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EXPERT COMMITTEE

Prof. V. N. Rajasekharan Pillai
Vice-Chancellor
IGNOU, New Delhi

Prof. Parvin Sinclair
Pro-Vice-Chancellor
IGNOU, New Delhi

Prof. Srikrishnadeva Rao
Director, School of Law, IGNOU, New Delhi

Prof. B. K. Pattanaik
Director, School of Extension & Development
Studies, IGNOU, New Delhi

Prof. V. L. N. Reddy
Former Director
Department of Adult & Continuing Education
Sri Venkateswara University, Tirupati

Prof. N. K. Ambasht
Former Chairman, National Institute of
Open Schooling, New Delhi

Prof. K. Parthasarathy
Director & Head, Dept. of Adult, Continuing
Education and Extension, Bharathidasan
University, Tiruchirappalli

Prof. C. J. Daswani
Former Consultant, UNESCO-India, New Delhi

Prof. D. Usha Rani
Dean, College Development Council
Sri Venkateswara University, Tirupati

Dr. V. Mohan Kumar
Director, Indian Adult Education Association
New Delhi

Dr. V. Sreedevi
Professor, Dept. of Home Science and Extension
Sri Venkateswara University, Tirupati

Dr. J. L. Pandey
Former Professor, NCERT, New Delhi

Prof. S. Sivaraju
Chairman, Centre for Development Studies
Tata Institute of Social Sciences, Mumbai

Dr. T. Vijaya Kumar
Senior Faculty (CESD)
National Institute of Rural Development
Hyderabad

Prof. B. B. Pande
Former Professor of Criminology
University of Delhi, Delhi

Prof. Balaram Paswan
Head, Dept. of Population Policies and Programmes
International Institute for Population Sciences
Mumbai

Dr. M. V. Lakshmi Reddy
Reader, School of Education, and
Programme Coordinator, MAAE, SOEDS
IGNOU, New Delhi.

COURSE TEAM

Course Contribution

Dr. B. Vijaya Laxmi (Unit 10)
Former Professor of Law
Kakatiya University, Warangal

Smt. S. Rajalakshmi (Unit 11)
Assistant Professor
PG Dept. of Criminal Law and Criminal Administration
The Tamil Nadu Dr. Ambedkar Law University, Chennai

Dr. R. D. Vijaya Sekhar (Unit 12)
Principal, Anantha College of Law, Tirupati

Dr. R. Rewathi (Unit 13)
Associate Professor
PG Dept. of Constitutional Law and Human Rights
The Tamil Nadu Dr. Ambedkar Law University, Chennai

Unit Design, Format Editing & Course Coordination

Dr. M. V. Lakshmi Reddy
Reader, School of Education
IGNOU, New Delhi

Content and Language Editing

Dr. M. V. Lakshmi Reddy
Reader, SOE, IGNOU
New Delhi

PRODUCTION TEAM

Mr. B. Natarajan
Deputy Registrar (Publication)
MPDD, IGNOU, New Delhi

Mr. Arvind Kumar
Asst. Registrar (Publication)
MPDD, IGNOU, New Delhi

Mr. Babu Lal Rewadia
Section Officer (Publication)
MPDD, IGNOU, New Delhi

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COURSE MAEE-002: BASICS OF LEGAL AWARENESS

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BLOCK 3 LIABILITY CREATING LAWS

Introduction to the Block

This Block deals with the laws that create liability on the part of individuals. These liabilities may be criminal, tortuous, contractual and familial, among others. Therefore, different types of liabilities and the varying contexts in which these liabilities arise in the life of individuals, either wittingly or unwittingly, are discussed in detail in this Block. It is divided into the following four Units.

Unit 10 titled "*Indian Penal Code*" highlights important aspects of criminal liabilities or offences of various kinds. It presents classification of offences, and explains the importance of proportionality of punishment and general exceptions to criminal liability. It provides a perspective of criminal liability with special emphasis on criminal conspiracy.

Unit 11 is on "*Tort Law*". It explains the concept of tort and highlights the similarities and differences between tort and crime. It also explains how tort creates a liability on those responsible for it. It discusses theories of tort and the nature of damages. It describes the ingredients, general conditions, rules and defences of tort. Further, it touches upon special torts. Who are competent to sue, who can be sued and who cannot be sued are also discussed in this Unit.

Unit 12 is about "*Contract Law*". It discusses the concept of contract, differences between contract and agreement, essentials of a valid contract, kinds of contract, and various ways and means of discharging the contractual obligations by the parties concerned.

Unit 13 focuses on different aspects of "*Family Law*" such as marriage, divorce, adoption, partition, inheritance of property, etc as part of practices of the social institution of 'family'. It explains how these aspects create rights and liabilities on the individuals concerned. It touches upon important similarities and differences that exist in respect of family law of Hindus, Parsis, Christians, Muslims and also law in respect of the interreligious marriages, namely, the Special Marriage Act.

UNIT 10 INDIAN PENAL CODE

Structure

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- 10.1 Objectives
- 10.2 Types of Offences or Classification of Offences
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10.0 INTRODUCTION

You have learnt about the Essentials of Indian Legal System in Block-1 and about Empowering Laws in Block 2 of MAEE-002, i.e. Basics of Legal Awareness. Now, in Unit-10, you will learn about Indian Penal Code that creates criminal liability on the persons. Indian Penal Code is one of the liability creating

laws of the country. In this Unit, we deal with important aspects of the law relating to offences – types of offences with emphasis on criminal conspiracy, proportionality of punishment, theories of punishment, and general exceptions to punishment.

10.1 OBJECTIVES

After thorough reading of this Unit, we expect you to be able to:

- Describe different types of offences or classify the offences;
- Distinguish between cognizable offence and non-cognizable offence, summons case and warrant case, and bailable offence and non-bailable offence;
- Explain criminal conspiracy;
- Discuss proportionality of punishment; and
- Elucidate the general exceptions to punishment.

10.2 TYPES OF OFFENCES OR CLASSIFICATION OF OFFENCES

As you have learnt from Unit-2 of Block-1 of this Course, the law of Code of Criminal Procedure (CrPC) is intended to provide a mechanism for the enforcement of criminal substantive law (e.g. Indian Penal Code). Without a mechanism for punishment, the substantive criminal law would be almost worthless. In other words, in the absence of enforcement machinery, the threat of punishment held out to the law-breakers of the substantive criminal law would remain empty in practice. The law of criminal procedure is meant to be complementary to criminal substantive law and creates the necessary machinery for the detection of crime, arrest of suspected criminals, collection of evidence, determination of guilt or innocence, as the case may be, of the suspected person and imposition of proper punishment on the guilty person.

Criminal substantive law such as the Indian Penal Code deals with the nature and types of offences. Offences are of different types. In this section, our focus is on various types of offences, which would help you in better understanding of the subsequent sections of this Unit. For the purpose of the codification all the offences have been classified into different categories, as presented below.

10.2.1 Cognizable Offences and Non-cognizable Offences

A 'cognizable offence' means an offence for which a police officer may, in accordance with the first schedule of the Indian Penal Code or under any other law, arrest without warrant. 'Non-cognizable offence' means an offence for which a police officer has no authority to arrest without warrant. The code has not given any guidelines to determine whether a particular offence belongs to one category or other. It all depends upon whether it is shown as cognizable or non-cognizable in the first schedule of the code. The schedule refers to all the offences under the Indian Penal Code and puts them into cognizable and non-cognizable categories. The basis for categorization in the schedule appears to rest on diverse considerations. However, it might be broadly stated that all serious offences are considered as cognizable. The seriousness of the offences is to be determined in

relation to the maximum punishment provided for the offence. The offences, under the laws other than IPC, which are punishable with imprisonment for three years or more have been shown in the First Schedule as cognizable and those punishable with less than three years have been shown as non-cognizable.

In case of a cognizable offence a police officer can arrest the accused person without any warrant or authority issued by a Magistrate and can investigate into such a case without any orders or directions from a magistrate. The police officer is under a legal duty to arrest without any warrant in respect of a cognizable offence. In the case of a cognizable offence it appears to be the responsibility of the state to bring the offender to justice.

