NAAC ACCREDITED

तेजस्वि नावधीतमस्तु

ISO 9001:2008 & 14001:2004

FAIRFIELD

Institute of Management & Technology

'A' Grade Institute by DHE, Govt. of NCT Delhi and Approved by the Bar Council of India and NCTE

Reference Material for Five Years

Bachelor of Law (Hons.)

Code: 038

Semester-III

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

DISCLAIMER: FIMT, ND has exercised due care and caution in collecting the data before publishing this Reference Material. In spite of this, if any omission, inaccuracy or any other error occurs with regards to the data contained in this reference material, FIMT, ND will not be held responsible or liable. FIMT, ND will be grateful if you could point out any such error or your suggestions which will be of great help for other readers.

INDEX

Five Years Bachelor of Law (Hons.)

Code: 038

Semester – I

S.NO.	SUBJECTS	CODE	PG.NO.
1	***FAMILY LAW-I***	*201*	*03-72*
2	***CONSTITUTIONAL LAW***	*203*	*73-86*
3	***LAW OF CRIMES-I***	*205*	*87-145*
4	***ECONOMICS-I***	*207*	*146-228*
5	***POLITICAL SCIENCE-II***	*209*	*229-224*

NAAC ACCREDITED
तेजस्वि नावधीतमस्तु
ISO 9001:2015 & 14001:2015

FAMILY LAW-I (201)

Unit-I: Hindu Marriage and Dissolution

a. Institution of Marriage under Hindu Law

i. Evolution and Concept of the Institution of Marriage

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

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

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

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

Historically, in most cultures, married women had very few rights of their own, being considered, along with the family's children, the property of the husband; as such, they could not own or inherit property, or represent themselves legally (see for example covertures). In Europe, the United States, and other places in the developed world, beginning in the late 19th century and lasting through the 21st century, marriage has undergone gradual legal changes, aimed at

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

ii. Forms, Validity and Voidability of Marriage

Forms of marriage

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

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

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

Ceremonies

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

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

As per Section 7, a marriage is a ceremonial affair. Saptapadi is an essential part of the ceremonies of marriage, its non performance will invalidate the marriage. The performance of vedic rights is not enough to solemnise the marriage.

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

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

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

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

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

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

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

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

Clause (i) – Condition of monogamy
This condition implies monogamy and prohibits bigamy or polygamy. The expression “neither party has a spouse living” depicts that the spouse must not be alive at the time of marriage. If the spouse is alive at the time of marriage that could bar the remarriage of a person. However one must note that the first marriage of a person should be a legally valid marriage. In spite of one’s valid marriage if the person remarries in violation of Section 5(i), the second marriage will be null and void and he will be subjected to penal consequences. The Scheduled Tribes are

exempted from the application of the Act. But there must be a proved custom to this effect.

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

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

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

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

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

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

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

Clause (iv) – Avoidance of degrees of prohibited relationship
The parties to marriage must not fall within the degree of prohibited relationship. This

relationship is defined under Section 3(g) of the Act.

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

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

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

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

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

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

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

Clause (v) – Avoidance of sapinda relationship
According to the Dharmashastra the Sapinda relationship is very important in the matter of marriage. According to Mitakshara Law of Marriage 'Pinda' means body and therefore those who are related by body or blood or consanguinity are sapindas among themselves. The Hindu Marriage Act has adopted Mitakshara definition but has limited the extent of Sapinda relationship to 5 degrees in line of ascent through the father and 3 degrees in the line of ascent through the mother.

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

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

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

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

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

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

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

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

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

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

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

According to Section 3(a) the expression 'custom' and 'usage' signify any rule which having

been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family: provided that the rule is certain and not unreasonable or opposed to the public policy; and in the case of a rule applicable only to a family it has not been discontinued by the family.

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

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

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

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

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

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

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

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

Besides the evidentiary value, the national commission for women has pointed that registration of marriage has critical importance to various women related issues, such as :–

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

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

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

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

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

Thus a marriage will be void ab initio:

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

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

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

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

Effect of Void marriages
A void marriage is no marriage. It is void since its inception. No legal rights and duties flow from it. Therefore, the relationship of husband and wife does not come into existence from a void marriage. No declaration of the court is necessary to this effect. The issues from a void marriage are illegitimate unless legitimatised by law in some way. If one withdraws from the society of the other, the other party has no right to the restitution of conjugal rights. If one of them marries again, he or she is not guilty of bigamy and the validity of later marriage is not affected because

of the first so called marriage.

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

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

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

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

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

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

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

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

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

(1) Full and complete penetration is an essential ingredient of ordinary and complete intercourse, though degree of sexual satisfaction obtained by the parties is irrelevant. If one spouse is oversexed and the other is not, it does not amount to impotency.

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

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

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

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

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

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

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

Provided no petition for annulling a marriage:

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

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

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

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

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

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

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

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

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

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

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

Section 12(1)(d) is to be read with Section 12(2)(b) which lays down three further conditions which are to be satisfied in order to avail of the remedy under Section 12(1)(d). These are:

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

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

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

Thus the requirements of this ground are:

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

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

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

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

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

b. Matrimonial Remedies

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

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

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

Judicial Separation: Legal Separation without divorce
Either party to the marriage may present a petition on any of the grounds stated in the provisions for divorce, praying for a decree of judicial separation. A judicial separation is a legal way to

stay separate from the spouse, without obtaining a decree of divorce. It also helps in cases to defend a petition for restitution of conjugal rights. A judicially separated spouse cannot be given a meaning to include a spouse merely living separately, and who has not obtained a decree for judicial separation.

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

Dissolution of marriage

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

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

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

Theories of Divorce

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

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

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

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

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

Grounds for Divorce Under Hindu Marriage Act

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

In the modern Hindu law, all the three theories of divorce are recognized & divorce can be

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

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

Adultery

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

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

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

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

The offence of adultery may be proved by:

Circumstantial evidence

Contracting venereal disease

Cruelty

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

.

Desertion

Desertion means the rejection by one party of all the obligations of marriage- the permanent forsaking or abandonment of one spouse by the other without any reasonable cause and without the consent of the other. It means a total repudiation of marital obligation.

The following 5 conditions must be present to constitute a desertion; they must co-exist to present a ground for divorce:
The factum of separation
Animus deserdendi (intention to desert)
Desertion without any reasonable cause
Desertion without consent of other party
Statutory period of two years must have run out before a petition is presented.

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

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

Wife's Special Grounds For Divorce

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

Pre-Act Polygamous Marriage

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

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

Rape, Sodomy Or Bestiality

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

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

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

Repudiation Of Marriage

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

Irretrievable Breakdown Of Marriage

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

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

(i) Guilt theory or Fault theory,

(ii) Consent theory,

(iii) Supervening circumstances theory.

The Irretrievable breakdown theory of divorce is the fourth and the most controversial theory in legal jurisprudence, based on the principle that marriage is a union of two persons based on love

affection and respect for each other. If any of these is hampered due to any reason and if the matrimonial relation between the spouses reaches to such an extent from where it becomes completely irreparable, that is a point where neither of the spouse can live peacefully with each other and acquire the benefits of a matrimonial relations, than it is better to dissolve the marriage as now there is no point of stretching such a dead relationship, which exist only in name and not in reality

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

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

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

Merits

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

Demerits

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

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

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

Conclusion

Hindus consider marriage to be a sacred bond. Prior to the Hindu Marriage Act of 1955, there

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

Unit-II: Muslim Marriage and Dissolution of Marriage

Nikah (Muslim Marriage)

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

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

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

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

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

DEFINITION

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

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

NATURE AND CONCEPT OF MARRIAGE

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

LEGAL ASPECT

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

SOCIAL ASPECT

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

RELIGIOUS ASPECT

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

ESSENTIAL OF A VALID MARRIAGE

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

I) COMPETENCE OF THE PARTIES

a) Age of Puberty

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

Minor's Marriage

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

Father;

Paternal Grandfather, however high;

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

Mother; and

Maternal uncle, aunt or other maternal relatives.

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

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

for marriage.
The Child Marriage Restraint Act, 1929 provides that a child marriage exists and will be valid but the guardians and others who conduct it can be punished. A child marriage can be prevented by an injunction.
Option of Puberty (Khyar-ul-Bulugh)
Under Muslim marriage, a minor on attaining the age of puberty can exercise the option of puberty wherein the minor can approve or disapprove the marriage contracted by the guardian who is not the father or the grandfather. If he disapproves, the marriage will dissolve with immediate effect. If the minor says nothing, it will be presumed that he has approved the marriage. As per the Shia law, a minor has to approve his marriage upon attaining the age of puberty.
If the father or the grandfather has contracted marriage fraudulently or negligently, the minor can repudiate the marriage on attaining the age of puberty. A wife can exercise the right even if the marriage was contracted by her father or her grandfather. There can be no unreasonable delay in the exercise of the option of puberty. The husband will lose his right to the option of puberty if the marriage has been consummated. The wife will also lose her right unless the consummation has taken place when the wife was still a minor and against her consent.
b) Soundness of Mind
Lunatics can get married during the lucid intervals for they can understand the consequences. Idiots on the other hand cannot do so. Idiocy refers to an abnormal state of the mind wherein the person cannot understand the consequences of their actions.
Marriage of insane persons
A person can contract a lawful marriage through a guardian. On recovering reason the said person can repudiate the marriage.
c) Religion of the parties
The parties can marry any Muslim irrespective of sects or sub sects.
Inter-Religion Marriage
Under Sunni law, a male can marry a Muslim girl of any sect/ sub sect or even a Kitabia girl. A Kitabia female is one who belongs to a community that originated in a book revealed by the heavens. Thus, the Jews and the Christians can be wed to a Sunni male. A marriage with a non-Muslim or non-Kitabia female, the marriage is merely irregular. Under Shia law, a marriage with a non-Muslim or a Kitabia woman is not permitted. However, a Muta marriage may be contracted with a Kitabia or Parsi female.
Marriage of a Muslim Female with a non-Muslim male
A Muslim female has no right to contract a marriage with a non-Muslim even if he is a Kitabia or Parsi. Such a marriage will be void.
The Special Marriage Act, 1954 allows any man or woman to get married to each other whether a Muslim or a non-Muslim. The succession will be governed under the Indian Succession Act, 1925.

II) FREE CONSENT OF THE PARTIES
If the parties are sane and adults, they can give consent on their own and the marriage will be a valid one. If the parties or one of them is either a minor or insane, the consent has to be obtained by the guardian. The consent will be deemed free when it is made at will and given voluntarily and not under any coercion or fraud.
Coercion is when the party is made to consent under the threat of harm to self or a loved one. All

sects and schools render a marriage under coercion to be void. The Hanafi School is the only exception. It is believed in the school that three things cannot be undone ever even if committed as a joke. The three things are marriage, divorce and taking back.

Fraud refers to a dishonest concealment of facts or presentation of false facts or statements to obtain consent. The moment the party whose consent was obtained by fraud comes to know of such fraud, he or she may accept the marriage as a legal one or altogether reject it.

Mistake of Fact is when the parties agree but not on the same thing. Consent refers to the meeting of the minds on the same issue. Where the identity of the bride to be, for example, is mistaken, the marriage will be void.

III) FORMALITIES IN THE MARRIAGE

Under Muslim law, religious ceremonies are not essential for validating a marriage. The only essential formalities are that of offer and acceptance.

Offer and Acceptance

Offer or Ijab signifies the willingness of a party to contract marriage with another. The offer comes in form of a declaration from the boy or his guardian. This offer has to be accepted by the girl or her guardian. This is referred to as acceptance or Qubool. Though no specific form exists, the words must show the unequivocal intention of the parties orthe guardians to marry the parties. It may be oral or written. When written down, it is referred to ass the Kabinnamah.

It is essential that the offer and acceptance occur at the same sitting. Thus, simultaneous actions must become a joint whole. For example, the groom to be has to send the offer through another. The bride must accept it in presence of others and then the marriage will be a valid one.

Reciprocity is another important aspect. The acceptance has to be for the proposal word to word, as it is and without any variations.

Conditional or Contingent Marriage is void even if the event that they are made dependent upon does in fact occur.

Presence of Witnesses is not essential under the Shia law. Under the Sunni law, the offer and acceptance needs to two competent witnesses. A Muslim male who is of sound mind and has attained the age of puberty is a competent single witness. Two sane Muslim females who have reached the age of puberty can also be treated as competent witnesses. Thus, two Muslim women along with a competent Muslim male witness will be regarded as competent witnesses for the marriage. Four females will not be regarded as competent witness. The term ‘witnesses’ does not refer to any one specifically asked or invited for this purpose only.

Registration under Muslim law is not essential for the validity of the marriage. But certain enactments provide for registration in the matters of marriage as well as divorces. The acts do so because then there exists a proof of the marriage. But even then the registration is optional only and not mandatory. It has also been held in a few cases that if the community custom requires registration, even if it is in a different format, the marriage has to be registered then. Under the Indian Christian Marriages Act, 1872, the registration of marriage will be essential if the marriage is between a Muslim and a Christian.

IV) ABSENCE OF PROHIBITION

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

cannot marry his own daughter.

Absolute Prohibitions

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

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

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

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

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

Relative Prohibitions

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

a) Unlawful Conjunctions

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

b) Marriage with the fifth wife

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

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

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

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

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

1) Dissolution of Marriage by divorce

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

2) Divorce of marriage by the death of the husband

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

3) Death if husband during divorce Iddat

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

4) Commencement of Iddat

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

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

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

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

Miscellaneous Prohibitions

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

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

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

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

KINDS OF MARRIAGE

Valid Marriage or the Sahih Marriage

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

Legal Effect of a Valid Marriage

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

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

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

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

v) Prohibited relations are created due to the marriage;

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

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

Void Marriage or the Batil Marriage

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

Legal Effects of a Void Marriage

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

Irregular Marriage or Fasid Marriage

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

Legal Effects of an irregular Marriage

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

Temporary marriage or Muta Marriage

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

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

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

Legal Effects of Temporary Marriage

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

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

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

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

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

RESTITUTION OF CONJUGAL RIGHTS
Restitution of conjugal rights refers to giving back the right to one party to stay with the spouse. As a couple is entitled to stay together and enjoy each other's company, if one spouse stays away without reason, the other can file a suit to move back with the aggrieved party. The courts have to look into the circumstances of each case and then decide. A wife can claim defences against her husband's claim as given below:
a) He falsely accused her of adultery;
b) Her prompt dower was not paid on demand;
c) The husband has been expelled from the caste;
d) Cruelty, physical or emotional, by the husband; and
e) Husband converted from Islam to another religion or used objectionable words against the Prophet, etc.

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

The Prophet declared that among the things which have been permitted by law, divorce is the worst . Divorce being an evil, it must be avoided as far as possible.But in some occasions this evil becomes a necessity, because when it is impossible for the parties to the marriage to carry on their union with mutual affection and love then it is better to allow them to get separated than compel them to live together in an atmosphere of hatred and disaffection. The basis of divorce in Islamic law is the inability of the spouses to live together rather than any specific cause (or guilt of a party) on account of which the parties cannot live together. A divorce may be either by the act of the husband or by the act of the wife. There are several modes of divorce under the Muslim law, which will be discussed hereafter.
Modes of Divorce:
A husband may divorce his wife by repudiating the marriage without giving any reason. Pronouncement of such words which signify his intention to disown the wife is sufficient. Generally this done by talaaq. But he may also divorce by Ila, and Zihar which differ from talaaq only in form, not in substance. A wife cannot divorce her husband of her own accord. She can divorce the husband only when the husband has delegated such a right to her or under an

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Talaaq-i-sunnat has two forms:
• Talaaq-i-ahasan (Most approved)
• Talaaq-i-hasan (Less approved).

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

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

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

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

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

The hasan talaaq:

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

Talaaq-i-Biddat:

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

Ila:

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

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

Zihar:

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

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

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

Divorce by mutual agreement:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Irretrievable Breakdown:

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

Conclusion:

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

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

Unit-III: Adoption, Maintenance of Guardianship

Adoption:

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

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

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

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

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

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

Who can be adopted?

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

Legal Implications for an Adopted Child

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

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

Maintenance of a Child or of Aged Parent(s)

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

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

Amount of Maintenance Provided

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

(d)Maintenance of a divorced Muslim wife

Maintenance of a divorced Muslim wife has always been a highly controversial and debatable social issue. The
issue of maintenance of Muslim wife has been a very difficult path as compared to Hindu wife. This issue has been subject matter of big fight by both Muslim fundamentalist and Hindu right wing.

Now coming to the legal technicalities of the issue, I would like to highlight the loop holes of statutes and the helplessness of the Legislature. The legal shortcoming of the maintenance law for Muslim Wife was used as a weapon by husbands to protect themselves from the liability of maintaining their wives. Prior to amendment, as per section 125 Cr.P.C.(Criminal Procedure Code), maintenance is granted only to the 'Wife' and therefore the husband started taking defense that the divorced women is no more his wife and henceforth not entitled for any maintenance. Then the legislature amended the section and inserted an explanation which clarifies that 'wife' includes divorced wives. However, husbands used another shield to protect themselves from the liability of maintaining their wife which was available under section 127(3) Cr.P.C. (Criminal Procedure Code), which
says that if women get any customary payment after divorce then husband will not be responsible for her maintenance. In numerous cases, it was held that 'Maher' or 'Dower' is the sum mentioned under sec 127 (3). Then the next stage came in, when the court recognized Dower as the sum mentioned under the aforesaid clause
but emphasized that such amount should be fair & reasonable as observed in Bai Fatima vs. Ali Hussain 1979 which find further approval of the Supreme Court in Fazlunbi vs. Khaderwali 1980 (SC) so as to protect Muslim women from destitution.

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

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

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

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

Conclusion:

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

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

Introduction:

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

Genesis

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

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

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

Statutory Provision:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Enforcement:

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

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

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

Hindu Law Text enjoins upon the husband a mandatory duty to maintain his wife. The duty to maintain is dehorns his possession of any property. A decree for maintenance creates a charge on his property. In Raghavan vs. Nagammal (AIR 1979 Mad 200) the High Court of Madras held that an order of maintenance, in term of Section 39 of the Transfer of property Act, creates a charge on the property Act. This principle was extended to an order passed under Section 125 Cr.P.C. in Diwakaran vs. Barghavy Chellamma (1985 (2) DMC 486).
Apart From the above, Section 125 (3) of the Cr. P.C. r/w Section 128 of the Cr.P.C. empowers the Magistrate to enforce the execution in case of default by the person ordered to pay maintenance. Section 51 of the C.P.C. can also be utilized for enforcing the order of maintenance

Validity of Marriage

Validity of the marriage for the purpose of summary proceedings under Section 125 Cr.P.C is to be determined on the basis of the evidence brought on record by the parties. The standard of proof of a marriage in such proceedings is not as strict as is required in a trial of offences under Section 494 IPC. If the claimant in proceedings under Section 125 of The Code succeeds in showing that she and the respondent have lived together as husband and wife the Court can presume that they are legally wedded spouses, and in such a situation the party who denies the marital status can rebut the presumption. Undisputedly marriage procedure followed in the temple, that too, in the presence of the idol of Lord Jaganath, which is worshiped by both the parties is considered to be valid. Once it is admitted that the marriage procedure was followed then it is not necessary to further probe in to whether the said procedure was complete as per the Hindu rites in the proceedings under Section 125 Cr.P.C. Dwarika Prasad Satpathi Vs. Bityut Prava Dixit, (1999) 7 SCC 675 1999 (4) crimes 206 = 2000 Cr.L.J 1, See also Raju Vs. Pushpa Devi, 1999 Cr.L.J 2294.

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

Guardianship

Guardianship Under Hindu Law

The Dharmashastras did not deal with the law of guardianship. During the British regime the law of guardianship was developed by the courts. It came to be established that the father is the natural guardian of the children and after his death, mother is the natural guardian of the children

COPYRIGHT FIMT 2020

and none else can be the natural guardian of minor children. Testamentary guardians were also introduced in Hindu law: It was also accepted that the supreme guardianship of the minor children vested in the State as parens patrie and was exercised by the courts. The Hindu law of guardianship of minor children has been codified and reformed by the Hindu Minority and Guardianship Act, 1956. The subject may be discussed under the following heads : (i) Guardianship of person of minors, (u) Guardianship of the property of minors, and (iii) De facto guardians, and (iv) guardians by affinity.

Guardianship of the person

Minor Children

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

Natural Guardians

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

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

children:
(a) Right to custody, .
(b) Right to determine the religion of children,
(c) Right to education,
(d) Right to control movement, and
(e) Right to reasonable chastisement
These rights are conferred on the guardians in the interest of the minor children and therefore of each- of these rights is subject to the welfare of the minor children. The natural guardians have also the obligation to maintain their minor children.

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

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

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

appoint guardians of the- person as well as the property of minor children. This power extends to the undivided interest of a coparcener.

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

Guardianship by affinity

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

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

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

De Facto Guardian

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

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

A mere intermeddler is not a de facto guardian. An isolated or fugitive act of a person in regard to child's property does not make him a de facto guardian. To make a person a de facto guardian some continuous course of conduct is necessary on his part. In other words, a de facto guardian is a person who is not a legal guardian, who has no authority in law to act as such but nonetheless he himself has assumed, the management of the property of the child as though he were a guardian. De facto guardianship is a concept where past acts result in present status. The term literally means 'from that which has been done.'
The de facto guardian was recognised in Hindu law as early as 1856. The Privy Council in Hanuman Pd.said that 'under Hindu law, the right of a bona fide incumbrancer, who has taken a de facto guardian a charge of land, created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not affected by the want of union of the de facto with the de jure title.

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

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

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

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

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

Testamentary Guardian

Among the Sunnis, the father has full power of making a testamentary appointment of guardian. In the absence of the father and his executor, the grandfather has the power of appointing a testamentary guardian. Among the Shias, the father's appointment of testamentary guardian is valid only if the grandfather is not alive. The grandfather, too, has the power of appointing a - testamentary guardian. No other person has any such power. Among both the Shias and the Sunnis, the mother has no power of appointing a testamentary guardian of her children. It is only in two cases in which the mother can appoint a testamentary guardian of her property of her minor children :.first, when she has been appointed a general executrix by the will of the child's father, she can appoint an executor by her will; and secondly, she can appoint an executor in respect of her own property. which will devolve after her death on her children.

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

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

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

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

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

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

Provisions of Special Marriage Act, 1954

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

The Special Marriage Act 1954
The Hindu Marriage Act 1955

Under the former Act the Hindu Marriage is called a Special Marriage .
The SMA has come into force with effect from 1st January 1955 and extends to the whole of India except the states of Jammu and Kashmir. The Act applies to all citizens of India domiciled in the territories to which this Act extends but who are presently and temporarily in the state of Jammu and Kashmir.
In other words, the Act applies to citizens of India permanently residing in any part of India except those persons permanently residing in the state of Jammu and Kashmir.
The Act provides for a special form of marriage which can be taken advantage of by any person in India as well as by citizens of India resident in foreign countries irrespective of the faith which either party to the marriage may profess. Thus, the said Act has extra-territorial operation so as to permit marriage between the citizens of India solemnized outside the territory of India in any foreign country.
Definition of Degrees of Prohibited Relationship – Section 2(b) :
According to Section 2(b) a man and any other person mentioned in Part I of the First Schedule and a woman and any other person mentioned in Part II of the said Schedule are within the degrees of Prohibited relationship.
According to the Explanation 1 appended to Section 2(b) , relationship includes –

- Relationship by half blood, full blood or uterine blood.
- Illegitimate and legitimate blood relationships

- Relationships by adoption as well as by blood.
  Explanation II has defined the terms full and half blood as –
  Full blood –
  Two persons are said to be related to each other by full blood when they are descendants from a common ancestor by the same wife.
  Half blood –
  Two persons are said to be related to each other by half blood when they are descendants from a common ancestor but by different wives.
  Explanation III has defined the term uterine blood as –
  Uterine blood –
  Two persons are said to be related by uterine blood when they are descendants of a common ancestor but by different husbands.
  Explanation IV states that in Explanation II and III, the term ancestor refers to the father and ancestress refers to themother.
  Section 4 – Conditions relating to Solemnization Of Special Marriage :
  Section 4 states that – notwithstanding any thing contained in any other law for the time being in force relating to the solemnization of the marriage – a marriage between any two persons may be solemnized under this Act if – at the time of the marriage the following conditions are fulfilled :
  Neither party has a spouse living
  Neither party is Incapable of giving a valid consent to the marriage in consequence of unsound mind, or
  Although capable of giving a valid consent – has been suffering from mental disorder of such kind or to such an extent that it would be unfit for marriage and procreation of children, or has been subject to recurring attacks of epilepsy or insanity
  The male has completed the age of 21 years and the female the age of 18 years
  The parties are not within the degrees of prohibited relationship within the meaning of Section 2 of the Act.
  Where the marriage is solemnized in the state of Jammu and Kashmir , both the parties are citizens of India domiciled in the territories to which this Act extends.
  Proviso to Section 4, states where the parties must not be within the degrees of prohibited relationship – that where a custom governing at least one of the parties to marry even when they are within the degrees of prohibited relationship, then such a marriage may be solemnized even though they are within such prohibited limits.
  A marriage shall be void if all these conditions are not satisfied. Thus when the minimum age of the bridegroom is less than 21 years then the marriage is considered void. Similarly, if a spouse suffers from epilepsy, then the marriage contravenes Section 4 and is to be held void. However, a marriage cannot be considered void if it is held that the marriage has not been consummated.
  Note –The term "persons" used in Section 4 may not refer to only those who are citizens of India. It may also refer to –
- 2 citizens of India whether they are residing in India or in foreign countries
- 2 foreigners who are in India
- A citizen of India and a foreigner.

Section 5 : Notice Of Intended Marriage :

Section 5 of the Act expressly states that when a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing in the prescribed form,

specified in Schedule II of the Act – to the marriage officer of the district in which at least one of the parties to the marriage has resided for a period of not less than 30 days immediately preceding the date on which such notice is given.

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

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

Notice of Intended Marriage When One Party Lives Abroad :

Marian Eva vs. State of H. P.

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

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

Section 6 : Marriage Notice Book And Publication :

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

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

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

Section 7 : Objection To Marriage :

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

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

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

Section 8 : Procedure On Receipt Of Objection :

Section 8 (1) provides that if an objection is made under Section 7 to an intended marriage , the

marriage officer shall not solemnized the marriage until he has inquired into the matter of the objection and is satisfied that the objection is of such a nature that it should not prevent the solemnization of marriage. The objection may be withdrawn by the person making it.
Section 8(1) further imposes on the marriage officer an obligation that he shall not take more than 30 days from the date of objection for the purpose of inquiring into the matter of the objection and arriving at a decision.
Section 8(2) provides that if the marriage officer upholds the objection and refuses to solemnize the marriage , either party to the intended marriage may within a period of 30 days from the date of such refusal , prefer an appeal to the District Court within the local limits of whose jurisdiction the office of the marriage officer is situated. The decision of thedistrict Court on such appeal shall be final and binding on the marriage officer who must then Act in accordance with the decision of the Court.
Section 9 : Powers Of Marriage Officers In Respect Of Inquiries :
Section 9 of the Act has laid down the powers of the marriage officer in respect of the conduct of inquiries in matters ofobjection to an intended marriage as entrusted to him under Section 8 of the Act.
Section 9 (1) provides that for the purpose of any inquiry under Section 8 , the marriage officer shall have all the powers vested in a civil Court under the Civil Procedure Code 1908 when trying a suit in respect of the following matters :

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

Any proceeding before the marriage officer shall be deemed to be a judicial proceeding within the meaning of Section 193 of the IPC 1860, in as much as, if any witness gives false evidence, he may be punished for giving false evidence under Section 193 of the IPC.
Explanation to Section 9 states that for the purpose of enforcing the attendance of any person to give evidence, the local limits of the jurisdiction of the marriage officer shall be the local limits of his district. According to Section 9(2) , if it appears to the marriage officer that the objection made to an intended marriage is arbitrary, unreasonable and mala fide (not in good faith) he may impose on the person fine , so objecting costs , not exceeding Rs 1000 and award the whole or any part of such compensation to the parties to the intended marriage . Any order made for costs by way of compensation may be executed in the same manner as if it was a decree passed by the District Court within the local limits of whose jurisdiction the marriage officer has his office.
Section 15 : Registration Of Marriage Celebrated In Other Forms :
This Section deals with the registration of marriages celebrated in other forms.
Accordingly, any marriage celebrated either before or after the commencement of this Act , other the marriage solemnized under this Act or under the Special Marriage Act 1872 – may be registered under Chapter III of the Special Marriage Act 1954 by the marriage officer .
But the following conditions need to be satisfied :-
Clause A ceremony of marriage has been performed between the parties and they have been living
(a) together ever since as husband and wife
(b) Neither party at the time of the registration of the marriage – more than one spouse living
(c) Neither party is an idiot or a lunatic at the time of registration of marriage

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

(e) The parties are not within the degrees of prohibited relationship .
A Proviso to clause (e) states that in the case of a marriage celebrated before the commencement of the Special Marriage Act 1954, the condition as to the degrees of prohibited relationship shall be subject to any law , custom or usage having the force of law governing such parties , which permits of a marriage between the two even within the degrees of prohibited relationship.

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

Section 16 : Procedure For Registration :

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

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

Section 19 : Effect Of Marriage On Member Of Undivided Family

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

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

Section 24 : Void Marriage :

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

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

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

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

Section 24(2) provides that the provision of Section 24 shall not apply to any marriage deemed to be solemnized under this Act within the meaning of Section 18.

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

Section 25 : Voidable Marriage :

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

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

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

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

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

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

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

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

Note –

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

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

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

Case Law – Gitika Bagchi vs. Subhabrota Bagchi

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 30: Re-Marriage Of Divorced Persons :

Section 30 of the Act provides for the re-marriage of divorced persons under certain circumstances. According to Section 30 where a marriage has been dissolved by a decree of divorce and either –

There is no right of appeal against the decree, or

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

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

Section 31 : Court To Which Petition Should Be Made :

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

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

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

The petitioner is residing at the time of presentation of the petition in a case where the respondent at the time residing outside the territories to which this Act extends or

The petitioner has not been heard of as being alive for a period of 7 years by those who would have naturally heard of him had he been alive.

Section 31(2) states that the District Court may by virtue of this subsection entertain a petition by a "wife" domiciled in the territories to which this Act extends for nullity of marriage or for divorce, if she is a resident in the said territories and has been ordinary resident thereon for a period of 3 years immediately preceding the presentment of the petition and the "husband" is not

resident in the said territories.

Section 33 : Proceedings To Be In Camera And May Not Be Printed Or Published

Section 33(1) states that every proceeding under this Act shall be conducted in CAMREA that is, in Judge's Private Room not in public/openly. Moreover, it shall not be lawful for any person to print or publish any matter concerning any such proceedings. However, a judgment of the High Court or the Supreme Court may be printed or published with the prior permission of the Court.

Section 33(2) states that any person who contravenes the provision contained in Section 33(1) – shall be punished with fine which may extend up to Rs 1000.

b. Emerging trends:

Surrogacy

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

Surrogacy arrangement is usually sought by intended parents when pregnancy is either medically impossible or it is considered very risky for the mother's health. These agreements may or may not includemonetary compensation. The arrangement is termed commercial surrogacy when the surrogate is given compensation higher than the medical reimbursement and other reasonable expenses; otherwise, it is referred to as altruistic or non-commercial surrogacy. Surrogacy laws and costs can differ significantly across jurisdictions in various nations.

History Of Surrogacy

Babylonian law and custom followed a practice known as antiquity. A couple could arrange for another woman to be impregnated by the male half of the couple. The child thus borne would be raised by the couple.A barren woman could use this practice to prevent a divorce.Several advances in medicine, social customs, and legalities have led to the development of modern commercial surrogacy.

In the 1930s,U.S., pharmaceutical companies Schering-Kahlbaum and Parke-Davis started the mass production of estrogen. For the first time in1944, Harvard Medical School Professor John Rock fertilized the human ova outside the uterus. In 1953, the first cryopreservation of sperm was performed successfully. A commercial sperm bank was first opened in New York in 1971, which turned this into a highly profitable business throughout the world.Louise Brown, the first test-tube baby and product of the IVF procedure, was born in England in 1978. In 1980,Noel Keane, a lawyer from Michigan prepared the first surrogacy contract. The first successful gestational surrogate pregnancy in a woman was carried out in 1985.In 1986,surrogate and biological mother, Mary Beth Whitehead of the United States, refused to give custody of the child (Baby M) to the couple against the surrogacy agreement. However, the courts of New Jersey awarded custody of the child to the biological father and not the surrogate mother. Similarly, in 1990,the surrogate mother Anna Johnson in California refused to yield custody of the baby to the intended parents. The court upheld the parental rights of the couple. This verdict legally defined the true mother as the woman who intends to create and raise a child. A

convention was held in Chile in 1994 by Latin American fertility specialists to discuss assisted reproduction and its ethical and legal status.So, the concept of surrogacy is not new and has existed in the world since ages.

Legal Issues Regarding Surrogacy Across The World

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

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

Although laws in Ukraine allow surrogacy, bringing the child into the country can be difficult. Surrogacy is completely banned in France, Germany and Sweden.Further, commercial surrogacy is not encouraged in the United Kingdom where legal hurdles exist.Surrogacy is more acceptable internationally, but there are no international laws on surrogacy or minimum standards. Also, legal parentage of such a child has not been recognized by any international conventions. In some countries, producing evidence (such as DNA test results) of at least one parent of the child having a genetic relationship with the child is mandatory;whereas in other countries, legal release of the child by the husband of any married surrogate is required. Obtaining citizenship and travel document is tough in most countries for such a child.In Belgium, altruistic surrogacy is legal,while commercial surrogacy is illegal. In France, Article 17/6 of the Civil Code nullifies any agreement with a third party relating to procreation or gestation and disobeying the law may lead to judicial problems.However, the Conseild'Etat, the highest administrative court in Francehas declared that overseas surrogacy agreement is lawful.

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

International Surrogacy Arrangement

Traditional surrogacy involves the union of the egg of a surrogate mother and, usually, the sperm of the commissioning father. The commissioning father would be the child's legal father, and the

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

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

Surrogacy In India – Legal Issues

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

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

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

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

India only has guidelines and no legislation governing surrogacy. The surrogacy agreement governs the contractual relation between the parties. The surrogate could claim the child as her

own or enforce parental visitation or custodial rights, thus creating problems. Also, the surrogate's husband may claim the child under section 112 of the Evidence Act.It is very important for the parents in this arrangement to prepare afoolproof surrogacy agreement and ensure a strong contract.

Concluding Remarks

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

Live-in Relationship

Status of live in relationships in India

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

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

WHAT IS LIVE IN RELATIONSHIP

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

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

LEGAL STATUS OF LIVE IN RELATIONSHIP

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

The first case in which the Supreme Court of India first recognized the live in relationship as a valid marriage was that of Badri Prasad vs. Dy. Director of Consolidation, in which the Court gave legal validity to the a 50 year live in relationship of a couple.

The Allahabad High Curt again recognized the concept of live in relationship in the case of Payal Katara vs. Superintendent, Nari Niketan and others, wherein it held that live in relationship is not illegal. The Court said that a man and a woman can live together as per their wish even without getting married. It further said that it may be immoral for the society but is not illegal.

Again in the case of Patel and Others., the Supreme Court has held that live in relationship between two adults without marriage cannot be construed as an offence. It further held that there is no law which postulates that live in relationships are illegal. The concept of live in relationship was again recognized in the case of Tulsa v. Durghatiya.

In the case of S. Khushboo vs. Kanniammal & Anr., the Supreme Court held that living together is a right to life. Live in relationship may be immoral in the eyes of the conservative Indian society but it is not "illegal" in the eyes of law. In this case, all the charges against Kushboo, the south Indian actress who endorsed pre- marital sex and live in relationship were dropped. The Court held that how can it be illegal if two adults live together, in their words "living together cannot be illegal."

However in one of its judgment Alok Kumar vs. State, the Delhi High Court has held that live in relation is walk in and walk out relationship and no strings are attached to it. This kind of relationship does not create any legal bond between the partners. It further held that in case of live in relationships, the partners cannot complain of infidelity or immorality.

Again giving recognition to live in relationships, the Supreme Court in the case of D. Velusamy v. D. Patchaiammal has held that, a 'relationship in the nature of marriage' under the 2005 Act must also fulfill some basic criteria. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'. It also held that if a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'.

The court made it clear that if the man has a live-in arrangement with a woman only for sexual reasons, neither partner can claim benefits of a legal marriage. In order to be eligible for 'palimony', a relationship must comply with certain conditions, the apex court said. The following conditions were laid down by the apex Court:

The couple must hold themselves out to society as being akin to spouses;

They must be of legal age to marry; they must be otherwise qualified to enter into a legal marriage, including being unmarried;

They must have voluntarily cohabited for a significant period of time.

Conscious of the fact that the judgment would exclude many women in live-in relationships from the benefit of the Domestic Violence Act, 2005, the apex court said it is not for this court to

legislate or amend the law. The parliament has used the expression ‘relationship in the nature of marriage’ and not ‘live-in relationship’. The court cannot change the language of the statute.

RIGHTS OF A FEMALE IN LIVE IN RELATIONSHIP

In June, 2008, it was recommended by the National Commission for Women to the Ministry of Women and Child Development to include live in female partners for the right of maintenance under Section 125 of Criminal Procedure Code, 1973. The view was also supported by the judgment in Abhijit Bhikaseth Auti v. State Of Maharashtra and Others. In October, 2008, the Maharashtra Government also supported the concept of live in relationships by accepting the proposal made by Malimath Committee and Law Commission of India which suggested that if a woman has been in a live-in relationship for considerably long time, she ought to enjoy the legal status as given to wife. However, recently it was observed that it is divorced wife who is treated as a wife in context of Section 125 of CrPC and if a person has not even been married i.e. the case of live in partners, they cannot be divorced, and hence cannot claim maintenance under Section 125 of CrPC.

The partner of a live in relationship was first time accorded protection by the Protection of Women from Domestic Violence Act, 2005, which considers females who are not formally married, but are living with a male person in a relationship, which is in the nature of marriage, also akin to wife, though not equivalent to wife. Section 2(f) of the Act defines domestic relationship which means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family. Thus, the definition of domestic relationship includes not only the relationship of marriage but also a relationship `in the nature of marriage’.

In a case in Delhi, the Delhi High Court awarded Rs. 3000/- per month as maintenance to a maid who was in a live in relationship with her widower employer.

In Varsha Kapoor vs UOI & Ors., the Delhi High Court has held that female living in a relationship in the nature of marriage has right to file complaint not only against husband or male partner, but also against his relatives.

In the case of Koppisetti Subbharao Subramaniam vs. State of Andhra Pradesh, the defendant used to harass his live in partner for dowry. In this case the Supreme Court held that the nomenclature ‘dowry’ does not have any magical charm written over it. It is just a label given to demand of money in relation to a marital relationship. The Court rejected the contention of the defendant that since he was not married to the complainant, Section 498A did not apply to him. Thus, the Supreme Court took one more step ahead and protected the woman in a live in relationship from harassment for dowry.

