings. Hence, we are of the view that Sessions Judge would be within his powers to consider even material which the accused may produce at the stage contemplated in Section 227 of the Code.

The Hon'ble Apex Court, in the same ruling[(1996) 9 SCC 766],, examined the purpose of Section 239 and observed:

Similar situation arise under Section 239 of the Code (which deals with trial of warrant cases on police report). In that situation the Magistrate has to afford the prosecution and the accused an opportunity of being heard besides considering the police report and the documents sent therewith. At these two State the Code enjoins on the Court to give audience to the accused for deciding whether it is necessary to proceed to the next State. It is a matter of exercise of judicial mind. There is nothing in the code which shrinks the scope of such audience to oral arguments. If the accused succeeds in producing any reliable material at that stage which might fatally affect even the very sustainability of the case, it is unjust to suggest that no such material shall be looked into by the Court at that stage. Here the "ground" may be any valid ground including insufficiency of evidence to prove charge.

Reasons For Charge:

It is seminal to refer the ruling State of Maharashtra v. Som Nath Thapa, (1996) 4 SCC 659. In this ruling, it was observed as: ‘ before adverting to what was stated in Antulay's case, let the view expressed in State of Karnataka vs. L. Muniswamy), 1977 (3) SCR 113 be noted. Therein, Chandrachud, J. (as he then was) speaking fore a three Judge Bench stated at page 119 that at the stage of framing charge the Court has to apply its mind to the question whether or not there is any ground for presuming the commission of the offence by the accused. As framing of charge affects a person's liberty substantially, need for proper consideration of material warranting such order was emphasised.’ In one of the case under TADA, the Hon’ble Apex Court held that the Designated Court should give reasons for framing charges because framing of charges substantially affects the liberty of the person concerned.

The Purpose Of Framing Charge:

In the ruling of a four-Judge Bench of The Hon’ble Supreme Court in V.C. Shukla v. State Through C.B.I.,1980 Supplementary SCC 92 at page 150 and paragraph 110 of the report). Justice Desai delivering a concurring opinion, opined that ‘ the purpose of framing a charge is to give intimation to the accused of clear, unambiguous and precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial’.

How To Interpret The Words In A Charge?

What To Be Done, If There Is Any Error In The Framing Of The Charge?

To give appropriate answers for these two important questions, I deem it is apt to see the recent ruling of the Hon’ble Supreme Court (2011) in Mohan Singh vs State Of Bihar, wherein it was observed as infra:

The purpose of framing a charge is to give intimation to the accused of clear, unambiguous and precise notice of the nature of accusation that the accused is called upon to meet in the course of a trial. (See decision of a four-Judge Bench of this Court in V.C. Shukla v. State Through C.B.I., reported in 1980 Supplementary SCC 92 at page 150 and paragraph 110 of the report). Justice Desai delivering a concurring opinion, opined as above.

17. But the question is how to interpret the words in a charge? In this connection, we may refer to the provision of Section 214 of the Code. Section 214 of the Code is set out below:

214. Words in charge taken in sense of law under which offence is punishable. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable."

18.The other relevant provisions relating to charge may be noticed as under:

211. Contents of charge.-

(1) Every charge under this Code shall state the offence with which the accused is charged.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

(3) If the law which 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.

215. Effect of errors.

No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, 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.

464. Effect of omission to frame, or absence of, or error in, charge.

(1) No finding sentence or order by a Court of competent jurisdiction shall 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 been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in

fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction;

While examining the aforesaid provisions, we may keep in mind the principles laid down by Justice Vivian Bose in Willie (William) Slaney v. State of Madhya Pradesh reported in (1955) 2 SCR 1140. At page 1165 of the report, the learned judge observed:- ;We see no reason for straining at the meaning of these plain and emphatic provisions unless ritual and form are to be regarded as of the essence in criminal trials. We are unable to find any magic or charm in the ritual of a charge. It is the substance of these provisions that count and not their outward form. To hold otherwise is only to provide avenues of escape for the guilty and afford no protection to the innocent."

. The aforesaid observation of Justice Vivian Bose in William Slaney (supra) has been expressly approved subsequently by this Court in V.C. Shukla (supra).

Reference in this connection may be made to the decision of this Court in the case of Tulsi Ram and others v. State of Uttar Pradesh reported in AIR 1963 SC 666. In that case in paragraph 12 this Court was considering these aspects of the matter and made it clear that a complaint about the charge was never raised at any earlier stage and the learned Judges came to the conclusion that the charge was fully understood by the appellants in that case and they never complained at the appropriate stage that they were confused or bewildered by the charge. The said thing is true here. Therefore, the Court refused to accept any grievance relating to error in the framing of the charge.

Subsequently, in the case of State of Andhra Pradesh v. Cheemalapati Ganeswara Rao and

another reported in AIR 1963 SC 1850, this Court also had to consider a similar grievance. Both in the case of Tulsi Ram (supra) as also in the case of Cheemalapati (supra) the charges were of conspiracy. The same is also a charge in the instant case. Repelling the said grievance, the learned Judges held that the object in saying what has been set out in the first charge was only to give notice to the accused as to the ambit of the conspiracy to which they will have to answer and nothing more. This Court held that even assuming for a moment that the charge is cumbersome but in the absence of any objection at the proper time and in the absence of any material from which the Court can infer prejudice, such grievances are precluded by reason of provision of Section 225 of the Cr.P.C. Under the present Code it is Section 215 which has been quoted above.

Reference in this connection may also be made in the decision of this Court in Rawalpenta Venkalu and another v. The State of Hyderabad reported in AIR 1956 SC 171 at para 10 page 174 of the report. The learned Judges came to the conclusion that although Section 34 is not added to Section 302, the accused had clear notice that they were being charged with the offence of committing murder in pursuance of their common intention. Therefore, the omission to mention Section 34 in the charge has only an academic significance and has not in any way misled the accused. In the instant case the omission of charge of Section 302 has not in any way misled the accused inasmuch as it is made very clear that in the charge that he agreed with the others to commit the murder of Anil Jha. Following the aforesaid ratio there is no doubt that in the instant case from the evidence led by the prosecution the charge of murder has been brought home against the appellant.