In the case of a non-cognizable offence, generally speaking, a police officer cannot arrest without a warrant and such an officer has neither duty nor the power to investigate into such offence without the authority given by a Judicial Magistrate. The non-cognizable offences are considered more in the nature of private wrongs and therefore the collection of evidence and the prosecution of the offenders is left to the initiative and efforts of private citizens. If judicial officer considers it desirable that a non-cognizable case should be investigated into by the police, he can order the police to do so. In such cases, the police officer will have all the powers in respect of investigation as he would have exercised if the case were a cognizable one.

The analysis of the relevant provisions of the first schedule would show the basis of categorization.

- 1) All serious offences are considered as cognizable. The seriousness of the offence depends upon the maximum punishment provided for the offence. Offences punishable with imprisonment for not less than three years are taken as serious offences and are made cognizable. In case of serious offences like murder, robbery, counterfeiting the coins, etc., requires the arrest of the offender by police. They are treated as cognizable offences.
- 2) Certain offences though serious on the criteria of punishment, have been considered as non-cognizable offences only, e.g. offences relating to marriage like bigamy and 'adultery' are punishable with more than five years imprisonment. These offences are private in nature and if made cognizable, police intervention in the private life cannot be avoided. Though the punishment provided is more than 3 years still they are enlisted in the category of non-cognizable offence.
- 3) Offences of giving false evidence or fabricating false evidence and offences against public justice are punishable with imprisonment for more than three years and treated as serious offences. But, they are enlisted and shown in First Schedule as non-cognizable only. If made cognizable, the attitude and interference of police is not desirable.
- 4) As a broad explanation, the offences which are not serious and punishable with less than three years imprisonment are treated as non-cognizable offences. These offences are mostly in the nature of private wrongs, like, assault, intentional insult, simple hurt, defamation, etc.
- 5) Certain offences which are not punishable with imprisonment for three years or more and not considered as serious, have been made cognizable. The

offences against public tranquility, offences affecting public morals, decency, the offences of uttering words or making gestures to insult the modesty of a woman, etc are punishable with less than three years imprisonments. Yet, they have been made cognizable. The necessity of making prompt arrest of the offenders is the probable reason for making these offences cognizable. If might also be not desirable to leave the proceedings in the hands of private persons.

- 6) It is not possible to list all offences under all laws other than penal code, because some offences would be created by enacting new laws and it might be difficult to amend the Schedule every time such new law is passed. However, general rule in first schedule can suitably be modified by making a specific provision in law and declaring a particular offence as cognizable or non-cognizable.

The schedule, however, suffers from certain weaknesses.

Weakness of the classification in First Schedule: If an offence is shown as cognizable, a police officer can arrest without warrant for such an offence. The advisability of having such arrangement, if questioned, the answer would be that judicial participation in decision-making is desirable in criminal justice system in order to ensure a fair balance between the interest of society and of the individual. The 'cognizable – non-cognizable' classification, as given in the first schedule, either presupposes the need of immediate action in respect of every cognizable offence, or otherwise, it considers unnecessary in all cognizable cases to have the arrest decision made by a 'neutral, detached judicial officer'. The same classification has also been used to determine the power of the police to investigate into a case without any specific authority given by judicial Magistrate.

The classification of offences is apparently and essentially intended to indicate as to whether the arrest in respect of an offence can be made with or without a warrant and to determine whether the police should or should not have the power to initiate investigation without any order of magistrate or to take preventive action. This resulted in undesirable consequences. Where the offences are mostly punishable with less than three years imprisonment, there is practically no enforcement of the laws as the police are not expected to involve in such cases. If the offences are expressly made cognizable the police automatically exercise wide powers to arrest without arrest warrant which may be considered as undesirable.

Therefore, the confusion caused in using the same classification for two divergent purposes continues.

The Criminal Law (Amendment) Act 1983 has made some changes and additions in the First Schedule of the code, i.e. Sections 376, 376A, 376B, 376C and 376D have been newly added and shown in column 4 of the Schedule as 'cognizable' (but no arrest shall be made without warrant or an order of a Magistrate).

This is a change in the traditional categorization of offences into cognizable and non-cognizable. This ensures investigation by the police but it also protects the public from the police power. The section 498-A has been made cognizable if informed by the persons mentioned in the section to the police officer. The offence of 498-A is placed in between the two categories of cognizable and non-cognizable.

10.2.2 Summons Cases and Warrant Cases

A 'warrant case' means, a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. A 'summons case' means, a case relating to offence, and not being a warrant case. The basis of the classification is the seriousness of the offence to which the case relates.

10.2.2.1 Significance of Determining Summons Case and Warrant Case

The classification is useful to determine two types of trial procedure to be adopted in the case.

- The trial procedure prescribed for a warrant case is much more elaborate than that provided for a summons case.
- The classification into 'summons case' and 'warrant case', therefore, assumes importance at the stage of issuing process to the accused person to decide as to whether a summons or a warrant is to be issued to him in the first instance. In a summons case, a summons shall be issued and in a warrant case a warrant may be issued.
- If a magistrate makes a decision to arrest he would issue a warrant of arrest. A warrant of arrest is a written order signed, sealed and issued by a Magistrate and addressed to a police officer or some other person specially named and commanding him to arrest the body of the person named in it.
- In a case where serious crime has been perpetrated by a dangerous person, and there is every chance of the person absconding unless immediately arrested, it would be certainly unwise to insist on the arrest being made only after obtaining a warrant from a Magistrate. There may be occasions where preventive action may be necessary in order to avert the danger of sudden out break of crime.
- Where a person has been concerned in a non-cognizable offence, he cannot, except in a few cases to be considered later, be arrested without a warrant. The code however does not expressly empower a magistrate to issue a warrant of arrest before taking the cognizance of any such offence; much less does it mention the circumstances in which such a warrant can be issued. It may perhaps be theoretically possible for a Magistrate to issue a warrant of arrest in case of a cognizable or non-cognizable offence even before taking the cognizance of the offence; in practice, a warrant for arrest is hardly ever issued prior to taking cognizance of the offence.

Taking Cognizance of Offences: 'Taking cognizance' has not been defined in the code. It is a word of indefinite import, and is not perhaps always used in exactly in the same sense. *Cognizance*, literally, means knowledge or notice and taking cognizance of offence means taking notice or becoming aware of the alleged commission. The Judicial officer will have to take cognizance of the offence before he could proceed to conduct a trial. Taking cognizance does not involve any formal action or indeed action of any kind and but occurs as soon as a magistrate as such applies his mind to the suspected commission of offence for the purpose of proceedings to take the subsequent steps.

A warrant for arrest may be issued by Magistrate after taking cognizance of any offence, in a case whether it is cognizable or non-cognizable. Hence, the distinction between summons case and a warrant case is relevant.

- If the case in which the cognizance has been taken is a summons case, a summons shall be issued to the accused person in the first instance for his attendance in court and if the case is a warrant case, a warrant for the arrest of the accused may normally be issued for causing the accused to be brought before the court. The code however gives discretion to the Magistrate to depart from this general rule if the circumstances so demand in a particular case. If the Magistrate has a reason to believe that the accused has absconded or would not obey the summons, he may issue a warrant for his arrest.
- In practice, however, the Magistrate has hardly any occasion to issue a warrant of arrest if he has taken cognizance of cognizable offence on a police report, because, the police report is submitted to the magistrate after the police has completed the investigation into the offence, and during the investigation the police has power to arrest without warrant a person involved in the commission of a cognizable offence. Further the police is under a legal duty to apprehend every person when it is legally authorized to apprehend.
- Cognizance of any offence can be taken by a Magistrate not only upon a police report but also: i) upon receiving a complaint, or ii) upon the information received from any person other than police officer, or iii) upon the knowledge of the Magistrate himself.

10.2.3 Bailable Offences and Non-bailable Offences

‘Bailable offence’ means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law. ‘Non-bailable’ offence means any other offence. The code has not given any test or any criterion to determine whether any particular offence is bailable or non-bailable. It all depends upon whether it has been shown as bailable or non-bailable in the First Schedule. But, it can be stated as general preposition that, by and large, serious offences are considered as non-bailable and others as bailable. According to the First Schedule, offences under laws other than the Indian Penal code which are punishable with imprisonment of three years or more have been considered ‘non-bailable’ offences and others which are punishable with less than three years imprisonment are considered as ‘bailable’ offences.

If a person accused of a bailable offence is arrested or detained without warrant he has a right to be released on bail. This does not mean that if the offence is non-bailable, he shall never be released on bail; his release, on the contrary, is left to the discretion of the authorities concerned. But, in such cases, bail is not a matter of right.