STATUS OF CHILDREN OF COUPLES IN LIVE IN RELATIONSHIP

Since there is no specific law that recognizes the status of the couples in live in relationship, hence the law as to the status of children born to couples in live in relationship is also not very clear.

The Hindu marriage Act, 1955 gives grants the status of legitimacy to every child irrespective of his birth out of a void, voidable or a legal marriage. But there is no specific law that raises any presumption of legitimacy in favour of children of live in partners. The future of children of live

in partners becomes very insecure in case the partners step out of their relationship. There comes the requirement of a strong provision to safeguard the rights of such children. The must be provision to secure the future of the child and also entitling the children to a share in the property of both the parents.

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

CONCLUSION

Live-in relationships in India have still not received the consent of the majority of people. They are still considered a taboo to the Indian society. The majority of the people consider it as an immoral and an improper relationship. At present there is no specific legislation that deals with concept of live in relationship and the rights of the parties and the children of the live in partners. It was a very unambiguous concept until the Supreme Court of India took the initiative and declared that live in relationship though considered immoral but it is not illegal.

Through its various decisions the judiciary has tried to accord legality to the concept and protect the rights of the parties and the children of live in couples. But at present there is a need to formulate a law that would clarify the concept. There should be clear provisions with regard to the time span required to give status to the relationship, registration and rights of parties and children born out of it. The utmost need of the hour is to secure the future of the children born to live in couples. The steps taken by the judiciary are indeed welcoming and pragmatic in approach. Though the live in relations provide the individuals individual freedom but due to the insecurity it carries it with, there needs to be a law to curtail its disadvantages

IVF

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

The Growth Trajectory

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

treatments available around the world. The Indian IVF sector accounts to around five billion dollars and has around 500 plus IVF clinics across the country.

Catch 22

The present prosperity witnessed by the segment, is a result of various factors. From hi-tech infrastructure, to effective treatment options to increased awareness to no regulations, all these determinants have influenced growth for this sector in India. Moreover, experts observe a correlation between the growth of the Indian IVF segment and the advancements in the world wide web. Opines Dr Annirudh Malpani, MD, Malpani Infertility Clinic, Mumbai, "The Indian IVF segment has been on the growth path since 1980s, but the major chance came in with the introduction of internet. Indians got a chance to interact with infertile patients using information therapy." With a similar opinion Dr Kedar Ganla, Consultant - Fertility Physician and Coordinator - IVF Department, Dr L H Hiranandani Hospital informs that a lot of information is disseminated to patients using the internet that felicitate patients to understand the available treatments options. He also mentions that apart from information doctors also provide counselling using internet and skype to domestic as well as overseas patients.

While the advances in the IVF field has helped the Indian industry, it is not without a catch. The situation currently is such that anyone can open an infertility or assisted reproductive technology (ART) clinic; no permission is required to do so and there is no written said law that regulates this practice. The industry only follows the guidelines laid down by the Indian Council of Medical Research(ICMR) that includes when, and by whom IVF can be performed. The guidelines also provides for IVF, ICSI, egg donation, and surrogacy but not for the setting up of the clinics that offer these techniques. Consequently, there is constant mushrooming of such clinics around the country.

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

India and Fertility Tourism

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

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

facilitated this. The easy availability of egg donors and surrogates in India has also encouraged international patients to consider India as one of the suitable countries to persue their treatment. Additionally, India is also equipped with some of the finest international IVF centres and highly qualified IVF doctors."

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

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

The Legal and Ethical Dilemma

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

Recalling the social ostracisation faced by Dr Mukhopadhyay despite his ground-breaking achievement and looking at the present situation it wouldn't be wrong to say that the field has always been mired in controversy. The subject seems to be as delicate as sex detection and its legal aspects. Getting to the crux of the subject, brings to light certain glitches that include bureaucratic negligence and social reprimand that are the actual causes for concern. Analysing the legal, moral and ethical concerns, Dr Nikhil Datar, Consultant Gynaecologist, Dr Balabhai Nanavati Hospital and Medico-legal Consultant responds, "Since we do not have a proper law in place different people will have different opinions. Morality and ethics is a grey area. Therefore, questions such as can a grandmother become a mother of the child? or can a close relative donate their eggs or sperms? will definitely draw public attention. Moreover, it is important to note that what could be morally correct for one person could be a vile thing for the another. Basically, this sector is market-and-wish driven because there is no binding law; so technically everyone is free to do what they like. Therefore, a law in place is a must." Getting to the intricacy of the situation,

Dr Tank states, "As IVF technology develops, it raises questions in all aspects of life, as the treatments are concerned with the creation and sustenance of life itself. When IVF was introduced and the first IVF baby was born in the UK, there was a maelstrom of debate which surrounded the treatment. Questions regarding the boundaries of procreation were raised and the treatments were derogated as physician's attempts to play God and interfere in the creation of life. As treatment progressed there has been a gradual acceptance in the minds of most. When gamete donation and surrogacy started being widely accessed as treatments a whole new set of questions emerged, not only with regard to the legal issues but even social ones with the welfare of the women/men who donate gametes and undertake to be surrogates. The legal issues can sometimes be very complex and quite clearly there are times when there is a need to revamp laws, as the existing laws are simply not equipped to take such issues under consideration." According to Dr Banerjee, legal issues include accreditation of IVF centre, personnel, and consent of patients. Drawing attention towards medico-legal cases concerning IVF he says, "There are medico-legal cases filed by patients on doctors for negligence when there is a failure of cycle. It is however a known fact that not all IVF cycles can be successful. There are also cases regarding using donor gametes without consent. The ethical issues of IVF would involve known vesus anonymous donation of gametes. The renumeration given to egg donors and surrogates has also been questioned in view of whether one should be paid for human parts and organs or whether it should be completely altruistic."

Critically Looked upon

On one hand the industry is battling with ethical and legal squabbles and on the other hand the growing number of western couples seeking donors and surrogates in India has prompted critics to view the practice of egg donation and surrogacy as exploitation of poor women. Critics express their concern and believe that women may be coerced by their husbands or in-laws or middlemen into becoming surrogates. Notwithstanding these concerns raised by critics, the industry strongly dissents to this allegation. Dr Malpani firmly says, "I do not agree that this practice can be exploitative. Women who opt to become surrogates do it of their own, free will. They normally do it to provide financial support to their families." Agreeing to this point, Dr Ganla, replies, "It is not an exploitative practice. It gives mutual benefit to both parties if done ethically under proper legal cover. It gives women of lower socio-economic class a chance for self empowerment. These women can contribute for the future plan of their family and for their children's education." On the same lines, Dr Banerjee says, " I disagree on the criticism. Professional egg donors and surrogates come from a low socio-economic status, the renumeration given to them is substantial, some times they cannot earn that in their lifetime. It would be considered exploitative if the process is without consent, non-voluntary, and the renumeration is shared by their spouses, relatives and agents."

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

The General Guidelines

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

Experts opine that keeping in mind the lack of regulations in our country, IVF practitioners and

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

The ART Bill 2010

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

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

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

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

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

Understanding that no law can be perfect, if we critically analysis the provisions of the draft it is evident that the said draft has certain lacunae that can be improved. According to Dr Abha Majumdar, Director, Center of IVF and Human Reproduction, Sir Ganga Ram Hospital, the bill needs to address areas wherein relatives of the patients would want to donate their eggs. She also points out to the need to encourage egg banking and sperm banking that should be registered under this law. Further on, she appeals that IVF practitioners should not be allowed to get involved in the entire compensation procedures.

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

Government's Take

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

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

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

Need of the Hour

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

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

Domestic Violence

Domestic Violence in India

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

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT 2005

MAIN FEATURES OF THE ACT

DEFINITIONS

Domestic Violence: The term "domestic violence" includes elaborately all forms of actual abuse or threat of abuse of physical, sexual, verbal, emotional and economic nature that can harm,

cause injury to, endanger the health, safety, life, limb or well-being, either mental or physical of the aggrieved person. The definition is wide enough to cover child sexual abuse, harassment caused to a woman or her relatives by unlawful dowry demands, and marital rape.
The kinds of abuse covered under the Act are:
Physical Abuse-

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

Sexual Abuse-
any conduct of a sexual nature that abuses, humiliates, degrades, or violates the dignity of a woman.
Verbal and Emotional Abuse-

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

Economic Abuse-

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

Beneficiaries under the Act:
Women: The Act covers women who have been living with the Respondent in a shared household and are related to him by blood, marriage, or adoption and includes women living as sexual partners in a relationship that is in the nature of marriage. Women in fraudulent or bigamous marriages or in marriages deemed invalid in law are also protected.
Children: The Act also covers children who are below the age of 18 years and includes adopted, step or foster children who are the subjects of physical, mental, or economical torture. Any person can file a complaint on behalf of a child.
Respondent: The Act defines the Respondent as any adult male person who is or has been in a domestic relationship with the aggrieved person and includes relatives of the husband or male partner.
Shared Household: A shared household is a household where the aggrieved person lives or has lived in a domestic relationship either singly or along with the Respondent. Such a household should be owned or tenanted, either jointly by both of them or by either of them, where either of them or both of them jointly or singly have any right, title, interest or equity in it. It also includes a household that may belong to the joint family of which the Respondent is a member, irrespective of whether the Respondent or person aggrieved has any right, title or interest in the shared household.

RIGHTS GRANTED TO WOMEN

Right to reside in a shared household:
The Act secures a woman's right to reside in the matrimonial or shared household even if she has

no title or rights in the household. A part of the house can be allotted to her for her personal use. A court can pass a residence order to secure her right of residence in the household.

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

Right to obtain assistance and protection:

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

Right to issuance of Orders:

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

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

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

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

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

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

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

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

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

LIABILITIES AND RESTRICTIONS IMPOSED UPON THE RESPONDENT

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

The Respondent can be made accountable for providing monetary relief to the aggrieved person and her children and pay compensation damages as directed in the Compensation order.
He has to follow the arrangements made by the court regarding the custody of the child or children of the aggrieved person as specified in the Custody order.
The Act does not permit any female relative of the husband or male partner to file a complaint against the wife or female partner.
AUTHORITIES RESPONSIBLE AND THEIR FUNCTIONS
The Act provides for appointment of Protection Officers and Service Providers by the state governments to assist the aggrieved person with respect to medical examination, legal aid, safe shelter and other assistance for accessing her rights.
Protection Officers: These are officers who are under the jurisdiction and control of the court and have specific duties in situations of domestic violence. They provide assistance to the court in preparing the petition filed in the magistrate's office, also called a Domestic Incident Report. It is their duty to provide necessary information to the aggrieved person on Service Providers and to ensure compliance with the orders for monetary relief.
Service Providers: These refer to organizations and institutions working for women's rights, which are recognized under the Companies Act or the Societies Registration Act. They must be registered with the state government to record the Domestic Incident Report and to help the aggrieved person in medical examination. It is their duty to approach and advise the aggrieved person of her rights under the law and assist her in initiating the required legal proceedings or taking appropriate protective measures to remedy the situation. The law protects them for all actions done in good faith and no legal proceedings can be initiated against them for the proper exercise of their powers under the Act.
Court of first class Judicial Magistrate or Metropolitan Magistrate: This shall be the competent court to deal with cases of domestic violence and within the local limits of this court, either of the parties must reside or carry on business or employment, or the cause of action must have arisen. The Magistrate is allowed to hold proceedings in camera if either party to the proceedings so desires.
General duties of Police Officers, Service Providers and Magistrate: Upon receiving a complaint or report of domestic violence or being present at the place of such an incident, they are under a duty to inform the aggrieved person of:

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

Counselors: The Magistrate may appoint any member of a Service Provider who possesses the prescribed qualifications and experience in counseling, for assisting the parties during the proceedings.
Welfare experts: The Magistrate can appoint them for assisting him in discharging his functions.
In charge of Shelter Homes: The person in charge of a shelter home shall provide shelter to the aggrieved person in the shelter home upon request made by the aggrieved person, a Protection Officer or a Service Provider on her behalf.
In charge of Medical Facilities: The person in charge of a medical facility shall provide medical aid to the aggrieved person upon request made by the aggrieved person, a Protection Officer or a Service Provider on her behalf.
Central and State Governments: Such governments are under a duty to ensure wide publicity of

the provisions of this Act through all forms of public media at regular intervals, to provide awareness and training to all officers of the government, and to coordinate the services provided by all Ministries and various Departments.

PROCEDURE OF FILING COMPLAINT AND THE COURT'S DUTY

The aggrieved person or any other witness of the offence on her behalf can approach a Police Officer, Protection Officer, and Service Provider or can directly file a complaint with a Magistrate for obtaining orders or reliefs under the Act. The informant who in good faith provides information relating to the offence to the relevant authorities will not have any civil or criminal liability.

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

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

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

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

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

PENALTY/PUNISHMENT

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

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

APPEAL

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

THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE RULES 2005

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

- the qualifications and experience to be possessed by a Protection Officer and the terms and conditions of his service;
- the form and manner in which a domestic incident report may be made;
- the form and the manner in which an application for Protection Order may be made to the Magistrate;
- the form in which an application for legal aid and services shall be made;
- the other duties to be performed by the Protection Officer;

- the rules regulating registration of Service Providers;
- the means of serving notices;
- the rules regarding counseling and procedure to be followed by a Counselor;
- the rules regarding shelter and medical assistance to the aggrieved person;
- the rules regarding breach of Protection Orders.

Same Sex Marriage

History:

Homosexuality has an ancient history in India. Ancient texts like Rig-Veda which dates back around 1500 BC and sculptures and vestiges depict sexual acts between women as revelations of a feminine world where sexuality was based on pleasure and fertility. The description of homosexual acts in the Kamasutra, the Harems of young boys kept by Muslim Nawabs and Hindu Aristocrats, male homosexuality in the Medieval Muslim history, evidences of sodomy in the Tantric rituals are some historical evidences of same-sex relationships.

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

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

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

The issue of homosexual conduct has come to this fore in recent legal and political debates for three main reasons:
(I). Liberalization of the law (in the U.K., by the Sexual Offences Act 1967 as amended in 2000 and some other countries by a similar legislation) has brought with it a change in social attitudes, so that the stigma attached to the homosexuality has to a greater extent disappeared.

(II). Campaigns for lesbian and gay rights especially in the U.S. have taken on an increasingly radical character, arguing for an end to all forms of discrimination against homosexuality, and even for the legalization of same sex marriages.
(III).The outbreak of HIV/AIDS which has been spread in western countries to a great extent by homosexual activity between males, has led to accusations and counter-accusations, often of a bitter kind. Spain, Belgium and the Netherlands, as well as Canada in allowing same-sex marriages. Same-sex acts are punishable by death in nine countries around the world.

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

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

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

The Indian law against homosexuality seems to be too harsh. The Constitutional validity of section-377 of IPC was challenged in the Delhi High Court as being violative of fundamental rights guaranteed under the Indian Constitution. Here it may be noted that, in practically all

crimes against human body listed under the Indian Penal Code, some sort of physical violence or coercion is an essential element of crime. The only exception is in the favour of section-377, which criminalizes sexual activity that leaves no victims. In the history of the statute from, 1860 in 1992 there was only 30 cases in the High Courts and Supreme Court. "The small number of cases filed under this section shows that this section is redundant and outdated and needs to be repealed.

The Central Government has informed the Delhi High Court that homosexuality cannot be legalized in India as the Indian society is intolerant to the practice of homosexuality/lesbianism. To paraphrase, three things can be said about the government's stance:
[a] the state has not just a function to, but actually a duty to stop unnatural sex, or else the social order would break down, law loose its legitimacy et al;
[b] that our society does not tolerate homosexuality, and notwithstanding the universality of human rights or the universal applicability of our fundamental rights and freedoms, its criminalization is therefore justified; and
[c] that it is really not our thing, its something that happens out there in the west, we do not have to copy that. In other words the three pillars of the classic culture arguments to criminalize the likes of us.

Why Should Be Legalized:
Arguments in favour of Decriminalizing Homosexuality: Gay and lesbian rights activists from various parts of the countries were protesting for their rights and for decriminalizing the homosexual conduct. There is a big debate in our country too- whether it should be legalized or not. I am giving some of the arguments in favour of decriminalizing it, specifically in Indian context- in view of Section-377 of the Indian Penal Code.
(1) It violates right to liberty guaranteed under Article-21 of the Indian Constitution which covers private consensual sexual relations. The fundamental right to liberty (under Article-21) prohibits the state from interfering with the private personal activities of the individual. The concept of privacy is so broad that no comprehensive and all encompassing definition of the term can be given. In the case National Coalition for Gay and Lesbian equality V. Ministry of Justice , the South African court held that, Privacy recognizes that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. Even at the international level, the right to privacy has been recognized in the favour of lesbians and gay man.

(2) Criminalization of homosexual conduct is unreasonable and arbitrary:
Infringement of, the right to equal protection before law requires the determination of whether there is a rational and objective basis to the classification introduced. There should be a just and reasonable nexus between the classification and the object sought to be achieved by the legislation. Section-377 of IPC, its legislative objective is to criminalize all the sexual activities which are against the order of nature, thus punishing the unnatural sex. Section-377 assumes that natural sexual act is that which is performed for procreation. Hence, it thereby labels all forms of non-procreative sexual act as unnatural. This gives a very narrow view to the distinction between the procreative and non-procreative sexual act. Hence, the legislative intent of creating a public code of sexual morality has no rational nexus with the classification created. Further the very

object of the section is vague, unreasonable, arbitrary and based up on the stereotyped notion that sex is only for procreation. Now if this presumption is accepted is correct then, what justifies the policies of family planning and the use of the contraceptive devices

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

(4). Section-377 violates the enjoyment of civil laws and gay men and lesbians and leads to other adverse effects: Section-292 of IPC punishes Obscenity; the current definition of obscenity can lead it to incriminate the gay and lesbian writings. As male homosexuality is a criminal offence, the presumption is that it is something depraved and can corrupt the minds and bodies of the persons. In the prevailing atmosphere any writing about the lesbians and the gay men can be criminalized, as homosexuality is treated as something immoral or depraved. The workman's Compensation Act, 1923- provides that in case of death caused by injury at the work place, the dependents of the employee are entitled to receive the compensation from the employer, the dependents will include a widow, minor legitimate son, unmarried daughter, widowed mother and an infirm son or daughter.

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

Why There Is Need For Legal Recognition:

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

Love is love. The real threat to marriage is the alarmingly high divorce rate. Marriage is also a legal joining of two individuals. People who are not religious choose to get married in a registry office and not in church. Marriage shows the strongest commitment you can make to one

another. Gay men and lesbians are just as human and have the same needs and desires as heterosexual human beings. I fail to see what God has to do with this Marriage in this instance is not religious, but a legal joining. Getting married is the ultimate way of showing your love and commitment to your partner, so why should gay people be deprived of this right. Who are we to sit and judge anyway. Same sex marriages should be legalized. If people find gay relationships contrary to their religion, it is up to them to refrain. Those who do not share their religious opinions should be free to make their own choice on this as on other issues. Gay men and lesbians are just as human and have the same needs and desires as heterosexual human beings.

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

The universality of Human rights demands that prevailing and dominant cultural and social norms cannot be invoked in a manner as to circumvent or restrain fundamental and constitutional rights. If we were to accept the government's arguments in the Delhi high court case, then many of the progressive legislations in my country would never have been enacted. For example, even today there are many men who think that tradition gives them a right to beat up their wives, or that they deserve to get a very fat dowry just because they were born with a penis. If we give in to these cultural beliefs, then there is nothing to turn round the legislations that we have made to stop violence against women or dowry and dowry related deaths

Conclusion

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

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

CONSTITUTIONAL LAW-I (203)

Definition

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

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

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

Classification:

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

Sources of Constitution:

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

Constitutional Conventions:

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

SALIENT FEATURES OF THE INDIAN CONSTITUTION:

1. The lengthiest Constitution in the world: The Indian Constitution is the lengthiest and the most detailed of all the written Constitutions of the world. While the American Constitution originally consisted of only 7 Articles, the Australian Constitution 128 Articles, the Canadian Constitution 147 Articles, the Indian Constitution originally consisted of 395 Articles divided into 22 Parts

and 8 Schedules, at present, the though still, the last numbered Article is 395 and the last numbered part is 22, yet the actual articles are 460 in number and 25 parts at present and the Schedules at present are 12 in number. Since 1950 Articles have been repealed and several Articles have been added to the Constitution. This extraordinary bulk of the Constitution is due to several reasons:-

(1) The framers of the Indian Constitution have gained experience from the working of all the known constitutions of the world. They were aware of the difficulties faced in the working of these constitutions. This was the reason that they sought to incorporate good provisions of those constitutions in order to avoid defects and loopholes that might come in future in the working of the Indian Constitution. The framers of the Indian Constitution framed, the most important chapter of the Fundamental Rights on the model of the American Constitution, and adopted the parliamentary system of government from the United Kingdom; they have taken the idea of the directive principles of state policy from the Constitution of Ireland, and added elaborate provisions relating to Emergency in the light of the Constitution of the German Reich and the Government of India act, 1935.

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

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

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

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

written Constitution is generally said to be rigid. The Indian Constitution, though written, is sufficiently flexible.

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

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

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

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

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

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

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

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

UNIT 2

Parliament:

Parliament of India consists of three organs. The President, the Council of States (the Rajya Sabha) and the House of the People (the Lok Sabha). Though President is not a member of either House of Parliament yet, like the British Crown, he is an integral part of the Parliament and performs certain functions relating to its proceedings. The President of America is not an integral part of the Legislature. In India, the President summons the two Houses of Parliament, dissolves

the House of People and gives assent of Bills. It is to be noted that, though the Indian Constitution provides for the parliamentary form of Government but unlike Britain, the Parliament is not supreme under the Indian Constitution. In India, the Constitution is supreme. In England, laws passed by the parliament cannot be declared unconstitutional while the Indian Constitution expressly vests this power in the courts. The Indian Parliament is the creature of the Constitution and derives all its powers from the Constitution. It is not a sovereign body.

Parliamentary Sovereignty:

What is Sovereignty? In its popular sense, the term sovereignty means supremacy or the right to demand obedience. In the British Constitution, the legislative authority alone resides in Parliament while executive authority resides in the crown. It is to be noted that, though the Indian Constitution provides for the parliamentary form of Government but unlike Britain, the Parliament is not supreme under the Indian Constitution. In India, the Constitution is supreme. In England, laws passed by the parliament cannot be declared unconstitutional while the Indian Constitution expressly vests this power in the courts. The Indian Parliament is the creature of the Constitution and derives all its powers from the Constitution. It is not a sovereign body. Under the Indian Constitution, Article 53 provides that the executive power of the Indian Union is vested in the President of India. Legislative power resides in Parliament which comprises the President, the Council of States and the House of the People. The Constitution can be amended only when the amending bill after being duly passed as required by article 368, has received the assent of the President. According to Austin, the sovereign possesses unlimited powers, but experience shows that there is no power on earth which can wield unlimited powers. It is suggested that sovereignty may be located in the constitution-amending body. However, that cannot be done in India whose Constitution does not prescribe only one procedure for amending the Constitution. Some amendments can be made by Parliament itself without the concurrence of the States. Some amendments mentioned in the Proviso to Article 368 of the Indian Constitution require in addition ratification by the legislatures of one-half of the States. As there is not one constitution-amending body for all purposes, it is not the repository of sovereign power. Moreover, the constitution-amending body functions rarely and it is artificial to ascribe sovereignty to it.

Parliamentary Privileges:

Parliamentary Privilege is defined by Sir T.F.May as: “Some of the peculiar rights enjoyed by each House collectively as a constituent part of the Parliament and by the members of each house individually, without which they could not discharge their functions and which exceed those possessed by other bodies or individuals. The constitutional provisions regarding privileges of the state Legislature and Parliament are identical. Articles 105 and 194 provide for privileges of the Legislature in India. While Article 105 deals with Parliament Article 194 deals with State Legislatures. The Constitution expressly mentions two privileges (a) freedom of speech in the legislature and (b) right of publication of its proceedings. Prior to the 44th Amendment with regard to other privileges Article 105 (3) provided that the powers, privileges and immunities of each House until they were defined by the Parliament shall be those of the House of Commons in England. After the 44th Amendment Article 105 now provides that in other respects, the powers, privileges and immunities of each House of Parliament, and of the members and the committees of each House, shall be such as may from time to time be defined by Parliament, and, until so defined, shall be those of that House and of its members and committees immediately before the coming into force of the 44th Amendment Act, 1978. Freedom of Speech:- In England this privilege of the House of Commons is well established. It has been given statutory recognition

by Bill of Rights in 1689 which says that the freedom of speech or debates in Parliament ought not to be impeached or questioned in any court or out of Parliament. The Indian Constitution expressly guarantees this privilege in Article 105 which says— “There shall be freedom of speech in Parliament and that no Member of Parliament shall be liable to any proceedings in any court in respect of anything said or any vote given by him in Parliament or any Committee thereof.” This article thus gives absolute immunity from Courts for anything said within the four walls of the House during the course of proceedings of the House or its Committees. So what is protected is the speech within the House. Outside the House a member of House is a good as any other citizen and if a member repeats or publishes a defamatory speech made by him within the House, he does so on his own responsibility and risk and will be held liable for prosecution under Section 500 of the Indian Penal Code.

Executive Power

The Constitution has conferred extensive executive powers on the President. The executive power of the Union of India is vested in him. He is the head of the Indian Republic. All executive functions are executed in the name of the President, authenticated in such manner as may be prescribed by rules to be made by the President (Article 77). He has power to appoint the Prime Minister and on his advice other Ministers of the Union, the Judges of the Supreme Court, and the High Courts, the Governors of the States, the Attorney-General, the Comptroller and Auditor-General, the Chairman and Members of the Public Service Commission, the Members of the Finance Commission and Official Commissions, Special Officer for Scheduled castes and Scheduled Tribes, Commission to report on the administration of Scheduled Areas, Commission to investigate into the conditions of backward classes, Special Officer for Linguistic minorities. The above-mentioned official holds their office during the pleasure of the President. This means that he has the power to remove them from their post. This power, however, to be exercised subject to the procedure prescribed by the Constitution. It is, however, to be noted that he has to exercise his executive powers on the advice of the Council of Ministers. f. Collective Responsibility of Cabinet: The basic principle of Parliamentary form of Government is the principle of collective responsibility. In England, this principle works on well established conventions. In India, this principle ensured by marking specific provisions in the Constitution. Article 75 (3) provides that the Council of Ministers shall be collective responsibility to the Lok Sabha. The principle of collective responsibility means that the Council of Ministers is as a body responsible to the Lok Sabha for the general conduct of affairs of the Government. The Council of Ministers work as a team and all decisions taken by the cabinet are the joint decisions of all its members. No matter whatever be their personal differences of opinion within the Cabinet, but once a decision has taken by it, it is the duty of each and every Minister to stand by it and support it both in the Legislature and outside. Lord Salisbury explained this principle of collective responsibility thus: “For all that passes in the Cabinet each member of it who does not resign is absolutely irretrievably responsible, and has no right afterward to say that he agreed in one sense to a compromise while in another he was persuaded by his colleagues. Thus the only alternative before a Minister who is not prepared to support and defend the decision of the Cabinet is to resign. This is a great weapon in the hands of the Prime Minister through which he maintains unity and discipline in his colleagues (Cabinet). A Minister who does not agree with Prime Minster or the Cabinet has the only alternative, that is, to resign from the Cabinet. According to this rule, the Council of Ministers is collectively responsible to the Lok Sabha, hence as soon as a Ministry looses the confidence of the House or is defeated on any question of

policy, it must resign.

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

The Supreme Court under our Constitution is such arbitration. It is the final interpreter and guardian of the Constitution. In addition, to the above function of maintaining the supremacy of the Constitution, the Supreme Court is also the guardian of the Fundamental rights of the people. Jurisdiction of the Supreme Court: A Court of Record: Article 129 makes the Supreme Court a 'Court of Record' and confers all the powers of such a court including the power to punish for its contempt. A Court of Record is a court whose records are admitted to be of evidentiary value and they are not to be questioned when they are produced before the court. Once a court is made a Court of Record, its power to punish for contempt necessarily follows from that position. The power to punish for contempt of court has been expressly conferred on the Supreme Court by our Constitution. This extraordinary power must be sparingly exercised only where the public interest demands. Original Jurisdiction—Article 131: The Supreme Court has original jurisdiction in any dispute:- (a) Between the Government of India and one or more States; (b) Between the Government of India and any State or States on one side one or more other States on the other; (c) Between two or more States. The Supreme Court in its original jurisdiction cannot entertain any suits brought by private individuals against the Government of India. The dispute relating to the original jurisdiction of the Court must involve a question of law or fact on which the existence of legal right depends. This means that the Court has no jurisdiction in matters of political nature. The term 'legal right' means a right recognized by law and capable of being enforced by the power of a State but not necessarily in a court of law. The original jurisdiction of the Supreme Court, however, does not extend to the following matters: (1) Article 131 of the Constitution says, that, the jurisdiction of the Supreme Court shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which was executed before the commencement of the Constitution and continues to be in operation or which provides that the jurisdiction of the Supreme Court shall not extend to such a dispute. (2) Under Article 264 Parliament may by law exclude the jurisdiction of the Supreme Court in disputes with respect to the use, distribution or control of the water of any inter-State river or river-valley. (3) Matters referred to the Finance Commission (Article 280 (4) The adjustment of certain expenses between the Union and the State (Article 290). Appellate Jurisdiction—Article 132: The Supreme Court is the highest Court of Appeal in the country. The writ and decrees of the Court run throughout the country. It can be truly said that the jurisdiction and powers of the Supreme Court in their nature and extent are wider than those exercised by the High Courts of any country in the Commonwealth or by the Supreme Court of the U.S.A.

The Appellate Jurisdiction of the Supreme Court can be divided into four main categories:- (a) Constitutional matters, (b) Civil matters, (c) Criminal matters, (d) Special leave to appeal. Power of the Supreme Court to withdraw and transfer cases –article 139-A: Article 139-A (1) provides that if on an application made by the Attorney-General of India or by a party or on its own motion the Supreme Court is satisfied that cases involving the same or substantially the same question of law are pending before the supreme Court and one or more High Courts or before two or more High Courts and that such questions are substantially question of general importance, it may withdraw them and dispose them itself. It may after disposing of the said question of law return any case to the High Court with a copy of its judgment and then the High Court will dispose of the case in accordance with such judgment. Clause (2) of Article 139-A empowers the Supreme Court to transfer cases, appeals or other proceedings from any High

Court to another High Court it thinks it expedient to do so for the end of justice. Advisory Jurisdiction of the Supreme Court—Article 143: Article 143 provides that if at any time it appears to the President that—(a) a question of law or fact has arisen or is likely to arise, and (b) the question is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question for the Advisory opinion of the Court and the Court may after such hearing as it thinks fit, report to the President its opinion thereon. Under clause (2), if the President refers to the Supreme Court matters which are excluded from its jurisdiction under the provision to Article 131, the Court shall be bound to give its opinion there on. Law declared by the Supreme Court to be binding on all courts—Article 141: The judgment of the Supreme Court will be binding on all courts in India. The expression "all courts, within the territory of India" clearly means courts other than the Supreme Court. Thus the Supreme Court is not bound by its own decisions and may in proper case reverse its previous decisions. Jurisdiction of the High Courts: A Court of Record:- Article 215 declares that every High Court shall be a Court of Record and shall have all powers of such a court including the power to punish to punish for its contempt. The scope and nature of the power of High Court under this Article is similar to the powers of the Supreme Court under Article 129.
General Jurisdiction: Article 225 says that subject to the provisions of the Constitution and to the provision of any law of the appropriate Legislature (a) the jurisdiction of the High Court, (b) the law administered in the existing High Court, (c) the powers of the judges in relation to the administration of justice in the courts, (d) the power to make rule of the High Court shall be the same as immediately before the commencement of this Constitution. Thus the pre-Constitutional jurisdiction of the High Court is preserved by the Constitution. Article 225 thus gives jurisdiction over revenue matters. In pre-Constitution period the decisions of the Privy Council were binding on all the High Courts under Section 212 of the Government of India Act. The effect of the present Article is the same and they are still binding on the High Courts unless it is reversed by the Supreme Court or by a law of the appropriate legislature. This means that the jurisdiction and powers of the High Courts can be changed both by the Union Parliament and the State Legislatures. Power of superintendence over all courts by the High Courts: Under Article 227 every High Court has the power of the superintendence over all courts and tribunals throughout the territory in relation to which it exercises jurisdiction. For this purpose, the High Court may call returns from them, make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts and prescribe forms in which books, entries and accounts are to be kept by the officers of such courts, and settle table of fees to be given to the sheriff, clerks, attorneys, advocates and pleaders. However this power has given for superintendence of High Court does not extend over any Court or Tribunal constituted by law relating to the Armed Forces. Transfer of certain cases to High Courts: Under 228 the High Court has power to withdraw a case from a subordinate Court, if it satisfied that a case pending in a subordinate Court involves a substantial question of law as to the interpretation of the Constitution. It may then either dispose of the case itself or may determine the said question of law and return the case to the subordinate Court with a copy of its judgment. The subordinate Court will then decide the case in conformity with the High Court's judgment. Writ Jurisdiction of the High Court (Article 226): Article 226 provides that not withstanding anything in Article 32 every High Court shall have power, throughout the territorial limits in relation to which it exercises jurisdiction to issue to any person or authority including the appropriate cases, any government, within those territories, directions, orders of writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them –(a) for the enforcement of

fundamental rights conferred by Part III, and (b) for 'any other purpose'. Thus the jurisdiction of a High Court is not limited to the protection of the fundamental rights but also other legal rights as is clear from the words "any other purpose". Those words make the jurisdiction of the High Court more extensive than that of the Supreme Court which is confined to only for the enforcement of fundamental rights. The words "for any other purpose", refer to enforcement of a legal right or legal duty. They do not mean that a High Court can issue writs for any purpose it pleases. Extension of jurisdiction of High Court: Under article 230, Parliament can by law extend or exclude jurisdiction of a high Court over any Union Territory. The Legislature of a State cannot increase, restrict or abolish the jurisdiction.

Independence of Judiciary: Independence of judiciary—Under the Constitution:
Only an impartial and independent judiciary can protect the rights of the individual and provide equal justice without fear or favor. It is, therefore, very necessary that the Supreme Court should be allowed to perform its functions in an atmosphere of independence and be free from all kinds of political pressures. The Constitution has made several provisions to ensure independence of Judiciary. Security of tenure: The Judges of the Supreme Court have security of tenure. They cannot be removed from office except by an order of the President and that also only on the ground of proved misbehavior or incapacity, supported by a resolution adopted by a majority of total membership of each House and also by a majority of not less than 2/3 of the members of the House present and voting. Parliament may, however, regulate the procedure for presentation of the address and for investigation and proof of the misbehavior or incapacity of a Judge. But Parliament cannot misuse this power, because the special procedure for their removal must be followed. The following are some of other important grounds explaining independence of Judiciary:- 1. Salary of Judges fixed, not subject to vote of Legislature, 2. Parliament can extend, but cannot curtail the jurisdiction and power of the Supreme Court, 3. No discussion in Legislature on the conduct of the Judges, 4. Power to punish for its contempt, 5. Separation of Judiciary from executive, 6. Judges of the Supreme Court are appointed by the Executive with the consultation of Legal Experts, 7. Prohibition on Practice after Retirement. Thus the position of the Supreme Court is very strong and its independence is adequately guaranteed. However, there are certain disturbing trends which are likely to threaten the independence of judiciary at present. (1) Although Article 124 vests the legal power of appointment in the executive but the executive is required to 'consult' legal experts i.e., judges of the Supreme Court and High Courts in appointing judges of the higher courts. But unfortunately, the Supreme Court interpreted the word 'consultation' in such a literal manner that it gave virtually discretion in the matter. In judges transfer case I (S.P.Gupta Vs Union of India) the Supreme Court held that the word "consultation", did not mean concurrence and the Executive was not bound by the advice given by the judges. The Government may completely ignore the advice of legal experts. Thus the power of appointment of the Judges of the Supreme Court and the transfer of the High court Judges was solely vested in the Executive from whose dominance the Judiciary was expected to be free. By conceding the power of appointment exclusively to the Executive, it is submitted, the court had itself put the independence of the judiciary into danger. Mr. Justice Bhagwati of the Supreme Court in the S.P.Gupta's case had suggested for establishment of a judicial commission for recommending the names of persons for the appointment of the Judges of the Supreme Court and High Courts. (2) The power of the President under article222 to transfer a judge from one High Court to another may also be used to undermine the independence of the judiciary.

UNIT 3

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

a. Legislative powers

The President of India is a component part of the Union Parliament. In theory he possesses extensive legislative powers. He has power to summon and prorogue the Parliament and he can dissolve the Lok Shaba. Article 85 (1), however, imposes a restriction on his power. The President is bound to summon Parliament within six months from the last sitting of the former session. If there is a conflict between the two houses of Parliament over an ordinary Bill he can call a joint sitting of both Houses, to resolve the deadlock (Article 108). At the commencement of each session the President addresses either House of Parliament of a joint session of a Parliament. In his address to joint session of Parliament he outlines the general policy and programme of the Government. His speech is like that of the King in England and is prepared by the Prime Minister. He may send message to either Houses of Parliament (Art. 86). Every Bill passed by both Houses of Parliament is to be sent to the President for his assent (Article 111). He may give his assent to the Bill, or withhold his assent or in the case of a bill other than a money-bill, may return it to the House for reconsideration on the line suggested by him. If the bill is again passed by both the houses of the Parliament with or without amendment, he must give his assent to it when it is sent to him for the second time. A bill for the recognition of a new State or alteration of State boundaries can only be introduced in either House of the Parliament after his recommendation (Article3). The State Bills for imposing restrictions on freedom of trade and commerce require his recommendation (Article 304). He nominates 12 members of the Rajya Sabha from among persons having special knowledge or practical experience of Literature, Science, Art and Social Services [Article 80(3)]. He is authorized by the Constitution to nominate two anglo-Indians to the Lok Sabha, if he is of opinion that the anglo-Indians community is not adequately represented in that House (Article 331). The President has to lay

before the Parliament the Annual Finance Budget, the report of Auditor-General, the recommendations of the Finance Commission, Report of the Union Public Service Commission, and report of the Special Commission for Scheduled Castes and Scheduled Tribes, the report of the Commission of the Backward Classes and the report of the Special Officer for linguistic minorities

b. Administrative powers

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

c. Financial powers

Article 280 provides for the establishment of a Finance Commission. The President shall within two years from the commencement of the constitution and thereafter at the expiration of every fifth year or at such earlier time as he considers necessary constitute a Finance Commission. The Finance Commission shall consist of a Chairman and four other members appointed by the President. Parliament may by law prescribe qualifications which shall be requisite for appointment as members of the Commission and the manner in which they shall be selected. In exercise of the power under Article 80 (1), Parliament has passed the Finance (Miscellaneous Provision) Act, 1951. It provides that the Chairman of the Commission shall be selected from among persons who have had experience in public affairs. The other four members shall be selected from among persons who (1) are, or have been, or are qualified to be appointed as judges of a High Court; or (2) have special knowledge of the Finance and accounts of Government, or (3) have had wide experience in financial matters and in administration, or (4) have special knowledge of economics. The members of the Commission shall hold office for such period as may be specified in the Presidential order and shall be eligible for appointment. The Commission is empowered to determine its procedure and shall have all the powers of a civil court in respect of summoning and enforcing the attendance of witnesses, production of any document and requisitioning any public record from any court or office.