In K. Prema S. Rao and another v. Yadla Srinivasa Rao and others reported in (2003) 1 SCC 217 this Court held that though the charge specifically under Section 306 IPC was not framed but all the ingredients constituting the offence were mentioned in the statement of charges and in paragraph 22 at page 226 of the report, a three-Judge Bench of this Court held that mere omission or defect in framing of charge does not disable the criminal court from convicting the accused for the offence which is found to have been proved on the evidence on record. The learned Judges held that provisions of Section 221 Cr.P.C. takes care of such a situation and safeguards the powers of the criminal court to convict an accused for an offence with which he is not charged although on facts found in evidence he could have been charged with such offence. The learned Judges have also referred to Section 215 of the Cr.P.C., set out above, in support of their contention.

Can Conviction Is Sustainable If There Is No Charge?
To know answer for this wuestion, see ruling Mohan Singh vs State Of Bihar; decided in 2011 . In this ruling, it was observed in para 25 as under:

. Even in the case of Dalbir Singh v. State of U.P., reported in (2004) 5 SCC 334, a three-Judge Bench of this Court held that in view of Section 464 Cr.P.C. it is possible for the appellate or revisional court to convict the accused for an offence for which no charge was framed unless the court is of the opinion that the failure of justice will occasion in the process. The learned Judges further explained that in order to judge whether there is a failure of justice the Court has to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. If we follow these tests, we have no hesitation that in the instant case the accused had clear notice of what was alleged against him and he had adequate opportunity of defending himself against what was alleged against him.

Is It Mandatory To Mention Section Of Law In The 'Charge'?
In K. Prema S. Rao and another v. Yadla Srinivasa Rao and others reported in (2003) 1 SCC 217 the Supreme Court held that though the charge specifically under Section 306 IPC was not framed but all the ingredients constituting the offence were mentioned in the statement of charges and in paragraph 22 at page 226 of the report, a three-Judge Bench of the Supreme Court held that mere omission or defect in framing of charge does not disable the criminal court from convicting the accused for the offence which is found to have been proved on the evidence on record. His Lordships held that provisions of Section 221 Cr.P.C. takes care of such a situation and safeguards the powers of the criminal court to convict an accused for an offence with which he is not charged although on facts found in evidence he could have been charged with such offence. The learned Judges have also referred to Section 215 of the Cr.P.C., set out above, in support of their contention.

Even in the case of Dalbir Singh v. State of U.P., reported in, a three-Judge Bench of the Supreme Court, Court held that in view of Section 464 Cr.P.C. it is possible for the appellate or revisional court to convict the accused for an offence for which no charge was framed unless the court is of the opinion that the failure of justice will occasion in the process. Their

Lordships Judges further explained that in order to judge whether there is a failure of justice the Court has to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. If we follow these tests, we have no hesitation that in the instant case the accused had clear notice of what was alleged against him and he had adequate opportunity of defending himself against what was alleged against him.

In Annareddy Sambasiva Reddy and others v. State of Andhra Pradesh; the Supreme court dealt with the same question and referred to Section 464 of Cr.P.C. In paragraph 55 at page 567 of the report, the Supreme Court held that if the ingredients of the section charged with are obvious and implicit, conviction under such head can be sustained irrespective of the fact whether the said section has been mentioned or not in the charge. The basic question is one of prejudice.

The Hon'ble Supreme Court in Rawalpenta Venkalu and another v. The State of Hyderabad reported in AIR 1956 SC 171 at para 10 page 174 of the report. The learned Judges came to the conclusion that although Section 34 is not added to Section 302, the accused had clear notice that they were being charged with the offence of committing murder in pursuance of their common intention. Therefore, the omission to mention Section 34 in the charge has only an academic significance and has not in any way misled the accused. In the instant case the omission of charge of Section 302 has not in any way misled the accused inasmuch as it is made very clear that in the charge that he agreed with the others to commit the murder of Anil Jha. Following the aforesaid ratio there is no doubt that in the instant case from the evidence led by the prosecution the charge of murder has been brought home against the appellant.

It is thus clear that no prejudice will be caused to the accused for non-mentioning of Section of law in the charge when all the ingredients of the offence were disclosed and the accused had full notice and had ample opportunity to defend himself against the same and at no earlier stage of the proceedings, the accused had raised any grievance

**QUES 13: EXPLAIN SUBMISSION OF DEATH SENTENCES FOR CONFIRMATION.**

Sentence of death submitted by Court of Session for confirmation(section 366)

When the Court of Session passes a sentence of death, the judgement shall submitted to the High Court. The sentence shall not executed unless confirmed by the High Court. The Court passing the sentence shall commit the convicted person to jail custody under a warrant.

Power to direct further inquiry made or additional evidence taken (section 367)

The High court has power to direct further inquiry or production of additional evidence. If it appears to the court any point bears guilt or innocence of the person so convicted. Unless the High Court directs, the presence of the convicted person may dispensed with when such inquiry made or such evidence taken. When the inquiry or evidence (if any) not made or taken by the High Court, the result of inquiry or evidence shall certified to such Court.

Power of High Court to confirm sentence or annul conviction (section 368)

In any case submitted under section 366, the High Court may-

confirm the sentence, or can also pass any other sentence warranted by law, or

declare conviction invalid and convict the accused of any offence of which the Court of Session might have convicted him, or order a new trial on the same or an amended charge, or

may acquit the accused person.

Provided that no order of confirmation shall made until the period allowed for submitting an appeal has expired, or, if an appeal submitted within such period, until disposal of appeal.

Confirmation or new sentence to signed by two Judges (section 369)

Every case so submitted for the confirmation of the sentence from High court. The confirmation should signed by two judge of High court. If new order or judgement passed by the High court. Then the judgment or order should passed by two judges.

Procedure in case of difference of opinion (section 370)

Any case heard by a Bench of Judges, such judges equally divide the opinion. The case so heard shall decided in manner provided by section 392.

Procedure in cases submitted to High Court for confirmation ( section 371)

In cases submitted by the Court of Session to the High Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court and attested with his official signature, to the Court of Session.