10.2.3.1 Some Aspects of Bail

Here, it is pertinent to provide you clear understanding of the meaning, object and related aspects of bail.

- a) **Object and meaning of bail:** There is no definition of bail in the code. The object of arrest and detention of the accused persons is primarily to secure his appearance at the time of trial and to ensure that in case he is found

guilty he is available to receive the sentence. The provisions dealing with issue of summons or arrest warrant or the release of the accused on the bail, are all aimed at ensuring the presence of the accused at his trial but not to interfere in his liberty.

Being put to jail life, if release on bail is denied to the accused, it would mean that though he is presumed to be innocent till the guilt is proved beyond reasonable doubt, he would be psychologically and physically deprived of life. The jailed accused loses his job and is prevented from preparing his defence. Naturally, burden lies on the family members.

On the other side, where the arrested person, if released on bail, is likely to put obstructions in conducting fair trial by destroying or altering or tampering the evidence or suspected to commit more offences during his release. It would be improper to release him on bail. Where accused is alleged to have committed serious offence or prone to abscond or jump bail order to avoid trial and sentence, the bail is generally denied. Where no such risks are involved, it would be inhuman and unjust to deny him bail.

To balance these conflicts, the Legislature has given some precise directions for granting or not granting bail. Where the legislature allows discretion in the grants of bail, the discretion is to be exercised as per the guidelines or norms evolved by the courts. The legislature also provides the provisions in which bail already granted can be cancelled.

What is required by bail is to 'procure the release of a person from legal custody by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction of the court. Bail covers release on one's own bond with or without sureties. The number of sureties, time of producing sureties and amounts of sum insisted, etc., depend on the circumstances.

- b) **Circumstances in which release on bail is mandatory:** These circumstances include the following.
 - i) Where the arrestee is not accused of a non-bailable offence;
 - ii) Where the investigation is not completed within the prescribed time;
 - iii) Where no reasonable grounds exist for believing that the accused is guilty of non-bailable offence;
 - iv) Where trial before Magistrate is not concluded within 60 days;
 - v) Where no reasonable grounds exist for believing that the accused is guilty after conclusion of trial but before judgment.
- c) **Discretion in granting bail in non-bailable offences:** The following circumstances can be taken into consideration:
 - i) the enormity of the charge,
 - ii) the nature of accusation,
 - iii) the severity of the punishment which the conviction will entail,

- iv) the nature of the evidence in support of the accusation,
- v) the nature and gravity of the circumstances in which the offence is committed,
- vi) the position and status of the accused with reference to the victim and the witnesses,
- vii) the danger of witnesses being tampered with,
- viii) the likelihood of accused fleeing from justice,
- ix) probability of the accused committing more offences,
- x) the protracted nature of the trial,
- xi) opportunity to the applicant for preparation of his defence and access to his counsel,
- xii) the health, age and sex of the accused person, etc.

d) No bail in case of offence punishable with death or imprisonment for life: In case of a person under arrest or detention, the person shall not be released on bail, if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. However, the court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail. Here, again the court releasing any person on bail will have to record in writing its reasons for doing so.

e) Bail with condition: The court may impose any condition which considers necessary.

- i) in order to ensure that such person shall attend in accordance with the conditions of the bond executed under Chapter XXXIII (relating to bail), or
- ii) in order to ensure that such person shall not commit an offence similar to the offence of which he is accused of or the commission of which he is suspected, or
- iii) otherwise in the interest of justice.

The above power to impose conditions can only be exercised:

- where the offence is punishable with imprisonment which may extend to seven years or more; or
- where the offence is one in Chapter VI (offences against the State), Chapter XVI (offences affecting the human body), or Chapter XVII (offences against property) of the IPC; or
- where the offence is one of abetment, conspiracy, or attempt in relation to any such offence as is mentioned in (1) or (2) above.

In view of the above, in Section 10.3 below, we will focus on criminal conspiracy.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to Check Your Progress’ Questions”

- 1) Explain the meaning and significance of ‘cognisable offence’ and non-cognisable offence’

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- 2) What are the circumstances in which release on bail is mandatory?

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- 3) What is meant by ‘taking cognizance of offence? Explain its significance in the context of summons case and warrant case.

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10.3 OFFENCE OF CRIMINAL CONSPIRACY

Before we discuss different aspects of criminal conspiracy, we will present you how the law of criminal conspiracy has originated and developed.

10.3.1 Development of Law of Conspiracy

Conspiracy, at common law, had its origin primarily as a civil wrong but was lately made punishable as a criminal wrong. Conspiracy was originally used to explain the acts of agreement of those who combined to carry but on legal proceedings in a vexatious or improper way. The Star Chamber gave it a more

concrete form and such agreement was made a substantive offence even when no act was done in pursuance of it. The evolution of the law of conspiracy has widened its scope gradually and general application can also be traced in close association with the law of principal and accessory. According to English law, if two or more persons agree together to do something contrary to law or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons who so agree commit the offence of conspiracy. Originally, the IPC contained only two persons by which conspiracy was made punishable, viz. (i) conspiracy by way of abetment, and (ii) conspiracy involved in certain offences. Thus, in the original law, some overt act by way of furthering the object of the conspiracy on the part of the accused was a prerequisite for imposing criminal liability. In 1868 the English Common law on criminal conspiracy was widened with the judgment of the House of Lords in *Muleahy v R.* case. In this case, the principle in common law that a mere agreement of two or more people to do an unlawful act by unlawful means was sufficient to attract liability under conspiracy, even if no specific overt act had been committed, was introduced.

In 1870, law of conspiracy was widened by insertion of Section 121-A IPC. Under this provision, it was not necessary that any act or omission had actually taken place. The conspiracy per se was not made an offence under IPC. The position has changed with the Amendment Act of 1913. The present section was incorporated in 1913, as 120-A, 120-B in a separate chapter, dealing with criminal conspiracy and the punishment thereof.

Now, the law of conspiracy covers the following:

- i) Conspiracy as a substantive offence.
- ii) Conspiracy as a form of abetment.
- iii) Conspiracy as a substantive offence.
- iv) Involvement in specific offence.

10.3.2 Definition of Criminal Conspiracy

When two or more persons agree to do, or cause to be done, 1) an illegal act, or 2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy (Section 120-A):

- 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.

Explanation: It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Let us now look at the *essential components* that together constitute criminal conspiracy.

- a) **Ingredients of section 120-A:** The main ingredients of section 120-A IPC are as follows:
 - i) There should be two or more persons involved;
 - ii) There should be an agreement between themselves;

- iii) The agreement must be to do or cause to be done,
 - a) an illegal act, or
 - b) an act which may not itself be illegal, by illegal means.

The proviso to the section amplifies the scope of the liability as follows.

- In the case of a conspiracy to commit an offence, the mere agreement is sufficient to impose liability without the requirement that some overt act in furtherance of the conspiracy should have been committed;
- However, in the case of a conspiracy to do an act which is not illegal, in other words a legal act, through means which are illegal, then in such cases there ought to be some overt act which should have been committed by one or more parties to the agreement, apart from the agreement itself.

Thus, when two or persons agree to do an illegal act or a legal act through illegal means, then they are liable to be tried for the offence of conspiracy.

- b) **Agreement is the gist of the offence:** Criminal conspiracy is an agreement by two or more persons to do or cause to be done an illegal act or an act which is not illegal by illegal means. The gist of this offence in the bare agreement to break the law: whether any act be done in pursuance thereof by the conspirators or not. In the case of agreement to do illegal act, the criminal conspiracy is completed by the conspirators or not. In the case of agreement to do illegal act, the criminal conspiracy is completed by the act of agreement and in case of agreement to do lawful act by illegal means there must be some act done by one or more parties to the agreement to effect the object thereof, that is, there must be an overt act. In the latter case, the agreement alone does not amount to a conspiracy unless it is followed by an overt act done by one or more persons in pursuance of such an agreement. There must be a meeting of minds to conclude agreement. The offence of conspiracy is complete when two or more conspirators agreed to do an illegal act.
- c) **An illegal Act:** The word illegal has been given a comprehensive meaning under this section. The word 'illegal' is defined as 'applicable to everything which is an offence, or which is prohibited by law, and a person is said to be legally bound to do whatever it is illegal in him to omit.
- d) **Illegal means to do an act which is not illegal:** There must be an overt act done by one or more of the parties. The methods or means employed are illegal. The act does not constitute as illegal. To achieve the lawful act, the means adopted are illegal. Hence, the means have to be proved.