Relevant Doctrines:

(a) Territorial Nexus:

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

(b) Harmonious Construction

When two or more provisions of the same statute are repugnant, the court will try to construe the provisions in such a manner, if possible, as to give effect to both by harmonizing them with each other. The court may do so by regarding two or more apparently conflicting provisions as dealing with separate situations or by holding that one provision merely provides for an exception of the general rule contained in the other. The question as to whether separate provisions of the same statute are overlapping or are mutually exclusive may, however, be very difficult to determine. The basis of the principle of harmonious construction probably is that the legislature must not have

intended to contradict itself. This principle has been applied in a very large number of cases dealing with interpretation of the Constitution. It can be assumed that when the legislature gives something by one hand it does not take away the same by the other. One provision of an Act does not make another provision of the same Act useless. The legislature cannot be presumed to contradict itself by enacting apparently two conflicting provisions in the same Act. In State of Bombay v. F.N. Balasara, while deciding upon the constitutionality of the Bombay Prohibition Act, 1949, enacted by the Bombay Legislature, whereby restrictions on production and sale of liquor were put, the Supreme Court observed that the expression possession and sale occurring in entry 31 of List II are to be read without any qualification. Under that entry the State Legislature has the power to prohibit possession, use and sale of intoxicating liquor absolutely. The word import in Entry 19 of List I standing by itself does not include with sale or possession of the article imported into country by a person residing in the territory into which it is imported. There is, therefore, no real conflict between entry 31 of List II and Entry 19 of List I. Consequently, the Act of 1949, in so far as it purports to restrict possession, used and sale of foreign liquor, is not an encroachment on the field assigned to the Federal Legislature. Some other cases: 1. Raj Krishna Vs Binod, AIR 1954 SC 202 2. Bengal Immunity Company Vs State of Bihar, AIR 1955 SC 661.

(c) Pith and Substance :

The Doctrine "Pith and Substance" means, that if an enactment substantially falls within the powers conferred by the Constitution upon the legislature by which it was enacted, it does not become invalid merely because it incidentally touches upon subjects within the domain of another legislature as designated by the Constitution. Within their respective spheres, the Union and the State Legislatures are made supreme and they should not encroach into the sphere reserved to the other. If a law passed by one encroaches upon the field assigned to the other the Court will apply the doctrine of 'pith and substance' to determine whether the Legislature concerned was competent to make it. If the 'pith and substance' of law, i.e., the true object of the legislation or a statute, relates to a matter with the competence of Legislature which enacted it, it should be held to be intra virus even though it might incidentally trench on matters not within the competence of Legislature. In order to ascertain the true character of the legislation one must have regard to the enactment as a whole, to its object and to the scope and effect of its provisions. The Privy Council applied this doctrine in Profulla Kumar Mukerjee Vs Bank of Khulna, AIR 1947. In this case the validity of the Bengal Money Lenders' Act, 1946, which limited the amount and the rate of interest recoverable by a money-lender on any loan was challenged on the ground that it was Ultra virus of the Bengal Legislature in so far as it related to 'Promissory Notes', a Central subject. The Privy Council held that the Bengal Money-lenders' Act was in pith and substance a law in respect of moneylending and money-lenders-a State subject, and was valid even though it trenched incidentally on "Promissory note"—a Central subject. In 1980 in the case of Ishwari Khetal Sugar Mills Vs State of U.P., the validity of the U.P. Sugar Undertakings (Acquisition) Act,1971, was challenged on the ground that the State Legislature had no competence to enact the impugned law on the ground that it fell under Parliament's legislative power under Entry 52 of List I. It was contended that in view of the declaration the Parliament had made under Entry 52 List I to take the Sugar Industry under its control, that industry went out of Entry 24 of List II and hence the State Legislature was divested of all legislative power

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

(d) Repugnancy:

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

UNIT 4

Amendment of Constitution:

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

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

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

Doctrine of Basic Structure:

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

wide but not unlimited. Under Article 368 Parliament cannot destroy the “basic feature” of the Constitution. A Special Bench of 13 Judges was constituted to hear the case. The Court by majority overruled the Golak Nath’s case which denied Parliament the power to amend fundamental rights of citizens. The majority held that Article 368 even before the 24th Amendment contained the power as well as the procedure of amendment. The Court held that underArt.368 Parliament is not empowered to amend the basic structure or framework of the Constitution.

LAW OF CRIMES-I (205)

UNIT ONE

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

History of the Indian Penal Code:

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

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

Extent and Operation of the Indian Penal Code:

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

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

Cases:

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

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

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

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

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

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

floating island belonging to the country whose flag it is bearing. Thus all the vessels are considered as the part of the territory of the country whose flag they fly.

<u>Exception to applicability of the Act:</u>

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

B. Definition of Crime

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

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

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

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

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

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

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

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

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

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

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

Stages Of A Crime

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

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

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

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

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

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

preparation- Sections 242, 243, 259, 266 and 474.

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

· Guilty intention to commit an offence;

· Some act done towards the commission of the offence;

· The act must fall short of the completed offence.

Attempt Under The Indian Penal Code, 1860- The Indian Penal Code has dealt with attempt in the following four different ways-
· Completed offences and attempts have been dealt with in the same section and same punishment is prescribed for both. Such provisions are contained in Sections 121, 124, 124-A, 125, 130, 131, 152, 153-A, 161, 162, 163, 165, 196, 198, 200, 213, 240, 241, 251, 385, 387, 389, 391, 394, 395, 397, 459 and 460.

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

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

· Fourthly, all other cases [where no specific provisions regarding attempt are made] are covered

under section 511 which provides that the accused shall be punished with one-half of the longest term of imprisonment provided for the offence or with prescribed fine or with both.

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

UNIT TWO

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

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

Every offence is not absolute, they have certain exceptions. When IPC was drafted, it was assumed that there were no exceptions in criminal cases which were a major loophole. So a separate Chapter IV was introduced by the makers of the Code applicable to the entire concept.
In short, the object of Chapter IV includes:
Exceptional circumstances in which an individual can escape liability.
Making Code construction simpler by removing the repetition of criminal exceptions.
Burden of Proof
Generally, Prosecution has to prove its case beyond reasonable doubt against the accused.
Before the enforcement of the Indian Evidence Act 1882, the prosecution had to prove that the

case does not fall under any exception, but section 105 of Evidence act shifted the burden on the claimant.

But in exceptions, as per Section 105 of Evidence Act, a claimant has to prove the existence of general exception in crimes.

The fabric of Chapter IV

Section 6 of IPC

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

The General Exceptions are divided into 2 categories:

Excusable Acts

Judicially Justifiable Acts

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

Excusable Acts

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

A mistake of Fact under Section 76 and 79

Under Section 76: Act done by a person bound or by mistake of fact believing, himself to be

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

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

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

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

Case law for Section 79

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

Accident under Section 80

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

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

Case law for Section 80

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

Infancy – Section 82 and 83

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

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

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

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

Case law for Section 83

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

Insanity – Section 84

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

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

Case law for Section 84

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

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

Intoxication – Section 85 and 86

Section 85: Act of a person incapable of judgment by reason of intoxication caused against his

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

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

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

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

Case law for Section 86

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

Justifiable Acts

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

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

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

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

Section 78: Act done pursuant to the Judgement or order of the court. Nothing which is done in

pursuance of, or which is warranted by the judgment or order of, a court of justice, if done whilst such judgment or order remains in force, is an offence, notwithstanding the court may have no jurisdiction to pass such judgment or order, provided the person doing the act in good faith believes that the court had such jurisdiction.

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

Necessity under 81

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

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

Case law for Section 81

In *Bishambher v. Roomal,* 1950, the complainant Bishambhara had molested a girl Nathia. Khacheru, Mansukh, and Nathu were accused related to father of the girl. The Chamars were agitated and determined to punish Bhishambher. Rumal Singh, Fateh Singh, and Balwant Singh intervened and tried to bring a settlement. They collected a panchayat and the complainant's black was blackened and given shoe beating. It was found by the court that accused had intervened in good faith but the panchayat was having no authority to take such a step.

Consent under Section 87 – 89 and Section 92

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

Example: A and E agreed to fence each other for enjoyment. This agreement implies the consent

of each other to suffer harm which, in the course of such fencing, may be caused without foul play and if A while playing fairly hurts E, then A, has committed no offence.

Case law for Section 87

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

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

Case law for Section 88

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

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

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

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

if the consent is given by a person under fear of injury, or under a misconception of fact, and if

the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

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

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

Case law for Section 90

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

Section 91: Exclusion of acts which are offences independently of harm caused.

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

Communication under Section 93

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

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

Duress under Section 94

Act to which a person is compelled by threats. Except murder, and offences against the state punishable with death, nothing is an offence which done by a person compelled to do it under threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence, provided the person doing the act did not of his own

accord, or from reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

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

Trifles under Section 95

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

Case law for Section 95

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

Private Defence under Section 96 – 106

Section 96: Things done in private defence.

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

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

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

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

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

Example: A father, in order to protect the life of daughter from the attack of a thief, shoots him in his leg. But the father will not be liable as he was protecting the life of his daughter.

Case law for Section 97

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

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

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

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

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

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

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

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

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

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

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

Case law for Section 99

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

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

Assault causing reasonable apprehension of death.

Reasonable apprehension of grievous hurt.

Committing rape

Unnatural lust

Kidnapping or abducting

COPYRIGHT FIMT 2020

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

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

Case law for Section 100

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

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

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

Case law for Section 101

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

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

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

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

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

Robbery;

House-breaking by night;

Mischief by fire committed on any building, tent or vessel, building, tent or vessel used as a

human dwelling, or a place for the custody of property;

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

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

Case law for Section 103

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

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

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

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

Case law for Section 104

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

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

The right of private defence of the property commences when:

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

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

Or, the property has been recovered.

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

Offender causes or attempts to cause to any person death or hurt

Or, wrongful restraint

As long as the fear of instant death or

Instant hurt or

Instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission of criminal trespass or mischief.

The right of private defence of property against house-breaking by night continues as long as the house-trespass which has been begun by such house-breaking continues.

Example: Suppose a thief into the house of an individual, and attempts to hurt him instantly with a knife, then that individual has the right to act in private defence and harm that thief to save life and property.

Case law for Section 105

In *Nga Pu Ke v. Emp*, paddy sheaves belonging to the accused were removed illegally by a person. Accused attacked the cartmen and that cartmen jumped off the carts and ran away leaving sheaves. The accused still chased him and attacked him leading to death. The court held him as guilty of offence.

Section 106: Right of private defence against deadly assault when there is a risk of harm to innocent person.

If in the exercise of private defence against an assault, a person causes apprehension of death, in which defender has no choice but harming an innocent person, his right will extend to that running of risk. 4

Example: C is attacked by a mob who attempts to murder him. He cannot exercise his right to private defence without firing on the mob. In order to save himself, he is compelled to hurt innocent children while firing so C committed no offence as he exercised his right.

Conclusion

So these were the general exceptions which are available to the accused to escape liability or save himself from the offence committed. It may extend to even causing the death of a person or

harm an innocent person too depending upon the circumstances. The accused should also have the right to be heard, keeping in view the democratic character of our nation. That's why these exceptions are provided so as to represent oneself in the court of law.

UNIT THREE

Incoherent Forms of Crime a. Joint and Constructive Liability b. Criminal Conspiracy c. Attempt d. Abetment

The concept of Joint Liability is present both in civil and criminal law. But here we will discuss only criminal joint liability.

The concept of joint liability comes under Section 34 of IPC which states that "when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." The section can be explained as when two or more persons commit any criminal act and with the intention of committing that criminal act, then each of them will be liable for that act as if the act is done by them individually.

"The mind was apt to take pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individuals, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete" – A warning addressed by Baron Alderson to the jury in Reg v. Hodge (1838) 2 Lew 227, on danger that conjecture or suspicion may take the place of legal proof.

"The conspirators invariably deliberately, plan and act in secret over a period of time. It is not necessary that each one of them must have actively participated in the commission of the offence or was involved in it from start to finish. What is important is that they were involved in the conspiracy or in other words, there is a combination by agreement, which may be expression or

implied or in part implied…" Firozuddin Basheeruddin and others vs. State of Kerala, 2001 SCC (Crl) 1341.

"The offence of conspiracy to commit a crime is different offence from the crime that is the object of the conspiracy because the conspiracy precedes the commission of the crime and is complete before the crime is attempted or completed, equally the crime attempted or completed does not require the element of conspiracy as one of its ingredients they are, therefore quite separate offences." [Leo Roy Frey V. Suppdt. Distt. Jail (AIR 1958 SC 119)].

"Acts subsequent to the achieving of the object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy." State v. Nalini, (1999) 5 SCC 253

"The essential ingredients of the offence of criminal conspiracy are: (i) an agreement between two or more persons; (ii) the agreement must relate to doing or causing to be done either (a) an illegal act; or (b) an act which is not illegal in itself but is done by illegal means. It is, therefore, plain that meeting of minds of two or more persons for doing or causing to be done an illegal act or an act by illegal means is sine qua non of criminal conspiracy. - Rajiv Kumar v. State of U.P., (2017) 8 SCC 791

The above mentioned judicial pronouncements crystallize the law on criminal conspiracy as applicable in India.

Criminal conspiracy under the Indian Penal Code (IPC) is a substantive offence in itself and punishable separately. There have been rare instances where persons have been tried for commission of the substantive act of criminal conspiracy.

However, most commonly, the charge of criminal conspiracy is slapped on an accused person along with the charge of a substantive offence under the IPC or any other law which he may be accused of committing along with other co-conspirators.

Criminal conspiracy is hatched to commit an illegal act which is an offence punishable under law. It is not essential that the accused person must do an overt act, and mere agreement between two or more persons to commit an illegal act is sufficient to constitute the offence of criminal conspiracy. It is also not necessary that the object of the conspiracy should have been achieved for it to be considered as an offence. Even if the conspiracy fails on account of abandonment or detection before commission of offence, the very act of entering into an agreement by the co-

conspirators is itself an offence and punishable under the law.

However, it has to be kept in mind that the standard of proof for the act of criminal conspiracy is the same as that of any other criminal offence i.e. beyond reasonable doubt.

In the case of State (NCT of Delhi) v. Navjot Sandhu, AIR 2005 SC 3820, it was held that:

"A few bits here and a few bits there on which the prosecution relies cannot be held to be adequate for connecting the accused in the offence of criminal conspiracy".

Also, in the case of State of Maharashtra & Ors. v. Som Nath Thapa &Ors., (1996) 4 SCC 659, it was observed that:

"for a person to conspire with another, he must have knowledge of what the co-conspirators were wanting to achieve and thereafter having the intent to further the illegal act takes recourse to a course of conduct to achieve the illegal end or facilitate its accomplishment."

In Subramaniam Swamy v. A Raja, (2012) 9 SCC 257, it was held that,

"suspicion cannot take the place of legal proof and existence of a meeting between the accused persons is not by itself sufficient to infer the existence of criminal conspiracy."

But the use of the offence of criminal conspiracy in contemporary times by investigating agencies and courts is not in accordance with the above stated well-settled principles of law. This has resulted in dilution of the law relating to criminal conspiracy.

In many cases today, the concept of 'deemed presumption' is applied, which is otherwise not available under the IPC. Undoubtedly, criminal conspiracies are hatched in secrecy and can only be perceived by actions of the participants, however that should not in any way dilute the standard of proof of "beyond reasonable doubt" that must be met by the prosecution.

It has never been easy to get direct evidence for proving an offence under Section 120-A, which defines criminal conspiracy. Considering this fact, Section 10 of the Indian Evidence Act comes into play.

This section can be divided into two parts: firstly where there is reasonable ground to believe that two or more persons have conspired to commit an offence or an actionable wrong. Only when this condition precedent is satisfied, the second part of the section comes into operation i.e. anything said, done or written by any one of such persons in reference to the common intention after the time when such intention was first entertained by any one of them is a relevant fact against each of the persons believed to be so conspiring as well for the purpose of proving the existence of the conspiracy.

COPYRIGHT FIMT 2020

It is therefore necessary that a prima facie case of conspiracy has to be established for application of Section 10. The second part of section permits the use of evidence which otherwise could not be used against the accused person. Sardar Sardul Singh Caveeshar v. State of Maharashtra [(1964) 2 SCR 378], is an authority on this issue.

The English rule on this matter is, in general, well settled. It is a common law rule. R.v. Blake illustrates the two aspects of it, i.e. what is admissible and what is inadmissible. What was held to be admissible against the conspirator was the evidence of entries made by his fellow conspirator contained in various documents actually used for carrying out the fraud. But a document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other.

The basic concepts of criminal conspiracy as enumerated above are losing their essence, resulting in misuse of this provision to the detriment of proper manifestation of law on this subject. It has been observed that trial courts in India are not following these principles. What is being done is that first they look for evidence which may be permitted under Section 10 of the Evidence Act and then apply it to the facts of a case to presume existence of criminal conspiracy.

It has to be ensured that all the stakeholders of the justice delivery mechanism do their duty diligently, and in a manner which is in consonance with the concept of criminal law as settled, followed and practiced.

The police and other investigating agencies, wanting to make someone an accused, in spite of a case having no evidence, use this age-old formula of invocation of Section 120-B IPC and bring all named in the charge sheet under its umbrella.

There have been numerous instances of such invocation of Section 120B IPC, like in the Indira Gandhi murder case, where Balbir Singh was convicted by the trial court. His conviction was upheld by High Court, but he was ultimately acquitted by the Supreme Court. In the Parliament House Attack case, the trial court convicted all the accused, but the High Court acquitted SAR Gillani and Afsan Guru. The Supreme Court ultimately upheld the judgment of the High Court for these two persons. Similarly, in the Jain Hawala case, the trial court framed charges against both VC Shukla and LK Advani along with the Jain Brothers. However, the High Court discharged them, an order which was confirmed by the Supreme Court by dismissing the appeal of the CBI.

Certain pressure groups in their zeal to prove their relevance, start exerting unnecessary pressure

on our very robust and independent justice delivery mechanism. This should be shunned, otherwise there are chances of misuse or wrong implementation of the law of criminal conspiracy to achieve misplaced moral victories.

The well-established rule of criminal justice "fouler the crime higher the proof" should always be remembered and followed. This, in my belief, is still the hallmark of our superior courts, but we have to remain cautious and not allow it to get diluted, especially by our investigating agencies.

The ingredients of section 34 of IPC are-
1) A criminal act is done by several persons;
2) The criminal act must be to further the common intention of all;
3) There must be participation of all the persons in furthering the common intention.

Let us take a hypothetical situation- There are two persons A and B. Both of them decided to rob a bank to earn some quick money. Both of them decided in advance that they will not hurt anybody and they will only take the money. After reaching the bank A tells B to guard the gate of the bank while he takes the money. When A was taking the money, security guard came running towards A. A out of fear, stabbed the security guard with a knife due to which he died. After that A ran with B along with the knife. In this case, even though B had no intention of killing the security guard but he will also be liable for the murder of security guard and robbery along with A.

he concept of Joint Liability is embodied under Section 34 of Indian Penal Code – "Acts done by several persons in furtherance of common intention- when a criminal act is done by several persons in furtherance of common intention of all, each of such persons is liable for that act in the same manner as if done by him alone." When IPC was enacted in 1860, section 34 at that time didn't included words 'in furtherance of common intention', then an amendment was made in year 1870 to amend Indian Penal Code and then these words were included in the section 34. The amended section 34 of IPC simply says that all those persons who have committed a crime with a common intention and they have acted while keeping in mind the common intention, then everyone should be liable for the acts of another done in common intention as if the act is done by the person alone. It happens that different persons perform different acts in the commission of the act or non commission of the act, even though when section 34 applies, all the persons in

group are jointly liable for the acts of another.

The concept of Joint Liability was evolved in the case of Reg v. Cruise, in this case police had gone to arrest A at his home. B, C and D were also present at that time. When all the three persons saw police coming, they came out of the house and gave a blow on the police and they drove them away. The court held that all the three are liable for the blow even if the blow was given by only one person.

The ingredients of Section 34 are:
· There should be criminal act- Criminal Act means that either committing the act or omitting to commit the act, which is an offence under IPC.
That criminal act is done by several persons- For the Section to apply, it is necessary that the act is done by more than one person as if the act is done by only one person then this section does not applies. That criminal act is done in the furtherance of common intention of all- it means that the persons should have decided in advance about the commission of the act and every one of them have acted keeping in mind that common intention.There should be participation in some way or other in the commission of the act- the persons cannot be held liable if they have decided what to do and then they have not done that thing, every person who is a part of the group should do something so as to participate in the commission of the act. The case of Barendra Kumar Ghosh v. King Emperor was one of the earliest cases where the court convicted another person for the act of another done in furtherance of common intention. The facts of the case are, a group of armed persons entered in the police station on 3rd August, 1923. They demanded money from the post master where he was counting the money. They fired from the pistol at the postmaster, due to which the postmaster died on the spot. All of the accused ran away without taking money. The Police was able to catch Barendra Kumar Ghosh who was standing outside the post office as a guard. Barendra's contention was that he was only standing as a guard but the Calcutta high court convicted him for murder under section 302 r/w section 34 of Indian Penal Code. When he appealed in the Privy Council, his appeal was rejected.

Section 34 of Indian Penal Code gives only a general definition as to what constitutes joint liability, it does not give any punishment for criminal acts done jointly by two or more than two

persons. This section is only a rule of evidence and it does not create any substantial offence. Section 34 on its own does not create any distinct offence and it lays down just a principle of liability that when two or more persons do something which is contrary to law, then both of them should be held liable. The Section 34 of IPC is a principle of constructive liability and the essence of that liability is existence of common intention in the minds of accused. There is also a canon in the criminal jurisprudence that the courts cannot distinguish between the conspirators and it is possible for them to see what part is played by which conspirator in the commission of the crime, so each person is held jointly liable for the acts of another. Since section 34 is itself not an offence, so every time when any criminal act is done by two or more persons, then both the sections i.e. section for that criminal offence and section of joint liability is applied. In the above case also, section 34 was applied with section 302 of IPC so as to convict the offender. As no offence is prescribed under section 34 of IPC, this section is always read with other sections of IPC. Some of the sections in which the concept of joint liability is discussed in IPC are section 34, section 120A and 120 B, section 149 of IPC.

Section 120A of Indian Penal Code gives definition as to what constitutes criminal conspiracy- "when two or more persons agree to do, or cause to be done,-

· An illegal act, or

An act which is not illegal by means, such an agreement is designated as criminal conspiracy provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof."

The definition simply means that when two or more persons agree to do some illegal act or agree to do a legal act by illegal means then that amounts to criminal conspiracy. The act is only which has been agreed by the parties earlier and not any other act. The term illegal has been defined in the Indian Penal Code in section 43- " the word illegal is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; and a person is said to be legally bound to do whatever is illegal in him to omit."

When the IPC was enacted, it had only two provisions through which conspiracy was made

punishable. One provision was the abetment by conspiracy and other was special offences which require more than 2 persons for committing them. When the IPC was amended in the year 1870, the law of conspiracy was widened by the insertion of section 121A which is waging war or attempting to wage war against government of India. In the year 1913 when Indian Criminal Law Amendment Act came, then chapter V-A was added in the Indian Penal Code and thus adding two sections i.e. section 120A and section 120B.

The main essence of conspiracy that is embodied in section 120A of Indian Penal Code is the unlawful agreement and ordinarily the offence is complete when the unlawful agreement is framed. It is not necessary that there should be some overt act in furtherance of the agreement made and it is not at all necessary that the object for which the conspiracy was made should be achieved.

Section 120B of Indian Penal Code prescribes punishment for the offence of criminal conspiracy- "Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

This section gives punishment for criminal conspiracy. It simply says that every person who is a part of criminal conspiracy for offences punishable with death, imprisonment for life or rigorous imprisonment for two years or upwards will be punished in the same was as if that person has abetted the offence and whoever is a party to any other conspiracy will be punished with imprisonment for a period not more than six months or fine or both.

A view came that a person should not be charged for conspiracy, if due to that conspiracy, some act has been omitted. This view was not correct. The criminal conspiracy is itself an independent offence and even if other offences are committed in pursuance of criminal conspiracy, then also

the person is charged for criminal conspiracy as the liability of conspirators is still present.

Section 149 of Indian Penal Code deals with offence in which every member of an unlawful assembly is guilty of offence committed in prosecution of common object. The sections says that-“If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.” This section simply means that if any member of an unlawful assembly commits an offence in prosecution of common object for which the assembly was formed, if the members of the assembly knew that such act is likely to be committed for achieving that common object, then every person who is a member of that unlawful assembly will be guilty of that offence. The punishment under section 149 is same as that of the offence which is committed in the unlawful assembly. If the prosecution wants to prove a person under section 149 of IPC, then it has to prove the presence of the person at the site and his participation in the unlawful assembly. This section creates a constructive liability or vicarious liability on the members of the unlawful assembly for the unlawful acts committed in pursuance of the common object. Once the case of a person falls in this section, the question that he did nothing with his own hands is immaterial. He cannot take the defence that he didn’t commit that offence, every person in an unlawful assembly knows the natural and probable consequences of the object to be achieved by the unlawful assembly. Mere part of an unlawful assembly will make all the persons liable for the unlawful act of other members. In this section, the liability of the members other than the principle offender is based on the fact that whether other members knew that the offence that was committed was likely to be caused in pursuance of the common object.

Case Laws Analysis

In the case of Rangaswamy v. State of Tamil Nadu, accused no. 3 was convicted by the trial court for committing offences contrary to section 302 r/w section 34; section 307 r/w section 34 and section 506 of IPC. He came to the Supreme Court with the pleading that he was only with friendly terms with accused no. 1 and accused no. 2 and he did not shared common intention with them to kill the deceased or to attack deceased companion. He said that it was by chance

that he was present at the site of offence and he had not participated in the commission of the offence. The accused no. 1 had a prior enmity with the deceased as he was accused of murdering brother of accused no. 1 and then he was released on bail. The occurrence of crime took place in bazaar. The court held that presence of accused no. 3 was established at the site of offence but there is no evidence to show that he shared a common intention with the other two accused. The Supreme Court acquitted accused no. 3 of all the charges.

In the case of William Stanley v. State of Madhya Pradesh, the accused in this case was a 22 year old man who was in love with the sister of the deceased. The deceased didn't like his intimacy. On the day of occurrence, there was a quarrel between the deceased and the accused and the accused was asked to go away from the house. Later, the accused returned with his younger brother and called the sister of deceased to come out. Instead of the sister, the deceased brother came out. There was a heated exchange of words. The accused slapped the deceased on the cheek. Then accused snatched hockey stick from his younger brother and gave one blow on the head of deceased due to which his skull was fractured. The deceased died in hospital 10 days later. According to doctor, the injury was such as likely to cause death. Both accused and his co-accused brother were charged for murder under section 302 read with section 34 of IPC. The co-accused brother was acquitted of all the charges but appellant was held guilty under section 302 of IPC. On the facts of the case, the conviction was altered into culpable homicide not amounting to murder under section 304 of IPC.

In the case of Chhotu v. State of maharashtra, the complainant party was attacked by the accused as a result of which one person died. The witness produced stated that three persons were assaulting the deceased and the fourth one was simply standing holding a knife in his hand. It was held that only three accused were liable under section 302/34 of IPC and fourth one didn't share the common intention.

In the case of Dadasaheb Patalu Misal and others v. State of Maharashtra, an incident happened at the village Panchegaon-Khurd, Taluka Sangola, District Solapur on the morning of 30th July 1980 around 7.30 A.M. The case is about 32 accused who formed into an unlawful assembly with the common object of forcibly removing the wood from the scene of offence. They were even ready to do a murderous assault it required. The accused armed themselves with axes,

sticks, spears, iron bars and whips, etc. and went to the scene of offence on that particular day and started removing woods. The complainant and his brothers also came to the site. When complainant stopped them from taking away wood, accused no. 1 suddenly inflicted an axe blow on ganpati. Then other accused also inflicted blows on ganpati. Accused no. 2 inflicted blow on vithoba who was going towards ganpati. The court convicted only some of the persons for unlawful assembly and the remaining were acquitted. The court also said that presence of a person at the site of offence even with weapons does not amount that he is a part of the offence.

In the case Ramdan and another v. State of Rajasthan, the appellants were convicted under section 307/34 of IPC. The facts are as follows. On 30th april, 1970, head constable Jangbahadur along with his party proceeded for patrolling. At about 6 P.M., they observed footprints of four camels having entered into Indian Border from Pakistan. The footprints were followed. Lakinram along with his party was also following the footprints. When his party reached outside the village Bogniyai, it was observed that the foot-prints of the two camels were diverted towards village Negarda and of the two camels went straight. Then there was a firing between accused party and border security force. The appellants were just moving here and there at the time of firing and finally sat under a tree. The court acquitted both the persons saying that section 34 is not applicable.

In the case of Rambaboo son of Kailash Narain and others v. State, a F.I.R was lodged by Bhajan Lal at 11:30 PM on 2nd september, 1979 in Kakwan district, Kanpur. He said in his F.I.R that on the aforesaid date akanoont about 8:30 PM, Ram Saran Bahelia came to his house from Ambari Har and told him that his brother Raj Kumar Pradhan had been murdered in Usar land between village Anayee and Sargavan. Bhajanlal then went to that place with other people in the village and saw that the dead body of Raj Kumar is in the field of Mohan Lal Dhanuk. Then he went to lodge complaint. A number of names came up in investigation. Dayashankar, a prosecution witness said that he heard them making conspiracy against Raj Pradhan. The appellants were acquitted of all the charges against them.

In the case of State of Haryana v. Pradeep Kumar and others, some persons were charged under murder of Krishnan Kumar Khandelwal who was a major contestant and majority of party members were supporting him. The respondent who was also present at the time of murder and

believed to be main conspirator was acquitted by the court. When the state appealed against the acquittal of Pradeep Kumar, it was rejected by Supreme Court.

In the case of Raju@Raj Kumar v. State of Rajasthan, the facts of the case are as follows, person filed a complaint in police station that when he and his father were at his uncle's residence, 10 to 12 persons came in the room and after surrounding his father, they killed him. According to the FIR, there was enmity between Ram Kishan Khandelwal on one hand and Hanuman, Hanif, Chhitar and Ramesh Shanker on the other hand. It was said the actual murder was done by Iqbal, Aziz, Raju Naik (appellant herein), Mahendra Singh, Hamid and Firoz. According to post-mortem report, the death was due to Syncope. Then court held that the conviction and sentence passed by session court is not correct and it ordered the acquittal of accused. The accused number 8 Sayeed was also acquitted of the charges as the allegations against him could not be proved.

In the case of Heera and another v. State of Rajasthan, a person was crushed by a vehicle at the bus stand. On the statement of witnesses, the police found that murder was done by 7 persons. The accused Heera and Rama @ Ram Singh along with co accused Anna. Mangla, Modu, Dharma and Satya Narayan were arrested. Some of the co-accused were acquitted and remaining were not. The court allowed the appeal and set aside the conviction of accused and he was set free.

In the case of Balaji Gunthu Dhule v. State of Maharashtra, the Supreme Court set aside the conviction of petitioner. The facts of the case are as follows; there was a quarrel between Ranga Rao (deceased) and Shantabai (other accused who died during trial). There was allegation that the accused persons have killed Ranga Rao. The appellant in his statement under Section 313 of the Code admits that there was a quarrel between Shantabai (deceased accused) and P.W. 10 and while rushing to the spot of quarrel the deceased involuntarily fell on a cement concrete platform - Otta and thereby suffered the fatal injury. The court then acquitted the appellant even though he was present at the site of offence.

Conclusion and Suggestions

The concept of joint liability is embodied in section 34 of Indian penal Code. This section just gives the definition of joint liability and it does not give any punishment for the same. This section has to be read with various other sections of IPC like section 120A which gives definition of criminal conspiracy, section 120 B which gives punishment for criminal conspiracy and section 149 which deals with unlawful assembly. This section 34 cannot be applied on its own and has to be applied with some other section so as to make a person jointly liable for that offence.

UNIT FOUR

Punishment a. Offence against the State b. Offence against Public Tranquility c. Theories of Punishment with special reference to Capital Punishment

A. Chapter VI, Section 121 to Section 130 of the Indian Penal Code deals with offences against State. Section 121A and Section 124A were added to the code in 1870. The Indian Penal Code 1860 has made provisions to safeguard and preserve State's existence and has provided the most Severe punishment of the death sentence or life imprisonment and fine in case of offence against the state.

1) Waging, or attempting to wage war, or abetting waging of war, against the Government of India. 121.

Section 121 of the Indian Penal Code, 1860 says that whoever wages war against the Government of India, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or imprisonment for life and shall also be liable to fine.

Illustration :

A joins an insurrection against the Government of India. A has committed the offence defined in this section

Ingredients of Section 121:

To constitute the offence under Section 121 of the Indian Penal Code the following ingredients must exist:

(1) Accused must wage war, or
(2) Attempt to wage war
(3) Abet the waging of such war.
(4) Against the Government of India

The offence under Section 121 is cognizable, non-bailable, non-compoundable and triable by Court of Session.

2) Conspiracy to commit offences punishable by section 121:

Section 121A was added to the Indian Penal Code in 1870. It says that whoever within or without India conspires to commit any of the offences punishable under section 121, or conspires to overawe, by means of criminal force or the show of criminal force, the Central Government or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine.

Explanation -

To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

3) Collecting arms, etc., with intention of waging war against the Government of India:

Section 122 of the Indian Penal Code says that, Whoever collects men, arms or ammunition or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India, shall be punished with imprisonment for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.

Ingredients of Section 122:

To invoke Section 122 of the Code following ingredient must be satisfied
(1) A person collects a men, arms or ammunition, or otherwise prepares to wage war,; and
(2) He does so with the intention of either waging war against the Government of India or being

prepared to wage war against Government of India.
The offence under Section 122 of The Indian Penal Code is Cognizable, non-compoundable, non-bailable and triable by Court of Session.
4) Concealing with intent to facilitate design to wage war:
Section 123 of the Code says that whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against the Government of India, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
Ingredients :

Essentials Ingredients of Section 123 of the Indian Penal Code are as follows
(1) A person commits an act or illegal or mission;
(2) He thereby conceals the existence of a design to wage war against the Government of India.
(3) He intends by such concealment to facilitate the waging war or knows it to be likely that, such concealment will facilitate the waging of War.
The offence under section 123 is cognizable, non-bailable non-compoundable, and tribal by Court of Session
5) Assaulting President, Governor, etc., with intent to compel or restrain the exercise of any lawful power. 124:
According to Section 124 of the Code Whoever, with the intention of inducing or compelling the President of India, or Governor of any State, to exercise or refrain from exercising in any manner any of the lawful powers of such President or Governor, assaults or wrongfully restrains, or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such President or Governor, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

B. This section is an extension of the second clause of Section 124A, of the Indian penal code, which makes conspiracy to overawe by means of criminal force or show of criminal force Government of India or any state Government punishable.

The offence under section 123 is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

6) Sedition:

Section 124A of the Indian Penal Code runs as follows:

Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, a shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1:

The expression "disaffection" includes disloyalty and all feelings of enmity.

Explanation 2:

Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3:

Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Essential Ingredients of Sedition:

Following are the essential ingredients of this section:

1) Bringing to attempting to bring into hatred; or

2) Exciting or attempting to excite disaffection against the Government of India;

3) Such act or attempt may be done -

(a) by words, either spoken or written, or

(b) by any signs, or

(c) visible representation; and

4) The act must be intentional

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

7) Waging war against any Asiatic Power in alliance with the Government of India:

Section 125 of the Indian Penal Code says that whoever wages war against the Government of any Asiatic Power in alliance or at peace with the Government of India or attempts to wage such war or abets the waging of such war, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine.

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

8) Committing depredation on territories of Power at peace with the Government of India:

Section 126 says that, Whoever commits depredation, or makes preparations to commit depredation, on the territories of any Power in alliance or at peace with the Government of India, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

9) Receiving property taken by war or depredation mentioned in sections 125 and 126 :

Section 127 of the Indian Penal Code says that whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 and 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received.

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

10) Public servant voluntarily allowing prisoner of state or war to escape:

According to Section 128 of the Indian Penal Code, whoever, being a public servant

and having the custody of any State prisoner or prisoner of war, voluntarily allows such prisoner to escape from any place in which such prisoner is confined, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

11) Public servant negligently suffering such prisoner to escape (Section 129):

Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined, shall be punished with simple imprisonment for a term which may extend to three years, and shall also be liable to fine.

The offence under this section is cognizable, bailable non-compoundable, and tribal by Magistrate of First Class

12) Aiding escape of, rescuing or harbouring such prisoner:
Section 130 of the Indian Penal Code says that, whoever knowingly aids or assists any State prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner, or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation -

A State prisoner or prisoner of war, who is permitted to be at large on his parole within certain limits in India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

The offence under this section is cognizable, non-bailable non-compoundable, and tribal by Court of Session.

C. Offences against Public Tranquility
141. Unlawful assembly.
An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First – To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or
Second – To resist the execution of any law, or of any legal process; or
Third – To commit any mischief or criminal trespass, or other offence; or
Fourth – By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
Fifth – By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.
Explanation-

An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

142. Being member of unlawful assembly.

Whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.

143. Punishment.

Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 6 months, or fine, or both—cognizable—Bailable— Triable by any Magistrate—Non-compoundable.

144. Joining unlawful assembly armed with deadly weapon.

Whoever, being armed with any deadly weapon, or with anything which, used as a weapon of offence, is likely to cause death, is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 2 years, or fine, or both—Cognizable—Bailable— Triable by any Magistrate—Non-compoundable.

145. Joining or continuing in unlawful assembly, knowing it has been commanded to disperse.

Whoever joins or continues in an unlawful assembly, knowing that such unlawful assembly has been commanded in the manner prescribed by law to disperse, shall be punished with

imprisonment of either description for a term which may extend to two years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 2 years, or fine, or both—Cognizable—Bailable— Triable by any Magistrate—Non-compoundable.

146. Rioting.

Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

147. Punishment for rioting.

Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 2 years, or fine, or both—Cognizable—Bailable— Triable by any Magistrate—Non-compoundable.

COMMENTS

The Sub-Inspector was pursuing investigation which is his duty and therefore it could not be said that while he was pursuing the investigation, it was in pursuance of an unlawful object and therefore no conviction could be passed under section 147; Maiku v. State of Uttar Pradesh, (1989) Cr LJ 860 : AIR 1989 SC 67.

148. Rioting, armed with deadly weapon.

Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 3 years, or fine, or both—Cognizable—Bailable— Triable by Magistrate of the first class—Non-compoundable.

COMMENTS

There must be nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object every member of the assembly will become liable for the same;

Allauddin Mian Sharif Mian v. State of Bihar, (1989) Cr LJ 1466 : AIR 1989 SC 1456.

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.

If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

CLASSIFICATION OF OFFENCE

Punishment—The same as for the offence—According as offence is cognizable or non-cognizable—According as offence is bailable or non-bailable—Triable by court by which the offence is triable—Non-compoundable.