**Ques 14:DIFFERNCE BETWEEN EXECUTION, SUSPENSION, REMISSION AND COMMUTATION OF SENTENCES?**



By virtue of article 72 and 161 of the Constitution of India, the President and Governor can grant pardon, to suspend, remit or commute a sentence passed by the court. In addition to the above constitutional provisions the Criminal Procedure Code, 1973 provides for Suspension, remission and commutation of sentences. Sections 432, 433, 433A, 434 and 435, empower the government to suspend or remit or commute sentences.

Suspension means to take or withdraw the sentence for the time being. It is the temporary postponement of the sentence. Remission implies reducing the period of sentence without changing its character. Commutation denotes the substitution of a form of punishment for a lighter one. Execution of sentences implies that court shall cause any order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

Suspension or Remission of Sentences-

'Suspension' means a stay of the execution of the sentence or postponement of a judicial sentence while 'Remission' means reducing the amount of sentence without changing its character.

Remission and suspension are different in their extent and meaning.

'Remission' means that the rest of the sentence needs not to be undergone; leaving the order of conviction and the sentence passed by the court untouched i.e. reduction of the amount of sentence without changing its character, for example, a sentence of one year may be remitted to six months. The effect of an order of remission is to entitle the prisoner to his freedom on a certain date. Therefore, once that day arrives, he is entitled to be released, and in the eye of law he is a free man from that moment. If there is any breach of condition of such remission, the remission can be cancelled and the prisoner committed to custody to undergo the unexpired portion of the sentence.Bottom of Form

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The procedure to be followed by government is also given in the Section 432(2), The Criminal Procedure Code, 1973. On receiving any application for the suspension or remission of a sentence, the government has to require the concerned court to state its opinion with reasons as to whether the application should be granted or refused. A certified copy of the records has to be sent along with such opinion. The government may cancel the suspension or remission of a sentence, if in its opinion the condition for granting such suspension or remission is not fulfilled: the offender may thereupon, if at large, be arrested by any police officer without a warrant and remanded to undergo the unexpired portion of the sentence. The power to remit the whole or any part of the sentence belongs exclusively to the Executive

The power given to the government by this section is purely discretionary, and the law does not enjoin upon the government to give reasons for remitting the unexpired portion of the sentence in the order of remission.

However, the appropriate government must exercise this power fairly and not arbitrarily. In exercising its power of remission under Sec 432, Government should have regard to the limitation imposed by Sec 433A of Criminal Procedure Code. The remission and suspension under section 432 does not in any way interfere with the order of conviction passed by the court, but it only affects the execution of the sentence.

Commutation of Sentences-

As a term of Criminal law, according to Black "In criminal law, the change of a punishment to one which is less severe as from execution to life imprisonment."

While suspension and remission deal with postponement of sentence and reducing the period of sentence without changing its character, remission deals with substitution of a form of punishment for a less severe one.

As according to Section 433, there is nothing to prohibit the appropriate government to commutate the sentence to any sentence, though it may be lowest sentence of fine. Under this section the President and the Governor has the power in appropriate case to commute any sentences to a lesser sentence

Section 433 provides government with power to commutate the sentences. It contains many types for sentences which are eligible of commutation. One of them is commutation of death sentences i.e. mercy petition.

Section 433 reads as – The appropriate Government may, without the consent of the person sentenced commute

a sentence of death, for any other punishment provided by the Indian Penal Code (45 of 1860)

a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine

a sentence of rigorous imprisonment for simple imprisonment for any term to which that person might have been sentenced, or for fine

a sentence of simple imprisonment, for fine.

Death sentence has always been a question of controversy, while on one hand it becomes a matter of human rights with respect to the accused

On the other hand it is one of weighing the gravity of the crime and its impact on the society. Section 433(a) of Criminal Procedure Code, 1973 is the provision that provides for commutation of capital punishment or death penalty.

It is on the basis of Section 433(b) of Criminal Procedure Code, that most convicts are able to get their sentence for life commuted up to 14 years. It was though wrongly also said that a

sentence for life means a sentence of 14 years. The correct law is, however, otherwise. The Supreme Court in 2005 itself declared that a sentence of life imprisonment means imprisonment for life. Section 433A of the Criminal Procedure Code puts restriction on the power of President and Governor that the death sentence cannot be commutate less than imprisonment for 14 years. In absence of an order under Section 55 IPC or Section 433(b) the convict cannot be released forthwith even after expiry of 14 years.

Execution of Sentence-

Execution of sentence means to impose the sentence on the person whom it is directed. While suspension, remission, commutation deal with altering the sentence in some or other form by either imposing a stay or reducing the sentence or replacing it with some other punishment, execution is different them. In Execution the sentence is carried off into effect as it has been directed by the court without altering the form of sentence.

Execution of order passed under Section 368, Execution of sentence of death passed by High Court, Postponement of execution of sentence of death in case of appeal to Supreme Court and Postponement of capital sentence on pregnant woman are carried under Section 413, 414, 415 and 416 of Cr.PC 1973.

Death sentences -When in a case submitted to the High Court for the confirmation of a sentence of death, the Court of Session receives the order of confirmation or other order of the High Court thereon, it shall cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary. It is provided that when a sentence of death is passed by the High Court in appeal or in revision, the Court of Session shall, on receiving the order of the High Court, cause the sentence to be carried into effect by issuing a warrant.

Execution of sentence of imprisonment is done in cases where the accused is sentenced to imprisonment for life or to imprisonment for a term in cases other than those provided for by section 413, the Court passing the sentence shall forthwith forward a warrant to the jail or other place in which he is, or is to be, confined, and, unless the accused is already confined in such jail or other place, shall forward him to such jail or other place, with the warrant. Where the accused is not present in Court when he is sentenced to such imprisonment as is mentioned in Sub-Section (1), the Court shall issue a warrant for his arrest for the purpose of forwarding him to the jail or other place in which he is to be confined; and in such case, the sentence shall commence on the date of his arrest.