10.3.3 Nature and Process of Criminal Conspiracy

Following aspects of criminal conspiracy provide you an idea of its nature and process.

- a) **The offence is continuing:** A criminal conspiracy may persist as long as the persons constituting it continue to act in furtherance of their objects. It is a continuous offence. It is committed not only when the agreement is first reached but continues as long as the agreement to effect the unlawful object continues. If the object of the conspiracy is accomplished and the conspirators disband themselves the conspiracy comes to an end.

- b) **Series of acts under one design:** It is not an ingredient of the offence under this section that all the parties should agree to do a single illegal act. It may comprise the commission of a number of acts. They can be held guilty of the offence of conspiracy to do illegal acts, though for individual offences all of them may not be liable. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve.
- c) **Steps not known to all conspirators:** It is not necessary that each member of a conspiracy must know each other or all the details of the conspiracy. It is also not necessary that every conspirator must have taken part in each and every act done in pursuance of conspiracy. It is necessary that a charge of conspiracy should contain particulars of the names of the place or places where it was hatched, persons hatching it, how it was hatched and what was the purpose of the conspiracy. It is not the law that every conspirator must be present at every stage of the conspiracy. If the conspirator concerned had agreed to the common design and had not resiled from that agreement, it can be presumed that he continued to be party to the conspiracy. The parties to such an agreement will be guilty of criminal conspiracy though the illegal act agreed to be done has not been done.

Here, it is important for you to know about separate and joint conspiracies as well.

Separate and joint conspiracies: It is not necessary that each member of a conspiracy must communicate with each other member of the criminal conspiracy. The offence of conspiracy is different from the offence which is committed in pursuance of the conspiracy. Criminal conspiracy will always precede the offence to be committed in pursuance of it. Some times two conspiracies, one small and the other big, may cover such area which partly may be a part of each conspiracy, the bigger one taking within its wings the smaller one. They continue to be separate and thus be tried separately. However, the court may be requested to permit to try jointly.

10.3.4 Charge of Criminal Conspiracy

The criminal conspiracy, being an independent offence, has to be proved like any other offence. Since conspiracy is often hatched up in utmost secrecy it is mostly impossible to prove conspiracy by direct evidence. The prosecution must prove agreement between two or more persons to do or cause to be done some illegal act: such agreement which is the essence of the offence of conspiracy is not always capable of proof by direct evidence, because the agreement is always entered secretly. It has to be inferred from the acts, statements and conduct of the parties to the conspiracy.

The express agreement need not be proved and nor it is necessary to prove the actual meeting of two persons. The evidence as to transmissions of thoughts or sharking the unlawful design, in part or full, may be sufficient.

- a) **Proof of Conspiracy:** Section 10 of the Indian Evidence Act, lays down the conditions sufficient for assessing the evidence of co-conspirators to prove conspiracy as against other conspirators. The following three ingredients need to be covered.

- i) There should be prima facie evidence regarding the involvement of two or more in forming an agreement.
- ii) If the above condition is fulfilled then anything said, done or written by any one of them in reference to the common intention will be evidence against the others.
- iii) Anything said, done or written by the conspirators, after common intention was formed by them, would be admissible.

Some Judicial Decisions: In *Topandas v Sate of Bombay* (AIR, 1956), it was held that two or more persons must be parties to such an agreement and one person alone can never be held guilty of criminal conspiracy for the simple reason that one cannot conspire with oneself. To establish a charge of conspiracy, knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary.

In *Amrita Lal Hazra and Others v Emperor* (42, ILR, Cal. 975), the High Court of Calcutta laid down the following principles.

- i) The person might be guilty of criminal conspiracy even though the illegal act agreed to do or cause to be done had not been done.
- ii) A person may be guilty of criminal conspiracy for the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means.
- iii) The defence is entitled to insist upon proof of reasonable ground for belief that the persons named in the charge have conspired together before particular facts are proved to show one or more of the accused took part in it.
- iv) The charge of criminal conspiracy must not be indefinite. The courts must state the illegal purpose and design of the agreement with such proper sufficient certainty as to lead to the necessary conclusions that it was an agreement to do an act in violation of law.

The Supreme Court in the (Rajiv Gandhi Assassination case) *State of Tamil Nadu v Nalini* (1999, p.2640) has brought out ten main principles governing the law of conspiracy.

- i) Offence of criminal conspiracy is exception to the general law where intent alone does not constitute crime. Not only the intention, there has to be agreement to carry out the object of the intention, which is an offence.
- ii) Acts subsequent to the achieving of objects of conspiracy may tend to prove that a particular accused was a party to the conspiracy.
- iii) Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence.
- iv) Conspirators may be enrolled in chain. It is not the part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.
- v) There has to be two conspirators and may be more than that. If intended crime is committed, it may help the prosecution to prove the charge of conspiracy.

- vi) It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time and all are equally responsible.
- vii) The prosecution has to produce evidence only to show that each of the accused has knowledge of object of conspiracy and agreement.
- viii) It is the unlawful agreement and not its accomplishment, which is the gist of the offence. The unlawful agreement need not be formal or express but may be inherent in and inferred from the circumstances. The agreement need not be entered into by all the parties to it at the same time but may be reached by successive actions.
- ix) Criminal conspiracy is a partnership in crime. Everything said, written or done by any of the conspirators in the execution, or in furtherance of the common purpose is deemed to have been said, done or written by each of them. The conspirator is not responsible for acts done by co-conspirator after termination of the conspiracy.

A person may join a conspiracy by word or deed. If one tacitly consents to the objects of the conspiracy and standing by or observing while the others put conspiracy into effect, is guilty though he intends to take no active part in the crime.

In *Khar Singh and others v The State (Delhi Adm.) i.e. Indira Gandhi Assassination Case* (1988, p.1883), the court observed that the most important ingredient of the offence of conspiracy is the agreement between two or more persons to do an illegal act. The illegal act may or may not be done in pursuance of agreement, but the very agreement is an offence and is punishable. The express agreement need not be proved. Nor actual meeting of two persons is necessary or to prove the actual wording of communication. The evidence as to transmission of thoughts sharing the unlawful design may be sufficient. The relative acts or conduct of the parties must be conscientious and clear to mark their concurrence as to what should be done. The innocuous, innocent or inadvertent events and incidents should not enter the judicial verdict. It is held that a conspiracy should be considered as substantive offence only when the object of conspiracy is extremely serious.

10.3.5 Punishment of Criminal Conspiracy

Section 120-B. Punishment of criminal conspiracy: It is as follows.

- 1) Whoever is a party to 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.

10.3.6 Abetment and Conspiracy

As regards the difference between abetment and conspiracy, the abetment is wider; it is a genus of which the offence of conspiracy is species. Abetment may be committed in various ways mentioned in Sections 107 and 108. Abetment per se is not a substantive offence, while criminal conspiracy is per se offence.

The offences under Sections 109 and 120-B are quite distinct. There may be an element of abetment in a conspiracy, but conspiracy is something more than an abetment. The offence of abetment created under the second clause of section 107 requires that there must be something more than a mere conspiracy; there must be some act of illegal commission or omission in pursuance of that conspiracy. The punishments for these two offences are also quite different. Abetment is concerned only with the punishment of abetment for which no express provision is made under IPC. A charge under Section 109 should be along with some other substantive offence committed in consequence of abetment. The criminal conspiracy is an independent offence.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”

4) Define criminal conspiracy and mention its essential ingredients.

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10.4 PROPORTIONALITY OF PUNISHMENT

Let us discuss the concept of punishment, before we touch upon the evolution, significance and theories of proportionality of punishment.

10.4.1 Concept of Punishment

Punishment has been with human society and human beings from the inception of society. Punishment is a necessary concomitant of law and that laws without punishment/ sanction are not true and effective laws. The ‘Command-Duty-Sanction’ model of law, enunciated by John Austin (quoted by Mehta, 1999, p.331), states punishment as one of the three pillars of a legal system. It is an evil attached to a command. Punishment is a coercive factor. It is a stick by which the law is enforced. It is as necessary to law as law is for the society. People obey the law whether or not they like it, as the same is the command of a sovereign backed by sanction/penalties.