COMMENTS

(i) It is well settled that once a membership of an unlawful assembly is established, it is not incumbent on the prosecution to establish whether any specific overt act has been assigned to any accused. Mere membership of the unlawful assembly is sufficient;
State of Maharashtra v. Joseph Mingel Koli, (1997) 2 Crimes 228 (Bom)

(ii) Every member of an unlawful assembly is vicariously liable for the acts done by others either in the prosecution of the common object of the unlawful assembly or such which the members of the unlawful assembly knew were likely to be committed;
State of Maharashtra v. Joseph Mingel Koli, (1997) 2 Crimes 228 (Bom)

150. Hiring, or conniving at hiring, of persons to join unlawful assembly.

Whoever hires or engages or employs, or promotes, or connives at the hiring, engagement or employment of any person to join or become a member of any unlawful assembly, shall be punishable as a member of such unlawful assembly, and for any offence which may be committed by any such person as a member of such unlawful assembly in pursuance of such hiring, engagement or employment, in the same manner as if he had been a member of such unlawful assembly, or himself had committed such offence.

CLASSIFICATION OF OFFENCE

Punishment—The same as for a member of such assembly, and for any offence committed by any members of such assembly—Cognizable—According as offence is bailable or non-

bailable—Triable by court by which the offence is triable—Non-compoundable.

151. Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse.

Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

Explanation-

If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 6 months, or fine, or both—Cognizable— Bailable—Triable by any Magistrate—Non-compoundable.

152. Assaulting or obstructing public servant when suppressing riot, etc.

Whoever assaults or threatens to assault, or obstructs or attempts to obstruct, any public servant in the discharge of his duty as such public servant, in endeavouring to disperse an unlawful assembly, or to suppress a riot or affray, or uses, or threatens, or attempts to use criminal force to such public servant, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 3 years, or fine, or both—Cognizable—Bailable— Triable by Magistrate of the first class—Non-compoundable.

153. Wantonly giving provocation with intent to cause riot—if rioting be committed—if not committed.

Whoever malignantly, or wantonly, by doing anything which is illegal, gives provocation to any person intending or knowing it to be likely that such provocation will cause the offence of rioting to be committed, shall, if the offence of rioting be committed in consequence of such provocation, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both; and if the offence of rioting be not committed, with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Para I: Punishment—Imprisonment for 1 year, or fine, or both—Cognizable— Bailable—Triable by any Magistrate—Non-compoundable.

Para II: Punishment—Imprisonment for 6 months, or fine, or both—Cognizable— Bailable—Triable by Magistrate of the first class—Non-compoundable.

153A. Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony.

(1) Whoever-

(a) by words, either spoken or written, or by signs or by visible representations or otherwise, promotes or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will between different religious, racial, language or regional groups or castes or communities, or

(b) commits any act which is prejudicial to the maintenance of harmony between different religious, racial, language or regional groups or castes or communities, and which disturbs or is likely to disturb the public tranquillity, or

(c) organizes any exercise, movement, drill or other similar activity intending that the participants in such activity shall use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, or participates in such activity intending to use or be trained to use criminal force or violence or knowing it to be likely that the participants in such activity will use or be trained to use criminal force or violence, against any religious, racial, language or regional group or caste or community and such activity for any reason whatsoever causes or is likely to cause fear or alarm or a feeling of insecurity amongst members of such religious, racial, language or regional group or caste or community,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Offence committed in place of worship, etc- Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

CLASSIFICATION OF OFFENCE

Para I: Punishment—Imprisonment for 3 years, or fine, or both—Cognizable— Non-bailable—Triable by any Magistrate of the first class—Non-compoundable.
Para II: Punishment—Imprisonment for 5 years and fine—Cognizable—Non- bailable—Triable by Magistrate of the first class—Non-compoundable.

COMMENTS

(i) Mens rea is a necessary ingredient for the offence under section 153A of the Indian Penal Code;

Bilal Ahmed Kaloo v. State of Andhra Pradesh, (1997) 7 Supreme Today 127.

(ii) Publication of the words or representation is not necessary under section 153A of the Indian Penal Code;

Bilal Ahmed Kaloo v. State of Andhra Pradesh, (1997) Supreme Today 127.

153AA. Punishment for knowingly carrying arms in any procession or organising, or holding or taking part in any mass drill or mass training with arms.

Whoever knowingly carries arms in any procession or organizes or holds or takes part in any mass drill or mass training with arms in any public place in contravention of any public notice or order issued or made under section 144A of the Code of Criminal Procedure, 1973 shall be punished with imprisonment for a term which may extend to six months and with fine which may extend to two thousand rupees.

Explanation-

”Arms” means articles of any description designed or adapted as weapons for offence or defence and includes fire-arms, sharp edged weapons, lathis, dandas and sticks.

CLASSIFICATION OF OFFENCE

Punishment-Imprisonment for 6 months and Fine of 2,000 rupees- Cognizable- Non-Bailable—Triable by any Magistrate—Non-compoundable.

153B. Imputations, assertions prejudicial to national-integration.

(1) Whoever, by words either spoken or written or by signs or by visible representations or otherwise,-

(a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India, or

(b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied or deprived of their rights as citizens of India, or

(c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons,

shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Whoever commits an offence specified in sub-section (1), in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

CLASSIFICATION OF OFFENCE

Para I: Punishment—Imprisonment for 3 years, or fine, or both—Cognizable— Non-bailable—Triable by any Magistrate of the first class—Non-compoundable.

Para II: Punishment—Imprisonment for 5 years and fine—Cognizable—Non- bailable—Triable by Magistrate of the first class—Non-compoundable.

154. Owner or occupier of land on which an unlawful assembly is held.

Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees, if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest police-station, and do not, in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly.

CLASSIFICATION OF OFFENCE

Punishment—Fine of 10,000 rupees—Non-cognizable—Bailable—Triable by any Magistrate—Non-compoundable.

155. Liability of person for whose benefit riot is committed.

Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land, respecting which such riot takes place or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom, such person shall be punishable with fine, if he or his agent or manager, having reason to believe that such riot was likely to be committed or that the unlawful assembly by which such riot was committed was likely to be held, shall not respectively use all lawful means in his or their power to prevent such assembly or riot from taking place, and for suppressing and dispersing the same.

CLASSIFICATION OF OFFENCE

Punishment—Fine—Non-cognizable—Bailable—Triable by any Magistrate—Non-compoundable.

156. Liability of agent of owner or occupier for whose benefit riot is committed.

Whenever a riot is committed for the benefit or on behalf of any person who is the owner or occupier of any land respecting which such riot takes p lace, or who claims any interest in such land, or in the subject of any dispute which gave rise to the riot, or who has accepted or derived any benefit therefrom,
the agent or manager of such person shall be punishable with fine, if such agent or manager, having reason to believe that such riot was likely to be committed, or that the unlawful assembly by which such riot was committed was likely to be held, shall not use all lawful means in his power to prevent such riot or assembly from taking place and for suppressing and dispersing the same.

CLASSIFICATION OF OFFENCE

Punishment—Fine—Non-cognizable—Bailable—Triable by any Magistrate—Non-compoundable.

157. Harbouring persons hired for an unlawful assembly.

Whoever harbours, receives or assembles, in any house or premises in his occupation or charge, or under his control any persons, knowing that such persons have been hired, engaged or employed, or are about to be hired, engaged or employed, to join or become members of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for 6 months, or fine, or both—Cognizable— Bailable—Triable by any Magistrate—Non-compoundable

158. Being hired to take part in an unlawful assembly or riot.

Whoever is engaged, or hired, or offers or attempts to be hired or engaged, to do or assist in doing any of the acts specified in Section 141, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both,

or to go armed- and whoever, being so engaged or hired as aforesaid, goes armed or engages or offers to go armed, with any deadly weapon or with anything which used as a weapon of offence is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

CLASSIFICATION OF OFFENCE

Para I: Punishment—Imprisonment for 6 months, or fine, or both—Cognizable—Bailable—Triable by any Magistrate—Non-compoundable.

Para II: Punishment—Imprisonment for 2 years, or fine, or both—Cognizable— Bailable—Triable by any Magistrate—Non-compoundable.

159. Affray.

When two or more persons, by fighting in a public place, disturb the public peace, they are said to "commit an affray".

160. Punishment for committing affray.

Whoever commits an affray, shall be punished with imprisonment of either description for a term which may extend to one month, or with fine which may extend to one hundred rupees, or with both.

CLASSIFICATION OF OFFENCE

Punishment—Imprisonment for one month, or fine of 100 rupees, or both— Cognizable—Bailable—Triable by any Magistrate—Non-compoundable.

1. Kinds of Punishment: - From *Indian Penal Code*, 1860

2. Theories of Punishment

Retribution

One of the oldest and most basic justifications for punishment involves the principles of revenge and retribution. This equation of punishment with the gravity of the offense is embedded in the

Judeo–Christian tradition in the Mosaic laws of the Old Testament that emphasize the idea of "an eye for an eye." Neither constrained by questions of offender culpability nor directed at preventing future wrongdoing, have offenders under a retributive philosophy simply got what they deserve. Punishment is justified on its own grounds, a general principle that has remained popular throughout Western history in both law and widespread public beliefs about how justice should be dispensed in democratic societies.

The classical retributive principle of "let the punishment fit the crime" was the primary basis for criminal sentencing practices in much of Western Europe in the nineteenth century. This principle of punishment was subsequently modified in neoclassical thought to recognize that some offenders who commit similar offenses may be less blameworthy or culpable due to factors outside of their control (e.g., diminished capacity, mental disease or defect, immaturity). Under this revised retributive theory of just deserts, punishment should fit primarily the moral gravity of the crime and, to a lesser extent, the characteristics of the offender. A current example of retributive principles being used as the basis for punishment involves mandatory sentencing policies and sentencing guidelines systems in the United States. Mandatory sentences dictate uniform sanctions for persons who commit particular types of offenses (e.g., enhanced penalties for crimes committed with firearms), whereas determinate sentencing guidelines prescribe specific punishments based on the severity of the criminal offense and the extensiveness of the offender's prior criminal record.

Consistent with a retributive philosophy, punishment under these sentencing systems focuses primarily on the seriousness and characteristics of the criminal act rather than the offender.

Although retribution is often linked to criminal sanctions, it is equally applicable to other types of legal sanctions and informal sanctions. For example, civil litigation that is based on the principle of strict liability is similar to retributive philosophy in that compensatory and punitive damages focus on the gravity of the prohibited act rather than characteristics of the offender. Lethal and nonlethal sanctions that derive from blood feuds between rival families, range wars in agrarian communities, terrorist attacks on civilian and government targets, and acts of "street justice" by vigilante groups and other extrajudicial bodies are often fuelled by the twin motives of revenge and retribution. Various economic punishments and sanctions that restrict business practices (e.g., asset forfeitures, injunctions, product boycotts, worker strikes and slowdowns, revocation of licenses, decertification of programs, cease-and-desist orders, denial of benefits) may be justified on various utilitarian grounds like protecting society or deterring wrongdoing,

but they may ultimately reflect the widespread belief in letting the punishment fit the crime.

Retribution as a penal philosophy has been criticized on several fronts when it is actually applied in practice. First, strict retributive sanctions based solely on the nature of the offense (e.g., mandatory sentences for drug trafficking, the use of firearms in the commission of crimes) are often criticized as being overly rigid, especially in societies that recognize degrees of individual culpability and blameworthiness. Second, the principle of *lex talionis* (i.e., the “eye for an eye” dictum that punishment should correspond in degree and kind to the offense) has limited applicability. For example, how do you sanction in kind, acts of drunkenness, drug abuse, adultery, prostitution, and/or traffic violations like speeding? Third, the assumption of proportionality of punishments (i.e., that punishment should be commensurate or proportional to the moral gravity of the offense) is untenable in most pluralistic societies because there is often widespread public disagreement on the severity of particular offenses.

Under these conditions, a retributive sentencing system that espouses proportional sanctions would be based on the erroneous assumption that there is public consensus in the rankings of the moral gravity of particular types of crime. Even with these criticisms, however, the retributive principle of *lex talionis* and proportionality of sanctions remains a dominant justification of punishment in most Western cultures. Retribution under a Judeo–Christian religious tradition offers a divine justification for strict sanctions and it clearly fits popular notions of justice (e.g., “he got what was coming to him”). The dictum of “let the punishment fit the crime” also has some appeal as a principled, proportional, and commensurate form of societal revenge for various types of misconduct.

One of the most convincing statements of the retribution theory was given by Immanuel Kant in the eighteenth century as follows:

….Punishment can never be administered merely as means for promoting another good, either with regard to the criminal himself to civil society, but must in all cases be imposed only because the individual on whom it is inflicted has committed a crime. For one man ought never to be dealt with merely as a means of subservient to the purpose of another, not be mixed up with the subjects of Real Rights (i.e. goods or property). Against such treatment his inborn personality has a right to protect him , even although he may be condemned to loose his civil personality. He must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or his fellow citizens.

Incapacitation

A primary utilitarian purpose for punishment involves various actions designed to decrease the physical capacity of a person to commit criminal or deviant acts. This principle of incapacitation focuses on the elimination of individuals' opportunity for crime and deviance through different types of physical restraints on their actions. The conditions of confinement may be so deplorable that they reduce the offender's subsequent desire to engage in misconduct, but such a deterrent effect is not a necessary component of incapacitation in its pure and earliest form. A plethora of devices, techniques, and structures have been used throughout history as means for incapacitation. The early tribal practices of banishment to the wilderness, the English system of "transportation" of convicts to other colonies in the seventeenth and eighteenth centuries, the exile of citizens in ancient Greek society, and political exile in more modern times are examples of incapacitated sanctions because they involve the physical removal of persons from their former communities, thereby restricting their physical opportunity for misconduct in the original setting. The stocks and pillory in English history and Colonial America were devices used for both public ridicule and incapacitation.

The function of incapacitation may also be served by other types of legal and extra legal restrictions on one's behaviour. Other legal forms of incapacitation involving civil or administrative decrees include court-ordered injunctions and restraint-of-trade agreements, restraining orders in domestic violence cases, revocations of licenses, foreclosures, and the passage of certification requirements to perform particular tasks (e.g., college degree requirements for teaching, passing medical board and bar exams for practicing medicine or law). Many of these actions are economic sanctions in that they carry financial consequences for those involved, but these civil and administrative rules can also be seen as incapacitated in that they place physical restrictions on one's possible actions. The most widely known type of incapacitation involves some form of incarceration, or what others have termed "penal bondage." Aside from their incapacitated effect on restricting immediate criminal opportunities, penal bondage of criminals, vagrants, debtors, social misfits, and other disadvantaged groups across time periods and geographical contexts has often included a component of forced labour (e.g., public works projects, forced servitude in military campaigns) as a condition of confinement.

Physical structures for incapacitation may have different purposes or functions besides the physical restraint of the body. These places of confinement are described across time and space

in context-specific terms like towers, workhouses, jails, prisons, correctional or treatment facilities, cottages, and mental institutions. The specific language used for descriptive purposes also signifies their functions beyond physical incapacitation. During the last half century, several new forms of incapacitation have emerged. For example, shock incarceration programs involve short-term incarceration of juvenile offenders to show them the pains of imprisonment and scare them into a future life of conformity. Another variant of incapacitation, intensive-supervision probation (ISP), leaves adjudicated criminals in their community but under the watchful eye of probation officers or other legal authorities.

Although research suggests that a small pool of people commits the predominant share of violent and property crime, efforts to successfully predict these high-risk offenders suffer from numerous ethical and practical problems, including high rates of both "false positives" (i.e., falsely labelling someone as a high-risk offender)and "false negatives" (i.e., releasing high-risk offenders because they were erroneously characterized as low-risk).

Contrary to early historical patterns of incapacitation that emphasized the reduction of the physical opportunity for crime and deviance, modern versions of this philosophy are more "forward-looking" in terms of focusing on the utility of punishments for changing offenders' criminal motivations once they are no longer physically restrained from committing deviance. In this way, incapacitation is united with other utilitarian philosophies for punishment. Different types of incapacitated sanctions may serve as the initial framework for establishing successful programs of deterrence and rehabilitation.

Deterrence

The doctrine of deterrence asks a fundamental question about the relationship between sanctions and human behaviour: Are legal and extra legal sanctions effective in reducing deviance and achieving conformity? Punishment is said to have a deterrent effect when the fear or actual imposition of punishment leads to conformity. Specifically, punishments have the greatest potential for deterring misconduct when they are severe, certain, and swift in their application. Punishments are also widely assumed to be most effective for instrumental conduct and for potential offenders who have low commitment to deviance as a livelihood (e.g., the person is not a professional criminal) The deterrent effect of a particular type of punishment depends upon several factors. These are:

(1) the social structure and value system under consideration

(2) the particular population in question
(3) the type of law being upheld
(4) the form and magnitude of the prescribed penalty
(5) the certainty of apprehension and punishment, and
(6) the individual's knowledge of the law as well as the prescribed punishment, and his definition of the situation relative to these factors

Deterrence is based on a rational conception of human behaviour in which individuals freely choose between alternative courses of action to maximize pleasure and minimize pain. From this classical perspective on crime and punishment, criminal solutions to problems become an unattractive option when the costs of this conduct exceed its expected benefit. Swift, certain, and severe sanctions are costs that are assumed to impede the likelihood of engaging in deviant behaviour. From a deterrence standpoint, any type of punishment (e.g., monetary, informal, incapacitative, corporal) has a potential deterrent effect as long as it is perceived as a severe, certain, and swift sanction.

The research literature on the effectiveness of criminal punishments outlines the four major types of deterrence, which include the following:

- *Specific deterrence* involves the effectiveness of punishment on that particular individual's future behaviour. Recidivism rates (e.g., rates of repeat offending among prior offenders) are often used to measure the specific deterrent value of punishments.
- *General deterrence* asks whether the punishment of particular offenders deters other people from committing deviance. A comparison of crime rates over time or across jurisdictions is typically used to ascertain the general deterrent value of punishment.
- *Marginal deterrence* focuses on the relative effectiveness of different types of punishments as either general or specific deterrents. For example, if recidivism rates for drunk drivers are higher for those who receive monetary fines than those who received jail time, jail time would be rated higher in its marginal deterrent value as a specific deterrent for drunk driving. Similarly, debates about capital punishment often focus on the marginal deterrent value of life imprisonment compared to the death penalty as a general deterrent for murder.
- *Partial deterrence* refers to situations in which the threat of sanction has some deterrent value even when the sanction threats do not lead to law abiding behaviour. For example, if a thief picked or "lifted" someone's wallet rather than robbing them at gunpoint (because the thief was fearful of the more serious penalty for committing an armed robbery), the thief would be treated as a "successful" case of partial deterrence.

When the philosophy of deterrence is used in the context of penal reform, it is often as a justification for increasing the severity of sanctions, particularly in Western developed countries. Legislative responses to terrorist attacks, drug trafficking, child abductions, etc., have been directed primarily at increasing the severity and/or duration of punishments. Although these greater punitive measures may serve to pacify widespread public demands to "get tough" on crime, the specific and general deterrent effect of such efforts is probably limited without

attention to the other necessary conditions for effective deterrence (i.e., high certainty and high celerity of punishments).

Empirical efforts to assess the effectiveness of deterrence are limited by several basic factors. First, persons may abide by laws or desist in deviant behaviour for a variety of reasons other than the looming threat or fear of legal sanctions. Some of these non deterrence constraints on behaviour include one's moral/ethical principles, religious beliefs, physical inability to commit the deviant act, and lack of opportunity. Second, neither swift nor certain punishment exists in most legal systems in the contemporary world. The majority of criminal offenses are typically unknown to the legal authorities and, even among the known offenses, only a small proportion result in an arrest and conviction. Third, the severity of punishment actually received by offenders is often far less than mandated by law, due to the operation of such factors as plea bargaining, charge reductions, etc.

Rehabilitation

Although it may seem contradictory or at least somewhat odd to assert that we punish for the treatment and reform of offenders, this basic principle underlies the rehabilitation purpose of punishment. The ultimate goal of rehabilitation is to restore a convicted offender to a constructive place in society through some combination of treatment, education, and training.

The salience of rehabilitation as a punishment philosophy is indicated by the contemporary jargon of "correctional facilities," "reformatories," and "therapeutic community" now used to describe jails, prisons, and other institutions of incapacitation. The link between places of incapacitation and reform is established throughout much of written history. The earliest forms of penal confinement in dungeons, towers, caves, and other dark and dreary places were largely incapacitative in their primary function, but some degree of moral and spiritual enlightenment was expected of those condemned to long periods of solitary confinement.

This idea of restraint to reform is evident within the context of religious penance in Judeo–Christian practices in Western Europe and the British colonies in North America and elsewhere. It is also manifested in U.S. history in the early development of reformatories and penitentiaries. These large-scale incarceration structures punished misguided youth and criminals by isolating them so they could reflect on their deviant actions, repent, and subsequently reform their behaviour. Confinement and reflection for spiritual reform are also of central importance in the religious principles found in Hinduism and Buddhism.

In contrast to retribution that emphasizes uniform punishments based on the gravity of the misconduct, rehabilitation focuses on the particular characteristics of individual offenders that require treatment and intervention. This individualized treatment approach is logically consistent with indeterminate sentencing structures that give judges enormous discretion to tailor punishments for the greatest good to the individual offender and provide parole boards with equally high discretion to release or retain offenders for future treatment. Through the application of current theories of human behaviour and the latest therapeutic techniques for behavioural modification, rehabilitation experienced growing acceptance in many countries throughout much of the twentieth century.

National fiscal restraints, declines in correctional budgets for program development, high public outcry for more severe and longer prison sentences, and a growing crime-control political ideology that focuses on suppression of criminal behaviour rather than its early prevention are current conditions in Western societies that are largely antithetical to the ideas of treatment and rehabilitation.

Restoration

One of the most recent goals of punishment derives from the principles of restoration. As an alternative to other punishment philosophies (e.g., retribution, incapacitation, rehabilitation), restorative justice fundamentally challenges our way of thinking about crime and justice. The global victims' rights movement is a relatively new phenomenon, but, the general roots of restorative justice can be traced back to the early legal systems of Western Europe, ancient Hebrew justice, and precolonial African societies.

Restorative justice literally involves the process of returning to their previous condition all parties involved in or affected by the original misconduct, including victims, offenders, the community, and even possibly the government. Under this punishment philosophy, the offender takes full responsibility for the wrongdoing and initiates restitution to the victim. The victim and offender are brought together to develop a mutually beneficial program that helps the victim in the recovery process and provides the offender a means of reducing their risks of re-offending.

The theory of reintegrative shaming developed by John Braithwaite is based on the principles of restorative justice. Offenders take personal responsibility for their actions and condemnation is focused on the deviant act, rather than the offender, and its impact on the victim and the community. Both the offender and the community need to be reintegrated as a result of the harm

caused by the criminal behaviour. Community mediation groups, neighbourhood councils, local support groups, and victim–offender conferences are the primary means of achieving these restorative efforts. The principles of restorative justice have been applied to the study of both criminal and civil sanctions. For example, the institutionalized practice of "written apology" and "letter of forgiveness" in the Japanese criminal justice system is designed to express remorse and make restitution. By accepting the apology, the victim forgives the offender. In all cases of restorative justice, the goal is to restore both the individual parties and their community's sense of wholeness. It stresses the harm caused to victims of crime and requires offenders to engage in financial restitution and community service to compensate the victim and the community and to 'make them whole once again'.

Kant argued that, even if no possible advantage can be found in punishing a given criminal, the punishment must nonetheless be imposed. To illustrate the categorical nature of this imperative, he constructed his famous example: "Even if a civil society resolved to dissolve itself with the consent of all its members- as might be supposed in the case of a People inhabiting an island resolving to separate and scatter themselves throughout the whole world- the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that everyone may realize the desert of his deeds and that guilt may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice".

Thus, it is clear that no theory of punishment can achieve the real purpose of punishment solely. Caldwell observes in this regard: "Punishment is an art which involves the balancing of retribution, deterrence and reformation in terms not only of the court and the offender but also of the circumstances in which it takes place and in the balancing of these purposes of punishments, first one and then the other, receives emphasis as the accompanying conditions change".

3. Death Sentence

Death Penalty

Capital offences in most time periods and places have included both acts that are considered *Mala en se* and acts that are *Mala Prohibita. Mala en se* crimes are wrong because of their intrinsic evil nature whereas *Mala Prohibita* crimes are wrong because some political authority has defined them as illegal. Capital punishment is the execution of a perpetrator for committing a

heinous crime, and it is a hotly debated topic in the present scenario. A dispassionate analysis of criminological jurisprudence would reveal that capital punishment is justified only in extreme cases in which a high degree of culpability is involved causing grave danger to society. Capital punishment is awarded for capital offences involving planned murder, multiple murders, rape and murder etc. Throughout history, civilizations have used capital punishment as a means of keeping social order as well as retribution. Many cultures throughout the ages have used capital punishment for grave offences, ranging from theft to murder. Many ancient societies accepted the idea that certain crimes deserved capital punishment.

"The Code of Hammurabi a legal document from ancient Babylonia (in modern-day Iraq), contained the first known death penalty laws. Under the code, written in the 1700s B.C., twenty-five crimes were punishable by death. These crimes included adultery (cheating on a wife or husband) and helping slaves escape. Murder was not one of the twenty-five crimes." Ancient Roman and Mosaic Law authorized the thought of retribution, they believed in the rule of “an eye for an eye and a tooth for a tooth”, in the same way, the ancient Egyptians, Assyrians and Greeks all executed citizens for a variety of crimes. The most prominent people executed are Socrates and Jesus.

In England, during the reigns of King Canute and William the Conqueror the death penalty was not used. Later, Britain reinstated the death penalty and brought it to the American colonies. Most of the death sentences involved torture, such as burning at the stake, breaking on the wheel, slow strangulation and many more severe punishments, but as humanitarian movement grew in strength and the intensity of the punishments by then, have reduced. At present the common modes of execution of death sentence, which are prevailing in the different parts of the world are, electrocution, guillotine, shooting, gas chamber, hanging and lethal injection.

TABLE: PROVISIONS/LAWS PROVIDING DEATH PENALTY

Provisions under the Indian Penal Code/Other Laws	**Nature of Offense**
Section 120B IPC	Being a party to a criminal conspiracy to commit a capital offense
Section 121 IPC	Waging, or attempting to wage war, or abetting waging of war, against the Government of India
Section 132 IPC	A betting a mutiny in the armed forces (if a mutiny occurs as a result), engaging in mutiny

Section 194 IPC	Giving or fabricating false evidence with intent to procure a conviction of a capital offense
Section 302 IPC	Murder
Section 303 IPC	Punishment for Murder by Life Convict
Section 305 IPC	Abetting the suicide of a minor, mentally ill person, or intoxicated person
Section 364A IPC	Kidnapping, in the course of which the victim was held for ransom or other coercive purposes.
Section 396 IPC	Banditry with murder - in cases where a group of five or more individuals commit banditry and one of them commits murder in the course of that crime, all members of the group are liable for the death penalty.
376A of IPC and Criminal Law (Amendment) Act, 2013	Rape if the perpetrator inflicts injuries that result in the victim's death or incapacitation in a persistent vegetative state, or is a repeat offender
Part II Section 4 of Prevention of Sati Act	Aiding or abetting an act of Sati
Bombay Prohibition (Gujarat Amendment) Bill, 2009	In Gujarat only - Manufacture and sale of poisoned alcohol which results in death(s)

Capital Offences in other laws

Sl. No.	Section Number	Description
1.	Sections 34, 37, and 38(1)	*The Air Force Act*, 1950
2.	Section 3(1)(i)	*The Andhra Pradesh Control of Organised Crime Act*, 2001
3.	Section 27(3)	*The Arms Act*, 1959 (repealed)
4.	Sections 34, 37, and 38(1)	*The Army Act*, 1950
5.	Sections 21, 24, 25(1)(a), and 55	*The Assam Rifles Act*, 2006
6.	Section 65A(2)	*The Bombay Prohibition (Gujarat Amendment) Act*, 2009
7.	Sections 14, 17, 18(1)(a), and 46	*The Border Security Force Act*, 1968
8.	Sections 17 and 49	*The Coast Guard Act*, 1978
9.	Section 4(1)	*The Commission of Sati (Prevention) Act*, 1987
10.	Section 5	*The Defence of India Act*, 1971
11.	Section 3	*The Geneva Conventions Act*, 1960
12.	Section 3 (b)	*The Explosive Substances Act*, 1908
13.	Sections 16, 19, 20(1)(a), and	*The Indo-Tibetan Border Police Force Act*, 1992

	49	
14.	Section 3(1)(i)	*The Karnataka Control of Organised Crime Act*, 2000
15.	Section 3(1)(i)	*The Maharashtra Control of Organised Crime Act*, 1999
16.	Section 31A(1)	*The Narcotics Drugs and Psychotropic Substances Act*, 1985
17.	Sections 34, 35, 36, 37, 38, 39, 43, 44, 49(2)(a), 56(2), and 59	*The Navy Act*, 1957
18.	Section 15(4)	*The Petroleum and Minerals Pipelines (Acquisition of rights of user in land) Act*, 1962
19.	Sections 16, 19, 20(1)(a), and 49	*The Sashastra Seema Bal Act*, 2007
20.	Section 3(2)(i)	*The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act*, 1989
21.	Section 3(1)(i)	*The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act*, 2002;
22.	Sections 10(b)(i) and Section 16(1)(a)	*The Unlawful Activities Prevention Act*, 1967
Source: India. Law Commission of India, Report no.262 on Death Penalty, August 2015, pp.31-32		

Death Sentence has been used as an effective weapon of retributive justice for centuries. The justifications argued that it is lawful to forfeit the life of a person who takes away another life. A person who kills another must be eliminated from the society and therefore, fully merits his execution, thus the motive for death penalty may include vengeance, which is compensatory and reparatory satisfaction for an injured party, group or society. The fear of being condemned to death is perhaps the greatest deterrent, which keeps a person away from criminality. The topic of capital punishment is difficult to discuss as there are varied opinions on the issue.

Capital punishment in the past was intended to inflict pain and suffering and the same time to be a public spectacle delivering a moral message through a dreadful example of the cost of sin and crime. To take but one example: David Johnson explains that in Japan in the period up to 1867, when most crimes were punished by death, 'execution methods ranged from boiling, burning and crucifixion to several levels of beheading ... Prior to execution, condemned criminals were paraded through the streets on horseback. Afterwards, bodies and heads were displayed on platforms or carried through the streets'.

Because it results in the death of the accused, capital punishment is the ultimate corporal

sanction. The wide variety of methods of execution used over time and place can be distinguished according to whether they involve instant or slow death. Beheadings, hangings, and strangulations have been identified as the most common means for merciful or instant death. The use of firing squads, gas chambers, and lethal injections are modern forms of instant death. In contrast, lethal methods associated with a slow or lingering death included the acts of burning, boiling, stoning, crucifixion, draw and quartering, and being “broken on the wheel.”

Public executions have been condemned by the United Nations Human Rights Committee as 'incompatible with human dignity. In Resolution 2004/67 the Commission on Human Rights urged states to ensure that where capital punishment occurs it shall not be carried out in public or in any other degrading manner. Yet executions have taken place in public, or been broadcast on television, in at least 19 countries or territories since 1995. To take a few recent examples: In Uganda military executions took place in 2002 in the presence of about 1,000 people and again in 2003 before 200 people.

In Kuwait, in January and May 2004, the bodies of prisoners executed by hanging were afterwards publicly displayed and four men were hanged in public in Kuwait City in October 2005 for trafficking in drugs. A public execution for murder took place by firing squad in Equatorial Guinea in April 2006, and in Vietnam, in April 2004, a woman was executed by firing squad 'in front of hundreds of spectators' for smuggling heroin. In Saudi Arabia, where public executions by beheading persist, four Sri Lankans were executed in February 2007 and subsequently their bodies were publicly displayed. The most important amongst these all is the execution of Saddam Husain which was broadcasted over the television and was available on the internet over the social networking sites and YouTube etc.

There remains much dispute about the proper role of doctors in the administration of the death penalty. In India the Supreme Court ruled in January 1995 that doctors employed in prisons had an obligation to participate in hangings by examining the body every few minutes after the drop to ensure that death had occurred. In strong contrast, the World Medical Association at its fifty-second meeting, held in Edinburgh in 2000, 'Resolved, that it is unethical for physicians to participate in capital punishment, in any way, or during any step of the execution process.

Views on Retention or Abolition of Death Penalty

Abolitionist of capital punishment argues that it leads to miscarriage of justice and the life imprisonment is a better substitute. They also argue that it violates the right to life of the

criminal. The legal imposition in the society involves long and unavoidable delays. Retentionist argues that as it is served when someone is put to death for committing murder with aggravating circumstances, capital punishment removes criminals from the society and reduces the crime in long run.

It is to be stated that some of the arguments on both sides have substance and carry weight: Prof. H.L.A. Hart sums up the position in the following words: "There are indeed ways of defending and criticizing death penalty which are quite independent of the utilitarian position and of the questions of fact which the utilitarian will consider as crucial. For some people the death penalty is ruled out entirely as something absolutely evil which, like torture, should ' never be used however many lives it might save. Those who take this view find that they are sometimes met by the counter assertion that the death penalty is something which morality actually demands, a uniquely appropriate means of retribution or 'reprobation' for the worst of crimes, even if its use adds nothing to the protection of human life." However, there has been some proximity between these two views on some points.

The United Nations Committee that studied capital punishment found that 'it is generally agreed between the retentionist and abolitionists, whatever their opinion about the validity of comparative studies of deterrence, that the data's which now exist show no correlation between the existence of capital punishment and lower rates of crime.

Eight Objections to Death Penalty: The American Civil Liberties (ACLU) Union believes the death penalty inherently violates the constitutional ban against cruel and unusual punishment and the guarantees of due process of law and of equal protection under the law.

Arguments against the retention of the Capital Punishment:

1. The Capital Punishment is neither deterrent nor has the retributive value as witnessed by the history.
2. It is uncivilized, indecent, barbaric, cruel and revengeful and is stigma on the society.
3. It is inhuman, if one cannot give life how is it justified to take it.
4. If injustice happens with an innocent it cant be corrected.
5. It serves no economical gains and is immoral too.
6. It leaves no room for reformation of the guilty neither he gets the opportunity thereof

Arguments for retention of the Capital Punishment

1. All the social contracts theories have sanctioned rights of the State to penalize the criminal in the interest of the administration of justice and same a necessary effective tool.
2. Those offenders who are incorrigible and dangerous should be eliminated from the society in as much as they act heinously and have no regards for Human Values.

3. It has a deterrent and retributive effect which is the main aim of the administration of justice, as is substitute of private vengeance and revenge and to protect the society, the sentence is must.
4. The possibility of death sentence being wrongly used and abused can be eliminated by good laws and proper executions.
5. It is a sort of right of private defence to the society against the criminal.
6. It is constitutional as held by the judiciary.
7. It serves to protect the life and liberty of the individuals of the society.
8. It is economical and less cruel than keeping the one under imprisonment for life, leaving him to die at an indefinite time, with no hope to come out of prison.
9. It prevents overcrowding of prison. It has a great value in satisfying the victims of the crime.

At the initial stage, the provisions under the *Indian Penal Code*, 1860 prescribed death as a rule and life as an exception in case of a murder. But slowly with the passage of time the trend tilted towards liberalization of the interpretation and provided that if death sentence is to be awarded reasons for the same were to be mentioned and now the courts try to find out the special reasons while awarding death sentence. It is in the rarest of the rare case, that death sentence should be awarded. But the million dollar question still remains to be answered - what are those cases which come under the category of rarest of rare cases. The judges of the apex court and other courts subordinate to the apex court have not been able to specify the category rarest of rare cases". Thus there is inconsistency in the judgments delivered by the courts including the apex court while dealing with cases that carry death sentence or life imprisonment.

In India also a serious debate on the abolition of death sentence has been going on for quite a long time. Even during the British Rule, the Indians made a serious attempt to procure abolition of capital punishment. In the year 1931, Gaya Prasad Singh introduced a bill for the abolition of capital punishment in the Legislative Assembly, but a motion for circulation of the Bill was defeated after it was opposed by the government. After India became independent, a similar Bill was the introduced in the Lok Sabha by Mukand Lal Agarwal, a sitting Member of Parliament, in the year 1956, but the same was rejected by the Government. In the year 1958 a resolution for abolition was moved in Rajya Sabha by Prithvi Raj Kapoor. The same was withdrawn after a debate in the Rajya Sabha. On this Prithvi Raj said: "The ripples are created and it is in the air." Its purpose has been served, said Kapoor. In the year 1961, a further resolution was moved by Savitri Nigam, another Rajya Sabha member. But the same was negatived after debate.

In the year 1962, another resolution of abolition of capital punishment was moved in the Lok Sabha by Raghunath Singh, a sitting member of Parliament. The said resolution received a serious attention but was withdrawn on the undertaking given by the Government that a

transcript of the whole debate would be forwarded to the Law Commission for consideration in the context of its review of the *Indian Penal Code,* 1860 and the *Criminal Procedure Code*, 1973. The Law Commission in the year 1967 submitted a separate report on capital punishment to the Government. The Report hence favoured the retention. The 35th Law Commission Report's recommendations stated:

It is difficult to rule out the validity of, or the strength behind, many of the arguments for abolition. Nor does the Commission treat lightly the argument of irrevocability of the sentence of death, the need for a modern approach, the severity of capital punishment, and the strong feeling shown by certain sections of public opinion, in stressing deeper questions of human values. Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population, and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area in this context. Similarly, even if abolition in some parts of India may not make a material difference, it may be fraught with serious consequences in other parts. On a consideration of all the issues involved, the Commission is of the opinion that capital punishment should be retained in the present state of the country.

The international community's consensus against the death penalty is growing; India thus is becoming increasingly isolated in its commitment to the death penalty. India has complied with the International Human Rights Instruments such as the International Covenant Civil and Political Rights but has not followed with abolishing the death penalty as so many other nations have done. In December 2007, India voted against a United Nations General Assembly resolution calling for a moratorium on the death penalty. In November 2012, India again upheld its stance on capital punishment by voting against the UN General Assembly draft resolution seeking to ban death penalty. On 31 August 2015, the Law Commission of India submitted 262nd Report to the government which recommended the abolition of capital punishment for all crimes in India, excepting the crime of waging war against the nation or for terrorism-related offences. The report cited several factors to justify abolishing the death penalty, including its abolition by 140 other nations, its arbitrary and flawed application and its lack of any proven deterring effect on criminals.

Code of Criminal Procedure and Death Sentence

- It is only the Sessions Court who alone can declare the death sentence as per the set of offences enlisted in the *Indian Penal Code,* 1860 i.e. the Judicial Magistrate below the rank of Sessions Judge has no authority to impose a death sentence.
- Prior to 1955, Section 367(5) of the *Code of Criminal Procedure*, 1898 insisted upon the Court to state its reasons if the sentence of death was not imposed in case of murder. But in 1955 Sub-

Section (5) of Section 367 was deleted. The deletion of Sub-Section (5) of Section 367 meant that normally the sentence of life imprisonment should be the rule and death sentence should be imposed only if there were aggravating circumstances.