**QUES 15: EXPLAIN PROVISION RELETAED TO REFERNCES AND REVISON.**

1.Reference

A. Nature and Scope

Section 113 of the Civil Procedure Code empowers a subordinate court to state a case and refer the same for the opinion of the High Court. Such an opinion can be sought when the code itself feels some doubt about a question of Law.The word 'Court' wherever it occurs in the code means a Court of civil Judicature.The reference can only be made by a Court but not by a persona designate.

A reference can only be made by a Court when there is a reasonable doubt about a question of Law or only when it is of opinion that Act is ultra vires. Unnecessary observations made by the High Court while disposing of the reference having no legal effect must be treated to have been rendered infructuous and superfluous but such power of reference is discretionary.

B. Object and reference under the proviso.

The object for the provision of reference is to enable subordinate courts to obtain in non-appealable cases the opinion of the High Court in the absence of a question of law and thereby avoid the commission of an error which could be remedied later on.When all the following conditions are satisfied the Court is bound to make a reference to the High Court under this proviso under setting out its opinion and the release for it.

(i) A question as to validity of any Act, ordinance or Regulation or any provision therein arises in a case before the court.

(ii) The Court is of the opinion that the same is invalid or inoperative

(iii) The same has not till then been declared invalid by the High Court to which the Court is subordinate or by the Supreme Court, and

(iv) The determination of the validity thereof is necessary for the disposal of the case.

No reference is warranted under Section 113 of the code where nothing involved regarding the issue of any Act/Ordinance/Regulation. This provision also ensures the validity of a legislative provision (Act, Ordinance or Regulation) should be interpreted and decided by the highest Court of the State and there wouldn't remain any chance of misinterpretation.

The right of reference, however, is subject to the conditions prescribed by the order 46 Rule 1 and unless they are fulfilled, the High court cannot entertain a reference form a subordinate Court. The rule requires the following conditions to be satisfied to enable a subordinate Court to make a reference:

(i) There must be a pending suit or appeal in which the decree is not subject to appeal in which the decree is not subject to appeal or a pending proceeding in execution of such decree;

(ii) A question of law or usage having the force of law must arise in the course of such suit, appeal or proceeding ; and

(iii) The court trying a suit or appeal or executing the decree must entertain doubt on such question.

The question as to the validity of any provision of any Act on the ground that it offends Art 14 of the Constitution comes within the proviso to S.113 through the question, however ,is also a question as to the interpretation of the constitution, for the validity of the provision is challenged on the ground that it contravenes an Article of Constitution.Matters within the proviso include the matter of testing the constitutional validity of Any Act, regulation, Ordinance.

Section 113 of the Code and Art 226 of the Constitution.
The working of S. 113 is to check the validity of an Act or a provision in it while Article 228 of the Constitution is to interpretation of the Constitution. The question of the validity of the provision of Act also includes the interpretation of the Constitution when validity is challenged on the grounds that it contravenes an article of the Constitution.The ambit of S. 113 of the Code is much wider than the Article 226 as it only working is confined to the substantial questions of the law to the interpretation of the Constitution and nothing else while in S.113 it is possible to consider the question of constitutional invalidity or constitutional inoperativeness of an Act, ordinance or regulations.

**2.Revision**

A. Meaning

Section 115 of the Code of Civil Procedure empowers A High Court to entertain a revision in any case decided by a subordinate Court in certain circumstances. This jurisdiction is known

as revisional jurisdiction of the High court .Revision meaning the action of revising, especially critically or careful examination or perusal with a view to correcting or improving.

B. Nature and Scope

In Major S.S Khanna v. Brig F.J Dillon, the Court stated "The section consists of two parts, the first prescribes the conditions in which the jurisdiction of the High Court arises, i.e. there is a case decided by a subordinate Court in which no appeal lies to the High Court, the second sets out the circumstances in which no appeal lies to the High court, the second out the circumstances in which the Jurisdiction may be exercised.''

For the effective exercise of the High court's superintending and visitorial powers over subordinate courts, this revisional jurisdiction has been conferred by the High Court under S.115; the powers given are clearly limited to the keeping of subordinate courts within the bound of their jurisdiction.It is a part of general appellate jurisdiction of the High court though the jurisdiction is strictly restricted by the terms of S.115 investing it.Though revisional Jurisdiction is only a part of appellate jurisdiction, it cannot be equated with full that of a full fledged appeal.

Section 115 authorizes the High Court to satisfy on three matters:
(i) That the order of the subordinate court is within jurisdiction.
(ii) That the case is one in which the court ought to exercises its jurisdiction;
(iii) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of the law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision.

In Pandurang Ramchandra Manddlik v. Maruti ramchandra Ghatge, it was held that ''..But an erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court, cannot be corrected by the High court under S. 115."

C. Object and Application

Any illegality ,irregularity or impropriety coming to the notice of High court has the jurisdiction to the High Court to examine the records relating to the ''any order'' and/or proceedings is capable of being corrected by the High Court by passing such appropriate

order or direction as the law requires and the justice demands but only limitation on the scope of the High Court's jurisdiction is that the order or proceeding sought to be scrutinized by the subordinate court .Revisional Jurisdiction doesn't allow High Court to interfere and correct errors of facts or of law.When the order is within the Jurisdiction of the subordinate Court, even if the order is right or wrong or in accordance with the law or not, unless it has exercised its jurisdiction illegally or with material irregularity the high Court has no jurisdiction to interfere.The high Court will not interfere in revision until it comes to the conclusion that the impugned order has occasioned a failure of justice or has caused an irreparable injury to the party against when it is made.The revisional power under Section 115 of the Code is clearly is the nature of a power to issue a writ of certiorari.Its ambit is not as large as certiorari as revisional Jurisdiction can only be exercised in the failure of Jurisdictional error but not in any other manner.

Section 115 of the Code and Art 227 of the Constitution.
A revision under section 115 and Superintendence under Article 227 are two separate and distinct proceeding. One can't be overindulging with the other.