Some of the sanctions are enlisted below.

- i) Moral sanctions are internal to person and depend upon his moral psyche.
- ii) Social sanctions are imposed directly or indirectly by society. It is a very powerful behavior mechanism.
- iii) Legal sanctions are imposed by the legislative enactments of laws. It comes from the law giver. The law is seen to be a command which imposes a duty and the failure to fulfill the duty attracts legal sanction.
- iv) Punitive sanctions actually inflict punishment upon the transgressor. Punitive sanction is the rough treatment given to the offender.

Punishing the offender is a primary function of all civil states. The incidence of crime and its retribution has always been an unending fascination for human mind. The practice of punishment and public opinion concerning it has been profoundly modified due to the rapidly changing social values and sentiments of the people. It is in this perspective that the problem of crime and punishment is engaging the attention of criminologists and penologists all around the world. The punishment can be used as a method of reducing the incidence of criminal behaviour. It is this principle which underlies the doctrines concerning the desirability and objectives of punishment.

Theories of punishment contain generally policies regarding handling of crime and criminals. There are four generally accepted theories of punishment, namely, *deterrent, retributive, preventive and reformative*.

Hugo Grotius (quoted Mehta, op. cit.) offered earliest and most simplistic definition of punishment as the reflection of an ill, suffered for an ill done. Stephen Schafer defines punishment as the enforcement of responsibility for violating a prescribed duty that is ruled by a power more powerful than the violator. Punishment can be defined as a penalty or sanction given for any crime or offence.

Sir Walter Moberly (quoted in Paranjape, 2009, p.222), while accepting the definition of punishment as given by Grotious, suggests that punishment presupposes that:

- i) what is inflicted is an ill, that is something unpleasant;
- ii) it is a sequel to some act which is disapproved by authority;
- iii) there is some correspondence between the punishment and the act which has evoked it;
- iv) punishment is imposed by some one's voluntary act;
- v) punishment is inflicted upon the criminal who is supposed to be answerable for him and for his wrong doing.

10.4.2 Origin and Evolution of the System of Punishment

A look at the system of punishment from the early times till date will provide us an understanding of the origin, evolution and adequacy of modern penal system.

- a) **Early stages:** The sense of fear and ignorance led to barbarous method of treatment of offenders. The concept of law and order was not known to them. The common methods of settling disputes were through personal

vengeance, reparation, etc. Thus, it led to exploitation of the weaker by the stronger resulting in complete chaos. The life and property were most insecure and always exposed to danger. The cases of property damages were generally settled by compelling the offender to pay compensation to the injured. Later, state came into existence and took to itself the task of maintaining law and order in the community by punishing the law-breakers.

- b) Medieval Period:** The tenets of religion had great influence on the administration of justice and penal policy. Crime began to be identified with sin and violence. This led to the evolution of solitary confinement as a means of penance by putting the wrong doer in isolation. It is believed that if the offender sincerely repented for his offence, the mental torture that he suffers is itself a great punishment for him.

The noted Italian criminologists, Garofalo and Enrico Ferri rejected this theory. Sir Leo Page observed that the theory is not only wrong but actively mischievous. This theory of expiation presented practical difficulties in the determination of exact quantum of punishment (quoted in Mehta, 1999, pp.331-333).

With the advance of science and knowledge in social disciplines, reformation became a wave throughout the European continent. Rehabilitation through the method of reformation is considered more useful. With this end, the modern judicial trend is to incorporate correctional methods in the penal programme.

Deterrence was the cardinal rule of justice; it meant considerable torture and harassment to offenders. The theory of vengeance is, thus, nothing but a perverted form of retributive method of punishment.

- c) Modern Penology:** It has been generally accepted that punishment must be in proportion to the gravity of the offence. It is suggested that reformation of criminal rather than his expulsion from society is more purposeful. Today, old barbarous methods of punishment are abandoned. Modern penologists have substituted new forms of penal sanctions for the old methods of sentencing. The present modes of punishment commonly include imposition of monetary fines, segregation of the offender temporarily or permanently through imprisonment, or externment or compensation by way of damages from the wrong doer. Undoubtedly, it goes to the credit of eminent criminologists, notably, Beccaria, Garofalo, Ferri, Tarde, Bentham and others, who formulated sound principles of penology and made all out efforts to ensure rehabilitation of the offender so as to make him a useful member of society once again. Open air jails, parole or probation are being intensively used for long-termers so that they can earn their livelihood while in the institution.

It was Beccaria (mentioned in Paranjape, 2009) who advocated equalized treatment for all criminals for similar offences and reiterated that it was not the personality of offender, but his antecedents, family background and circumstances, which had to be taken into consideration while determining his guilt and punishment. He was equally opposed to the discretionary power of court and argued that the function of determining appropriate punishment for different offences must be confined to the legislature and law makers

alone. The function of jury is to determine the question of fact, i.e. whether the crime has been committed by the offender or not, and decide the guilt or innocence of the accused. The central theme of penal policy advocated by adherents of classical school was quality of punishment for similar offences. However, this theory has fallen into disuse.

The adherents of neo-classical school suggested that punishment should be awarded in varying degrees depending on the mental condition and intent of the criminal. It was for the first time that an attempt was made to shift the emphasis from 'crime to criminal'. This led to classification of criminals into different categories according to the genesis of the criminality. The object was to make the reformatory methods of punishment more effective. Sen (1943, p.45), rightly observed that punishment is converted into a treatment method for bringing about reformation of the offender.

Garefalo believed that reformation had only a limited utility in cases of young or first offenders and it hardly served any useful purpose in cases of recidivist and hardened criminals. He also rejected deterrent punishment since it had failed to determine the exact quantum of punishment for a given offence under varying social circumstances.

Enrico Ferri asserted that punishment was necessary for the protection of society. He opined that punishment was a social deterrent. Ferri did not believe that the imprisonment does not serve useful purpose.

It is well settled that prevention of crime and protection of society are the main objects of punishment. Punishment is an act which involves the balancing of retribution, deterrence and reformation.

10.4.3 Essentials of an Ideal Penal System

An ideal penal system must, essentially, include the following characteristics:

- 1) A rational penal policy should aim at protecting the society from crimes and reclaim criminals by removing imperfections in the penal law of the country. Greater emphasis should be on prevention rather than cure.
- 2) Bentham, well known English law reformer, commented that penal policy must be in conformity with the utilitarian doctrine of pleasure and pain: punishment to be effective should be proportionate to the gravity of the offence.
- 3) Elimination of delay in awarding punishment is, perhaps, the most fundamental requirement of an ideal penal programme. Inordinate delay causes loss of faith in justice delivery system.
- 4) Penal actions act as a threat to the aggressor thereby refraining him from committing such forbidden acts of violence. As Beccaria puts it, the purpose of punishment is 'to make crime an ill bargain for the offender'.
- 5) Experience has shown that the principle of equal punishment for similar offences does not prove effective for all types of criminals. It is for this reason that classification of criminals into different categories is deemed necessary.

- 6) It is significant to note that efficacy of punishment essentially depends on the proper functioning of agencies which administer criminal justice. Disproportionate and unduly harsh punishment shall make the members of community feel that their life is not safe and insecure in the hands of administrators.
- 7) Reformation of criminals should be the object of punishment. The punishment to be efficacious must include the combination of deterrence, prevention and reformation.
- 8) While appreciating the need for reformatory approach towards criminals, a word of caution seems necessary. With all the comforts to inmates in prisons, the inmates often take the institutions as an easy resort to spend their life comfortably without shouldering any responsibilities. This obviously effects the very object of reformation.
- 9) The authorities should refrain from projecting the image of the offenders as 'big shot'. The rewards so often announced by the govt. on the heads of notorious dacoits, murderers and criminals seem to undermine the aspect of penal policy, e.g. Poolan Devi story is pictured as 'Bandit queen' and Veerappan as 'Sandal wood jungle dacoit'.
- 10) Most of the modern penologists are opposed to retention of capital punishment on humanitarian grounds. 'Despite growing disinclination for awarding death penalty, there is a growing reluctance to abolish it. The ideal policy is to retain capital punishment in the statute book to be used in 'rarest of rare case'.
- 11) Punishment should include both compensation as well as imprisonment.
- 12) The efficacy of punishment, by and large, depends on the impartiality. The penal policy should be completely free from considerations as to the caste, creed, religion or status of the offender.
- 13) As a sound principle of criminal justice, it is for the legislature to prescribe maximum limit of punishment for every offence in Penal Code without laying down any minimum limit. This will enable law courts to award punishment according to the requirements of individual offender, thus, infusing an element of discretion in judicial sentencing.
- 14) The system of solitary confinement has now become obsolete and outdated. It is discarded because it is torturous. It is so painful that it completely destroys the personality of the offender and he turns hostile and indifferent to the community.
- 15) Punishment should always serve as a measure of social defence. An ideal policy should have enough elasticity so as to mould itself with the changing needs of time and place.