- In the present *Code of Criminal Procedure* it is provided in Section 354 that the judge has to give special reasons for imposition of death sentence. Also, it is mandatory for the judge to allow hearing, for the punishment imposed.
- Section 366 of the *Code of Criminal Procedure* provides that when a Sessions Court passes a sentence of death, it will not be executed until the High Court confirms the same.

Constitutionality and Death Sentence

The Constitutionality aspect of Death Sentence will be discussed hereafter with the help of principles held in Case Laws:

Serial No	Case and Citation	Held
	Jagmohan Singh v. *State of U. P* (1973) 1 SCC 20	The first challenge to the constitutionality of the death penalty in India came in the 1973. he petitioners argued that the death penalty violated Articles 14, 19 and 21 of the *Constitution of India*. It was argued that since the death sentence extinguishes, along with life, all the freedoms guaranteed under Article 19(1) (a) to (g), it was an unreasonable denial of these freedoms and not in the interests of the public. Further, the petitioners argued that the discretion vested in judges in deciding to impose death sentence was uncontrolled and unguided and violated Article 14. Finally, it was contended because the provisions of the law did not provide a procedure for the consideration of circumstances crucial for making the choice between capital punishment and imprisonment for life, it violated Article 21. This case was decided before the *Code of Criminal Procedure* was re-enacted in 1973, making the death penalty an exceptional sentence. The Supreme Court found that the death penalty was a permissible punishment, and did not violate the Constitution.
	Ediga Anamma v. *State of Andhra Pradesh* (1974) 4 SCC 443.	In commuting the death sentence to life imprisonment, the Court observed the following: "In any scientific system which turns the focus, at the sentencing stage, not only on the crime but also the criminal, and seeks to personalise the punishment so that the reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined." the court also said, "a legal policy on life or death cannot be left for ad hoc mood or

		individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life”.
	Rajendra Prasad v. *State of Uttar Pradesh* 1979) 3 SCC 646	The Court found itself confronting, not the constitutionality of the death sentence, but that of sentencing discretion. The Court per majority (of two judges) said, “special reasons necessary for imposing death penalty must relate, not to the crime as such but to the criminal”.
	Bachan Singh v. *State of Punjab,* (1980) 2 SCC 684	The Court adopted the ‘rarest of rare’ guideline for the imposition of the death penalty, saying that reasons to impose or not impose the death penalty must include the circumstances of the crime and the criminal. Justice Bhagwati in his dissenting opinion found the death penalty necessarily arbitrary, discriminatory and capricious. He reasoned that “the death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived sections of the community and the rich and the affluent usually escape, from its clutches. This circumstance also adds to he arbitrary and capricious nature of the death penalty and renders it unconstitutional as being violative of Articles 14 and 21.”
	Mithu v. *State of Punjab* (1983) 2 SCC 277.	The Supreme Court was confronted with the mandatory sentence of death enacted in Section 303 of the IPC. The Court held that the mandatory death sentence was unconstitutional, stating: “A standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case. It is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case”.
	Deena v. *Union of India* (1983) 2 SCC 277.	Rejecting a constitutional challenge to execution by hanging, held that while a prisoner cannot be subjected to barbarity, humiliation, torture or degradation before the execution of the sentence, hanging did not involve these either directly or indirectly.
	Parmanand Katara v. *Union of India* 1995) 3 SCC 248.	The Court accepted that allowing the body to remain hanging beyond the point of death – the Punjab Jail Manual instructing that the body be kept hanging for half an hour after death – was a violation of the dignity of the person and hence unconstitutional.

	T.V. Vatheeswaran v. *State of Tamil Nadu* (1983) 2 SCC 68	The Court held that a delay in execution of sentence that exceeded two years would be a violation of procedure guaranteed by Article 21.
	Sher Singh v. *State of Punjab* 1983) 2 SCC 344	It was held that delay could be a ground for invoking Article 21, but that no hard and fast rule could be laid down that delay would entitle a prisoner to quashing the sentence of death.
.	*Triveniben* v. *State of Gujarat* 1989) 1 SCC 678	The Court said, "the only delay which would be material for consideration will be the delays in disposal of the mercy petitions or delay occurring at the instance of the Executive."
.	*Shatrughan Chauhan* v *Union of India.* (2014) 3 SCC 1.	This case also laid down guidelines for "safeguarding the interest of the death row convicts" which included reaffirming the unconstitutionality of solitary or single cell confinement prior to rejection of the mercy petition by the President, necessity of providing legal aid, and the need for a 14- day period between the rejection of the mercy petition and execution.
	Shatrughan Chauhan v. *Union of India*, (2014) 3 SCC 1, at paras 98-103	The Supreme Court has characterized the nature of mercy provisions (Articles"72 and 161) as constitutional duty rather than privilege or a matter of grace.
.	*Vikram Singh* v. *Union of India*, (Criminal Appeal No. 824 of 2013, Supreme Court of India, decided on August 21, 2015)	The Supreme Court acknowledged that "punishments must be proportionate to the nature and gravity of the offences for which the same are prescribed" However, it held that "Section 364A cannot be dubbed as so outrageously disproportionate to the nature of the offence as to call for the same being declared unconstitutional" saying death sentences would only be awarded in the rarest of rare cases.
.	*Epuru Sudhakar* v. *Govt. of A.P.* (2006) 8 SCC 161	The exercise of power under Article 72 by the President and Article 161 by the Governor is subject to limited form of judicial review.
Source: India. Law Commission of India, Report no.262 on Death Penalty, August 2015		

Alternative to Death Penalty

Section 53 of the *Indian Penal Code*, 1860 enumerates various kinds of punishments that can be awarded to the offenders, the highest being the death penalty and the second being the sentence of imprisonment for life. At present there is no sentence that can be awarded higher than

imprisonment for life and lower than death penalty. In USA a higher punishment called "Imprisonment for life without commutation or remission" is one of the punishments. As death penalty is harsh and irreversible the Supreme Court has held that death penalty should be awarded only in the rarest of the rare cases, the committee considers that it is desirable to prescribe a punishment higher than that of imprisonment for life and lower than death penalty. Section 53 is suitably amended to include "Imprisonment for life without commutation or remission" as one of the punishments. Wherever imprisonment for life is one of the penalties prescribed under the *Indian Penal Code*, 1860 the following alternative punishment be added namely "imprisonment for life without commutation or remission". Wherever punishment of imprisonment for life without commutation or remission is awarded, the State Governments cannot commute or remit the sentence. Therefore, suitable amendment may be made to make it clear that the State Governments cannot exercise power of remission or commutation when sentence of "Imprisonment for life without remission or commutation" is awarded. This however cannot affect the Power of Pardon etc. of the President and the Governor under Articles 72 and 161 of the *Constitution of India,* 1950 respectively.

Countries that seek to abolish the death penalty face the task of establishing viable alternatives that sufficiently satisfy the demands of retribution while remaining proportionate to the gravity of the crime; that appear not to greatly lessen any possible marginal deterrent effect; that incapacitate those who continue to pose a genuine threat to public safety; and that provide a humane environment with opportunities for the prisoner to be rehabilitated, or at least not made more dangerous by the conditions of confinement.

In considering what should replace the death penalty they will, of course, need to bear in mind that there is a difference between:

(i) providing a suitable penalty in cases where the executive reprieves or commutes a death sentence;

(ii) replacing the death penalty for crimes of lesser seriousness than murder when the scope of capital punishment is being retracted;

(iii) finding a replacement penalty for murder when a mandatory death sentence is abolished and the courts are allowed discretion as to punishment; and

(iv) replacing capital punishment de jure at what is often the last cycle of the abolition process, when executions have been reserved for a small number of the most egregious murders:

ECONOMICS-I (207)

UNIT-I

Definition:

Microeconomics (from Greek prefix*mikro*-meaning "small" and economics) is a branch ofeconomics that studies the behavior of individual households and firms in making decisions on the allocation of limited resources. Typically, it applies to markets where goods or services are bought and sold. Microeconomics examines how these decisions and behaviors affect the supply and demand for goods and services, which determines prices, and how prices, in turn, determine the quantity supplied and quantity demanded of goods and services. This is in contrast to macroeconomics, which involves the "sum total of economic activity, dealing with the issues of growth, inflation, and unemployment." Microeconomics also deals with the effects of national economic policies (such as changing taxation levels) on the aforementioned aspects of the economy. Particularly in the wake of the Lucas critique, much of modern macroeconomic theory has been built upon 'micro foundations'—i.e. based upon basic assumptions about micro-level behavior.

One of the goals of microeconomics is to analyze market mechanisms that establish relative prices amongst goods and services and allocation of limited resources amongst many alternative uses. Microeconomics analyzes market failure, where markets fail to produce efficient results, and describes the theoretical conditions needed for perfect competition. Significant fields of study in microeconomics include general equilibrium, markets under asymmetric information, choice under uncertainty and economic applications of game theory. Also considered is the elasticity of products within the market system.

Wealth Definition:

The early economists like J.E. Cairnes, J.B.Say, and F.A.Walker have defined economics as a science of wealth. Adam Smith, who is also regarded as father of economics, stated that economics is a science concerned with the nature and causes of wealth of nations. That is, economics deal with the question as to how to acquire more and more wealth by a nation. J.S.Mill opined that it is the practical science dealing with the production and distribution of wealth. The American economist F.A.Walker says that economics is that body of knowledge, which relates to wealth. Thus, all these definitions relate to wealth.

However, the above definitions have been criticized on various grounds. As a result, economists like Marshall, Robbins and Samuelson have put forward more comprehensive and scientific definitions. Emphasis has been gradually shifted from wealth to man. As Marshall puts, it is "on the one side a study of wealth; and on the other, and more important side, a part of the study of man."

Welfare Definition:

According to Marshall, economics not only analysis the aspect of how to acquire wealth but also how to utilize this wealth for obtaining material gains of human life. In fact, wealth has no meaning in itself unless it is used to purchase all those things which are required for our sustenance as well as for the comforts necessary for life. Marshall, thus, opined that wealth is a means to achieve certain ends. In other words, economics is not a science of wealth but a science of man primarily. It may be called as the science which studies human welfare. Economics is concerned with those activities, which relates to wealth not for its own sake, but for the sake of human welfare that it promotes. According to Canon, "The aim of political economy is the explanation of the general causes on which the material welfare of human beings depends." Marshall in his book, "Principles of Economics", published in 1890, describes economics as, "the study of mankind in the ordinary business of life; it examines that part of the individual and social action which is most closely connected with the attainment and with the use of the material requisites of well being".

On examining the Marshall's definition, we find that he has put emphasis on the following four points:

(a) Economics is not only the study of wealth but also the study of human beings. Wealth is required for promoting human welfare.

(b) Economics deals with ordinary men who are influenced by all natural instincts such as love, affection and fellow feelings and not merely motivated by the desire of acquiring maximum wealth for its own sake. Wealth in itself is meaningless unless it is utilized for obtaining material things of life.

(c) Economics is a social science. It does not study isolated individuals but all individuals living in a society. Its aim is to contribute solutions to many social problems.

(d) Economics only studies 'material requisites of well being'. That is, it studies the causes of material gain or welfare. It ignores non-material aspects of human life.

This definition has also been criticized on the ground that it only confines its study to the material welfare. Non-material aspects of human life are not taken into consideration. Further, as Robbins said the science of economics studies several activities, that hardly promotes welfare.

Scarcity Definition:

Lionel Robbins challenged the traditional view of the nature of economic science. His book, "Nature and Significance of Economic Science", published in 1932 gave a new idea of thinking about what economics is. He called all the earlier definitions as classificatory and unscientific. According to him, *"Economics is the science which studies human behaviour as a relationshipbetween ends and scarce means which have alternative uses."* This definition focused itsattention on a particular aspect of human behaviour, that is, behavior associated with the utilization of scarce resources to achieve unlimited ends (wants). Robbins definition, thus, laid emphasis on the following points:

- 'Ends' are the wants, which every human being desires to satisfy. Want is an effective desire for a thing, which can be satisfied by making an effort for obtaining it. We have unlimited wants and as one want gets satisfied another arises. For instance, one may have the desire to buy a car or a flat. Once the car or the flat is purchased, the person wishes to buy a more spacious and designable car and the list of his wants does not stop here but goes on one after another. As human wants are unlimited, we have to make a choice between the most urgent want and less urgent wants. Thus the problem of choice arises. That is why economics is also called as a science of choice. If wants had been limited, they would have been satisfied and there would have been no economic problem.

(*b*) 'Means 'or resources are limited. Means are required to be used for the satisfaction of various wants. For instance, money is an important means to satisfy many of our wants. As stated, means are scarce (short in supply in relation to demand) and as such these are to be used

Optimally. In other words, scarce or limited means/resources are to be economized. We should not make waste of the limited resources but utilize them very judiciously to get the maximum satisfaction.

(c) Robbins also said that, the scarce means have alternative uses. It means that a commodity or resource can be put to different uses. Hence, the demand in the aggregate for that commodity or resource is almost insatiable. For instance, if we have a hundred rupee note, we can use it either to purchase a book or a fashionable clothe. We may use it in other unlimited ways as we like.

Let us now turn our attention to the definitions put forward by modern economists. J.M.Keynes defined economics as the study of the management of scarce resources and of the determination of income and employment in the economy. Thus his study centered on the causes of economic fluctuations to see how economic stability could be established. According to F. Benham, economics is, “a study of the factors affecting the size, distribution and stability of a country’s national income.” Recently, economic growth and development has taken an important place in the study of economics. Prof. Samuelson has given a growth oriented definition of economics. According to him, economics is the study and use of scarce productive resources overtime and distribute these for present and future consumption. In short, economics is a social science concerned with the use of scarce resources in an optimum manner and in attainment of desired level of income, output, employment and economic growth.

Methodology:

The Deductive Method:

Deduction Means reasoning or inference from the general to the particular or from the universal to the individual. The deductive method derives new conclusions from fundamental assumptions or from truth established by other methods. It involves the process of reasoning from certain laws or principles, which are assumed to be true, to the analysis of facts.

Then inferences are drawn which are verified against observed facts. Bacon described deduction as a “descending process” in which we proceed from a general principle to its consequences. Mill characterised it as a priori method, while others called it abstract and analytical.

Deduction involves four steps: (1) Selecting the problem. (2) The formulation of assumptions on the basis of which the problem is to be explored. (3) The formulation of hypothesis through the process of logical reasoning whereby inferences are drawn. (4) Verifying the hypothesis. These

steps are discussed as under.

(1) Selecting the problem:

The problem which an investigator selects for enquiry must be stated clearly. It may be very wide like poverty, unemployment, inflation, etc. or narrow relating to an industry. The narrower the problem the better it would be to conduct the enquiry.

(2) Formulating Assumptions:

The next step in deduction is the framing of assumptions which are the basis of hypothesis. To be fruitful for enquiry, the assumption must be general. In any economic enquiry, more than one set of assumptions should be made in terms of which a hypothesis may be formulated.

(3) Formulating Hypothesis:

The next step is to formulate a hypothesis on the basis of logical reasoning whereby conclusions are drawn from the propositions. This is done in two ways: First, through logical deduction. If and because relationships (p) and (q) all exist, then this necessarily implies that relationship (r) exists as well. Mathematics is mostly used in these methods of logical deduction.

(4) Testing and Verifying the Hypothesis:

The final step in the deductive method is to test and verify the hypothesis. For this purpose, economists now use statistical and econometric methods. Verification consists in confirming whether the hypothesis is in agreement with facts. A hypothesis is true or not can be verified by observation and experiment. Since economics is concerned with human behaviour, there are problems in making observation and testing a hypothesis.

For example, the hypothesis that firms always attempt to maximise profits, rests upon the observation that some firms do behave in this way. This premise is based on a priori knowledge which will continue to be accepted so long as conclusions deduced from it are consistent with the facts. So the hypothesis stands verified. If the hypothesis is not confirmed, it can be argued that the hypothesis was correct but the results are contradictory due to special circumstances.

The Inductive Method:

Induction "is the process of reasoning from a part to the whole, from particulars to generals or from the individual to the universal." Bacon described it as "an ascending process" in which facts are collected, arranged and then general conclusions are drawn.

The inductive method was employed in economics by the German Historical School which sought to develop economics wholly from historical research. The historical or inductive method expects the economist to be primarily an economic historian who should first collect material, draw generalizations, and verify the conclusions by applying them to subsequent events. For this, it uses statistical methods. The Engel's Law of Family Expenditure and the Malthusian Theory of Population have been derived from inductive reasoning.

Scope:

Scope means the sphere of study. We have to consider what economics studies and what lies beyond it. The scope of economics will be brought out by discussing the following.
a) Subject – matter of economics.
b) Economics is a social science
c) Whether Economics is a science or an art?
d) If Economics is science, whether it is positive science or a normative science?

a) Subject – matter of economics: Economics studies man's life and work, not the whele of it, but only one aspect of it. It does not study how a person is born, how he grows up and dies, how human body is made up and functions, all these are concerned with biological sciences, Similarly Economics is also not concerned with how a person thinks and the human organizations being these are a matter of psychology and political science. Economics only tells us how a man utilizes his limited resources for the satisfaction of his unlimited wants, a man has limited amount of money and time, but his wants are unlimited. He must so spend the money and time he has that he derives maximum satisfaction. This is the subject matter of Economics.

Economic Activity: It we look around, we see the farmer tilling his field, a worker is working in factory, a Doctor attending the patients, a teacher teaching his students and so on. They are all engaged in what is called "Economic Activity". They earn money and purchase goods. Neither money nor goods is an end in itself. They are needed for the satisfaction of human wants and to promote human welfare.

To fulfill the wants a man is taking efforts. Efforts lead to satisfaction. Thus wants- Efforts- Satisfaction sums up the subject matter of economics.

b) Economics is a social Science: In primitive society, the connection between wants efforts and satisfaction is close and direct. But in a modern Society things are not so simple and straight. Here man produces what he does not consume and consumes what he does not produce. When he produces more, he has to sell the excess quantity. Similarly he has to buy a product which is not produced by him. Thus the process of buying and selling which is called as Exchange comes in between wants efforts and satisfaction.
Nowadays, most of the things we need are made in factories. To make them the worker gives his labor, the land lord his land, the capitalist his capital, while the businessman organizes the work of all these. They all get reward in money. The laborer earns wages, the landlord gets rent the capitalist earns interest, while the entrepreneur's (Businessman) reward is profit. Economics studies how these income—wages, rent interest and profits-are determined. This process in called "Distribution: This also comes in between efforts and satisfaction.
Thus we can say that the subject-matter of Economics is

1. Consumption- the satisfaction of wants.
2. Production- i.e. producing things, making an effort to satisfy our wants
3. Exchange- its mechanism, money, credit, banking etc.
4. Distribution – sharing of all that is produced in the country. In addition, Economics also studies "Public Finance"

Macro Economics – When we study how income and employment is generated and how the level of country's income and employment is determined, at aggregated level, it is a matter of macro-economics. Thus national income, output, employment, general price level economic growth etc. are the subject matter of macro Economics.
Micro-Economic – When economics is studied at individual level i.e. consumer's behavior, producer's behavior, and price theory etc it is a matter of micro-economics.

c) Economics, a Science or an Art? Broadly different subjects can be classified as science subjects and Arts subjects, Science subjects groups includes physics, Chemistry, Biology etc while Arts group includes History, civics, sociology Languages etc. Whether Economics is a science or an art? Let us first understand what is terms 'science' and 'arts' really means.
A science is a systematized body of knowledge. A branch of knowledge becomes systematized when relevant facts hove been collected and analyzed in a manner that we can trace the effects back to their and project cases forward to their effects. In other words laws have been discovered

explaining facts, it becomes a science, In Economics also many laws and principles have been discovered and hence it is treated as a science. An art lays down formulae to guide people who want to achieve a certain aim. In this angle also Economics guides the people to achieve aims, e.g. aim like removal poverty, more production etc. Thus Economics is an art also. In short Economics is both science as well as art also.

d) Economics whether positive or normative science: A positive science explains "why" and "wherefore" of things. i.e. causes and effects and normative science on the other hand rightness or wrongness of the things. In view of this, Economics is both a positive and. normative science. It not only tells us why certain things happen, it also says whether it is right or wrong the thing to happen. For example, in the world few people are very rich while the masses are very poor. Economics should and can explain not only the causes of this unequal distribution of wealth, but it should also say whether this is good or bad. It might well say that wealth ought to be fairly distributed. Further it should suggest the methods of doing it.

Economic Problems:

Economic problem is the problem of how to make the best use of limited, or scarce, resources. The economic problem exists because, although the needs and wants of people are endless, the resources available to satisfy needs and wants are limited. Limited resources

Resources are limited in two essential ways:

1. Limited in physical quantity, as in the case of land, which has a finite quantity.
2. Limited in use, as in the case of labour and machinery, which can only be used for one purpose at any one time.

Opportunity cost:

Choice and opportunity cost are two fundamental concepts in economics. Given that resources are limited, producers and consumers have to make choices between competing alternatives. All economic decisions involve making choices. Individuals must choose how best to use their skill and effort, firms must choose how best to use their workers and machinery, and governments must choose how best to use taxpayer's money.

In microeconomic theory, the opportunity cost of a choice is the value of the best alternative forgone, in a situation in which a choice needs to be made between several mutually exclusive alternatives given limited resources. Assuming the best choice is made, it is the "cost" incurred

by not enjoying the benefit that would be had by taking the second best choice available.

Economic Agents:

Aperson, company, or organization that has an influence on the economy by producing, buying, or selling: The proper functioning of marketeconomy is influenced mostly by the stateinteraction with the economicagent.

Economists like to refer to the people they study as economic agents. Economic agents come in two basic varieties, producers and consumers, and we study their behavior in the Theory of the Firm and the Theory of the Consumer

Economic Organizations:

The three major international economic organizations are the World Bank, the International Monetary Fund (IMF), and the World Trade Organization (WTO). The WTO emerged out of the General Agreement on Tariffs and Trade (GATT) in 1995; it is an arrangement across countries that serves as a forum for negotiations on trading rules as well as a mechanism for dispute settlements in trade issues. By contrast, the World Bank and IMF deal with their member countries one at a time. They have little influence with industrial countries but can affect developing countries during times of economic crisis and when those countries seek additional foreign exchange resources. The origins and evolution of the three organizations are of considerable interest. Perhaps even more important in light of the recent financial crises in Mexico, East Asia, and a few other countries, are the questions that arise about the current and future roles of the IMF and the World Bank.

These questions cover a broad set of issues. A healthy open trading system is crucial for the progress of the international economy. It is particularly important in providing an environment in which developing countries can successfully reform their policies and achieve rapid economic growth and rising living standards for all. I have been particularly interested in the relationship between preferential trading arrangements, such as the North American Free Trade Agreement (NAFTA), and the WTO. The issue is simple: the WTO is based on the principle of open, nondiscriminatory trade among its members, while preferential trading arrangements are, by their nature, discriminatory. Under NAFTA, for example, goods originating in Mexico and Canada are not subject to duties when they enter the United States, yet the same goods from

other countries are subject to U.S. duties. Assuring that preferential trading arrangements will not block progress in multilateral liberalization is important, and I am now completing a paper in which I analyze how much discrimination has been a factor under the first three years of NAFTA.

My other major concern regarding international economic organizations is closely related to the subject of developing countries' economic policy reforms. I want to know what the current and future roles of the World Bank and IMF will be in economic policy reform in developing countries. In the case of the World Bank, for example, to what extent will the Bank need to focus its resources on poor countries and the support of economic policy reforms, as opposed to tackling "new issues," such as gender and ethnicity (including treatment of minorities). Both the Bank and the IMF have been criticized by many in light of the Asian financial crises of 1997 and 1998.

Marginalism:

One of the methodological principles of bourgeois political economy, based on the use of the analysis of marginal values in research on economic laws and categories.

Marginal analysis in economic theory was introduced in the middle of the 19th century by A. Cournot of France and J. von Thuenen and H. Gossen of Germany. Marginalism became widespread in the last quarter of the 19th century, when bourgeois political economists initiated an intensive search for new forms and methods of theoretical analysis and of capitalist apologetics. Marginalism was used after about 1880 by the basic schools in bourgeois political economy, such as the Austrian school and the mathematical school. A thorough substantiation of marginalism was developed by J. B. Clark.

Marginalism views economics as the interaction of individual economies. In marginalism the study of the laws of economic functioning is based on the analysis of the economic behavior of the decision-maker during the production process and in the market. In this analysis quantitative methods can be used. Mathematical analysis is particularly useful in studying the functional connection between factors (for example, the dependence of demand for merchandise on the price, the prices of other goods, and the income of the consumer; the effect of various ratios of input of labor and capital on productivity). It is equally useful in deriving marginal functions

(marginal utility, demand elasticity, the marginal productivity of the factors of production). The specific mathematical approach for marginal analysis was developed by the economists of the mathematical school.

The shift from free competition to all-powerful monopolies, and also the growing rate of state-monopoly regulation of the economy, placed before the bourgeois economists a number of practical tasks that could not be implemented by a strict reliance on the subjectivistic understanding of economic processes. Among the tasks were determining the use of economic-mathematical models, analyzing and forecasting market trends, computing the coefficients of the elasticity of demand, and optimalizing production inputs.

The characteristic feature of contemporary marginalists is the departure (although inconsistent) from the orthodox subjectivist interpretation of the economic categories and the enhancement, especially in the works of econometrists, of the role of formal-logical and empiric analysis. Thus, several bourgeois economists and econometrists (H. Schultz, C. Cobb, and P. Douglas) were able to develop mathematical methods of research into some problems of the economy, particularly forecasting and analyzing demand and optimalizing production inputs. A number of provisions and findings of the marginal-school economists had a definite influence on the development of a number of fields of applied mathematics, including theory of games, linear programming, and operations research. The basic marginalistic conceptions, such as marginal utility, marginal rate of replacement, marginal productivity, and marginal capital efficiency, are used in the contemporary bourgeois theories of demand, the firm, prices, and market equilibrium.

Time Value of Money:

The idea that money available at the present time is worth more than the same amount in the future due to its potential earning capacity. This core principle of finance holds that, provided money can earn interest, any amount of money is worth more the sooner it is received.

A time value of money calculation is a calculation that solves for one of several variables in a financial problem.

In a typical case, the variables might be: a balance (the real or nominal value of a debt or a financial asset in terms of monetary units), a periodic rate of interest, the number of periods, and

a series of cash flows. (In the case of a debt, cash flows are payments against principal and interest; in the case of a financial asset, these are contributions to or withdrawals from the balance.) More generally, the cash flows may not be periodic but may be specified individually. Any of the variables may be the independent variable (the sought-for answer) in a given problem. For example, one may know that: the interest is 0.5% per period (per month, say); the number of periods is 60 (months); the initial balance (of the debt, in this case) is 25,000 units; and the final balance is 0 units. The unknown variable may be the monthly payment that the borrower must pay.

Differences between Macro and Microeconomics:

To an extent, both macro and microeconomics look at supply and demand, as well as price levels. However, each field views these factors from a different standpoint. To better grasp the meaning of macroeconomics, it might be helpful to think of it as a "top-down approach" toward understanding the economy. Macroeconomics paints a picture of the economic conditions in a particular country as a whole; however, knowledge of macroeconomic principles can be used to develop an understanding of conditions for the individual players in the economy. Likewise, microeconomics looks at the economy from the bottom up, but the information it gathers about individual households and businesses is helpful in gaining an understanding of general economic conditions. The difference of micro and macroeconomics may seem well-defined on the surface, but these two categories of study can overlap in significant ways. In fact, no student of the economy can truly comprehend the meaning of macroeconomics without comprehending the meaning of microeconomics as well.

Positive v/s normative science:

It deals with thing as they “ought to be”. It has no objection to discussion the moral rightness or wrongness of things. Economics is not only explaining facts as they are but also justifies them.

Positive Science deals with things as they are means “What is”. It explains their causes and effect but it remain strictly neutral as regards ends, it refuses to pass moral judgments.

Both can be distinguish as follows:

Basis: Positive Normative

- Expresses What is : What ought to be
- Based on Cause & effect of facts : Ethics
- Deal with Actual or realistic situation : Idealistic situation
- Value judgment Are not given : Are given

Partial vs. General:
Microeconomic models are usually classified as partial and general equilibrium models. As a layman, I understand that partial equilibrium focuses attention on a few economic variables to find the equilibrium, while general eq. models capture a larger interaction.

Static vs. Dynamic: Microeconomic models are usually classified as partial and general equilibrium models. As a layman, I understand that partial equilibrium focuses attention on a few economic variables to find the equilibrium, while general eq. models capture a larger interaction.

Short run vs. Long run:
In microeconomics, the long run is the conceptual time period in which there are no fixed factors of production, so that there are no constraints preventing changing the output level by changing the capital stock or by entering or leaving an industry. The long run contrasts with the short run, in which some factors are variable and others are fixed, constraining entry or exit from an industry. In macroeconomics, the long run is the period when the general price level, contractual wage rates, and expectations adjust fully to the state of the economy, in contrast to the short run when these variables may not fully adjust.

Economic offences:

Economic and financial offences cover fraud, forgery and counterfeiting, offences against the legislation governing cheques (in particular forgery or use of stolen cheques), forgery or use of credit cards, undeclared employment, offences against companies (such as misuse of company assets).

1. The process through which statutes are enacted by a legislative body that is established and empowered to do so.
2. A particular bill or other piece of legislation
The legislation changed how we run our business as we must do our best to foresee possible governmental and regulation changes

Relation between Economics and Law:
Law and economics or economic analysis of law is the application of economic theory (specifically microeconomic theory) to the analysis of law. Economic concepts are used to explain the effects of laws, to assess which legal rules are economically efficient, and to predict which legal rules will be promulgated.

Positive law and economics

Positive law and economics uses economic analysis to predict the effects of various legal rules. So, for example, a positive economic analysis of tort law would predict the effects of a strict liability rule as opposed to the effects of a negligence rule. Positive law and economics has also at times purported to explain the development of legal rules, for example the common law of torts, in terms of their economic **efficiency.**

Normative *law and economics*

Normative law and economics goes one step further and makes policy recommendations based on the economic consequences of various policies. The key concept for normative economic analysis is efficiency, in particular, allocative efficiency.

A common concept of efficiency used by law and economics scholars is Pareto efficiency. A legal rule is Pareto efficient if it could not be changed so as to make one person better off without making another person worse off. A weaker conception of efficiency is Kaldor-Hicks efficiency. A legal rule is Kaldor-Hicks efficient if it could be made Pareto efficient by some parties compensating others as to offset their loss

UNIT – II

Demand:

Meaning: The demand for any commodity at a given price is the quantity of it which will bebought per unit of time at that price.

Elements of Demand: According to the definition of demand here are three elements of demandfor a commodity:-

(i) There should be a desire for a commodity.

(ii) The consumer should have money to fulfill that desire.

(iii) The consumer should be ready to spend money on that commodity.

Thus we can define demand as the desire to buy a commodity which is backed by sufficient purchasing power and a willingness to spend.

Determinants of Demand:

There are many economic, social and political factors which greatly influence the demand for a commodity. Some of these factors are discussed below:

(1) Price of the Commodity

(2) Price of Related Goods

(i) Complementary Goods

(ii) Substitute Goods

(3) Level of Income and Wealth of the Consumer

(i) Necessaries

(ii) Inferior goods

(iii) Luxuries

(4) Tastes and Preference

(5) Government Policy

(6) Other Factors:

(i) Size and Composition of Population

(ii) Distribution of Income and Wealth

(iii) Economic Fluctuations

Law of Demand:

The law of demand states that, other things being equal, the demand for good increases with a decrease in price and decreases in demand with a increase in price. The term other things being equal implies the prices of related goods, income of the consumers, their tastes and preferences etc. remain constant.

Demand Schedule:

A Demand schedule is a list of the different quantities of a commodity which consumes purchase at different period of time. It expresses the relation between different quantities of the commodity demanded at different prices.

(i) Individual Demand Schedule: It is defined as the different quantities of a given commodity which a consumer will buy at all possible prices.

(ii) Market Demand Schedule: Market demand schedule is defined as the quantities of a given

commodity which all consumers will buy at all possible prices at a given moment of time.

Demand Curve is simply a graphic representation of demand schedule. It expresses the relationship between different quantities demanded at different possible prices of the given commodity.

Individual Demand Curve:The graphic representation of Individual Demand is known isIndividual Demand Curve.

Market Demand Curve: The graphic representation of market demand schedule is known asMarket Demand Curve .Thus market demand curve is the one that represents total quantities of a commodity demanded by all the consumers in the market at different prices. It is the horizontal summation of the individual demand curves.

Demand Curve slopes downwards:

Reasons are:-

(i) Law of Diminishing Marginal Utility: The law of demand is based on the law of diminishing marginal utility which states that as the consumer purchases more and more units of a commodity, the satisfaction derived by him from each successive unit goes on decreasing. Hence at a lesser price, he would purchase more. Being a rational human beings the consumer always tries to maximize his satisfaction and does so equalizing the marginal utility of a commodity with its price i.e. Mux = px. It means that now the consumer will buy additional units only when the price falls

(ii) New Consumers:When the price of a commodity falls many consumers who could notbegin to purchase the commodity e.g. suppose when price of a certain good 'x' was Rs. 50 market demand was 60 units now when the price falls to Rs. 40, new consumers enter the market and the overall market demand rises to 80 units.

(iii) Several Use of Commodity:There are many commodities which can be put to severaluses e.g. coal, electricity etc. When the prices of such commodities go up, they will be used for important purpose only and their demand will be limited. On the other hand, when their price fall they are used for varied purpose and as a result their demand extends. Such inverse relation between demand and price makes the demand curve slope downwards.

(iv) Income Effect : When price of a commodity changes, the real income of a consumer alsoundergoes a changes. Hence real income means the consumer's purchasing power. As the price of a commodity falls the real income of a consumer goes up and he purchases more units of a commodity eg. Suppose a consumer buys units wheat at a price Rs. 40/kg now, when the price falls to Rs. 30/kg. His purchasing power or the real income increase which induces him to buy more units of wheat.

(v) Substitution Effect : As the price of a commodity falls the consumer wants to substitute thisgood for those good which now have become relatively expensive e.g. among the two substitute goods tea and coffee, price of tea falls then consumer substitutes tea for coffee. This is caused the 'Substitution effect' which makes the demand curve sloped downwards. In a nutshell, with a fall in price more units are demanded partly due to income effect and partly due to substitution effect. Both of these are jointly known as the 'price effect'. Due to this negative price effect the demand curve slopes downwards.

Exceptions to the Law of Demand:

Exceptions to the law of demand refer to such cases where the law of demand does not operate, i.e., a positive relationship is established between price and quantity demanded.

- Giffen Goods: Sir Giffen made an interesting observation in 1845 during famine in Ireland. When price of potatoes went up, poor people purchased more quantity of potatoes instead of less quantity as expected from the law of demand. The reason was that between two items of food consumption meat and potatoes- potatoes were still cheaper, with the result that the poor families purchased more of potatoes and less of meat. This is known as Giffen effect which is seen in cheap necessary foodstuffs. Again, the word 'Giffen' is not synonymous with 'inferior'. It simply refers to those goods which have a positive relationship with price.
- Conspicuous Goods or Goods of Ostentation
- Conspicuous Necessities
- Future Expectations About Prices
- Change in Fashion

- Ignorance
- Emergency

Change in Demand:

(1) Movement along the Same Demand Curve : When due to change in price alone demandchanges, it is expressed by different points on the same demand curve.

(i) Expansion of Demand: When with a fall in price, demand for a commodity rises (other things being equal it is called expansion of demand. It is represented through the downward movement along the demand curve.

(ii) Contraction of Demand: When with an increase in price, demand for a commodity falls (other things being equal) It is called contraction of demand. It is represented by upward movement along the demand curve.

(2) Shifting of Whole Demand Curve: -When due to change in factors other than price of thesame commodity like change in taste, income etc. the demand changes, the entire demand curve shifts either upwards or downwards.

(i) Increase in demand: -When due to favorable change in factors other than the price thedemand of the commodity rises it is called increase in demand. It is represented by a right ward shift in the demand curve.

Increase in demand takes place in two ways:-

(a) When more purchase takes place at same price.

(b) When same purchase takes place at more price. Here DD is the original demand curve where Q1 quantity is bought a P price. Due to the change in factors the quantity purchased increases to Q2 at the same price P. this causes the demand curve to shift upward or to the right. This shift in demand curve is called increase of demand.

(ii) Decrease in Demand: When due to change in factors other than the price the demand of the commodity falls, it is called decrease in demand. Its is represented by a left ward shift in the demand curve.

Decrease in demand takes place in two ways :-

(a) When less purchase takes place a same price.

(b) When same purchase takes place at less price.

Here DD is the original demand curve where Q1 quantity is bought at P price. Due to the change in other factors the quantity purchased decreases to Q2 at same price P.This cause the demand curve to shift downward or leftward. This shift in demand curve is called decrease in demand.

Elasticity of Demand:

Meaning: The elasticity of demand measures the responsiveness of the quantity demanded of agood to change in its quantitative determinant. Types Elasticity of demand are as follows :-

- Price Elasticity of Demand
- Income Elasticity of Demand
- Cross Elasticity of Demand

Price Elasticity of Demand:

The Degree of responsiveness of the quantity demanded of a good to a change in its prices of goods.

Methods to measures the elasticity of demand;

(1) % or Proportionate Method

(2) Total Outlay or Total Expenditure Method

(3) Point Elasticity or Geometric Method

(4) Arc Elasticity Method

There are five degrees of Price Elasticity of Demand :-

(i) Perfectly Elastic Demand : A Perfectly elastic demand is one in which demand is infinite at the prevailing price. It is a situation where the slightest rise in price causes the quantity demanded of the commodity to fall to zero.

(ii) Perfectly Inelastic Demand: Perfectly inelastic demand is one in which a change in quantity demanded. It is a situation where even substantial changes in price leave the demand unaffected.

(iii) Unitary Elastic Demand: unitary elastic demand is one in which the quantity demanded changes by exactly the same percentage as the price. It is a situation when change in quantity demanded in response to change in price of the commodity is such that total expenditure of the commodity, remains same.

(iv) Greater than Unitary Elastic Demand or Elastic Demand:A elastic demand is one inwhich the quantity demanded changes by a larger percentage than the price. It is a situation when change in quantity demanded in response to change in price of the commodity is such that the total expenditure on the commodity increases when prices decreases and total expenditure decreases when price increases.

(v) Less than Unitary Elastic Demand or Inelastic Demand:Inelastic Demand is one inwhich quantity demanded changes by a smaller percentage than the change in price. It is a situation when change in quantity demanded in response to change in price of the commodity is such that total expenditure on the commodity decreases when price falls and total expenditure increases when price rises.

(2) Total Outlay Method: Under this the elasticity of demand can be measured by consideringthe changes in price and the subsequent change in the total quantity of goods purchased and the total amount of money spent on it. This method gives only the nature of elasticity and not the exact numerical value.

Degree of prices elasticity of demand according to this method as follows:

(i) Elastic Demand: The demand for a commodity is elastic when the total expenditure on it increases with a fall in price.

(ii) Unitary Elastic Demand: here, with a fall in price the total outlay of the consumers on that commodity remains the same, though he purchase more in terms of units. Elasticity in this case equals to one.