S.115 and Art 227are distinguished with the each other in the following way:-
1) Revisional power is only judicial while Article 227 which empowers Superintendence is both Judicial as well as administrative.
2) Revisional power is statutory and it can be taken away by legislation but the power of superintendence is constitutional and cannot be curtailed or taken away by the statue.
3) Revisional power has less peripheral application as compared to Article 227 as S.115 are restricted and cannot be exercised in all the conditions.

**3. Review**

A. Meaning
Review means to reconsider, to look again or to re examine. In legal sense, it is a judicial re-examination of the case by the same court and by the same Judge.

B. Nature and Scope
According to the general principle of law, once the judgment is passed the court

becomes functus officio. A power of review should not be confused with the appellate powers which enables an appellate court to enable all errors committed by the subordinate Court. Greater care, seriousness and restrain should be given in review application as would not be fair to court to deal with the same case with the same party over again and again and it would increase the backlog of the case over the court.

A right of review is both substantive as well as procedural. As a substantive right, it has to be conferred by law, either expressly or by necessary implications. There can be no inherent right of review. As a procedural provision, every Court or tribunal can correct an inadvertent error which has crept in the order due to procedural defect or mathematical or clerical error or by misrepresentation or fraud of a party to the proceeding, which can be corrected asex debito justitae. If a review is not maintainable I, it cannot be allowed by describing such application as an ''clarification'' or ''modification''

C. Object and Application

A person aggrieved by a decree or order may apply for review of a Judgment. A person aggrieved has been understood to mean who has a genuine grievance because an order has been made which prejudicially affects his interests.But the concept, purpose and provisions ''person aggrieved'' varies according to the context, purpose and provisions of the statue.A person who is neither a party to the proceedings nor a decree or order binds him, cannot apply for review as the decree or order does not adversely or prejudicially affect him. The remedy of review, which is a reconsideration of the Judgment by the same Court and by the same Judge, has been borrowed from the Court of equity. This remedy has a remarkable resemblance to the writ of error. Rectification of an order stems from the fundamental principle that justice is above all. It is exercised to remove error and not to disturb finality.

D. Circumstances for Reviews

A) No Right of appeal is allowed

Where no right of appeal is allowed to an aggrieved party, he can file a review application. When an appeal is dismissed on the ground that it was incompetent or was time –barred, the provisions of review would get attracted.

B) Right of appeal lies but not availed.

A review petition is also maintainable in cases where appeal is provided but no such appeal is

preferred by the aggrieved party. An application for review can be presented so long as no appeal is preferred against the order. However when appeal is already pending in the Court, no review petition can be entertained. But if the review petition is filed first and subsequently appeal is filed, the jurisdiction of the court to deal with the review application is not affected. If review is granted before the disposal of the appeal, the decree or order ceases to exist and the appeal will not remain. If appeal is decided on the merits before an application of review is heard, such petition becomes infructuous and is liable to be dismissed.

E. Grounds for review

(i) Discovery of new and important matter or evidence.

A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree is passed. The underlying object of this provision is neither to enable the Court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.

The new evidence must be such as presumably to be believed, and if believed to be conclusive. In other words, such evidence must be:-

(a) Relevant

(b) Or of such character that if it had been given it might possibly have altered the judgment.

(ii) Mistake or error

What is an error apparent on the face of the record cannot be defined precisely or exhaustively, and it should be determined on the facts of the each case. Such error may be one of fact or of the law.No error can be said to be apparent on the face of the record if it is not self-evident and requires an examination or argument to establish it.

In the case of Thungabhandra Industries ltd v. Govt of A.P, the Supreme Court rightly observed:

"…….where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of apparent on the face of the record would be made out.

(iii) Other sufficient reason.

The other sufficient reason has not been defined in the Code. There are the reasons which has been observed in the number of cases are following;-

(a) Where the statement of the judge is not correct.

(b) The decree or order has been passed under a misapprehension of the true state of circumstances.

(c) Where a party had no notice or fair opportunity to produce his evidence.

(d) Where a Court has failed to consider a material issue, fact or evidence.

(e) Misconception by the court of a concession made by the advocate.

(f) The court has omitted to notice or consider material statutory provisions.

(g) Ground which goes to the root of the matter and affects inherent jurisdiction of the Court.

(h) manifest wrong has been done and it is necessary to pass an order to do full and effective justice.

**QUES 16; WHAT ARE PROVISION RELATING TO INHERENT POWER OF COURTS?**

Inherent powers are those powers which are not subject to being taken away from courts and may be used by a court to do complete and satisfied justice between the parties before it.

Background of Section 482

Section 482 particularly deals with the saving of inherent powers of the High Court. The section saves inherent powers of High Court and prohibits all such things which limit or curtails such power. The inherent power oh High Court can be exercised:

To give effect to an order under the Code; or

To prevent abuse of the process of Court; or

To secure the ends of justice.

The section provides the specific provisions where the inherent powers can be exercised. No such power can be exercised other than those which are specifically provided. Also, these powers cannot be invoked where any specific provision for a particular case is made. The section in its very sense talks to save the powers, however, on the other hand, it limits the power by prescribing the specific provisions where these powers can be exercised.

The inherent powers exist and in its wide scope, it is a rule of practice that will only be exercised in exceptional cases

The Supreme Court in Madhu Limaye v. State of Maharashtra, has held that the following principles would govern the exercise of inherent jurisdiction of High Court given by section 482:

The power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;

It should be exercised very sparingly to prevent abuse of the process of any Court or otherwise to secure to the ends of justice;

It should not be exercised as against the express bar of the law engrafted in any other provision of the Code.

Power to be exercised ex debito justitiae

The power conferred by section 482 should be exercised ex debito justitiae.

In State of Maharashtra v. Arun Gulab Gawali, the Court held that the provisions of section 482 are meant to advance justice and not to frustrate it. The High Court should not assume the power of the trial court and this power should be exercised cautiously.