10.4.3.1 Proportionality of Punishment: Sentencing Process and Policies

The object of criminal trial is to determine whether the accused person is guilty of the offence he is charged with, and to prescribe suitable action if he is proved guilty on the basis of criminal law. The determination of the second issue involves the choice of appropriate sanction out of the many permitted by law. The

sentencing process involves the determination of the appropriate sanction both in qualitative and quantitative terms. Bentham sought to achieve some element of rationality in the penal policy by advocating punishments of different magnitudes for different kinds of offences.

Bentham provided the following guidelines for the gradation of offences in terms of different punishment.

- 1) That the value of the punishment must not be less in any case than what is sufficient to out-weigh that of the profit of the offence.
- 2) When two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.
- 3) The punishment should be adjusted in such manner to each particular offence that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.
- 4) The punishment ought, in no case, be more than what is necessary to bring it into conformity with the rules given.

The other rules propounded by Bentham laid down that the quantum of punishment prescribed should be in inverse proportion to the possibility and time factor involved in the infliction of punishment. Regarding the fixation of punishment, Bentham said that the quantum should vary according to the offender's capacity to suffer. He then enumerated thirty two variables of capacity for suffering, ranging from sex, age, physical and mental health, religion and lineage, among others.

The classical school paved the way for distinguishing the various crimes according to their gravity and the prescription of different punishments for them. The IPC is an example of the influence exercised by Bentham. The grading of the various offences is based on their gravity and the gravity of the offence is generally assessed in terms of social danger, alarm, social disapproval, harm and wickedness involved in it.

- i) **Social danger:** Receiving stolen property is punishable with longer punishment because of the greater social danger posed by the professional receivers of the stolen property as compared to ordinary thieves. Another example, while maximum punishment for ordinary cases of criminal breach of trust under IPC is three years; it is seven and ten years when breach of trust is committed by a public servant.
- ii) **Alarm:** The gravity of an offence is also determined with reference to the alarm it causes to the society. One of the reasons for punishing unsuccessful attempts to commit crimes is that though intended harm is not caused some alarm is caused to the victim and others.
- iii) **Social Disapproval:** Heterosexual intercourse is punishable if it is against the will or without the consent of the victim. To illustrate, in India, illicit relationship with a married woman is punishable but a situation when the man is married and the woman unmarried is not punishable as such.
- iv) **Harm:** This is one of the factors to be considered in the sentencing policy by legislators and judges. An attempt to commit an offence involves the same

wickedness on the part of the offender as in the case of the successful commission of the crime, but attempts are punishable with less penalties since lesser or no harm is caused in unsuccessful attempts.

- v) **Wickedness:** Though the harm produced by the different offences may be the same, yet the offence involving greater wickedness should carry greater punishment. It should not be concluded from the above discussion that the quantum of punishment for various offences is variably based on highly scientific or rational considerations.

Prescribing sentences for various offences is a legislative function and courts in India cannot question the wisdom of legislatures even if the sentences appear to them to be unreasonable or excessive. The courts can exercise their discretion in such cases in fixing the appropriate punishment where maximum penalties have been provided but they cannot but be helpless when maximum sentences are laid down.

10.4.3.2 Primary and Secondary Decisions

The first issue which a court has to decide after finding the accused person guilty is to determine whether the offender needs to be dealt with through 'individualization', or by penal sanctions. Secondly, after making the choice between the two conflicting approaches, the court has to select the appropriate device out of those available in the particular approach. It is obvious that in case of the imposition of imprisonment or fine, the quantum of the sanction shall also have to be fixed. These parts of sentencing decisions are accordingly referred to as the primary and secondary decisions. The criminal procedure code of 1973 incorporated some provisions which reflect the contemporary thinking that sentencing is an important stage in the administration of criminal justice.

The Law Commission identified the various considerations to be made in its Forty Seventh Report. As per the commission, many factors, like nature of offence, the circumstances, prior criminal record of the offender, age of the offender, the professional and social record of the offender, background of the offender with reference to education, home life and social adjustments, the prospect of rehabilitation, the possibility of a return to normal life, possibility of treatment or training and the possibility of the sentence serving as a deterrence have to be taken into consideration.

- a) **Pre-sentencing inquiry:** Following devices are useful in arriving at appropriate decisions. It is evident that the sentencing authority must have sufficient information regarding the various personal factors of the accused. Courts not only receive and use the information given in the reports but they may also seek advice from experts like psychiatrists or probation officers. The congress of the Institutional penal and penitentiary commission in Brussels held in 1951 recognized the utility of presenting report and some of the resolutions are reproduced below.
 - i) A presentence report covering not merely the surrounding circumstances of the crime but also factors of personality, character and socio-cultural background of the offender is a highly desirable one.
 - ii) The scope and intensity of the investigation report should be adequate to furnish the judge with enough information to enable him to make a reasoned disposition.

- iii) It is recommended that criminologists in various countries conduct researches designed to develop prognostic methods.
 - iv) It is recommended that the professional preparation of judges concerned with peno-correctional problems include training in the field of criminology.
- b) **Disparity in sentencing:** One difficult problem relating to the sentencing process is the lack of uniformity in the quantum of punishment given by different courts for the same or similar offence. Obviously, it would be unreasonable to expect uniformity of a very high degree since penology is not the kind of discipline where a ready-made formula of a precise nature can be applied to meet the various situations nor all the judicial officers possess the same attitude while sentencing, since they are found to be influenced by their own values and personalities.
- c) **Disparity Reduction:** Though sentencing disparity cannot be eliminated altogether, yet efforts can be made for reducing it to the minimum level.

The strategies indicated are, the better training of judicial officers and the co-ordination of sentencing policies through sentencing councils. Provision for appellate review of sentence is also made in criminal laws which go a long way in reducing the disparities.

Improving sentencing skills should be an important part of any scheme which aims to make sentencing practices more consistent. Training of judicial personnel in penology and sentencing procedures would enable judges to keep abreast with the latest trend in penological thought and practice.

Since sentencing requires more experience in the fields of social work and psychiatry, the job must be entrusted to a board of experts. But, this proposal has been criticized because of the potentialities of abuse. This apprehension can be eliminated by providing appeals.

Another alternative is to try a combination of the judiciary and the board of experts by employing the technique of indeterminate sentence. The board then decides the limits and the actual time of release on the basis of the performance.

The steps taken to reduce sentencing-disparity, thus, aim at reducing the sentencing-discretion of both judges and parole boards.

Indian perspective: P. K. Sen, a well known authority on Indian penology, observed that penology embodies the fundamental principles upon which the state formulates its scheme of punishment. He opines that punishment always lacks exactness because it is concerned with human conduct which is constantly varying according to circumstances. He suggested, punishment must be devised on case law so that it would be free from rigidity and capable of modification with changing social conditions. Penal science is not new to Indian criminal jurisprudence. A well defined system did exist in ancient India even in the period of Manu or Kautilya. The ancient administrators were convinced, that punishment serves as a check on repetition of crime and prevents law-breaking. They believed that all the theories of punishment are directed towards a common goal, that is, the protection of society from crime and criminals. Sen asserted that the concept of punishment has now radically changed in as much as it is no longer regarded as a reaction of the aggrieved party against the wrong doer but has become an instrument of social defence for the protection of society against crime.

10.4.4 Theories of Punishment

To punish criminals is a recognized function of all civilized states for centuries. The crucial problem to the penologists is as to the end of punishment and its place in penal policy. Broadly speaking, four types of views can be distinctly found to prevail, viz. a) Deterrent, b) Retributive, c) Preventive, and d) Reformative. Modern penologists call them as 'theories of punishment'.