(iii) Inelastic demand: A commodity will have inelastic demand when with a fall in its pricethe total expenditure on it also falls. Here, the elasticity is less than unity.

(3) Point Elasticity Method:In this method we measure elasticity at a given point on thedemand curve. Here we make use of derivatives rather than finite changes in price and quantity. Point elasticity can also be calculated as :-

(4) Arc Elasticity:It is a measure of the average responsiveness to price change exhibited by ademand curve over some finite stretch of the curve.

Determinants of Price Elasticity of Demand:

(i) Nature of Commodity

(ii) Substitute Goods

(iii) Position of a Commodity in a Consumer's Budget

(iv) Number of Uses

(v) Time Period

(vi) Consumer Habit

(vii) Joint or Tied Demand

(viii) Price Expectation

Income Elasticity of Demand:

Income elasticity of demand is the ratio of change in demand to the change in income.

$$= \frac{\%\ \text{Change in Quantity Demanded}}{\%\ \text{Change in Income}}$$

Degrees of Income Elasticity of Demand

(i) Negative Income Elasticity of Demand:Negative Income Elasticity of Demand isone in which demand for a commodity falls as the income rises. This holds good for inferior goods.

(ii) Zero Income Elasticity of Demand:Zero income elasticity of demand is one in whichdemand of a commodity does not change as the income changes. This holds good for essential goods.

(iii) Greater than Zero but less than One Income Elasticity of Demand:

Greater than zero but less than one income elasticity of demand is one in which demand for a commodity rises less than in proportion to a rise in income.

(iv) Unitary Income Elasticity of Demand: Unitary income elasticity of demand is one in which the demand for a commodity rises in the same proportion as the rise in income.

(v) Greater than Unitary Income Elasticity of Demand: Greater than unitary income elasticity of Demand is one in which the demand for commodity rises more than in proportion to rise in income.

Cross Elasticity of Demand

The cross elasticity of demand is the responsiveness of demand for commodity X to change in price of commodity Y and is represented as follows:-

$$= \frac{\text{Proportionate Change in the Quantity Demanded of Commodity X}}{\text{Proportionate Change in the Price of Commodity Y}}$$

The relationship between X and Y commodities may be substitute as in case of tea and coffee or complementary as in the case of ball pens and refills.

(i) Cross elasticity = Infinity where Commodity X is nearly a perfect substitute for Commodity Y

(ix) Cross Elasticity = Zero where Commodities X and Y are not related

(x) Cross Elasticity = Negative where Commodities X and Y are complementary

Thus, if Ec approaches infinity, means that commodity X is nearly a perfect substitute for commodity Y. On the other hand, if Ec approaches Zero it would mean that the two commodities in question are not related at all. Ec shall be negative when commodity Y is complementary to commodity X.

Factor affecting Elasticity of Demand:

(i) Nature of Commodity: Ordinarily, necessaries like salt, Kerosene, oil, match boxes,textbooks, seasonal vegetables, etc. have less than unitary elastic demand. Luxuries like air conditioner, costly furniture, fashionable garments etc. have greater than unitary elastic demand. The reason being that change in their price has a great effect on their demand. Comforts like milk, transistor cooer, fans etc have neither very elastic nor very inelastic demand. JointlyDemanded Goods like car & petrol, pen & ink, camera & films etc. have ordinarily in elasticdemand for example rise in price of petrol will not reduce its demand if the demand for cars has not decreased.

(ii) Availability of Substitutes: Demand for those goods which have substitute are relativelymore elastic. The reason being that when the price of commodity falls in relation to its substitute, the consumer will go in for it and so its demand will increase. Commodities have no substitute like cigarettes, liquor etc. have inelastic demand.

(iii) Different Uses of Commodity: Commodities that can be put to a variety of uses haveelastic demand, for instance, electricity has multiple uses. It is used for lighting, room-heating, air-conditioning, cooking etc. If the tariffs of electricity increase, its use will be restricted to important purpose like lighting. It will be withdrawn from important uses. On the other hand, if a commodity such as paper has only & a few uses, its demand is likely to be inelastic.

(iv) Postponement of the Use: Demand will be elastic for those commodities whoseconsumption can be postponed for instance demand for constructing a house can be postponed. As a result demand for bricks, cement, sand etc. will be elastic. Conversely goods whose demand cannot be postponed, their demand will be inelastic.

(v) Income of Consumer: People whose incomes are very high or very low, their demand willordinarily be inelastic. Because rise or fall in price will have little effect on their demand. Conversely middle income groups will have elastic demand.

(vi) Habit of Consumer: Goods to which a person becomes accustomed or habitual will have inelastic demand like cigarette, coffee tobacco. Etc. It is so because a person cannot do without them.

(vii) Proportion of Income Spent on a Commodity: Goods on which a consumer spends a verysmall proportion of his income, e.g. toothpaste, needles etc. will have an inelastic demand. On the other hand goods on which the consumer spends a large proportion of his income e.g. cloth etc. their demand will be elastic.

(viii) Price Level:Elasticity of demand also depends upon the level of price of the concernedcommodity. Elasticity of demand will be high at higher level of the price of the commodity and low at the lower level of the price.

(ix) Time Period:Demand is inelastic in short period but elastic in long period. It is so becausein the long run, a consumer can change his habits more conveniently in the short period.

Importance or significance of Elasticity of Demand

(i) Helpful in Price Determination:The concept of elasticity helps a monopolist in fixingprices for his product. He will fix a higher price in those markets where there is inelastic demand for his product. Conversely, he will fix a lower price for the same product in some other segments of the market where there is elastic demand for that particular product. In this way he can discriminate the price to maximize his profit.

(ii) Useful for Government:Government fixes a higher tax rates in case of goods havinginelastic demand and a lower tax rate for good having elastic demand.

(iii) Useful in International Trade:It helps to calculate the terms of trade and the consequentgain from foreign trade. If the demand for home product is inelastic, terms of trade will be profitable to the home country.

(iv) Helpful in Forecasting Demand:It is possible to forecast the demand for a particularcommodity by analyzing its states of elasticity.

(v) Elasticity of Demand:Elasticity of demand also helps in taking decision regardingdevaluing or revaluing a country in terms of foreign currency.

Theory of Supply / Supply and Its Determinants:

Meaning: “The supply of good is the quantity offered for sale in a given market at a given timeat various prices”. Thus, the important features of supply may be concluded as:-

(i) It is the quantity of commodity offered for sale in the market at various prices.

(ii) It is flow and is always measured in terms of time.

Determinants of Supply are follows:

(i) Price of the Good

(ii) Price of Related

(iii) Price of Factors of Production

(iv) State of Technology

(v) Government Policy

(vi) Other Factor: Includes various individual policies, exchange policies, trade policy etc.Time is another important factor influencing supply e.g. it is quite difficult to adjust the supply to the changing conditions in the short period. But such adjustments in supply become easy if the time period is long. Again, transparent and infrastructural facilities positively affect the supply of a good.

Law of Supply:

In the Words of Dooley, "The law of supply states that other things remaining the same, higher the prices the greater the quantity supplied and lower the prices the smaller the quantity supplied".

Assumption of the Law:

(i) It is assumed that incomes of buyers and sellers remain constant.

(ii) It is assumed that the tastes and preferences of buyers and sellers remain constant.

(iii) Cost of all the factors of production is also assumed to be constant.

(iv) It is also assumed that the level of technology remains constant.

(v) It is also assumed that the commodity is divisible.

(vi) Law of supply states only a static situation.

Criticisms of Law of Supply:

(i) It Explains Only the Static Situation

(ii) Expectation of Change in the Prices in

(iii) It does not apply on Agricultural Products

(iv) It does not apply on Artistic

(v) It does not apply on the Goods of Auction

Why Supply Curve upward sloping:

The following reason are responsible through which supply increase with increase in price & Vice-versa:-

(i) Seller becomes ready to offer more goods from their old stocks.

(ii) Producer increase their production in view of high profit possibilities.

(iii) New firms enter the market visualizing higher profit which in turn, increases supply & vice-versa.

Exception of the law of supply:

(1) Social distinction goods

(2) Antique goods

2. Labor supply curve
3. Agriculture commodity
4. Perishable commodity

(i) Perfectly Elastic Supply:Under this, supply tends to be infinitely elastic. It happenswhen nothing is supplied at a lower price but a small increase in price causes the quantity supplied to increase to an infinite extent indicating that the producers are ready to supply any quantity at that price. Here, the supply curve becomes parallel to x axis

(iii) Perfectly Inelastic Supply: At times, the supply of a commodity may not change at all to any

change in price. Such a commodity is said to have zero elasticity of supply or perfectly inelastic supply. Graphically, the supply curve drawn is parallel to Y axis.

(iii) Unit Elastic:When the proportionate change in the quantity supplied is equal to theproportionate change in price, the supply of the commodity is said to be of unit elasticity. Here, the coefficient of elasticity of supply is equal to one, i.e. Es = 1. As given in the figure, relative change in the quantity supplied (q) is equal to the relative change in the price (p).

(iv) More than Unit Elastic Supply or Relatively greater Elastic Supply :

Elasticity of supply is said to be more than unity when a small change in price leads to a substantial change in commodity supplied. It means that relative change in commodity supplied is more than the relative change in price.

(v) Less than Unit Elastic Supply or Relatively less Elastic Supply : In this case a substantial change in price leads to a very small change in quantity supplied. It means that the quantity supplied is lesser in proportion than the change in price of the commodity. Thus, Es < 1.

Elasticity of Supply measured

(i) Percentage Method:

It is depicted of follows:

= Proportionate Change in Quantity Supplied

Proportionate Change in Price

(ii) Geometric Method (Point Method):

Measuring the elasticity at a particular point of the supply curve is known as point elasticity of supply

(iii) Arc Method: It is a measure of the average responsiveness to price change exhibited by a supply curve over some finite stretch of the curve.

hift of Demand and Supply and Change in Supply:

(1) Movement along the Same Supply Curve: When due to change in price alone, the supplychanges it is expressed by different points on the same supply curve.

3. Expansion of Supply:When supply of a commodity increases on an increase in its price, itis called expansion. It is shown by upward movement of supply curve.

4. Contraction of Supply:when supply of a commodity decrease on a falls in its price, it iscalled contraction of supply; It is shown by downward movement of supply curve.

Both expansion and contraction of supply is shown as under:-

Original supply of commodity is OQ, at price OP. When the price increases to OP1, the supply increase to OQ1 i.e. T1 on Supply curve. This is expansion of supply. When the price falls to OP2 Supply decreases to OQ2 i.e. T2 on supply curve. This is contraction of Supply:

(2) Shifting of the Whole Supply Curve: When due to change in factors other than price of the same commodity like change in income, change in taste etc, the supply changes it makes the supply curve shift either leftward or rightward of the original supply curve. This is called shifting of the supply curve.

4. Increase in Supply:When supply of a commodity increases due to change in any factorother than price it is called increase in supply. It is shown by rightward shift of supply curve.

5. Decrease in Supply:When the supply of a commodity decreases due to a change in anyfactor other than price, it is called decrease in supply. It is shown by leftward shift of the supply curve.

Elasticity of Supply/ concept of Elasticity:

According to Samuelson, ‘Elasticity of Supply is the degree of responsiveness of supply ofa commodity to a change in its price.’ It is measured by dividing the percentage change in the quantity supplied of a commodity by the percentage change in its price. It can be expressed as follows:-

% Change in Quantity Supplied

% Change in Price

Factors affecting the Elasticity of Supply:

(i) Nature of the Commodity

(i) For perishable goods, its supply will not respond in an effective manner to the change in price. So it has an inelastic supply.

(ii) For durable goods, its supply will respond effectively and it will have an elasticity of supply.

(ii) Production Time

(iii) Techniques of Production

Price Determination of a Commodity: The competition between buyers and sellers, by the relation of the demand to the supply, of the call to the offer. The competition by which the price of a commodity is determined is threefold.

The same commodity is offered for sale by various sellers. Whoever sells commodities of the same quality most cheaply is sure to drive the other sellers from the field and to secure the greatest market for him. The sellers therefore fight among themselves for the sales, for the market. Each one of them wishes to sell, and to sell as much as possible, and if possible to sell alone, to the exclusion of all other sellers. Each one sells cheaper than the other. Thus there takes place a competition among the sellers which forces down the price of the commodities offered by them.

But there is also a competition among the buyers; this upon its side causes the price of the proffered commodities to rise.

Finally, there is competition between the buyers and the sellers: these wish to purchase as cheaply as possible, those to sell as early as possible. The result of this competition between buyers and sellers will depend upon the relations between the two above-mentioned camps of competitors – i.e., upon whether the competition in the army of sellers is stronger. Industry leads two great armies into the field against each other, and each of these again is engaged in a battle among its own troops in its own ranks. The army among whose troops there is less fighting, carries off the victory over the opposing host.

Concepts of Production: Total Product:
Total product (also known as total physical product) is defined as the total quantity of output produced by a firm in the given inputs. Total product identifies the specific outputs which are possible using variable levels of counts. An understanding of total product is essential to the short-run analysis of a firm's production. Changes in total product are taken into account closely when there are changes in variable costs (labor) of production.

Average Product:
Average Product is defined as the product produced per unit of variable input employed when fixed inputs are held constant. It is commonly thought of as the amount of product produced by every worker.

Marginal Product:

'Marginal Productis similar to average product but is looked at from another perspective. Discrete marginal product is defined as the change in total product that comes as a result of a one unit increase in the variable input/capital level of a firm. Continuous marginal product is calculated as the derivative of total product with respect to the variable input employed. This can be represented as

$(dTP)/(dVI)=MP$

where TP is total product, MP is marginal product and VI is variable inputs. The analysis of marginal product is foundational to explaining the law of supply (upward-sloping supply curve) via the Law of Diminishing Marginal Returns.

Returns to Factor and Returns to Scale:

Returns to a factor:

1. Only one factor varies while all the rest are fixed.

2. The factor-proportion varies as more and more of the units of the variable factor are employed to increase output.

4. Returns to a factor or to variable proportions end up in negative returns.

3. It is a short-run phenomenon.

5. Returns to variable proportions are caused by indivisibility of certain fixed factors, specialization of certain variable factors, or sub-optimal factor proportions.

Returns to scale:

1. All or at least two factors vary.

2. Factor proportion called scale does not vary. Factors are increased in same proportion to increase output.

3. It is a long-run phenomenon.

4. Returns to scale end up in decreasing returns.

5. Returns to scale can be attributed to economies and diseconomies of scale caused by technical and/or managerial indivisibilities, exhaustibility of natural and managerial resources, or depreciability of certain factors.

Returns to a factor relate to the short-period production function when one factor is varied keeping the other factor fixed in order to have more output, the marginal returns or marginal product of the variable factor diminishes.

This relates to the Law of Variable Proportions. On the other hand, returns to scale relate to the long-period production function when a firm changes its scale to production by changing one or more of its factors. This refers to the Law of Returns to Scale.

Assumptions:

We explain the relation between the returns to a factor and returns to scale on the assumptions that:

(1) There are only two factors of production, labour and capital;

(2) Labor is the variable factor and capital is the fixed factor;

(3) Both factors are variable in returns to scale and the production function is homogeneous.

Costs and Revenue Concepts:

Revenue:

Profit making is considered to be the most important objective of firm. Like the consumers aim at utility maximization, the producers aim at the profit maximization. Profit is a difference between total cost and total revenue.Profit can be increased either by reducing the cost of production or by increasing the revenue. In this unit, we are going to learn various concepts of total revenue, the behiour of revenue under different market conditions and the importance of concept of revenue.

Fixed cost	A cost which does not vary with

	output in the short-run (e.g. rent, insurance, etc).
Variable cost	A cost which varies with output in both the short and long-run (e.g. raw materials, direct labour, etc).
Sunk cost	A cost which is irrecoverable upon exiting the industry (e.g. advertising, R&D, etc).
Total cost	TC = TFC + TVC
Average cost	Cost per unit of output. TC/Q
Marginal cost	The addition to TC from producing one more unit of output. change in TC/change in Q
Total Revenue	The total income gained from selling the firm's output. TR = P-Q
Average revenue	Revenue per unit of output. TR/Q
Marginal revenue	The addition to TR from selling one more unit of output. change in TR/change in Q
Internal Economies of Scale	Internal economies of scale can be defined as a fall in long-run average cost associated with an increase in output for an individual firm.

External Economies of Scale	Internal economies of scale occur when an individual firm expands, whereas external economies of scale have an impact on the entire industry and therefore lower the long-run average cost curve at each output level.
Diseconomies of scale	A rise in long-run average costs as output increases.
Allocative efficiency	Where society gets the optimum mix of goods and services in the highest possible quantities, at which point P = MC.
Productive efficiency	Any level of output at which LRAC is minimised; occurs where LRAC = LRMC.
Dynamic efficiency	Reinvestment of profits into R&D to promote faster rate of technological development that will reduce costs and produce better quality products for consumers. Often finance with supernormal profits (hence feasible when AR>AC)
Minimum efficient scale	The level of output at which LRAC stops falling (i.e. the smallest level of output at which the firm is productively efficient).
Normal profit	The minimum (accounting) profit which the entrepreneur

	needs to remain in long-term production (i.e. the opportunity cost of capital and enterprise). Occurs at the level of output where AR = AC.
Supernormal profit	Any profits in excess of normal profits. Occurs at any level of output where AR > AC

UNIT-III

Perfect competition – a pure market

Perfect competition describes a market structure whose assumptions are strong and therefore unlikely to exist in most real-world markets. Economists have become more interested in pure competition partly because of the growth of e-commerce as a means of buying and selling goods and services. And also because of the popularity of auctions as a device for allocating scarce resources among competing ends.

Assumptions for a perfectly competitive market

- Many sellers each of whom produce a low percentage of market output and cannot influence the prevailing market price.
- Many individual buyers, none has any control over the market price
- Perfect freedom of entry and exit from the industry. Firms face no sunk costs and entry and exit from the market is feasible in the long run. This assumption means that all firms in a perfectly competitive market make normal profits in the long run.
- Homogeneous products are supplied to the markets that are perfect substitutes. This leads to each firms being "price takers" with a perfectly elastic demand curve for their product.
- Perfect knowledge – consumers have all readily available information about prices and products from competing suppliers and can access this at zero cost – in other words, there are few transactions costs involved in searching for the required information about

prices. Likewise sellers have perfect knowledge about their competitors.

- Perfectly mobile factors of production – land, labour and capital can be switched in response to changing market conditions, prices and incentives.
- No externalities arising from production and/or consumption.

Evaluation – Understanding the real world of imperfect competition!

It is often said that perfect competition is a market structure that belongs to out-dated textbooks and is not worthy of study! Clearly the assumptions of pure competition do not hold in the vast majority of real-world markets, for example, some suppliers may exert control over the amount of goods and services supplied and exploit their monopoly power. On the demand-side, some consumers may have monopsony power against their suppliers because they purchase a high percentage of total demand. Think for example about the buying power wielded by the major supermarkets when it comes to sourcing food and drink from food processing businesses and farmers. The Competition Commission has recently been involved in lengthy and detailed investigations into the market power of the major supermarkets. In addition, there are nearly always some barriers to the contestability of a market and far from being homogeneous; most markets are full of heterogeneous products due to product differentiation – in other words, products are made different to attract separate groups of consumers.

Consumers have imperfect information and their preferences and choices can be influenced by the effects of persuasive marketing and advertising. In every industry we can find examples of asymmetric information where the seller knows more about quality of good than buyer – a frequently quoted example is the market for second-hand cars! The real world is one in which negative and positive externalities from both production and consumption are numerous – both of which can lead to a divergence between private and social costs and benefits. Finally there may be imperfect competition in related markets such as the market for key raw materials, labour and capital goods. Adding all of these points together, it seems that we can come close to a world of perfect competition but in practice there are nearly always barriers to pure competition. That said there are examples of markets which are highly competitive and which display many, if not all, of the requirements needed for perfect competition. In the example below we look at the global market for currencies.

Currency markets - taking us closer to perfect competition

- The global foreign exchange market is where all buying and selling of world currencies takes place. There is 24-hour trading, 5 days a week.
- Trading volume in the Forex market is around $3 trillion per day – equivalent to the annual GDP of France! 31% of global trading takes place in London alone.
- Most trading in currencies is 'speculative.'

The main players in the currency markets are as follows:

- Banks both as "market makers" dealing in currencies and also as end-users demanding currency for their own operations.
- Hedge funds and other institutions (e.g. funds invested by asset managers, pension funds).
- Central Banks (including occasional currency intervention in the market when they buy and sell to manipulate an exchange rate in a particular direction).
- Corporations (for example airlines and energy companies who may use the currency market for defensive 'hedging' of exposures to risk such as volatile oil and gas prices.)
- Private investors and people remitting money earned overseas to their country of origin / market speculators trading in currencies for their own gain / tourists going on holiday and people traveling around the world on business.

Why does a currency market come close to perfect competition?

- Homogenous output: The "goods" traded in the foreign exchange markets are homogenous - a US dollar is a dollar and a euro is a euro whether someone is trading it in London, New York or Tokyo.
- Many buyers and sellers meet openly to determine prices: There are large numbers of buyers and sellers - each of the major banks has a foreign exchange trading floor which helps to "make the market". Indeed there are so many sellers operating around the world that the currency exchanges are open for business twenty-four hours a day. No one agent in the currency market can, on their own influence price on a persistent basis - all are 'price takers'. According to Forex_Broker.net "The intensity and quantity of buyers and sellers ready for deals doesn't allow separate big participants to move the market in

joint effort in their own interests on a long-term basis."

- Currency values are determined solely by market demand and supply factors.

- High quality real-time information and low transactions costs: Most buyers or sellers are well informed with access to real-time market information and background research analysis on the factors driving the prices of each individual currency. Technological progress has made more information immediately available at a fraction of the cost of just a few years ago. This is not to say that information is cheap - an annual subscription to a Bloomberg or a Reuter's news terminal will cost several thousand dollars. But the market is rich with information and transactions costs for each batch of currency bought and sold has come down.

- Seeking the best price: The buyers and sellers in foreign exchange only deal with those who offer the best prices. Technology allows them to find the best price quickly.

What are the limitations of currency trading as an example of a competitive market?

- Firstly the market can be influenced by official intervention via buying and selling of currencies by governments or central banks operating on their behalf.

Monopolistic Competition:

A type of competition within an industry where:

1. All firms produce similar yet not perfectly substitutable products.

2. All firms are able to enter the industry if the profits are attractive.

3. All firms are profit maximizers.

4. All firms have some market power, which means none are price takers Pure monopoly and perfect competition are two extreme cases of market structure. In reality, there are markets having large number of producers competing with each other in order to sell

their product in the market. Thus, there is monopoly on one hand and perfect competition on other hand. Such a mixture of monopoly and perfect competition is called as monopolistic competition. It is a case of imperfect competition.

Monopolistic competition has been introduced by American economist Prof. Edward Chamberlin, in his book 'Theory of Monopolistic Competition' published in 1933.

Features of Monopolistic Competition:

The following are the features or characteristics of monopolistic competition:-

1. Large Number of Sellers: There is large number of sellers producing differentiated products. So, competition among them is very keen. Since number of sellers is large, each seller produces a very small part of market supply. So no seller is in a position to control price of product. Every firm is limited in its size.

2. Product Differentiation: It is one of the most important features of monopolistic competition. In perfect competition, products are homogeneous in nature. On the contrary, here, every producer tries to keep his product dissimilar than his rival's product in order to maintain his separate identity. This boosts up the competition in market. So, every firm acquires some monopoly power.

3. Freedom of Entry and Exit: This feature leads to stiff competition in market. Free entry into the market enables new firms to come with close substitutes. Free entry or exit maintains normal profit in the market for a longer span of time.

4. Selling Cost: It is a unique feature of monopolistic competition. In such type of market, due to product differentiation, every firm has to incur some additional expenditure in the form of selling cost. This cost includes sales promotion expenses, advertisement expenses, salaries of marketing staff, etc.But on account of homogeneous product in perfect competition and zero competition in monopoly, selling cost does not exist there.

5. Absence of Interdependence: Large numbers of firms are different in their size. Each firm has its own production and marketing policy. So no firm is influenced by other firm. All are

independent.

6. Two Dimensional Competition: Monopolistic competition has two types of competition aspects viz.

- Price competition i.e. firms compete with each other on the basis of price.
- Non price competition i.e. firms compete on the basis of brand, product quality advertisement.

7. Concept of Group: In place of Marshallian concept of industry, Chamberlin introduced the concept of Group under monopolistic competition. An industry means a number of firms producing identical product. A group means a number of firms producing differentiated products which are closely related.

8. Falling Demand Curve: In monopolistic competition, a firm is facing downward sloping demand curve i.e. elastic demand curve. It means one can sell more at lower price and vice versa.

Imperfect Competition:

A type of market that does not operate under the rigid rules of perfect competition. Perfect competition implies an industry or market in which no one supplier can influence prices, barriers to entry and exit are small, all suppliers offer the same goods, there are a large number of suppliers and buyers, and information on pricing and process is readily available. Forms of imperfect competition include monopoly, oligopoly, monopolistic competition, monopsony and oligopoly

Perfect competition is often viewed as a theoretical model, because every industry or market operates in some form of imperfect competition. For example, some industries rely on heavy initial capital investment, such as industrial manufacturers and telecom providers. This makes the prospect of having many competitors practically impossible. In the real world, markets are evaluated by their relative closeness to perfect competition, and efforts are made to approach it.

Monopoly:

A market structure characterized by a single seller, selling a unique product in the market. In a monopoly market, the seller faces no competition, as he is the sole seller of goods with no close substitute.

In a monopoly market, factors like government license, ownership of resources, copyright and patent and high starting cost make an entity a single seller of goods. All these factors restrict the entry of other sellers in the market. Monopolies also possess some information that is not known to other sellers.

Duopoly:

Market situation in which only sellerssupply a particular commodity to many buyers. Either seller can exert some control over the output and prices, but must consider the reaction of its sole competitor (unless both have formed an illegal collusive duopoly)

A situation in which two companies own all or nearly all of the market for a given product or service. A duopoly is the most basic form of oligopoly, a market dominated by a small number of companies. A duopoly can have the same impact on the market as a monopoly if the two players collude on prices or output. Collusion results in consumers paying higher prices than they would in a truly competitive market and is illegal under U.S. antitrust law

Oligopoly:

Market situation between, and much more common than, perfect competition (having many suppliers) and monopoly (having only one supplier). In oligopolistic markets, independent suppliers (few in numbers and not necessarily acting in collusion) can effectively control the supply, and thus the price, thereby creating a seller's market. They offer largely similar products, differentiated mainly by heavy advertising and promotional expenditure, and can anticipate the effect of one another's marketing strategies. A situation in which a particular market is controlled by a small group of firms.

An oligopoly is much like a monopoly, in which only one company exerts control over most of a market. In an oligopoly, there are at least two firms controlling the market.

DUMPING LEGAL DEFINITION

- The act of selling goods at less than fair market value, typically for the purpose of injuring a competitor and gaining market share.
- The selling of large amounts of a stock, or stocks in general, at whatever market prices are in effect. For example, investors might dump stocks on hearing of an outbreak of fighting in some part of the world.

- The selling of a product in one market at an unusually low price while selling the same product at a significantly higher price in another market. For example, a firm may sell a product in its home market at a price covering all costs, and then sell the product in a foreign market at a significantly lower price, covering only variable costs. See also antidumping.
- The sale of goods of one nation in the markets of a second nation at less than the price charged within the first nation. Dumping can eliminate competitors by undercutting their prices
- Selling goods or commodities in another country at prices that are substantially below the going market price. International trade regulations attempt to prevent dumping. Violations may be reported to the World Trade Organization.
- Selling a large amount of securities in a market with no concern for what effect that is likely to have on the price or the product
- The selling of large amounts of a stock or stocks in general at whatever market prices are in effect. For example, investors might dump stocks upon hearing of an outbreak of fighting in some part of the world.
- The selling of a product in one market at an unusually low price while selling the same product at a significantly higher price in another market. For example, a firm may sell a product in its home market at a price covering all costs and then sell the product in a foreign market at a significantly lower price covering only variable costs.

Dumping- Evolution of the term:

It has long been customary to speak of one market as a _dumping ground for the surplus products of another market when the producers of the latter for any reason sell their commodities in the former at unusually low prices.

From this usage it was a natural outcome to speak of selling in a distant market at reduced prices as dumping, but the word used in this sense appeared not to have entered into the literature of economics until the first years of the twentieth century. In 1903 and 1904, the tariff question was the dominant political issue in Great Britain, and in a huge output of polemical literature which

marked the tariff controversy. The term became well established and appeared with or without apologetic quotation marks in book after book.

The term dumping has since found its way into the economic terminology of the French, German, Italian and probably other languages. Initially, it had a vague and uncertain meaning, and is still used indiscriminately for such diverse price-practices such as severe competition, customs undervaluation, bargain, sacrifice or slaughter sales , local price-cutting and selling in one national market at a lower price than in another.

In recent years, however, the increased use of the term by academic economists with their creditable tendency towards the exact establishment of terminology and of the development of legislation dealing with dumping and allied price-practices, which made necessary some measure of precision in the differentiation between various price practices, have both contributed to the consistency of the usage. Extensive variations in the use of the term both as to gist and implication are nevertheless still present.

According to Dale, the origin of the word dump is uncertain. Its usage by the early nineteenth century had come to mean the act of throwing down in a lump or mass, as with a load from a cart, and it was then a natural extension to apply the word to the disposal of refuse and to describe as a dumping ground, a market for the disposal of surplus stock. During this time, dumping was used in English language trade literature to illustrate loosely a situation in which goods were sold cheaply in foreign markets. Today, however, the term is used intentionally to signify the practice of price discrimination in international trade.

Importance:

The term was applied persuasively to describe almost any situation in which goods were sold abroad at cheap prices, irrespective of the cause of the cheapness, the insinuation being that the goods were unwanted in their country of derivation and were exported only to get rid of them.

Economists have always defined dumping as transnational price discrimination where prices vary between national markets. Although economists still object in principle, they now accept that dumping may also be defined as transnational sale below costs. Deard off admits this new. The definition has broadened over the years; some now consider dumping including ‗sales below costs', at least presumptively….this alternative criteria for dumping have gradually acquired elevated status of an alternative definition.

However, there is no correlation between price discrimination and sales below cost. Sales below

cost may occur with or without discrimination and yet, on the other hand discrimination may take place without selling below costs. The term dumping is employed most often, even in careless business language to signify selling the same commodities at different prices in different markets. Commercially, the term is often uncritically extended to cover various types of sales at prices lower than those generally current, even if the prices are uniform to all purchasers.

Types of Dumping

1. Sporadic Dumping: Occasional sale of a commodity at below cost in order to unload anunforeseen and temporary surplus of the commodity such as cheese, milk, wheat etc. in the international market without reducing domestic prices.

2. Predatory Dumping: Temporary sale of a commodity at below its average cost or a lowerprice abroad in order to derive foreign producers out of business, after which prices are raised to take advantage of the monopoly power abroad.

3. Persistent Dumping: Continuous tendency of a domestic monopolist to maximize total profitsby selling the commodity at a higher price in the domestic market than internationally (to meet the competition of foreign rivals).

Impact of Dumping:

Dumping usually occurs because of the following reasons:

(1) Producers in one country are trying to stay competitive with producers in another country,

(2) Producers in one country are trying to eliminate the producers in another country and gain a larger share of the world market,

(3) Producers are trying to get rid of excess stuff that they can't sell in their own country,

(4) Producers can make more profit by dividing sales into domestic and foreign markets, then charging each market whatever price the buyers are willing to pay.

Wage determination:

wage law is the body of law which prohibits employers from hiring employees or workers for less than a given hourly, daily or monthly minimum wage. More than 90% of all countries have some kind of minimum wage legislation. Until recently, minimum wage laws were usually very tightly focused. In the U.S. and Great Britain, for example, they applied only to women and children. Only after the Great Depression did many industrialized economies extend them to the general work force. Even then, the laws were often specific to certain industries. In France, for example, they were extensions of existing trade union legislation. In the U.S., industry specific wage restrictions were held to be unconstitutional.

Coverage was later extended to most of the labor force. A minimum wage is the lowest hourly, daily or monthly remuneration that employers may legally pay to workers. Equivalently, it is the lowest wage at which workers may sell their labor. Although minimum wage laws are in effect in many jurisdictions, differences of opinion exist about the benefits and drawbacks of a minimum wage.

Rent, Interest, and Profits:

Introduction:

A. Labor markets, because wages and salaries account for about 70 percent of our national income. (If proprietors' income, which is largely labor income, is added to wages and salaries, the return to labor increases to 80 percent.)

B. The three sources of income—rent, interest, and profits—which compose the remaining 20 percent of our national income.

1. Why do different parcels of land in different locations receive different rent payments?

2. What factors determine interest rates and causes interest rates to change?

COPYRIGHT FIMT 2020

3. What are the sources of profits and losses and why do profits and losses change over time?

II. **Economic rent** is the price paid for use of land and other natural resources that are fixed in supply. (Note that this definition differs from the everyday use of the term.)

A the demand for land is downward sloping because of diminishing returns and the fact that producers must lower the price of the product to sell additional units of output.

B. Perfectly inelastic supply of the resource is one unique feature of the supply side of the market that determines rent. Land has no production cost; it is a "free and non reproducible gift of nature." Its quantity does not change with price (with a few exceptions).

C. Changes in demand therefore determine the amount of rent. This will be determined by several factors.

1. The price of the product grown on the land,

2. The productivity of the land, and

3. The prices of other resources combined with the land for production.

D. Land rent is viewed as a surplus payment because it performs no incentive function to provide more supply; it is not necessary to ensure the availability of land.

E. Some argue that rent should be taxed away, since it is unearned, or that land should be nationalized and owned by the state.

1. Henry George's proposal for a single tax of up to 99 percent of land rent asserted that this tax could eliminate other taxes. Unlike the effect of a tax on other resources, the tax on land would not have a negative incentive effect.

2. Critics of the single-tax idea make several points.

a. Current levels of government spending are too great to be supported by rent taxes.

b. It is difficult to separate the rent component from other income resulting from the combined use of land with other resources.

c. Unearned income goes beyond land and land ownership; capital gains and interest income might also be considered unearned.

d. It is unfair to tax current owners, who may have paid a steep market price for the land and therefore find that the rent return is not high relative to that price.

E. Each parcel of land is not equally productive. More productive land will be in great demand and therefore will receive different rents. These different rent payments allocate land to its most productive use.

F. In reality, land has alternative uses and costs. From society's perspective, rent is a surplus; but an individual firm must pay rent to attract the land away from alternative uses. Without rent to allocate land among its various uses, there would be no market mechanism to make sure each piece of land was being utilized in its most valuable fashion. Therefore, rent does provide an important function to our economic system.

Interest is the price paid for the use of money. It is usually viewed as the money that must be paid for the use of one dollar for one year.

A. Two aspects of interest are important.

1. It is stated as a percentage, and the Truth in Lending Act of 1968 requires lenders to state the costs and terms of consumer credit in terms of an annualized interest rate.

2. Money itself is not an economic resource, but it is used to acquire capital goods, so in hiring money capital, businesses are ultimately buying the use of real capital goods.

B. The loan able funds theory of interest.

1. The supply of loan able funds is an upward-sloping curve—a larger quantity of funds will be made available at high interest rates than at low interest rates. Most individuals prefer present consumption and must be paid to defer consumption by saving.

2. The demand for loan able funds is inversely related to the rate of interest. At higher interest rates fewer investment projects will be profitable since fewer projects yield the high rate of return needed to compensate for the high interest cost.

3. Economists disagree about the responsiveness of the quantity of investment funds supplied to changes in interest rates. Most economists believe that saving is relatively insensitive to interest rate changes and believe the supply of funds is inelastic.

4. Whether the curves are elastic or inelastic, the equilibrium interest rate equates the quantities of loan able funds supplied and demanded.

5. Households rarely lend savings directly to businesses. Households place their savings in financial institutions and receive an interest payment. Businesses borrow funds from financial institutions and pay an interest payment.

6. Changes in the supply of funds may occur as a result of changes in tax policy or social insurance benefits.

7. Anything that changes the rates of return on potential investments, such as improvements in technology or a decrease in the demand of the final product, will change the demand for funds.

8. Both households and businesses operate on both the supply and demand sides of the market for loan able funds. While households supply loan able funds, they may also borrow to finance large purchases and education. Similarly, businesses may save in the market for loan able funds, and governments may borrow to finance deficits.

C. Banks and other financial institutions not only gather and make available the savings of households, but also create funds through the lending process.

D. There are many different interest rates with different names and they vary for many reasons. 1. Varying degrees of risk (riskier loans carry higher rates),

2. Differing maturities on the loan (higher rates usually on longer term loans),

3. The size of the loan (larger loans have lower rates),

4. Taxability (interest on some local and state bonds is tax free; the interest would be lower, since lenders don't have to pay federal taxes on that interest income),

5. Market imperfections play a role, because some banks in smaller towns have more market power than banks that have a lot of competition.

E. Economists usually refer to what is called the "pure rate of interest," which is best approximated by the interest paid on long term, riskless bonds such as the long term bonds of the

U.S.government. In spring 2001 this rate was 5.5 percent. The current rate can be found in the third section of the daily Wall Street Journal and other publications.

F. The role of the interest rate is important because it affects both the level and composition of investment and R&D spending.

1. The level of investment varies inversely with the interest rate. The Federal Reserve System will increase and decrease the money supply and thus influence interest rates. Changes in investment will affect the level of GDP.

2. Interest rates will also have an effect on borrowing for R&D. Again, R&D depends upon the cost of borrowing money as compared to the expected rate of return on the R&D project.

3. Nominal interest rates are those stated in terms of current dollars; the "real" interest rate is the rate of interest expressed in terms of dollars of constant or inflation-adjusted value. The real interest rate is the nominal rate minus the rate of inflation.

5. It is the real interest rate, not the nominal rate, that businesses should consider in making their investment and R&D decisions.

G. Application: Usury laws specify maximum interest rate that can be charged on loans. The purpose is to make borrowing more accessible to low-income borrowers. However, Figure 29-2 demonstrates several problems with usury laws.

1. There will be a shortage of credit if the usury rate is below the market rate. Riskier borrowers may be excluded from borrowing from established financial institutions.

2. Credit-worthy borrowers will be able to borrow at below-market "prices."

3. Lenders will receive less than market rates of return on the funds loaned.

4. Funds will not be allocated to their most efficient use.

IV. Economic profits are what remains of a firm's total revenue after it has paid individuals and other firms for materials, capital and labor supplied to the firm (the explicit costs) and allowed for payment to self employed resources (the implicit costs).

A. The role of the entrepreneur is most important in a capitalist economy. Profits are the reward paid for entrepreneurial ability, which includes taking initiative in combining resources for production, making non routine policy decisions, introducing innovations in products and production processes, and taking risks associated with the uncertainty of all of the above functions.

1. A **normal profit** is the minimum required to retain the entrepreneur in some specific line of production.

2. An economic profit is any profit above the normal profit. This residual profit also goes to the entrepreneur. This residual profit does not exist under pure competition in a static economy. It occurs because of the dynamic nature of real-world capitalism and the presence of monopoly power.

B. There are several sources of economic profits, but they would not occur in a static, unchanging economy. Thus, the first prerequisite is that the economy be dynamic.