- To prevent the abuse of the process of any Court
- The Court in Ganga Prasad provided that the word "process" is a general word meaning in effect anything done by the Court. The 'abuse of process' means generally that the filing of the case is itself oppressive, having a collateral purpose, which is other than what the case is to ultimately deliver under legitimate judicial process.
- Section 482 aims merely to preserve and recognize the power inherent powers of High Court and not confers any new powers.
- In Sankatha Singh v. State of Uttar Pradesh, it was held that the High Court cannot, in the OF its exercise inherent powers, do something which the Code specifically prohibits the Court from doing. It is being an extraordinary power, has not to be pressed in aid except for remedying a flagrant abuse by a subordinate court of its powers.
- To secure the ends of justice

- Where the Court is satisfied that inherent powers are required to be exercised to secure the ends of justice, it is empowered to do so. This principle is of utmost importance to secure the independence of Courts and administration of justice. It allows the Court to freely exercise its discretionary functions without any unreasonable interference.
- The Supreme Court in Madhu Limaye v. the State of Maharashtra,[6] has held the following principles would govern the exercise of inherent jurisdiction of the HC:
- Power is not to be resorted to if there is a specific provision in the code for redress of grievances of aggrieved party;
- It should be exercised sparingly to prevent abuse of process of any Court or otherwise to secure ends of justice;
- It should not be exercised against the express bar of the law engrafted in any other provision of the code.

Nature of the power under section 482

The power under this section is to be exercised cautiously and carefully and within the limitation set under the section.

The Supreme Court in its pronouncement in State of Haryana v. Bhajan Lal & Ors., provided that its difficult to lay any exhaustive list where the inherent powers can be exercised. However, in following kinds this power can be exercised:

Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1)of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

Where the uncontroverted allegations made in the F.I.R. or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non- cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2)of the Code.

Where the allegations made in the F.I.R. or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to a private and personal grudge.

The Supreme Court in Madhu Limaye v. the State of Maharashtra, does not lay any general proposition limiting the power of quashing the criminal proceedings or FIR or complaint as vested in section 482 of the Code or extraordinary power under Article 226 of the Constitution.

Therefore, it for the purpose of securing the ends of justice, quashing of FIR becomes necessary. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such power. Section 482 is very wide in its nature and it is important for Courts to look upon it wisely. The nature of the power is mainly to empower the Courts to secure the administration of justice which can be compromised by filing vexatious criminal proceedings

**QUES 17: EXPALIN PROVISION RELATING TO TRANSFER OF CRIMINAL CASES?**

There are five grounds of transfer that a party can take if the parties suspect that a fair justice will not be served.

- That a fair or impartial inquiry or trial cannot be had in any subordinate criminal court
- That a place where the offense took place is far away from the place of court and the court wants to view the occurrence

- A difficult question of law has arisen which cannot be decided by the lower court
- The convenience of the party or witness
- That it is expedient for justice
- if any of the above-ground exists in any case than the high court can order that;
- Any particular case or class of case or appeal be transferred from one subordinate court to another
- Any particular case is tried by itself
- Any accused person can be sent to another session court or to itself for trail
-

Transfer Of Case To The High Court

When any case is withdrawn from any of its subordinate courts and is tried by itself. Then the high court must adopt the same rules and procedures which the lower court has adopted.

Mods For Application Of Transfer

There are three mods to file a transfer petition in criminal cases;

Application by the lower court

Application by any interested party

Suo Motu order

1. Application By Lower Court

When any matter arises to determine any difficult question of law. Then the lower court always consults with the high court and for this purpose, they make a report. High court while considering the importance of this report can transfer criminal cases from one court to another or to itself.

2. Application By Any Interested Party

Application for transfer can be filed by any party mentioning the grounds in it which are explained above. If the party show mistrust towards the presiding officer of the court or there

is a danger to his life or fair trial cannot be held than he can submit this application and upon this high court can transfer the case.

Suo Motu Order

The high court has the discretion to transfer case Suo Motu even without having any application to transfer.

Transfer Application By Advocate General

When the applicant is an advocate general who wants to transfer the criminal case, than his application must be supported by affidavit or confirmation. Except advocate general this requirement is not mandatory for other applicants.

Application By Accused person

When the application is filed by the accused person than high court may order the accuse to furnish bonds with or without sureties in the court. If his application is rejected than the amount of bonds will be awarded to the opposing party. Notice To The Public Prosecutor By The Accused Person

In every application of transfer filed by the accused, prior notice shall be given in writing to the public prosecutor along with the copy of grounds on which transfer of the case is sought. The court can make no order unless the 24 hours are elapsed of giving notice to the public prosecutor.

Payment Of Compensation Upon Rejection Of Application

When an application is filed under section 526 and while rejecting this application the high court thinks that this application was filled to waste the time of court or it was frivolous and vexatious. Then the High Court can impose fine on the applicant which will be paid to the opposing party. The maximum amount of fine cannot exceed five hundred rupees.

No Adjournment or Judgement Is pronounced

During the trial, if any party intimates to the presiding officer of the court that he wants to file an application to transfer the case. No adjournment will be granted to the intended applicant. And also no judgment will be pronounced unless this application has been decided by the high court.

Application of Transfer In Appeal

When after the conviction an appeal has been preferred and before arguing on this appeal the appellant intimates to the high court that he wants to file an application under this section. the court while accepting the wishes of the appellant can order him to furnish bond without sureties of rupees 500. The court fixes a time under which the intended party will file an application, otherwise, his bond will be fortified.

2. Transfer of Criminal Case By Provincial Government

Section 527 of the Criminal Procedure Code states that, If the provincial government thinks that by transfer of case it will promote the ends of justice or tend to the general convenience of parties or witnesses. Then Government can do so by making a notification in the official gazette and by this can order that

A particular case or appeal be transferred from one high court to another high court

From one criminal court subordinate to the high court to another criminal court equal or superior-subordinate court of another high court.

Consent of Other Provincial Government

But This order of transfer cannot be made unless the government of that province gave consent. In this way, the case can be transferred from one high court to another high court.

3. Transfer Of Criminal Case By Session Court

Section 528 of Cr.P.C gives power to the session judge to transfer or withdraw the case from his subordinate courts. Session judge while withdrawing the case from its subordinate can transfer it to another additional session judge before the trial commences or appeal is argued.

4. Transfer Of Criminal Case By Magistrate

Any magistrate to whom cognizance is given under section 192 (2) can recall the case and give it to another magistrate to start an inquiry.