- a) **Deterrent theory:** This kind of punishment presupposes infliction of severe penalties on offenders with a view to deterring them from committing crime. This theory also seeks to create some kind of fear in the mind of others, so that they keep away from committing crimes. It is one of the effective policies despite the fact that it invariably fails in practical application. It failed in case of hardened criminals and also in many cases crimes are committed in an emotional moments without prior design or intention. The object underlying the deterrent punishment is thus defeated. The severity of punishment is a very inferior deterrent.
- b) **Retributive theory:** This is based on the principle that evil should be returned for evil. This theory underlined the idea of vengeance or revenge. It has its origin in the crude animal instinct of individual. The modern view, however, does not favour this theory because it is neither wise nor desirable.

According to this theory, offender should be made to suffer in proportion to the injury caused to the victim, viz. a tooth for a tooth, or eye for an eye. It is a barbarous form of punishment and betrays an utter ignorance of the causes that lead to crime.

Retributive theory is closely associated with the notion of expiation which means blotting out the guilt by suffering an appropriate punishment. It is this consideration which underlies the mathematical equation of crime, namely, guilt plus punishment is equal to innocence. Most penologists refuse this theory. The reason being that no sooner an offender completes his term of sentence, he thinks that his guilt is washed off and he is free to do crime again.

- c) **Preventive theory:** The object of punishment, according to this theory, is to prevent a criminal from committing crime in future by rendering the offender incapable of committing the offence either permanently or temporality. The purpose is to make sure that the criminal does not commit the act again. The best way is to detach him from society. It is least harsh measure adopted under the concept of incapacitation of offenders.
- d) **Reformatory theory:** Plato is the father of the reformatory theory of punishment. This theory views punishment as an instrument to induce wrong doers to hate unrighteousness and to love righteousness. The reformatory theory seeks to strengthen the character of the man, so that he may not become easy victim to his own temptation. Criminals stay in prison should serve to re-educate him and to re-shape his personality in a new mould. This theory condemns all kinds of corporal punishment. The major emphasis of the reformist movement is rehabilitation of inmates in pre-correctional

institutions so that they are transformed into good citizens. The reformists advocate humane treatment of inmates inside the prisons and suggest to train the prisoners to adjust themselves to free life in society after their release from the institutions.

The modern penologists reaffirm their faith in reformatory justice. Punishment should not be regarded as an end in itself but only as a means.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

- 5) Explain the importance of grading of offences in determining the proportionality of punishment.

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- 6) Write in brief about theories of punishment.

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To conclude, while drawing up the treatment of offenders, it must be borne in mind that human nature is complex and it is not possible to comprehend it fully. This is the reason why all human beings do not respond in the same manner. The prisons act as treatment and training centers. The emphasis is shifted from custody to training of offender. Mere treatment in institutions does not help in the ultimate rehabilitation of the offenders because of the stigma society attaches to the released inmates. The penal system should be so devised as to cause minimum of suffering to offenders and at the same time develop social morals and social discipline among citizens. In short, it should neither be intolerably severe nor unrealistically lenient. The penal policy reflects the social reaction to crime and therefore the motive for punishment should largely depend on the social structure and accepted norms and values of a given society.

10.5 GENERAL EXCEPTIONS

As a general rule of law, man is presumed to know the nature and consequences of his act and is held responsible for it. There are, however, certain exceptions to this general rule, wherein a person may be excused of crime. The framers of penal code have put all cases of exception in Chapter IV of IPC — from Sections 76-106. Every definition of offence, every penal provision and every illustration of a definition under the penal code shall be construed subject to the provisions contained in this chapter. The scope of the general exceptions provided in this chapter is very wide. It is not only limited to the offences under the IPC, but it also extends to the offences under special or local laws as well.

All the provisions mentioned, in this chapter, can broadly be classified into two categories:

- 1) Excusable Acts, and
- 2) Justifiable Acts.

The law excuses certain class of persons even though their acts constitute an offence under excusable acts. In excusable category, the necessary mensrea for the offence would be lacking either by reason of a bonafide mistake as to the existence of fact or by reason of the act being done accidentally or by reason of infancy, or insanity or intoxication and so the actor is to not responsible for what he has done.

Under second category, the acts committed, though are offences are held to be justifiable under certain circumstances and are exempted from punishment. In this category, the circumstances under which the offence was committed furnish legal justification for its commission either by reason of the act being done by a judge under the direction of law or pursuance of the order of the court or to prevent a greater harm to a person or to property, or an act done with the consent of the person harmed or done under coercion, or in the exercise of the right of private defence, or the act being of a trival nature, hence the law would not take notice of it.

We, therefore, need to keep in mind the object of general exceptions, before seeking these exceptions as defence.

- a) **Object of General Exceptions:** Every penal clause is subject to a number of limitations and no offence can be absolute without any exception. An offence committed by a child or mentally ill person cannot be treated in the same manner as an offence committed by a sane adult. Liability cannot be fixed on persons who would have committed an offence by accidents, under threat, by necessity or in private defence, in the same manner as a person who has committed an offence with an evil intention or design. For instance, there is a presumption that all persons are sane and are not acting under the influence of alcohol. Such presumption may be true of large section of people but not without exception. A separate chapter on 'general exceptions' has been enacted which is applicable to the entire code to avoid repetition.

Every provision under the code has to be read along with the chapter on "General Exceptions" before coming to any conclusion on the liability or culpability of a person accused of a crime.

- b) **Burden of Proof:** It is the fundamental rule of criminal jurisprudence that a person is innocent until proved guilty. This means that there is always a presumption of innocence in favour of every accused and the burden of proving every aspect of the crime solely rests on the prosecution. The standard of proof required is very high. The prosecution has to prove every aspect of the case beyond all reasonable doubt. The burden of proving that the accused not only committed the criminal act but also did so with a guilty mind rests upon the prosecution throughout the trial, it never shifts to the defence. If there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it is given to the accused.

Section 105 of Indian Evidence Act changed the position and it places the burden on the accused to prove that the case falls within one of the exception. The 'court shall presume' the absence of such circumstances. It is open to the accused to adopt a defence that his case falls under one or other of the general exceptions. If the accused takes such defence then it is for him to prove the same. Once a prima facie case of the existence of circumstances that bring the case within any of the general exceptions is made out, then the burden once again shifts on the prosecution to prove beyond doubt the guilt of the accused or to establish that the general exception claimed by the accused does not exist. This rule of evidence is based on the principle that even if a hundred guilty persons go unpunished, innocent persons should not be punished.

We will now discuss the general exceptions of the following categories.

10.5.1 Mistake of Fact

Section 76: Act done by a person bound or by mistake of fact believing himself bound, by law: Noting is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of mistake of law in good faith believes himself to be, bound by law to do it.

- a) **Mistake of law:** Protection applies only to mistake of fact and not to mistake of law. This is based on the English common law maxim, '*ignorantia facit excusat ignorantia juris non excusat*', i.e. ignorance of fact is excused, but ignorance of law excuses no one. Mistake of law means, both mistake as to the existence of any law as well as mistake as to what the law is. Mistake of law is no excuse. The rule is founded on the fiction that every man knows the law, or ought to know the law under which he lives. It is everybody's duty to know the law. Mistake of law even in good faith will not be a defence under section 76.
- b) **Mistake of fact:** Mistake of fact or ignorance of fact under common law is generally a defence under this section. Though an act is not justified by law, yet it is done under the bonafide belief and in good faith that it is justified by law, and then it will not be an offence. Where a fact is unknown to the accused, his conduct must not be taken to be the intention with regard to it. The mistake must be of such a character that, had the supposed circumstances been real, they would have prevented liability from attaching to the person in doing what he did. The mistake must be reasonable one. Superstitious belief will be of no defence.
- c) **Bound by law:** Under section 76 acts done by a person bound by law or by mistake of fact believes himself to be bound by law is protected from criminal liability.

d) Ingredients: Section 76 deals with the following two classes of cases wherein a person is excused from criminal liability on the ground of mistake of fact.

- i) where a person is bound by law to do something and does it.
- ii) where a person believes in good faith owing to a mistake of fact and not a mistake of law, that he is bound to do something and does it.

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.

Section 78: Act done pursuant to the judgment or order of 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 had no jurisdictions to pass such judgment or order, provided the person doing the act in good faith believes that the Court had such jurisdiction.

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

10.5.2 Judicial Acts

Section 77 extends special immunity to a judge against criminal prosecution with respect to acts done by him judicially in discharge of his official duty. To avail the benefit under this section:

- i) the act must have been done by a judge in discharge of his official duty;
- ii) the act done must be within his jurisdiction; and
- iii) the act must be performed in good faith.