1. In a dynamic economy, the future is uncertain and some risks cannot be insured against.

2. Uninsurable risks stem from three general sources:

a. Changes in the general economic environment

b. Changes in the structure of the economy; and

c. Changes in government policy.

3. Some or all of the economic profit in a real, dynamic economy may be compensation for risk taking.

4. Some of the economic profit may be compensation for dealing with the uncertainty of innovation.

5. Monopoly power is a less desirable source of economic profits because such profits stem from a misallocation of resources.

C. The functions of profits include the following:

1. The expectation of profits encourages firms to innovate, which stimulates new investment. This will expand output and employment.

2. Profits allocate resources among alternative lines of production. Resources leave unprofitable ventures and flow to profitable ones, which is where society is signaling it wants these resources to be allocated.

V. Labor income is the dominant type of income, with wages and salaries constituting about 70 percent of national income. If one adds in a part of proprietors' income, which is probably largely labor income, the share rises to about 80 percent. Therefore, the "capitalists'" share of income is only about 20 percent. These percentages have remained remarkably stable in the U.S. since 1900.

Risk Theory of Profit:

Prof. Hawley, an American economist in 1907, propounded the risk-bearing theory of profit. Prof. Hawley remarks, "The profit of an undertaking, or residue of the product after the claims of land, labor and capital are satisfied, is not the reward of management or coordination but of the risk and responsibilities that the undertaker subjects himself to". So, according to this theory, profit is the reward for risk-taking in business. Every business involves some risk or other. Since the entrepreneur undertakes the risk, he is entitled to receive profit. If he does the reward, he will not be prepared to undertake the risks. Hence, higher the risk, the greater is the possibility of profit. This profit of the entrepreneur exceeds the ordinary return on capital. If it were less than the ordinary return on capital, the entrepreneur would not be prepared to undertake the risk.

The main objections to this theory are as follows:

1. No Direct Relation between Risk and Profit

Unlike the theory, there is no direct relation between risk and profit. It is not necessary that if the risk were high, the profit would correspondingly be high. In reality, profit is influenced by several factors addition to risk bearing. Profit may arise due to superior ability or monopoly position.

2. Reward for Risk-avoidance

According to Prof. Carver profits arise not because risks are borne, but because the superior entrepreneurs are able to reduce them. So profit is the reward for risk-avoidance rather than risk-taking. Still it cannot be denied that a great deal of pure profit is the reward for risk taking.

3. Unforeseeable Risks

A strong criticism has been made by Prof. Knight. According to him profit does not arise due to all kinds of risk. It arises only due to unforeseeable risks. The foreseeable risks such as fire, accident can be insured. So an insurable risk is, in reality, no risk at all. Profit arises only due to unforeseeable risks such as fall in price, changes in fashion new discovery. These risks are non-insurable. So these risks give rise to profit. Prof. Knight referred to unforeseeable risk as uncertainty-bearing. So profit is the reward for uncertainty bearing, which is the special function of the entrepreneur. Peter Duckers also regards profit as the reward for undertaking unforeseeable risk, which cannot be provided against.

Interest:

Interest is money paid by a bank or other financial institution to an investor or depositor in exchange for the use of the depositor's money.

Amount of interest is (usually) a fraction (called the interest rate) of the initial amount deposited called the principal amount.

$$A = P(1 + r)t.$$

Notation:

r:interest rate per unit time

P:principal amount

A:amount due (account balance)

t:ti

These quantities are related through the equation:

$A = P(1 + rt)$.

If a portion of the interest is credited after a fraction of a year, then the interest is said to be compounded. If there are *n* compounding periods per year, then in *t* years the amount due is

$A = P$1 + r n nt

The annual interest rate equivalent to a given compound interest rate is called the effective interest rate.

UNIT-IV

Concept of Money:

A commodity,asset, or (most commonly) currency that may be exchanged for goods and services. Usually, the domestic government issues its own money and provides penalties to persons and businesses in its jurisdiction that do not accept it. Money and the money supply are integral to determining interest rates, inflation, and especially economic growth. There is no uniform agreement as to what qualifies as money; some economists include more mediums of exchange than other economists. Every society throughout history has used some sort of money, even bartering economies traded for something perceived to be equivalent.

A generally accepted medium for the exchange of goods and services, for measuring value, or for making payments. Many economists consider the amount of money and growth in the amount of money in an economy very influential in determining interest rates, inflation, and the level of economic activity. There is some disagreement among economists as to what types of things actually should be classified as money; for example, should balances in money market funds be included.

Functions of Money:

Money is any good that is widely accepted in exchange of goods and services, as well as payment of debts. Most people will confuse the definition of money with other things, like income, wealth, and credit. Three functions of money are:

1. Medium of exchange: Money can be used for buying and selling goods and services. If there were no money, goods would have to be exchanged through the process of barter (goods would be traded for

other goods in transactions arranged on the basis of mutual need). For example: If I raise chickens and want to buy cows, I would have to find a person who is willing to sell his cows for my chickens. Such arrangements are often difficult. But Money eliminates the need of the double coincidence of wants.

2. Unit of account: Money is the common standard for measuring relative worth of goods and service.

3. Store of value: Money is the most liquid asset (Liquidity measures how easily assets can be spent to buy goods and services). Money's value can be retained over time. It is a convenient way to store wealth.

Impact of Money:

Activating the concept of money can influence people's own expressions of emotion as well as their reactions to the emotional expressions of others. Thinking about money increases individuals' disposition to perceive themselves in a business-like relationship with others in which transactions are based on objective criteria and the expression of emotion is considered inappropriate. Therefore, these individuals express less emotion in public and expect others to do likewise. Six experiments show that subtle reminders of money lead people to have more negative attitudes toward expressing emotions in public and to avoid expressing emotion in their written communications. In addition, money-primed participants judge others' emotions to be more extreme and are disposed to avoid interacting with persons who display these emotions, especially when participants believe that these emotions are expressed in public.

Inflation and Deflation:

In economics inflation means, a rise in general level of prices of goods and services in a economyover a period of time. When the general price level rises, each unit of currency buys fewer goodsand services. Thus, inflation results in loss of value of money. Another popular way of looking atinflation is "too much money chasing too few goods". The last definition attributes the cause ofinflation to monetary growth relative to the output / availability of goods and services in theeconomy.

In case the price of say only one commodity rise sharply but prices of other commodities falls, itwill not be termed as inflation. Similarly, in case due to rumors if the price of a commodity risesduring the day itself, it will not be termed as inflation.

(a) **DEMAND - PULL INFLATION**: In this type of inflation prices increase results from anexcess of demand over supply for the economy as a whole. Demand inflation occurs whensupply cannot expand

any more to meet demand; that is, when critical production factors arebeing fully utilized, also called Demand inflation.

(b) **COST - PUSH INFLATION**: This type of inflation occurs when general price levels riseowing to rising input costs. In general, there are three factors that could contribute to Cost-Pushinflation: rising wages, increases in corporate taxes, and imported inflation. [imported raw orpartly-finished goods may become expensive due to rise in international costs or as a result ofdepreciation of local currency

Types of inflation such as:

(1) Currency inflation whereby prices rise NOT because of an increase in money supply, but adecline in value of the currency on world markets (*i.e.* G5 manipulation of dollar 40% lower in 1985 led to 1987 Crash & capital flight back to Japan creating bubble there);

(2) capital concentration into one sector causing bubble which can be purely domestic or inspiredinternationally with rising currency as was the case in Japan 1989 or USA into 1929;

(3) the classroom plain vanilla idea of a rise in prices with an increase in in money supply such assudden discovery of gold in California, Australia and Alaska during 19th century, and the importof gold and silver from America into Europe by Spain that created wholesale systemic inflation inall European economies, and

(4) Commodity inflation that is caused by a drop in supply such as food due to weather orexhaustion of resources.

(5) Money supply remains unchanged, but the VELOCITY increases from leverage (i.e. lending).

Deflation:

Deflation is the opposite of inflation. Deflation refers to situation, where there is decline ingeneral price levels. Thus, deflation occurs when the inflation rate falls below 0% (or it isnegative inflation rate). Deflation increases the real value of money and allows one to buy moregoods with the same amount of money over time. Deflation can occur owing to reduction in thesupply of money or credit. Deflation can also occur due to direct contractions in spending,either in the form of a reduction in government spending, personal spending or investmentspending. Deflation has often had the side effect of increasing unemployment in an economy,since the process often leads to a lower level of demand in the economy. In economics, deflationis a decrease in the general price level of goods and services. Deflation occurs when theinflation rate falls below 0% (a negative inflation rate). This should not be confused withdisinflation, a slow-down in the inflation rate (i.e., when inflation declines to lower levels).

Inflation reduces the real value of money over time; conversely, deflation increases the real valueof money – the currency of a national or regional economy. This allows one to buy more goodswith the same amount of money over time.

Economists generally believe that deflation is a problem in a modern economy because it increasesthe real value of debt, and may aggravate recessions and lead to a deflationary spiral. Historicallynot all episodes of deflation correspond with periods of poor economic growth.Deflationoccurred in the U.S. during most of the 19th century (the most important exception was during theCivil War). This deflation was caused by technological progress that created significant economicgrowth.This deflationary period of considerable economic progress preceded theestablishment of the U.S. Federal Reserve System and its active management of monetary matters.

Deflation is likewise multidimensional

(1) The classroom version of a decrease in money supply;

(2) Failure of money supply expansion to match increase in demand for money

_ (a) as in deleveraging during economic decline as VELOCITY collapses and thus even QE1, QE2, QE3 failed to produce inflation because they were less than the destruction of capital fromdeleveraging

_ (b) the classic contraction in money supply during economic declines relative to the shift indemand from assets to liquidity

_ (c) rise in the demand for money outpaces the available supply as in flight to quality money supply growth falls below economic expansionmoney supply growth falls below population expansion (more people making due with the sameamount of money)

(3) Contraction in available capital due to rising costs private or public

_ (a) from sudden price sock as in OPEC during 1970s creating STAGFLATION

_ (b) sudden rise in taxation causing decline in VELOCITY of money

_ (c) confiscation of assets by regulation

_ (d) historical forced loans,

_ (e) criminalization of normal human activity to confiscate assets as penalty under pretense of law

(4) in a precious metal money supply the debasement of new currency causes Gresham's Lawwhereby the the older money supply is then hoarded thereby shrinking the TOTAL supply ofmoney

(a) This causes prices to rise in terms of the debased new currency ONLY creating an admixture ofinflation (rising prices systemically) coinciding with a deflation caused by the contraction in the TOTAL available money supply

(5) Collapse in government / rule of law causes wealth to shift and concentrate in tangible assets (Flight to quality) that survives the transition to a new government and monetary system

(a) This is normally associated with a collapse in the legal tender status of money wherebygovernment no longer accepts its own currency in payment for taxes

(i) As was the case in Rome

(ii) Japan constantly demonetized previous currency or devalued it by a factor of 10 causing wealthto hoard in tangible assets and barter to emerge as rice displaced coins for 600 years because ofdevaluation by government.

Supply of and Demand for Money:

Monetary theory develops the link between money supply and other macroeconomic variables,including the price level and output (GDP). In this chapter we begin with competing theories ofmoney demand and some empirical evidence about the behavior of money demand.

The Quantity Theory of Money

This theory, developed by the classical economists over 100 years ago, related the amount ofmoney in the economy to nominal income. Economist Irving Fisher is given credit for thedevelopment of this theory. It begins with an identity known as the equation of exchange:

$MV = PY$

Where M is the quantity of money, P is the price level, and Y is aggregate output (and aggregateincome). V is velocity, which serves as the link between money and output. Velocity is the numberof times in a year that a dollar is used to purchased goods and services.

The equation of exchange is an identity because it must be true that the quantity of money, timeshow many times it is used to buy goods equals the amount of goods times their price.

To move towards the quantity theory of money

Fisher makes two key assumptions:

1. Fisher viewed velocity as constant in the short run. This is because he felt that velocity is affected by institutions and technology that change slowly over time.
2. Fisher, like all classical economists, believed that flexible wages and prices guaranteed output, Y, to be at its full-employment level, so it was also constant in the short run.

Putting these two assumptions together let's look again at the equation of exchange:

$MV = PY$

If both V and Y are constant, then changes in M must cause changes in P to preserve the equalitybetween MV and PY. This is the quantity theory of money: a change in the money supply, M, results in an equal percentage change in the price level P.

We can further modify this relationship by dividing both sides by V:

$M = (1/V) \times PY$

Since V is constant we can replace (1/V) with some constant, k, and when the money market is in equilibrium, Md = M. So our equation becomes

$Md = k \times PY$ the quantity theory of money, money demand is a function of income and does not depend

on interest rates.

Central Banking: Functions:

A Central Bank is defined in terms of its functions and as per Vera Smith, “The primary definitionof Central Banking is a banking system in which a single bank has either complete control or aresiduary monopoly of note issue.”

As per Sayers, the Central Bank “Is the organ of Government that undertakes the major financialoperations of the government and by its conduct of these operations and by other means,influences the behavior of financial institutions so as to support the economic policy of thegovernment.”

The broadest definition has been given by Economist De Knock and as per him a Central Bank is

“A Bank which constitutes the apex of the monetary and banking structure of its country andwhich performs as best as it can in the national economic interest.

Functions of a Central Bank:

Majority of Economists has accepted the following functions to be performed by a Central Bankand it is been framed by the economist De Knock.

1. Regulator of Currency:

The central bank is the issue bank and it has a monopoly note issue. Notes issued by it flows aslegal tender money.

The issue department issues notes and coins to commercial banks and coins are manufactured inthe government mint but are placed into flow through the central bank.

Various Central banks had been adopting varied modes of note issue in various nations. Thecentral bank is obligatory by statute to hold a specified volume of gold and foreign securitiesversus the notes issue.

In few nations, the quantity of gold and foreign securities abides a fixed proportion amidst 30 to 45percent of the total notes issued.

In few other nations, a minimum specified quantity of gold and foreign currencies is obligatory tobe kept against note issue by the Central Bank.

2. Banker, Fiscal Agent and Adviser to the Administration:

In general, Central Bank performs as bankers, fiscal agents and advisers to their corresponding lawof administration. As a banker to the law of administration, the central bank holds the depositinvestment of the central and state governments and makes spending on behalf of the law ofadministration. And hence, however, it denies paying interest on government deposit investments.

- It purchases and sells foreign currencies on behalf of the law of administration.
- It holds the inventories of gold of the law of administration and thus it is the guardian ofadministration's finance and affluence.
- As a fiscal agent, the central bank makes short term loans to law of administration for a term notmore than 90 days.
- As an adviser, the central bank advises government on fiscal and money matters as protecting,devaluation and revaluation, inflation or deflation of the currency, balance of payments, deficitfinancing etc.

3. Guarding of Cash Reserves of Commercial Banks:

- Commercial banks are necessitated by law to keep reserves equal to a certain percentage of bothtime and demand deposits liabilities with the central bank.
- It is on the origin of these reserves that the central bank shifts funds from one bank to another tomake possible the clearing of cheques.
- Thus the central bank performs as the guardian of the cash reserves of commercial banks andfacilitates in making feasible their transactions.

Other functions:

1. Monopoly of note issue:

Note issue primarily is the main function of a central bank in every country. These days, in all thecountries where there is a central bank generally it has got the monopoly of the sole right of noteissue. In the beginning this was not the function of central bank, but gradually all the central bankgas acquires this function.

There are many advantages of the note issue by central banks some important ones are as follow:

1. Central bank controls the credit creating power of commercial bank. By controlling theamount of currency in circulation, the volume of credit can be controlled to quite a large extent.
2. People have more confidence in the currency issued by the control bank because it has theprotection and recognition of the government.
3. In the event of monopoly of note issue of central bank, there will be uniformity in the currencysystem in the country.
4. The currency of the country will be flexible if the central bank of the country has themonopoly of note issue because central bank can bring about changes very early in the volume ofpaper money according to the needs of business, industry and messes.
5. The system of note issue has some advantages. If the central bank of the country has themonopoly of

note issue, all such advantages will accrue to the government.

2. Bankers, Agent and Adviser to the Government:

As banker to the government, central bank provides all those service and facilities to thegovernment which public gets from the ordinary banks. It operates the account of the publicenterprise. It mangers government departmental undertaking and government funds and wherethere is a need gives loan to the government. From time to time, central bank advice thegovernment on monetary, banking and financial matters.

3. Custodian of Cash Reserve of Commercial Bank:

Central bank is the bank of banks. This signifies that it has the same relationship with thecommercial banks in the country that they gave with their customers. It provides security to theircash reserves, give them loan at the time of need, gives them advice on financial and economicmatter and work as clearing house among various members bank.

4. Custodian of Nation's Reserve of International:

Central bank is the custodian of the foreign currency obtained from various countries. This hasbecome an important function of central bank. These days, because with its help it can stabilize theexternal value of the currency.

5. Lender of the Last Resort:

Central bank works as lender of the last resort for commercial banks because in the time of need itprovides them financial assistance and accommodation. Whenever a commercial bank facesfinancial crisis, central bank as lender of the last resort comes to its rescue by advancing loans andthe bank is saved from being failed.

6. Clearing House Function:

All commercial bank have their accounts with the central bank. Therefore, central bank settles themutual transactions of banks and thus saves all banks controlling each other individually forsetting their individual transaction.

7. Credit Control:

These days, the most important function of a central bank is to control the volume of credit forbringing about stability in the general price level and accomplishing various other socio economicobjectives. The significance of this function has increased so much that for property understandingit. The central bank has acquired the rights and powers of controlling the entire banking.

A central bank can adopt various quantitative and qualitative methods for credit control such asbank rate, open market operation, changes in reserve ratio selective controls, moral situation etc.

Other Functions:

Besides the 7 functions explained above, central banks perform many other functions that are as Follows:

8. Collection of Data

Central banks in almost all the countries collects statistical data regularly relating to economicaspects of money, credit, foreign exchange, banking etc. from time to time, committees andcommission are appointed for studying various aspects relating to the aforesaid problem.

9. Central Banking in Developing Countries

The basic problem of underdeveloped countries is the problem of lack of capital formation whosemain causes are lack of saving and investment. Therefore, central bank can play an important roleby promoting capital formation through mobilizing saving s and encouraging investment

Credit Control through Monetary Policy:

1. Bank Rate Policy (BRP):

The Bank Rate Policy (BRP) is a very important technique used in the monetary policy forinfluencing the volume or the quantity of the credit in a country. The bank rate refers to rate atwhich the central bank (i.e RBI) rediscounts bills and prepares of commercial banks or providesadvance to commercial banks against approved securities. It is "the standard rate at which thebank is prepared to buy or rediscount bills of exchange or other commercial paper eligible forpurchase under the RBI Act". The Bank Rate affects the actual availability and the cost of thecredit. Any change in the bank rate necessarily brings out a resultant change in the cost of creditavailable to commercial banks. If the RBI increases the bank rate than it reduce the volume ofcommercial banks borrowing from the RBI. It deters banks from further credit expansion as itbecomes a more costly affair. Even with increased bank rate the actual interest rates for a shortterm lending go up checking the credit expansion. On the other hand, if the RBI reduces the bankrate, borrowing for commercial banks will be easy and cheaper. This will boost the creditcreation. Thus any change in the bank rate is normally associated with the resulting changes inthe lending rate and in the market rate of interest. However, the efficiency of the bank rate as atool of monetary policy depends on existing banking network, interest elasticity of investmentdemand, size and strength of the money market, international flow of funds, etc.

2. Open Market Operation (OMO):

The open market operation refers to the purchase and/or sale of short term and long term securitiesby the RBI in the open market. This is very effective and popular instrument of the monetarypolicy. The OMO is used to wipe out shortage of money in the money market, to influence theterm and structure of the interest rate and to stabilize the market for government securities, etc. It isimportant to understand the working of the OMO. If the RBI sells securities in an open market,commercial banks and private

individuals buy it. This reduces the existing money supply as moneygets transferred from commercial banks to the RBI. Contrary to this when the RBI buys thesecurities from commercial banks in the open market, commercial banks sell it and get back themoney they had invested in them. Obviously the stock of money in the economy increases. Thisway when the RBI enters in the OMO transactions, the actual stock of money gets changed.

Normally during the inflation period in order to reduce the purchasing power, the RBI sellssecurities and during the recession or depression phase she buys securities and makes more moneyavailable in the economy through the banking system. Thus under OMO there is continuousbuying and selling of securities taking place leading to changes in the availability of credit in aneconomy. However there are certain limitations that affect OMO via; underdeveloped securitiesmarket, excess reserves with commercial banks, indebtedness of commercial banks, etc.

3. Variation in the Reserve Ratios (VRR):

The Commercial Banks have to keep a certain proportion of their total assets in the form of CashReserves. Some part of these cash reserves are their total assets in the form of cash. Apart of thesecash reserves are also to be kept with the RBI for the purpose of maintaining liquidity andcontrolling credit in an economy. These reserve ratios are named as Cash Reserve Ratio (CRR)and a Statutory Liquidity Ratio (SLR). The CRR refers to some percentage of commercial bank'snet demand and time liabilities which commercial banks have to maintain with the central bankand SLR refers to some percent of reserves to be maintained in the form of gold or foreignsecurities. In India the CRR by law remains in between 3-15 percent while the SLR remains inbetween 25-40 percent of bank reserves. Any change in the VRR (i.e. CRR + SLR) brings out achange in commercial banks reserves positions. Thus by varying VRR commercial banks lendingcapacity can be affected. Changes in the VRR helps in bringing changes in the cash reserves ofcommercial banks and thus it can affect the banks credit creation multiplier. RBI increases VRRduring the inflation to reduce the purchasing power and credit creation. But during the recession ordepression it lowers the VRR making more cash reserves available for credit expansion.

(B) Qualitative Instruments or Selective Tools:

The Qualitative Instruments are also known as the Selective Tools of monetary policy. Thesetools are not directed towards the quality of credit or the use of the credit. They are used fordiscriminating between different uses of credit. It can be discrimination favoring export overimport or essential over non-essential credit supply. This method can have influence over thelender and borrower of the credit. The Selective Tools of credit control comprises of followinginstruments.

1. Fixing Margin Requirements:

The margin refers to the "proportion of the loan amount which is not financed by the bank". Or inother words, it is that part of a loan which a borrower has to raise in order to get finance for hispurpose. A change in a margin implies a change in the loan size. This method is used to encouragecredit supply for the needy sector and discourage it for other non-necessary sectors. This can bedone by increasing margin for the non-necessary sectors and by reducing it for other needy sectors.

Example: - If the RBI feels that more credit supply should be allocated to agriculture sector, then itwill reduce the margin and even 85-90 percent loan can be given.

2. Consumer Credit Regulation:

Under this method, consumer credit supply is regulated through hire-purchase and installment saleof consumer goods. Under this method the down payment, installment amount, loan duration, etcis fixed in advance. This can help in checking the credit use and then inflation in a country.

3. Publicity:

This is yet another method of selective credit control. Through it Central Bank (RBI) publishesvarious reports stating what is good and what is bad in the system. This published information canhelp commercial banks to direct credit supply in the desired sectors. Through its weekly andmonthly bulletins, the information is made public and banks can use it for attaining goals ofmonetary policy.

4. Credit Rationing:

Central Bank fixes credit amount to be granted. Credit is rationed by limiting the amountavailable for each commercial bank. This method controls even bill rediscounting. For certainpurpose, upper limit of credit can be fixed and banks are told to stick to this limit. This can help
in lowering banks credit expoursure to unwanted sectors.

5. Moral Suasion:

It implies to pressure exerted by the RBI on the indian banking system without any strict action forcompliance of the rules. It is a suggestion to banks. It helps in restraining credit during inflationaryperiods. Commercial banks are informed about the expectations of the central bank through amonetary policy. Under moral suasion central banks can issue directives, guidelines andsuggestions for commercial banks regarding reducing credit supply for speculative purposes.

6. Control through Directives: Under this method the central bank issue frequent directives to commercial banks. These directivesguide commercial banks in framing their lending policy. Through a directive the central bank caninfluence credit structures, supply of credit to certain limit for a specific purpose. The RBI issuesdirectives to commercial banks for not lending loans to speculative sector such as securities, etcbeyond a certain limit.

7. Direct Action:

Under this method the RBI can impose an action against a bank. If certain banks are not adhering to the RBI's directives, the RBI may refuse to rediscount their bills and securities. Secondly, RBI may refuse credit supply to those banks whose borrowings are in excess to their capital. Central bank can penalize a bank by changing some rates. At last it can even put a ban on a particular bank if it does not follow its directives and work against the objectives of the monetary policy.

These are various selective instruments of the monetary policy. However the success of these tools is limited by the availability of alternative sources of credit in economy, working of the Non-Banking Financial Institutions (NBFIs), profit motive of commercial banks and undemocratic nature off these tools. But a right mix of both the general and selective tools of monetary policy can give the desired results.

Money markets and capital markets:

As money became a commodity, the money market became a component of the financial markets for assets involved in short-term borrowing, lending, buying and selling with original maturities of one year or less. Trading in the money markets is done over the counter and is wholesale. Various instruments exist, such as Treasury bills, commercial paper, bankers' acceptances, deposits, certificates of deposit, bills of exchange, repurchase agreements, federal funds, and short-lived mortgage-, and asset-backed securities.[1] It provides liquidity funding for the global financial system. Money markets and capital markets are parts of financial markets. The instruments bear differing maturities, currencies, credit risks, and structure. Therefore they may be used to distribute the exposure.

Commercial Banking: Functions:

According to Prof. Sayers, "A bank is an institution whose debts are widely accepted in settlement of other people's debts to each other." In this definition Sayers has emphasized the transactions from debts which are raised by a financial institution.

According to the Indian Banking Company Act 1949, "A banking company means any company which transacts the business of banking. Banking means accepting for the purpose of lending of investment of deposits of money from the public, payable on demand or other wise and withdraw able by cheque, draft or otherwise."

Functions of Commercial Banks:

Commercial bank being the financial institution performs diverse types of functions. It satisfies thefinancial needs of the sectors such as agriculture, industry, trade, communication, etc. That meansthey play very significant role in a process of economic social needs. The functions performed bybanks are changing according to change in time and recently they are becoming customer centricand

widening their functions. Generally the functions of commercial banks are divided into twocategories viz. primary functions and the secondary functions. The following chart simplifies the**functions of banks**.

Primary Functions of Commercial Banks:

Commercial Banks performs various primary functions some of them are given below :

1. Accepting Deposits: Commercial bank accepts various types of deposits from public especiallyfrom its clients. It includes saving account deposits, recurring account deposits, fixed deposits, etc. These deposits are payable after a certain time period.

2. Making Advances: The commercial banks provide loans and advances of various forms. Itincludes an over draft facility, cash credit, bill discounting, etc. They also give demand anddemand and term loans to all types of clients against proper security.

3. Credit creation: It is most significant function of the commercial banks. While sanctioning a loan to a customer, a bank does not provide cash to the borrower Instead it opens a deposit account from where the borrower can withdraw. In other words while sanctioning a loan a bank automatically creates deposits. This is known as a credit creation from commercial bank.

Secondary Functions of Commercial Banks:

Along with the primary functions each commercial bank has to perform several secondary functions too. It includes many agency functions or general utility functions. The secondary functions of commercial banks can be divided into agency functions and utility functions.

Agency Functions : Various agency functions of commercial banks are

1. To collect and clear cheque, dividends and interest warrant.
2. To make payment of rent, insurance premium, etc.
3. To deal in foreign exchange transactions.
4. To purchase and sell securities.
5. To act as trusty, attorney, correspondent and executor.
6. To accept tax proceeds and tax returns.

General Utility Functions: The general utility functions of the commercial banks include

1. To provide safety locker facility to customers.
2. To provide money transfer facility.
3. To issue traveler’s cheque.
4. To act as referees.
5. To accept various bills for payment e.g. phone bills, gas bills, water bills, etc.
6. To provide merchant banking facility.

7. To provide various cards such as credit cards, debit cards, Smart cards, etc.

Organization and Operations (Credit Creation): The creation of credit or deposits is one of the most vital operations of the commercial banks. Similar to other corporations, banks aim at earnings profits. For this intention, they accept cash in demand deposits and advance loans on credit to customers. When a bank advances funds, it does not pay the amount in currency notes. However, it introduces a current account in the name of the investor and lets him to withdraw the necessary amount by cheques. By this way, banks create deposits or credit.

Demand deposits mount in two ways:

1. When the customer deposits currency with commercial banks, and
2. When banks advance loans, discount bills, provide overdraft facilities and make deposit investments through bonds and securities.

The first type of demand deposits is termed "primary deposits". Banks play a passive play in introducing them.

The second type of demand deposits is termed as "derivative deposits". Banks actively create deposits.

As per Withers,

Banks can generate credit by introducing a deposit, every time they advance a loan.

- This is for the reason that every time a loan is sanctioned, imbursement is made through cheques by the customers.
- All such imbursements are regulated through the clearing house.
- As long as the loan is due, a deposit of that amount remains pending in the books of the bank.

- Thus every loan creates a deposit; however, this is an overstated and tremendous outlook.

- They go to the contra intense.
- They hold that banks cannot create money out of skinny air.
- They can lend only what they have in cash.
- Hence, they cannot and do not create funds.

The Progression of Credit Creation:

A bank can lend parity to its surplus reserves. However, the whole banking system can lend and create credit up-till a multiple of its nominal surplus funds deposits.

The deposit multiplier is based upon the required reserve which is the foundation of credit creation.

Metaphorically, the required reserve ratio is given as:

$$RRr = \frac{RR}{D}$$

$$\text{Or} \quad RR = RRr \times D$$

Where RR is the required cash reserves with banks, RRr is the required reserve ratio and D is the demand deposits of banks.

To represent that D is based on RR and RRr, we have divide both sides equally by RRr like the following:

$$\frac{RR}{RRr} = \frac{RRr}{RRr} \times D$$

$$\text{Or} \quad \frac{RR}{RRr} = D$$

$$\text{Or} \quad \frac{1}{RRr} = \frac{D}{RR}$$

$$\text{Or} \quad D = \frac{1}{RRr} \times RR$$

Where 1 / RRr, is the reciprocal of the percentage ratio and is termed as the deposit expansion multiplier. It ascertains the bounds of the deposit expansion of a bank.

The optimum amount of demand deposits which the banking system can support with any specified value of RR is by applying the multiplier to RR.

Taking the original variation in the amount of deposits (ΔD) and in cash reserves (ΔRR), it follows from any specified percentage of RRr.

$$\Delta D = RR \times \frac{1}{RRr}$$

Non-Banking Financial Institutions: Meaning:

A non-bank financial institution (NBFI) is a financial institution that does not have a full banking license or is not supervised by a national or international banking regulatory agency. NBFIs facilitate bank-related financial services, such as investment, risk pooling, contractual savings, and brokering. Examples of these include insurance firms, pawn shops, cashier's check issuers, check cashing locations, payday lending, currency exchanges, and microloan organizations. Alan Greenspan has identified the role of NBFIs in strengthening an economy, as they provide "multiple alternatives to transform an economy's savings into capital investment [which] act as backup facilities should the primary form of intermediation fail."

Role:

NBFIs supplement banks by providing the infrastructure to allocate surplus resources to individuals and companies with deficits. Additionally, NBFIs also introduces competition in the provision of financial services. While banks may offer a set of financial services as a packaged deal, NBFIs unbundle and tailor these service to meet the needs of specific clients. Additionally, individual NBFIs may specialize in one particular sector and develop an informational advantage. Through the process of unbundling, targeting, and specializing, NBFIs enhances competition within the financial services industry.

Growth:

Some research suggests a high correlation between a financial development and economic growth. Generally, a market-based financial system has better-developed NBFIs than a bank-based system, which is conducive for economic growth.

Stability:

A multi-faceted financial system that includes non-bank financial institutions can protect economies from financial shocks and enable speedy recovery when these shocks happen. NBFIs provide “multiple alternatives to transform an economy's savings into capital investment, serve as backup facilities should the primary form of intermediation fail.”

However, in the absence of effective financial regulations, non-bank financial institutions can actually exacerbate the fragility of the financial system.

Since not all NBFIs are heavily regulated, the shadow banking system constituted by these institutions could wreak potential instability. In particular, CIVs, hedge funds, and structured investment vehicles, up until the 2007-2012 global financial crisis, were entities that focused NBFI

supervision on pension funds and insurance companies, but were largely overlooked by regulators. Because these NBFIs operate without a banking license, in some countries their activities are largely unsupervised, both by government regulators and credit reporting agencies. Thus, a large NBFI market share of total financial assets can easily destabilize the entire financial system. A prime example would be the 1997 Asian financial crisis, where a lack of NBFI regulation fueled a credit bubble and asset overheating. When the asset prices collapsed and loan defaults skyrocketed, the resulting credit crunch led to the 1997 Asian financial crisis that left most of Southeast Asia and Japan with devalued currencies and a rise in private debt.

Due to increased competition, established lenders are often reluctant to include NBFIs into existing credit-information sharing arrangements. Additionally, NBFIs often lack the technological capabilities necessary to participate in information sharing networks. In general, NBFIs also contribute less information to credit-reporting agencies than do banks

Money Markets and Capital Markets: Meaning and Instruments:

As money became a commodity, the money market became a component of the financial markets for assets involved in short-term borrowing, lending, buying and selling with original maturities of one year or less. Trading in the money markets is done over the counter and is wholesale. Variousinstruments exist, such as Treasury bills, commercial paper, bankers' acceptances, deposits,certificates of deposit, bills of exchange, repurchase agreements, federal funds, and short-livedmortgage-, and asset-backed securities. It provides liquidity funding for the global financialsystem. Money markets and capital markets are parts of financial markets. The instruments beardiffering maturities, currencies, credit risks, and structure. Therefore they may be used to distributethe exposure.

Participants:

The money market consists of financial institutions and dealers in money or credit who wish toeither borrow or lend. Participants borrow and lend for short periods of time, typically up tothirteen months. Money market trades in short-term financial instruments commonly called"paper." This contrasts with the capital market for longer-term funding, which is supplied by bondsand equity.

The core of the money market consists of interbank lending--banks borrowing and lending to eachother using commercial paper, repurchase agreements and similar instruments. These instrumentsare often benchmarked to (i.e. priced by reference to) the London Interbank Offered Rate (LIBOR)for the appropriate term and currency.

Finance companies typically fund themselves by issuing large amounts of asset-backedcommercial paper (ABCP) which is secured by the pledge of eligible assets into an ABCP conduit.

Examples of eligible assets include auto loans, credit card receivables, residential/commercialmortgage loans, mortgage-backed securities and similar financial assets. Certain large corporationswith strong credit ratings, such as General Electric, issue commercial paper on their own credit.

Other large corporations arrange for banks to issue commercial paper on their behalf viacommercial paper lines.

In the United States, federal, state and local governments all issue paper to meet funding needs.

States and local governments issue municipal paper, while the US Treasury issues Treasury bills tofund the US public debt:

- Trading companies often purchase bankers' acceptances to be tendered for payment to overseassuppliers.
- Retail and institutional money market funds
- Banks
- Central banks
- Cash management programs
- Merchant banks

Functions of the money market:

- Transfer of large sums of money
- Transfer from parties with surplus funds to parties with a deficit
- Allow governments to raise funds
- Help to implement monetary policy
- Determine short-term interest rates

Common money market instruments:

- Certificate of deposit - Time deposit, commonly offered toCommon money market instruments:
- Certificate of deposit - Time deposit, commonly offered to consumers by banks, thrift institutions,and credit unions.
- Repurchase agreements - Short-term loans—normally for less than two weeks and frequently forone day—arranged by selling securities to an investor with an agreement to repurchase them at afixed price on a fixed date.
- Commercial paper - short term usanse promissory notes issued by company at discount to facevalue and redeemed at face value
- Eurodollar deposit - Deposits made in U.S. dollars at a bank or bank branch located outside the United States.
- Federal agency short-term securities - (in the U.S.). Short-term securities issued by

governmentsponsored enterprises such as the Farm Credit System, the Federal Home Loan Banks and theFederal National Mortgage Association.

Federal funds - (in the U.S.). Interest-bearing deposits held by banks and other depositoryinstitutions at the Federal Reserve; these are immediately available funds that institutions borrow or lend, usually on an overnight basis. They are lent for the federal funds rate.

Municipal notes - (in the U.S.). Short-term notes issued by municipalities in anticipation of taxreceipts or other revenues.

Treasury bills - Short-term debt obligations of a national government that are issued to mature inthree to twelve months.

Money funds - Pooled short maturity, high quality investments which buy money market securitieson behalf of retail or institutional investors.

Foreign Exchange Swaps - Exchanging a set of currencies in spot date and the reversal of theexchange of currencies at a predetermined time in the future.

Capital market:

Capital markets are financial markets for the buying and selling of long-term debt- or equitybackedsecurities. These markets channel the wealth of savers to those who can put it to long-termproductive use, such as companies or governments making long-term investments. Financialregulators, such as the UK's Bank of England (BoE) or the U.S. Securities and Exchange Commission (SEC), oversee the capital markets in their jurisdictions to protect investors againstfraud, among other duties.

Modern capital markets are almost invariably hosted on computer-based electronic tradingsystems; most can be accessed only by entities within the financial sector or the treasurydepartments of governments and corporations, but some can be accessed directly by the public.

There are many thousands of such systems, most only serving only small parts of the overallcapital markets. Entities hosting the systems include stock exchanges, investment banks, andgovernment departments. Physically the systems are hosted all over the world, though they tend tobe concentrated in financial centers like London, New York, and Hong Kong. Capital markets aredefined as markets in which money is provided for periods longer than a year.

A key division within the capital markets is between the primary markets and secondary markets.

In primary markets, new stock or bond issues are sold to investors, often via a mechanism known as underwriting. The main entities seeking to raise long-term funds on the primary capital markets are governments (which may be municipal, local or national) and business enterprises (companies). Governments tend to issue only bonds, whereas companies often issue either equity

or bonds. The main entities purchasing the bonds or stock include pension funds, hedge funds, sovereign wealth funds, and less commonly wealthy individuals and investment banks trading on their own behalf. In the secondary markets, existing securities are sold and bought among investors or traders, usually on a securities exchange, over-the-counter, or elsewhere. The existence of secondary markets increases the willingness of investors in primary markets, as they know they arelikely to be able to swiftly cash out their investments if the need arises.

A second important division falls between the stock markets (for equity securities, also known as shares, where investors acquire ownership of companies) and the bond markets (where investors become creditors).

The money markets are used for the raising of short term finance, sometimes for loans that are expected to be paid back as early as overnight. Whereas the *capital markets* are used for the raising of long term finance, such as the purchase of shares, or for loans that are not expected to be fully paid back for at least a year.

Funds borrowed from the *money markets* are typically used for general operating expenses, to cover brief periods of illiquidity. For example a company may have inbound payments from customers that have not yet cleared, but may wish to immediately pay out cash for its payroll.

When a company borrows from the primary *capital markets*, often the purpose is to invest in additional physical capital goods, which will be used to help increase its income. It can take many months or years before the investment generates sufficient return to pay back its cost, and hence the finance is long term

Together, *money markets* and *capital markets* form the financial markets as the term is narrowly understood. The capital market is concerned with long term finance. In the widest sense, it consist of a series of channels through which the saving of the community are made available for industrial and commercial enterprises and public authorities.