While making such transfer the magistrate has to record the reason in writing for doing.

**QUES 18: EXPLAIN PROVISION OF PLEA BARGAINING?**

A plea bargain is an agreement between a defendant and a prosecutor, in which the defendant agrees to plead guilty or "no contest" (nolo contendere) in exchange for an agreement by the prosecutor to drop one or more charges, reduce a charge to a less serious offense, or recommend to the judge a specific sentence acceptable to the defense.

As criminal courts become ever more crowded, prosecutors and judges alike feel increased pressure to move cases quickly through the system. Criminal trials can take days, weeks, or sometimes months, while guilty pleas can often be arranged in minutes. Also, the outcome of any given trial is usually unpredictable, whereas a plea bargain provides both prosecution and defense with some control over the result—hopefully, one that both can live with.

For these reasons and others, and despite its many critics, plea bargaining is very common. More than 90% of convictions come from negotiated pleas, which means less than 10% of criminal cases end up in trials. And though some commentators still view plea bargains as secret, sneaky arrangements that are antithetical to the people's will, the federal government and many states have written rules that explicitly set out how plea bargains may be arranged and accepted by the court.

Charge Bargaining and Sentence Bargaining

Lawyers and judges often divide plea bargaining into two types: sentence bargaining and charge bargaining. (Plea bargaining can, however, be broken into additional categories.)

Sentence bargaining is a method of plea bargaining in which the prosecutor agrees to recommend a lighter sentence for specific charges if the defendant pleads guilty or no contest to them. Charge bargaining is a method where prosecutors agree to drop some charges or reduce a charge to a less serious offense in exchange for a plea by the defendant.

When Are Plea Bargains Negotiated and Made?

In most jurisdictions and courthouses, plea bargaining can take place at virtually any stage in the criminal justice process (but see the California exception, explained above). Plea deals can be struck shortly after a defendant is arrested and before the prosecutor files criminal charges. Plea negotiations may culminate in a deal as a jury returns to a courtroom to

announce its verdict. If a trial results in a hung jury, in which the jurors are split and cannot make the unanimous decision required, the prosecution and defense can (and frequently do) negotiate a plea rather than go through another trial. And plea deals are sometimes reached after a defendant is convicted while a case is on appeal.

Pleading "No Contest" (Nolo Contendere) In Place of a Guilty Plea

A "no contest" or nolo contendere plea in essence says to the court, “I don’t choose to contest the charges against me.” This type of plea, often part of a plea bargain, results in a criminal conviction just like a guilty plea. And a no-contest plea will show up on a criminal record. However, if the victim later sues the defendant in civil court, the no-contest plea often cannot be offered into evidence against the defendant as an admission of guilt. A guilty plea, on the other hand, does serve as an admission of guilt and can be introduced in civil cases as evidence against the defendant.

The Consequences for Your Criminal Record

A guilty or no-contest plea entered as a judge-approved plea bargain results in a criminal conviction; the defendant’s guilt is established just as it would be after a trial. The conviction will show up on the defendant’s criminal record (rap sheet). And, the defendant loses any rights or privileges, such as the right to vote, that the defendant would lose if convicted after trial. Depending on the nature of the conviction and the defendant's other interactions with the law, however, the defendant might be able to seal, or expunge, the criminal record.

**QUES 19:EXPLAIN PROVISION RELATING TO JUDGEMENT.**

JUDGEMENT (CHAPTER 27, CrPC)

Chapter 27 of the Code of Criminal Procedure deals with matters relating to judgement and its delivery. The Code does not provide for a definition of the term “judgement”. It can be understood as the final order of the court, a trial that terminates either in conviction of the accused (if found guilty) or acquittal of the accused (if found innocent)

.In the case of Surendra Singh v. State of U.P., the Supreme Court defined the term as “the final decision of the court intimated to the parties and to the world at large by formal ‘pronouncement’ or ‘delivery’ in open court.”

S. 354, Cr.P.C., 1973 provides for the language and the contents of a judgement. According to this section, every Judgement shall be written in the language of the court which is to be determined by the State Government (S. 272, Cr.P.C., 1973).

The judgement should contain the point or points of determination and the reasons for the decision. It should clearly indicate the evidence considered to reach upon the conclusion. The judgement should be a speaking order and must therefore contain the specifications as to the offence (if any) of which the accused is convicted and the punishment he is sentenced to. If there are any doubts as to which of the two parts of the same section the offence falls, the court shall specify the same and pass the judgement in alternative. If any offence is punishable with imprisonment for life or death, and the court in the instant case, prescribes the death penalty, it is duty bound to furnish the reasons for the same.

S. 353, Cr.P.C., 1973 provides the manner in which the judgement of a criminal court has to be delivered. It states that judgement should be pronounced immediately after termination of trial or at some subsequent time with notice to both sides. It has to be pronounced in open court by the presiding officer by delivering the whole of the judgement or reading out the whole judgement or reading out the operative part of the judgement and explaining the substance of the judgement in the language which is understood by the parties. It is a fundamental rule of criminal jurisprudence that the judge who hears the evidence should write the judgement.

It was held in Surendra Singh v. State of U.P., that a judgement written by a judge cannot be delivered by another judge. It is merely considered as an opinion

A judgement is an expression of the criminal court's opinion. All expressions of the criminal court other than a judgement of conviction or acquittal fall in the category of orders. An order of discharge, an interlocutory order in a criminal case, order of dismissal of complaint (under S. 203, Cr.P.C., 1973) do not constitute a judgement. . 2(wa), Cr.P.C., 1973 which was introduced vide the Cr.P.C. (Amendment) Act, 2008 defines victim as "a person who has suffered a loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression 'victim' includes his or her guardian or legal heir."

The victim of a crime, in addition to the physical and/or mental injury suffers from certain monetary losses as well. The idea that S. 357, Cr.P.C., 1973 incorporates is the combination of the roles of Criminal Court (which punishes the offender) and the Civil Court (which

awards damages/compensation to the aggrieved party) to an extent by empowering the Criminal Court to grant compensation to the victim and to order the payment of costs of the prosecution. The order for compensation can be passed by

a) the Trial Court – at the time of passing of the judgement.

b) the Appellate Court (or High Court or Court of Sessions) – in revision.