POLITICAL SCIENCE-II (209)

POLITICAL SCIENCE
BALLB 209

UNIT 1
DEMOCRACY
Democracy, or democratic government, is "a system of government in which all the people of a state or polity ... are involved in making decisions about its affairs, typically by voting to elect representatives to a parliament or similar assembly," as defined by the Oxford English Dictionary. Democracy is further defined as (a:) "government by the people; especially : rule of the majority (b:) "a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections."

According to political scientist Larry Diamond, it consists of four key elements: (a) A political system for choosing and replacing the government through free and fair elections; (b) The active participation of the people, as citizens, in politics and civic life; (c) Protection of the human rights of all citizens, and (d) A rule of law, in which the laws and procedures apply equally to all citizens.

The term originates from the Greek (dēmokratía) "rule of the people", which was found from δῆμος (dêmos) "people" and κράτος (krátos) "power" or "rule", in the 5th century BC to denote the political systems then existing in Greek city-states, notably Athens; the term is an antonym to ἀριστοκρατία (aristokratía) "rule of an elite". While theoretically these definitions are in opposition, in practice the distinction has been blurred historically. The political system of Classical Athens, for example, granted democratic citizenship to an elite class of free men and excluded slaves and women from political participation. In virtually all democratic governments throughout ancient and modern history, democratic citizenship consisted of an elite class until full enfranchisement was won for all adult citizens in most modern democracies through the suffrage movements of the 19th and 20th centuries. The English word dates to the 16th century, from the older Middle French and Middle Latin equivalents.

Democracy contrasts with forms of government where power is either held by an individual, as in an absolute monarchy, or where power is held by a small number of individuals, as in an oligarchy. Nevertheless, these oppositions, inherited from Greek philosophy, are now ambiguous because contemporary governments have mixed democratic, oligarchic, and monarchic elements. Karl Popper defined democracy in contrast to dictatorship or tyranny, thus focusing on opportunities for the people to control their leaders and to oust them without the need for a revolution.
FEDERAL FORM OF GOVERNMENT
The Indian federal system of today has many such characteristics which are essential for a federal polity.

The main federal features of the Indian Constitution are as follows:

1. Written Constitution:

The Indian Constitution is a written document containing 395 Articles and 12 schedules, and therefore, fulfils this basic requirement of a federal government. In fact, the Indian Constitution is the most elaborate Constitution of the world.

2. Supremacy of the Constitution:

India's Constitution is also supreme and not the hand-made of either the Centre or of the States. If for any reason any organ of the State dares to violate any provision of the Constitution, the courts of laws are there to ensure that dignity of the Constitution is upheld at all costs.

3. Rigid Constitution:

The Indian Constitution is largely a rigid Constitution. All the provisions of the Constitution concerning Union-State relations can be amended only by the joint actions of the State Legislatures and the Union Parliament. Such provisions can be amended only if the amend-ment is passed by a two-thirds majority of the members present and voting in the Parliament (which must also constitute the absolute majority of the total membership) and ratified by at least one-half of the States.

4. Division of Powers:

In a federation, there should be clear division of powers so that the units and the centre are required to enact and legislate within their sphere of activity and none violates its limits and tries to encroach upon the functions of others. This requisite is evident in the Indian Constitution.

The Seventh Schedule contains three Legislative Lists which enumerate subjects of administration, viz., Union, State and Concurrent Legislative Lists. The Union List consisted of 97 subjects, the more important of which are defence, foreign affairs, railways, posts and tele-graphs, currency, etc.

The State List consisted of 66 subjects, including, inter-alia public order, police, administration of justice, public health, education, agriculture etc. The Concurrent List embraced 47 subjects including criminal law, marriage, divorce, bankruptcy, trade unions, elec-tricity, economic and social planning, etc.

The Union Government enjoys exclusive power to legislate on the subjects mentioned in the Union List. The State Governments have full authority to legislate on the subjects of the State List under normal circumstances. And both the Centre and the State can't legislate on the subjects mentioned in the Concurrent List, The residuary powers have been vested in the Central Government.

5. Independent Judiciary:

In India, the Constitution has provided for a Supreme Court and every effort has been made to see that the judiciary in India is independent and supreme. The Supreme Court of India can declare a law as unconstitutional or ultra Vires, if it contravenes any provisions of the Constitution. In order to ensure the impartiality of the judiciary, our judges are not remov-able by the Executive and their salaries cannot be curtailed by Parliament.

6. Bicameral Legislature:

A bicameral system is considered essential in a federation because it is in the Upper House alone that the units can be given equal representation. The Constitution of India also provides for a bicameral Legislature at the Centre consisting of Lok Sabha and Rajya Sabha.

While the Lok Sabha consists of the elected representatives of people, the Rajya Sabha mainly consists of representatives elected by the State Legislative Assemblies. However, all the States have not been given equal representation in the Rajya Sabha.

7. Dual Government Polity:

In a federal State, there are two governments—the national or federal government and the government of each component unit. But in a unitary State there is only one government, namely the national government. So, India, as a federal system, has a Central and State Government.

CONFEDERAL AND QUASI FEDERAL GOVERNMENT

A confederation (also known as a confederacy or league) is a union of sovereign states, united for purposes of common action often in relation to other states. Usually created by treaty, confederations of states tend to be established for dealing with critical issues, such as defence, foreign relations, internal trade or currency, with the general government being required to provide support for all its members. Confederalism represents a main form of inter-governmentalism, this being defined as 'any form of interaction between states which takes place on the basis of sovereign independence'.

The nature of the relationship among the member states constituting a confederation varies considerably. Likewise, the relationship between the member states and the general government, and the distribution of powers among them is highly variable. Some looser confederations are similar to international organisations. Other confederations with stricter rules may resemble federal systems.

Since the member states of a confederation retain their sovereignty, they have an implicit right of secession. The political philosopher Emmerich Vattel observed: 'Several sovereign and independent states may unite themselves together by a perpetual confederacy without each in particular ceasing to be a perfect state. … The deliberations in common will offer no violence to the sovereignty of each member'.

Under a confederal arrangement, in contrast with a federal one, the central authority is relatively weak. Decisions made by the general government in a unicameral legislature, a council of the member states, require subsequent implementation by the member states to take effect. They are therefore not laws acting directly upon the individual, but instead have more the character of inter-state agreements.[5] Also, decision-making in the general government usually proceeds by consensus (unanimity) and not by majority, which makes for slow and inefficient government. These problematic features, limiting the effectiveness of the union, mean that political pressure tends to build over time for the transition to a federal system of government, as happened in the American, Swiss, German and European cases of regional integration.
Constitution of India has not described India as a federation. Article 1 of the Constitution describes India as a "Union of States." This means, India is a union comprising of various States which are integral parts of it. The Indian Union is not destructible. Here, the States can not break away from the union. They do not have the right to secede from the union. In a true federation, the constituting units or the States have the freedom to come out of the union.

India is not a true federation. It combines the features of a federal government and the features of a unitary government which can also be called the non-federal features. Because of this, India is regarded as a semi-federal state. . The Supreme Court of India also describes it as "a federal structure with a strong bias towards the Centre".

The Centre exercises control over the States. The States have to respect the laws made by the central government and can not make any law on matters on which there is already a central law. The centre can also give directions to the States which they must carry out.

In a true federation, the upper house of the legislature has equal representation from the constituting units or the States. But in our Rajya Sabha, the States do not have equal representation. The populous States have more representatives in the Rajya Sabha than the less populous States.

The upper house of the Indian Parliament, that is, the Rajya Sabha is not properly representative of all the States of Indian union. In India, the existence of a State or a federating unit depends upon the authority of the Centre. The boundary of a State can be changed by created out of the existing States.

In a true federal state, citizens are given dual citizenship. First, they are the citizens of their respective provinces or States and then they are the citizens of the federation. In India however, the citizens enjoy single citizenship, i.e., Indian citizenship or citizenship of the country as a whole.

PARLIAMENTARY FORM OF GOVERNMENT

A parliamentary system is a system of democratic governance of a state where the executive branch derives its democratic legitimacy from legislature (parliament) and is also held accountable to that legislature. In a parliamentary system, the head of state is normally a different person from the head of government. This is in contrast to a presidential system in a democracy, where the head of state often is also the head of government, and most importantly, the executive branch does not derive its democratic legitimacy from the legislature.

Countries with parliamentary systems may be constitutional monarchies, where a monarch is the head of state while the head of government is almost always a member of the legislature (such as the United Kingdom, Sweden, Spain and Japan), or parliamentary republics, where a mostly ceremonial president is the head of state while the head of government is regularly from the legislature (such as Ireland, Germany, India and Italy). In a few parliamentary republics, such as Botswana, South Africa and Suriname, as well as German states, the head of government is also head of state, but is elected by and is answerable to the legislature.

Characteristics:

A parliamentary system may use bicameralism with two chambers of parliament (or houses): an elected lower house, and an upper house or Senate which may be appointed or elected by a different mechanism from the lower house. Another possibility is unicameralism with just one parliamentary chamber.
Scholars of democracy such as Arend Lijphart distinguish two types of parliamentary democracies: the Westminster and Consensus systems.
The Palace of Westminster in London, United Kingdom. The Westminster system originates from the British Houses of Parliament.
The Reichstag Building in Berlin, Germany. The Consensus system is used in most of Western European countries.
The Westminster system is usually found in the Commonwealth of Nations.[4][5][6] These parliaments tend to have a more adversarial style of debate and the plenary session of parliament is more important than committees. Some parliaments in this model are elected using a plurality voting system (first past the post), such as the United Kingdom, Canada, and India, while others use proportional representation, such as Ireland and New Zealand. The Australian House of Representatives is elected using instant-runoff voting, while the Senate is elected using proportional representation through single transferable vote. Regardless of which system is used, the voting systems tend to allow the voter to vote for a named

candidate rather than a closed list.
The Western European parliamentary model (e.g. Spain, Germany) tends to have a more consensual debating system, and usually has semi-circular debating chambers. Consensus systems have more of a tendency to use proportional representation with open party lists than the Westminster Model legislatures. The committees of these Parliaments tend to be more important than the plenary chamber. Some West European countries' parliaments (e.g. in the Netherlands and Sweden) implement the principle of dualism as a form of separation of powers. In countries using this system, Members of Parliament have to resign their place in Parliament upon being appointed (or elected) minister. Ministers in those countries usually actively participate in parliamentary debates, but are not entitled to vote.
Implementations of the parliamentary system can also differ on the manner of how the prime minister and government are appointed and as to whether the government needs the explicit approval of the parliament, rather than just the absence of its disapproval. Some countries such as India also require the prime minister to be a member of the legislature, though in other countries this only exists as a convention.

The head of state appoints a prime minister, of their personal choice, without reference to a parliament. While in practice most prime ministers under the Westminster system (including Australia, Canada, New Zealand, India and the United Kingdom) are the leaders of the largest party in parliament, technically the appointment of the prime minister is a prerogative exercised by the monarch, the governor-general, or the president. No parliamentary vote takes place on who is forming a government, but since parliament can immediately defeat the government with a motion of no confidence, the head of state is limited by convention to choosing a candidate who can command the confidence of parliament and has little or no influence in the decision;
The head of state appoints a prime minister who must gain a vote of confidence within a set time. Example: Italy, Thailand;
The head of state appoints the leader of the political party with the majority of the seats in the parliament as prime minister. Example: Greece, where in the case of no party has a majority, then, the leader of the party with a plurality of seats is given an exploratory mandate to receive the confidence of the parliament within three days, if this is not possible then the leader of the party with the second highest seat number is given the exploratory mandate, if this fails then the leader of the third largest party is given it and so on;
The head of state nominates a candidate for prime minister who is then submitted to parliament for approval before appointment as prime minister. Example: Spain, where the King sends a nomination to parliament for approval. Also, Germany where under the German Basic Law (constitution) the Bundestag votes on a candidate nominated by the federal president. In these cases, parliament can choose another candidate who then would be appointed by the head of state;
Parliament nominates a candidate who the head of state is then constitutionally obliged to appoint as prime minister. Example: Japan, where the Emperor appoints the Prime Minister on the nomination of the Diet. Also, Ireland where the President of Ireland appoints the Taoiseach on the nomination of the Dáil Éireann;
A public office holder (other than the head of state or their representative) nominates a candidate, who if approved by parliament is appointed as prime minister. Example: Under the Swedish Instrument of Government (1974), the power to appoint someone to form a government has been moved from the monarch to the Speaker of Parliament and the parliament itself. The speaker nominates a candidate, who is then elected to prime minister (statsminister) by the parliament if an absolute majority of the members of parliament does not vote no (i.e. he can be elected even if more members of parliament vote No than Yes);

Direct election by popular vote. Example: Israel, 1996–2001, where the prime minister was elected in a general election, with no regard to political affiliation.
Furthermore, there are variations as to what conditions exist (if any) for the government to have the right to dissolve the parliament:

In some countries like Denmark, Malaysia, Australia and New Zealand, the prime minister has the de facto power to call an election, at will. This was also the case in the United Kingdom until the passage of the Fixed-term Parliaments Act 2011.
In Israel, parliament may vote in order to call an election or pass a vote of no confidence against the government.
Other countries only permit an election to be called in the event of a vote of no confidence against the government, a supermajority vote in favour of an early election or prolonged deadlock in parliament. These requirements can still be circumvented. For example, in Germany in 2005, Gerhard Schröder deliberately allowed his government to lose a confidence motion, in order to call an early election.
In Sweden, the government may call a snap election at will, but the newly elected Riksdag is only elected to fill out the previous Riksdag's term. The last time this option was used was in 1958.
Norway is unique among parliamentary systems in that the Storting always serves the whole of its four-year term.
The parliamentary system can be contrasted with a presidential system which operates under a stricter separation of powers, whereby the executive does not form part of, nor is appointed by, the parliamentary or legislative body. In such a system, parliaments or congresses do not select or dismiss heads of governments, and governments cannot request an early dissolution as may be the case for parliaments. There also exists the semi-presidential system that draws on both presidential systems and parliamentary systems by combining a powerful president with an executive responsible to parliament, as for example the French Fifth Republic.

Parliamentarism may also apply to regional and local governments. An example is the city of Oslo, which has an executive council (Byråd) as a part of the parliamentary system.

A few parliamentary democratic nations such as India, Pakistan, Bangladesh etc. have enacted a law which prohibits floor crossing or switching the party after election process. With this law, the elected representative have to lose their seat in the Parliament House, if they defy the direction of the party in any voting.

PRESIDENTIAL FORM OF GOVERNMENT

A presidential system is a system of government where a head of government is also head of state and leads an executive branch that is separate from the legislative branch. The United States, for instance, has a presidential system. The executive is elected and often titled "president" and is not responsible to the legislature and cannot, in normal circumstances, dismiss it. The legislature may have the right, in extreme cases, to dismiss the executive, often through impeachment. However, such dismissals are seen as so rare as not to contradict a central tenet of presidentialism, that in normal circumstances using normal means the legislature cannot dismiss the executive.

The title president has persisted from a time when such person personally presided over the government body, as with the US President of the Continental Congress, before the executive function was split into a separate branch of government and could no longer preside over the legislative body.

Presidential systems are numerous and diverse, but the following are generally true:

The executive can veto legislative acts and, in turn, a supermajority of lawmakers may override the veto. The veto is generally derived from the British tradition of royal assent in which an act of parliament can only be enacted with the assent of the monarch.
The president has a fixed term of office. Elections are held at regular times and cannot be triggered by a vote of confidence or other parliamentary procedures. Although in some countries there is an exception, which provides for the removal of a president who is found to have broken a law.
The executive branch is unipersonal. Members of the cabinet serve at the pleasure of the president and must carry out the policies of the executive and legislative branches. Cabinet ministers or executive departmental chiefs are not members of the legislature. However, presidential systems often need legislative approval of executive nominations to the cabinet, judiciary, and various lower governmental posts. A president generally can direct members of the cabinet, military, or any officer or employee of the executive branch, but cannot direct or dismiss judges.
The president can often pardon or commute sentences of convicted criminals.
Countries that feature a presidential system of government are not the exclusive users of the title of President. For example, a dictator, who may or may not have been popularly or legitimately elected may be and often is called a president. Likewise, leaders of one-party states are often called presidents. Most parliamentary republics have presidents, but this position is largely ceremonial; notable examples include Germany, India, Ireland, Israel and Italy. The title is also used in parliamentary republics with an executive presidency, and also in semi-presidential systems.

Characteristics:
In a full-fledged presidential system, a president is chosen directly by the people or indirectly by the winning party to be the head of the executive branch. Presidential governments make no distinction between the positions of head of state and head of government, both of which are held by the president.

A few countries (e.g., South Africa) have powerful presidents who are elected by the legislature. These executives are titled "president", but are in practice similar to prime ministers, who also undertake more ceremonial duties like a head of state. Other countries with the same system include Botswana, the Marshall Islands, Nauru, and Suriname.

In some presidential systems, there is an office of prime minister or premier but, unlike in semi-presidential or parliamentary systems, the premier answers to the president and not to the legislature.

By contrast, national presidents are figurehead heads of state, like constitutional monarchs, of parliamentary governments and are not active executive heads of government (although some figurehead presidents and constitutional monarchs maintain reserve powers). They are responsible for the formalities of state functions and ensuring a functional parliament, while the constitutional prerogatives of head of government are generally exercised by the prime minister. Such symbolic presidents can be directly elected by the people or indirectly by a legislative vote. Only a few nations, such as Ireland, have a popularly elected ceremonial president.

UNIT 2

Meaning of Power- Power can be defined as one capability and capacity to change, mould and impress the behavior of others as desired and planned by employing number of methods.
National Power- National Power refers to the power of a nation with regard to its capabilities and capacities to influence change and mould the behavior of other nations as per its strategy planning and the legislation of national interest.

Components of the National Power- Power and also the national power. National Power is very comprehensive issue and is determined by number of components which are as under:
1. Population: - A nation has to take care of the needs of the people of its country. Therefore it has to its population in to consideration while framing its planning and strategy to deal with other countries. It is therefore the population is important elements and components to determine the national power.
2. Geography: - Geography is another very important component to constitute the national power. The area, climate, contents and soil and location constitute the geography of a nation. It affects the national power. More is the ideal geographical situation; more is the powerful a nation is.
3. Economy: - Economic conditions determine all other conditions. It is therefore the economy of a nation is main component and determinants of national power more strong and viable economy makes a nation more powerful. It economy is poor, undeveloped and week ascent resources the nation will be in submersing positions.
4. Technology: - This is the era of scientific and technological advancement. It is therefore more a country is advance in science and technology, more at is powerful. Since China and USA and Japan are more powerful nations in the world.
5. Military Preparedness: - The military and army preparedness makes a nation more and powerful.
6. Stable Political System.
7. National Character of the people.

Limitations on National Power- A nation cannot be allowed to exercise unlimited power because it is not good for the survival of other countries. Therefore more are certain mechanism and conditions which limit the national power. There are as under:
1. International morality 2. Public opinion. 3. International Law
1. International Morality: - As the morality based on social commons and values has been the main weapon and controller of the human behavior, in similar way the world opinion and the determinant factors of international morality have been playing decisive role in shaping, monitoring and limiting the national behavior and so the national power. Every nation has to live with world community no nations has independent existence, it is therefore every nation has to act and behave keeping in view the expectations of the world community. International morality can be understood as the cumulative mode of behavior based on many elements, intents, modes of behavior and code and conduct.
2. Public Opinion/ World Opinion: - As public opinion determine the behavior of a perform in the society, in similar way the Nation's behavior and so the national power also is determined and conditioned by the public opinion and the world opinion on different international issue. Generally no state or nation can afford to go against the public opinion and world opinion.
3. International Law: - As a municipal law and state law is main and effective instrument to check and control the man is individual and social behavior in the same way international law is the most effective instrument to limit and combine the behavior of the nations. Although there are some differences between the national law and international law but both have the same objective. Both the laws are generally followed by the people and nations.

BALANCE OF POWER

Balance of power has emerged as very interesting and important concept in the study of structure and function of the world community particularly as part Second World War scenario. It has been understood and defined differently but different authors. Here we are giving same definitions of prominent authors. Slicher says- Balance of power indicators the relative positions of the people and communities at different level. In simple way the balance of power can be explained the process of management of mutual relations by the nations so as no country or nation could hurt the intents of other nations. In a way it is a decentralized system of governing the behavior of each other. According to B.F. Sydney- It is a collective effect to check a nation to become so powerful which starts to harm other

countries. Followings are main features of balance of power: a. Distribution of power b. To maintain equilibrium of power c. To make a powerful block d. To main the stability and peace e. Management power politics f. It is a balancing process g. It is system to make collective policies h. It seeks to maintain status qua i. It is both idealistic and strategic j. It is both democratic and monopolistic Instruments for Maintaining Balance of Power 1. Compensation 2. Intervention 3. Buffer State- To create such a state which acts as a link between two belligerent states. 4. Armaments 5. Diplomacy 6. Making Alliance like NATO and war raw Pact 7. Balancing System Criticism 1. It is negative trend seller 2. It is based on accumulation of power 3. It failed to maintain international peace 4. It could not control and check the autocratic behavior of the nations 5. It provoked conflicts and wars 6. It created balances in international relations 7. It proved impracticable 8. It locked ideal distribution of power Relevance In fact it is very much debatable whether Balance of power is relevant in today is would or not. Ogenski says it is irrelevant in today's time. Similar are the views of Morgenthos and Polmer and Peckiness that although the balance of power is not bad but today's circumstances are not apperpual for the working of Balance of power. The advent of nuclear war and biological weapons has made balance of power irrelevant. Globalization and restructuring of the world community on logical and bilateral basis has function made it irrelevant.

UNIT 3

Introduction

To check the outbreak of Second World War league of nation was formed offer the end of international world war in 1920 on the basis of Treaty of varsellers. Unfortunately due to discriminatory provisions of the Treaty of varsellers, league of nation could not check the rivalry various groups in Europe and Second World War related in 1939. During the war it seeks effects were related to build an international organization. Various conferences were held for this purpose and finally UNO came into existence on 24th October, 1945 it Francisco conference. 24 in October are celebrated as UN Day. It had 25 original members in which India was one of them.

Main Principles of UN were as under:

1. All the states are equal.
2. Every state will expect the national unity and sovereignty of other nation.
3. All the disputes will be settled by mutual negotiations and discusses
4. No nation will resort to war.
5. No nation will interfere in internal matters of other countries.

Objectives of the UN:

UN came into existence with two bread objectives:

1. To check and remove the possibilities of the outbreak of third world war and also to remove the tension which develops in any part of the world.
2. The second most important objective of the UN was to promote the international co-operation in different areas among the members of UN.

Organs of UN

Followings are the six main organs of UN

1. General assembly.
2. Security Council.
3. Economic and social council.
4. Transfer ship council.
5. International court of justices.
6. Secretariat.

1. General Assembly: - It is the legislature of the UN. Every member country can send its five members to General Assembly. However every nation will have one vote each. This most important organ of UN

at its represents every civilization, culture, geography, language and ethos of the world. It can be called as microcosm of the world. It meets once a year for three to four matters special sessions can also be called on the request of majority of the states or by the Security Council. It famous its own rules and regulations. It also affects its presidents and vice- presidents for a year to provide members meetings of the Assembly.

Functions

It performs following functions:

1. Deliberative functions
2. Supervisory functions
3. Financial functions
4. Passing a resolution 'Uniting for Peace'
5. Elective functions
6. Constituent function i.e. Amendment in the Charter of UN

2. Security Council: - It is the executive of UN and it is most powerful organs of UN. It has five permanent members i.e. USA, UK, Russia, China and France. It has also ten non permanent members which are appointed for two years by General Assembly. Security Council is five permanent members have Veto power is no decision can be final without the consent of each permanent member.

Power and functions of Security Council

1. It is concerned mainly with the maintenance of international peace and security.
2. It implements the decisions of General Assembly.
3. Submission of annual reports to General Assembly.
4. Regulation of Armaments.
5. Giving consent for admissions to new members of UN.
6. Interference where peace is threatened.
7. Deciding military actions if other measures fail.
8. Appointment of General Secretary of UN.
9. Supervising role.
10. Election of 15 Judges to international court of Justice.

3. Economic and Social Council: - It has 54 members who are elected by General Assembly in a team of three years. It meets twice a year. It has members' functional commissions and opinions to perform its functions smoothly.

Functions

1. Its main function is to promote social, cultural, economic and educational conditions in different parts of the world to co-ordinates with different opinion for his work.
2. It monitors the activities, give suggestions and get reports.
3. It promotes human rights and human freedom.
4. It gives the report to General Assembly and Security Council.
5. It carries out the recommendations of General Assembly.
6. It supports and gives assistance at the request of member of UN.

4. The Trusts ship Council: - In UN system, mandate system of League of nation was replaced was replaced by Trusts ship Council. It is created as a principal organ of UN to administer same of the Territories ruled by colonel powers to prepare these Territories ruled by colonial powers to prepare these territories for seeks Governances and independence. It works under the General Assembly.

Compositions

Followings are the categories of the members of Trusteeship Council:

1. Members Administering Trust Territories.

2. Permanent members of UN who do not administer Trust Territories.
3. UN members elected by General Assembly for three years.
Functions
1. Getting reports submitted by administering authority
2. Accepted petitions and exams it in consultation with administering authority
3. To pay provide limits to trust Territories
4. Taking necessary action in conformity with the terms of the Trusts ship agreements It is reported that most of the areas and Territories under the Trusts ship Council have become independent and self governing independent nations. It is therefore the task of Trusts ship Council has become over.
5. Secretariat: - It is office Head quarter of UN in New York. Its chief administrative, supervisory and representative powers. He is really a spokesman of UN. Secretary has big army of civil servants from different member countries of UN. Secretaries keep the record and prepare files and reports. It has several departments.
6. International Court of Justices (I.C.S.): - It is the judicial organ of UN. It has 15 judges from different parts of the world. They are elected by General assembly and Security Council for nine years. No two judges can be from the same nations a. C.J. settler the international disputes of different types among different nations on the basis of international law. Its decisions are final and binding. They are impeached by Security Council. Its Headquarter is at leagues. b. It has on final and optional jurisdiction. c. It has advising jurisdiction also.
Peaceful settlement of disputes- This first and for most objective of UN is to remove the tensions and conflict among member countries of UN. For this purpose it makes every effort to seller the disputes in different areas. It is also commenced about the removing the possibilities of outbreak of third world war. To settle the disputes among the countries UN takes numbers of peaceful measures to bring the parties on discussions and understanding. Some of the measures are as under:
1. Negotiations: UN makes the disputing parties agree to come on the negotiating table so that by discussions are arranged by UN. This most useful and successful measures.
2. Mediation: Some third party mediation which may be common friend country or any authority or personality can mediate between the disputing parties to settle then disputes.
3. Conciliation: Various efforts are undertaken at different levels to make the disputing parties to council with each other point of view so that disputes are settled and tensions is removed.
4. Arbitration: It is sort of strict order issued by competent authority on the basis of some fact finding report. Even orders are generally binding on both the parties.
5. Judicial Settlements: It all such measures as disputes above fail to settle the disputes and no disputing party responds positively to the above effects than the disputes is referred to international law and other facts existence. Such judicial decisions are binding in the member states and are implemented by the Security Council.
6. Collective Security: it is the process of taking collective decision to remove the possible threat to international peace and security due to aggressions or threat of aggressions and war. In collective security aggression of one country upon other is considered aggression or attack against all.
A. According to Pelmer and Perpins- It is collective effort to meet the treat to international peace and security.
B. According to Slaicher-Collective Security is mechanism among some countries where every country is consulted to co-operate in can of attack on any other country. C. According to Jocub- It is a mechanisum of collective effort foe collective security.
Features of Collective Security
1. It is device of power management
2. Individual security is limited with collective Security
3. Commitment for joint efforts against threat to peace and Security
4. Belief in UN system or such world body

5. It stands between balance of power and UN system
6. It is a determent system
7. It is anti war system
8. It is a co-operative system

Criticism

1. Its nature is idealistic
2. Identification of aggression difficult
3. It leads to war
4. It is not neutrality
5. It has many weakness
6. It can be permanent system

Collective Security and UN

It is said that UN system works on the principle of collective Security. It came into existence because of the urge of all the member countries to achieve collective Security by checking the possibilities of outbreak of third world war. Many provisions from Art- 39 to Art 51 of UN charter are given which deal, with the need and efforts for collective's security. Uniting for peace resolution of 1950 is a clear indication of collective security. It has been used in various internal crises like Korean crisis 1950. Suez Canal crisis 1956 and against Iraq in 1991.

UNIT 4

Cold War Diplomacy- causes phases and case studies, Korean crisis, Vieira crisis, Cuban crisis, Afghanistan crisis and Gulf war-I

After the Second World War, the world was divided into blocks. One was capitalist block led by USA and other was communist bloc led by the USSR, Unions of soviet socialist Republic. In fact in second war USA and USSR emerged more victorious and they both were maximum beneficiary while the other European countries and their allies like France, Britain and suffered economically as well as politically. Mutual rivalry, mistrust and competitiveness developed in Second World War itself which was further escalated and manifested after the war. Both the blocks started to increase their areas of influence particularly in Asia, Africa and Latin America who were newly independent and were in dire need of all types of aids. This mutual competitiveness and rivalry created such situation where they both started to harm the interests of each other which led to strained relations. This situation has been described as COLD WAR. Some author calls it as proxy war also. Leon calls cold war as the continues preparation for war. Pt. Jawahar Lal Nehru calls it as conflict between two competitors. It can also be called as state of war without actual war. It is a weapon of diplomacy also. It is a situation when one group or nation tries to let donor the other nation or group. It can also be called as the psychological war. It was originated in part of Second World War period and its main cause can be understood as following.

1. Ideological conflict between communication and capitalism
2. Anxiety and fear of western countries about the growing power as influence of USSR
3. Mutual mistrust and distrust between USA and USSR in Second World War itself
4. Atomic secrecy of USA and its attack on Japan
5. Formation of military block and Alliance by both the groups
6. Interferences of USSR in Germany, Turkey, Greek and Iran
7. Frequent use of veto in security council by both the groups
8. Opposite stand of both the groups in number of international issue like Kashmir issue Afghanistan issue and partition issue

Phases of Cold War

The history of cold war can be described in three phrases

1. Final Phase- 1945-1953
2. Second Phase- 1953-1963
3. Third Phase-1963-1970 Main events of Final Phase- 1945- 1953
1. Mutual fear and interest of each other is Expansion
2. Inflammatory speech of churchillou Marlen 5, 1946
3. Growing influence of Soviet Union in developing countries
4. Marshall Plan of USA to check the influences of USSR. Under this plan president of USA announced liberal economic aid for developing combines
5. Truman is doctrine on 12 March 1947 in which USSR president. Truman gave massive aid to Turkey and Unarm
6. Establishment of military alliances by rival groups NATO in 1949
7. Display of power and influence in Korea by USA and USSR

Main event of second phase- 1953 to 1963

1. Establishment of SEATO and war saw pact by USA and USSA respectively in 1955
2. Nuclear arms race
3. Vietnam crisis- mutual rivalry started in Vietnam when the form of Hochi Minh attacked the forcing of France USSR and China supported the forces of Hochi Minh which USA and Britain supported France
4. In 1956 USSR interfered in Hungary which was opposed by western power
5. Rivalry over Suez Canal in 1956 6. Britain war crisis in 1961

Main events of third phase- 1969-1970

1. Change of leadership in USA and USSR
2. Indo- Pak war in 1965 in which USSR supported India and USA supported Pakistan in Kashmir issue
3. Arab Israel war 1967
4. Beginning of détente which helped in the relaxation of Tension of cold war

Impact of cold war

1. Polarization of world politics
2. It affected the functioning of UN
3. It generated Terrorism
4. Multiplicity of military alliances
5. Fear of Atomic war
6. It generated the politics of opportunity at international level
7. Origin of non- alignment
8. Development of the concept of balance of power and collective security

Post cold war – on going missions – Gulf war-II, Ethiopia and Somalia

Post Second World War world remained in to grip of cold war mainly 1970. During this period itself and after words same structural, functional and strategic and also ideological took place which eased the Tension of cold war. The top leaders of the world and nation states realized the need of peace, co-operation and development for which all meaningful persons started to work. The increasing danger of atomic war and UN of biological weapons forced the world to work for peace and remove the possibility of third world war. The UN system and its specialized agencies contributed in the development of internationalism and world order based on mutual co-operation and expect for each other is enmity, integrity and sovereignty. Increasing strength of third world countries also put on check on the monopoly of USA and USSR and other seen big power. Non aligned countries also worked as a power block. Increasing number functional organization on regional basis like ASEAN, OAC, OPEC, SAARC. League of Muslim countries also made the world multipolar due to which the intensity of cold war declined.

Following are some developments of post cold war period.
1. Increasing peace of détente which means efforts, negotiations and summits for resolving the disputes by negations.
2. Increasing role of UN system
3. Development of internationalism
4. Threat of atomic war
5. Common problems of world community and common efforts to solve them. The prominent such problems are Terrorism, Arms race, pollution, drop practicing, population, environmental issue, human rights, woman empowerment, international economic order, child abuse, etc
6. Increasing role of third world countries
7. Decline of Marxism as dominant ideology
8. Disintegration of USSR
9. Liberal leadership in the world
10.Development of democratic culture and human rights
11.Leading role of UN in Gulf war, Somalia and Ethiopia
Foreign policy – Alliances, NATO, CENTO, SEATO, WARSAWPAC, and Non Aligned movement
Meaning of Foreign policy: - Foreign policy is the policy, attitude and approach of country which it intends and shape to follow in dealing other countries to legalize and promote its national interests. The National power shapes the national interests hence it is the most important determinant of the Foreign policy.
Main determinants of Foreign Policy are:
1. Geography
2. Economic and national resources
3. Strategic position
4. National interest
5. Military preparedness
6. Stable political system
7. World scenario
8. Political leadership 9. History and culture
10.Contemporary events
India after independence made Foreign Policy on the basis of same following elements mentioned the above. Pt. Jawaharlal Nehru is called as the architect of India is Foreign Policy.
1. Panchsheel
2. Opposition of colonialism, imperialism and racialism
3. Support for UN
4. Non- Alignment
5. Good relation with neighbor
6. Support for disarmament
7. Support for new international economic order
The Foreign policies which were followed by USA and USA after second world war need to be particularly referred have become as part of that policy USA and USSR made several military Alliances to counter each other is influence and power. It was the era of cold war. Formation of then alliances accelerated the pace of cold war. Main such alliance and group were NATO, SEATO, CENTO, and ALAM.
NATO- National Atlantic Treaty Organization After Second World War USA and some western countries entered into a military agreement which was treaty to counter the influence of USSR and its communist ideology. This treaty came into force on 4th April 1949. It was provided in this treaty that attack on any member of this treaty will be considered attack on all and hence the attacking nation will have to face the consequences with this treaty USSR was territorial and it also started to think of

creation of similar type of alliances.

SEATO- South East Asian Treaty organizations For the same purpose i.e. to counter the influences of USSR and communism USA entered into military alliance with South East Asian nations in Pacific Ocean.

BAGDAD PACT (CENTO) Central Treaty Organization On creation of several military alliances by USA, communist bloc lad by USSR also entered into military alliance in 1955 with the name of CENTO (Central Treaty Organization) this is popularly known as the BAGAD PACT. Its purpose was to check the popularity of capitalism and influences of USA.

NON ALGNED MOVEMENT

After Second World War the world was divided into two power blocks one capitalist block led USA and second communist, block led by USSR. Post Second World War period witnessed the emergence of large number of newly independent nations states as a result of the process of decolonization and national movements for independent in Asia, Africa and Latin America. There newly independent countries were in the process of national development and deconstruction for which they needed economic and technological aid. The capitalist block and communist bloc started to attract their newly independent nations into their campus by giving them liberal, economic, technological and political support. They asked to then countries to join then military alliance like NATO, CENTO, SEATO and war saw Pact. USA offered Marshall plans them for joining their military camp. Pt. Jawahar Lal Nehru of India, Marshall Tito of Yugoslavia, Suharto, Indonesia and Col nausea of Egypt and sensed the threat to newly indulged countries from the power block. They arranged a meeting at Bandung in 1955 and discussed about the need of NAM (Non Aligned Movement).

Meaning of NAM: - The liberal meaning of NAM meaning not to join military group or block. Non aligned does not mean neutrality or isolated from the world affairs but to take part in world affairs but to take part in world affairs actively and take the stand impartially and fearlessly without joining any camp. NAM allows the nation states have any kind of relation with USA or USSR on the basis of mutual respect and reasonable understanding. NAM suggests the member countries to promote their mutual co-operation in all the areas become they all have similar conditions and similar legalize. In a short period NAM become very popular. Its number grew very fast. Its first summit was held in 1961 at Belgrade in which 25 members took part. Today it has 120 members its 16th summit was held in 1912. Its number from 25 to 120 proves its utility and acceptance in the world community.

Role, weaknesses and Relevance of non- Aligned Movement From 1961 ties 2013 the NAM has travelled a long journey with ups and down, achievements and crime. NAM has played a very significant role not only in protectively the unity, dignity, integrity and sovereignty of the newly independent countries but promoted their mutual cooperation.

We can summarize the role as under:

1. In protecting the unity, dignity and sovereignty of developing countries 2. In promoting the co-operation any newly independent countries in differ field 3. In checking the negative design and intentions of body the power block 4. In strengthens the UN system 5. In democratization of UN system 6. NAM emerged as a powerful block in General Assembly 7. It staking the claim in Security Council 8. Helped in passing the uniting for peace Resolution 1950 in General Assembly 9. In taking but in deliberations at various world for vices 10.In creating world opinion

Weaknesses of NAM

In the big beginning NAM moved in its desired and attitude of the member countries started to change. The meaning of their national interest started to change and stared to violate the principles and dictates of NAM. Grouping on number of basis started being the members of NAM. Mutual tension conflicts and wars started. The discussions of NAM summit no longer remained sacrosanct for them. They started to have mutual Treaties even the defense treaties with the countries of communist block and capitalist block. Iran- Iraq war for long period, Indo- Pak war in 1965 and 1971 Iraq is occupation of Kuwait. Indo- Lankan conflicts are such many examples which weakened the NAM. Even the intrgrity6 of India

was questioned when it had a Treaty with USSR in 1971 and it did not criticize USSR on Afghanistan issue all were the factors were not only weakened the NAM but also raised the questions on its extenuation and relevance. Some of the leader's raised the demand of binding NAM.

Relevance of NAM

Now it has become an issue of discussion debate and even controversy weather in today is world the NAM has relevance or not. People argue that since the world structure and world scenario has changed from the time when NAM came into existence, it irrelevant and unnecessary to runs a unless and dysfunctional organization or movement. The world is globalization and has multipolar world. USA and USSR the Russia is not that much powerful. The position of USA has also undergone change. Many new economic and nuclear power states have emerged on the world same. In spite of some situation, use can safely say that the principles of NAM still are relevant. Every state needs unity, integrity, sovereignty and dignity which are possible only if they are allowed to take independent, disportail and unconditional decisions on the basis of merit of the issues, for which NAM stood.