The fine, inter alia, may be imposed in the following cases:

To meet the prosecution expenses;

For any loss or injury caused to the victim, when such compensation is recoverable in Civil Cases;

In cases where a death has been caused or where a person has abetted the commission of such an offence and the victim is entitled to recover damages under the Fatal Accidents Act, 1976;

The court in its discretion may impose fine in such cases where fine does not form a part of the sentence.

357-A talks about victim compensation scheme.

It assigns the role of formulating victim, compensation schemes to the State governments and the legal services authorities are suppose to carry out its implementation. This scheme applies to the victims irrespective of the outcome of the prosecution. S. 357-B and S. 357-C have enhanced the protection given to victims by providing for additional compensation to be given in addition to the fine and guidelines for medical treatment of the victims, respectively.

Additionally, S. 358 of the Code provides for compensation to persons who have groundlessly been arrested. The essential requirement for the application of this section are:

a person must have caused another to be arrested by a police officer;

the magistrate hearing the case must be of the opinion that there was no sufficient ground for causing the arrest.

Under S. 359 of the Code, the Criminal Courts (and the Courts of Appeal, in cases of revision) are empowered to pass an order for compensation in non-cognizable cases.

The quantum of compensation is determined by taking into consideration the nature of the crime, injury/ loss suffered and the convict's capacity to pay compensation. In the case of Manish Jain v. State of Karnataka, the Apex Court opined that the amount of compensation has to be reasonable.

. 362 of the Code states that no Court, when it has signed its judgement or final order disposing off a case can alter or review the same unless it is done in order to correct clerical errors. S. 363 provides that a copy of the judgement has to be given to the accused and other persons

. In the case of Shree Lal Sarof v. State of Bihar, the Court held that when a person is affected by a judgement or an order passed by a criminal court, then on application made in this behalf under S. 363(5), and on the payment of the prescribed fees, he has to be provided a copy of the order, disposition or other part of the record irrespective of whether he has appeared in the court or not. S. 374 of the Code provides for the translation of judgement. S. 375 of the Code provides that in case tried by the court of sessions or by a chief judicial magistrate, the court or such magistrate shall forward a copy of the finding/sentence to the district magistrate within whose local jurisdiction the trial was held. The logic behind this provision is to keep the DM informed about the serious crimes.

**QUES 20: EXPLAIN GENERAL PROVISION RELATING TO INVESTIGATION AND INQUIRY.**

Inquiries and trial are simply two out of the various stages in the due course of deciding a case of criminal nature. They are both defined as under the Code of Criminal Procedure, 1973. The Chapter XXIV deals with the general provisions as to inquiries and trials.

An Inquiry is either done by a magistrate or by the court. It is not to be done by police officials. Inquiry is different from Investigation.

Inquiry according to the Code includes every inquiry other than a trial conducted under this Code, by a Magistrate or court. It relates to proceedings of Magistrates prior to trial. [Section 2 (g)]

Section 159 of the Code empowers a Magistrate on receipt of a police report under Section 157, Cr.P.C. to hold a preliminary inquiry in order to ascertain whether an offence has been committed and, if so, whether any persons should be put upon their trial.

The cases which are triable by the court of sessions, the commencement of proceedings takes place before a Magistrate, which are in the nature of an inquiry preparatory to sending the accused to take his trial before the Court of Session.

The Magistrate in such cases is bound to either discharge the accused or commit him for trial, but he has no power to declare an accused either guilty or innocent of the offence with which he is charged.

An inquiry is also by a Magistrate in cases triable by himself under S. 202 of the Code. On a complaint being filed before a Magistrate, he examines the complainant and the witnesses on oath in order to find out whether there is any matter which calls for investigation by a criminal court.

The Magistrate may not act on the complaint and dismiss it if he distrusts the statements of the complainant and the witnesses and the result of the 'investigation or inquiry does not establish sufficient ground for proceeding. All these proceedings are in the nature of inquiry.

"Investigation", according to the Code, includes all proceedings under it for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf. [Section 2 (h)].

Investigation consists of steps taken by a police officer other than a Magistrate to ascertain whether any offence has been committed at all and, if so, by whom and what is the evidence on which the prosecution can be based. Investigation can also be made by a person specially authorized by a Magistrate to do so. The case is only started if investigation by the police reveals that an offence has been committed by the accused, otherwise not.

The term "trial" has not been defined in the Code. It is the examination and determination of a cause by a judicial tribunal which has jurisdiction over it. It is a judicial proceeding which ends in conviction or acquittal but not discharge.

In a warrant case the trial begins with the framing of the charge when the accused is called upon to plead thereto : but in a summons case, as if is not necessary to frame a formal charge, the 'trial' starts when the accused is brought before the Magistrate and the particulars of the offence are stated to him. In a case exclusively triable by a court of session the trial begins only after the committal proceedings by the Magistrate. The term "trial" includes appeal and revision, which are a continuation of the first 'trial'.

The function of a court in a criminal trial is to find out whether the person arraigned before it as the accused' is guilty of the offence with which he is charged. For this purpose it scans the material on record to find whether there is any reliable and trustworthy evidence on the basis of which it is possible to found the conviction of the accused and to hold that he is guilty of the offence with which he is charged

Inquiry is the second stage which is conducted by a Magistrate for the purpose of committing the accused to sessions or discharging him when no case has been made out. In case of complaints made to a Magistrate, it refers to a preliminary inquiry made by him under Section 202 to ascertain the truth or falsehood of the complaint or whether there is any matter which calls for investigation by a criminal court.

The final stage of the case comes when the accused is put on trial before the Sessions Judge or the Magistrate when he is empowered by law to try the cases himself.

Inquiry is viable in determination of truth or falsehood of certain allegations in order to take any further action according to law. It may involve examination of witnesses or inspection of the locale.

Trial, on the other hand, is what actually determines the accused person's innocence or guilt in the court of law. We can say that Trial begins where Inquiry ends.