Under the first part, a judge does not commit an offence when he does something in his judicial capacity while exercising a power which the law has given to him. Under second part, it is not an offence for a judge to do something in his judicial capacity while exercising such power which in good faith he believes the law has given to him. Thus, if a magistrate assumes on an erroneous reading of the law that he had the jurisdiction to decide a particular case, he is not criminally liable for exceeding his jurisdiction.

Section 78 is a corollary to Section 77. It protects those who execute a judgment or order of the court of justice. Under this section, i) an officer is exempted from criminal prosecution provided the act is done: i) in good faith, and ii) under the belief in the legality of order. If these conditions are satisfied, an officer will not be liable for prosecution even if the court issuing the order had no jurisdiction or the order happened to be erroneous.

Section 79 is complementary to section 76. This section exempts a man from criminal liability in those cases where by reason of a mistake of fact in a good faith, and not by reason of a mistake of law, a man considers himself justified by law in doing an act that the person doing it believes in good faith by reason of a mistake of fact to be justified in doing, is not an offence.

Mistake in order to attract the attention of section 79 must be bonafide mistake in good faith based on genuine grounds. Good faith requires due care and attention. The ignorance of law will not exempt a person from criminal liability under section 79.

Distinction between Section 76 and Section 79: Under section 76 a person acts under compulsion, while under section 79 he acts under a legal justification. Section 76 grants exemption to a person from criminal liability when he believes himself bound by law to do a thing in a particular way, although the true state of facts reveal his act to be an offence. Section 79 deals with cases wherein a person, by reason of a mistake of fact, feels himself to be justified by law in doing an act in a particular way. Under section 76, a person acts because he believes he must act in a particular way, whereas under section 79 a person thinks he has justification for action and acts accordingly.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

- 7) Explain the burden of proof on prosecution in respect of proving a crime, and burden of proof on the accused in seeking defence of general exceptions.

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- 8) What is the distinction between Sections 76 and 79 of General Exceptions to an offence under IPC?

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10.5.3 Accident and Misfortune

Section 80: Accident in doing a lawful act: Nothing is an offence which is done by accident or misfortune, and 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.

A man is not criminally responsible for unintended and unknown consequences of his lawful acts performed in a lawful manner, by a lawful means, with proper care and caution. To avail the benefit of exemption from criminal liability, it must be proved that the act was done by: i) accident or misfortune, ii) without any criminal intention or knowledge, iii) in a lawful manner, iv) by lawful means, and v) with proper care and caution.

An accident means, in ordinary sense, an event which occurs without one's knowledge and beyond expectations. The happening must be one to which human fault does not contribute. Accidents have always been recognized as a valid defence to criminal liability, provided certain other conditions mentioned in the provision are also satisfied. If the act is illegal, exemption from criminal liability is not extended. Further, the accidental act should not only be without any criminal intention and a lawful act, but the said act also has been exercised with proper care and caution. What is expected is not utmost care, but sufficient care that a prudent and reasonable man would consider adequate, in the circumstances of the case.

10.5.4 Necessity or Inevitable Accidents

Section 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 be 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.

This embodies the principle that where the accused chooses lesser evil, in order to avert bigger evil, then he is immune to criminal harm caused. This section deals with what one can call inevitable accidents. The *doctrine of necessity* embodied is an indirect recognition to such unavoidable situations. Doctrine of necessity acts as a defence against criminal liability. In other words, the law has to be broken to achieve a greater good. The immunity from criminal liability will be available, under this action, where an offence is committed without any criminal intention to cause the harm and in good faith. The explanation to the section provides that the justification for the harm caused and whether the risk caused should be excused, is a question of fact to be determined in each case.

- a) *Ingredients:* To attract the provisions of this section the following conditions must be satisfied.
- i) the act must have been done without any criminal intention to cause harm,
 - ii) the act must be done in good faith for the purpose of preventing or avoiding other harm to person or property, and
 - iii) the harm must have been done in order to avert a grater harm.

10.5.5 Persons under Legal Disability

Section 82: Act of a child under seven years of age: Nothing is an offence which is done by a child under seven years of age. It provides complete immunity from criminal liability to acts of children less than 7 years of age. The immunity is granted to children on the pragmatic approach of the state that children below seven years are not capable of understanding the nature and consequences of

their acts and hence they do not have the capacity to have the requisite mens rea (doli incapax). He cannot distinguish right from wrong. Thus if a child below 7 years of age is charged for committing a crime, the fact that he was at that time below 7 years of age is ipso facto an answer to the prosecution.

Section 83: Act of a child above seven and under 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 attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion. This section provides qualified immunity to a child above seven years and under twelve years of age. The condition required is that such a child has not attained the requisite degree of understanding and maturity to judge the nature and consequences of his conduct; he is then exempted from criminal responsibility. However, once court comes to a conclusion that the concerned child has not attained sufficient maturity of understanding, then the immunity conferred by this section is as absolute as that conferred by section 82. The maturity of his understanding can be inferred from the nature of the act and his subsequent conduct and other allied factors. The words 'consequences of his conduct' do not mean penal consequences but the natural consequences of an act. 'Proof of attainment of sufficient maturity' can be arrived at by the court on the consideration of all the circumstances of the case, and need not be proved by the prosecution by positive evidence.

10.5.6 Insanity or Mental Abnormality

Section 84: Act of a person of unsound mind: Nothing is an offence which is done by a person who, at the time of doing 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.

Insanity or mental abnormality is an exception to criminal liability recognized by law. This is based on the *principle of mens rea*. Guilty mind alone is punishable. An insane or a mentally unsound person is incapable 'of having a will of his own;' hence should be exempt from criminal liability. The term 'unsoundness of mind' is not defined anywhere. The courts have treated this expression as equivalent to insanity. Insanity is denoted by mental derangement, mental disorder and all other forms of mental abnormality known to medical services.

Ingredients of this section include the following.

- i) It must be proved that the accused was incapable of knowing the nature of the act, and
- ii) That the accused was precluded by reason of unsoundness of mind from understanding that what he was doing was either wrong or contrary to law.

The crucial point of time for deciding whether the benefit of section 84 should be given to the accused or not is the material time when the offence took place. If, at that moment, a man is found to be labouring under such defect of reason, as not to know the nature of the act he was doing or that even if he knew, of it he did not know it was either wrong or contrary to law, then the court must apply section 84. The court has to take into consideration the relevant circumstances like the behavior of the accused before the commission of the offence and after the commission of the offence.

- **Plea of insanity:** Where a plea of insanity is raised under section 84 IPC the court has to consider whether the accused has established that at the time of committing the act he was of unsound mind. If it is found that he was of unsound mind then the accused has to prove that his unsoundness of mind was of degree and nature to satisfy one of the knowledge tests laid down in this section, viz, that by reason thereof he was incapable of knowing the nature of his act, or that he was doing what was either wrong or contrary to law. It is this test which distinguishes *legal insanity* from *medical insanity*.
 - **Medical and Legal insanity:** Medical insanity and legal insanity are different from each other. The former is dependent on medical grounds, while other depends on this factor as to be proved in a court of law to enable the accused to be acquitted of the charge. If there are sufficient medical grounds to hold that a person is suffering from insanity, it is a case of medical insanity. The legal insanity must be proved by the accused that at the time of commission of crime, because of unsoundness of mind, he did not know the nature of the act or that he was doing what was either wrong or contrary to law. Medically a person may be certified sane or insane. Legal insanity has to be proved with the requirement of the law under this section. If he fails the law presumes him sane at the time of commission of the crime.
- **Presumption of sanity:** It is important to remember that this plea of insanity is a defence against criminal responsibility. The courts will presume that every person is sane and in full control of all his faculties, until the contrary is proved. As per section 105 of the Indian Evidence Act, 'when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any general exceptions is upon him and the court shall presume the absence of such circumstances'.
- **Proof of insanity:** The court has to consider two issues.
 - Whether the accused has established that, at the time of committing the act, he was of unsound mind?
 - If he was of un sound mind, whether he has established that the unsoundness of mind was of a degree and nature to satisfy one of the knowledge test laid down by the section?
- **Burden of proof:** The burden of proving the plea of insanity rests on the accused and that onus can be discharged by producing evidence as to his conduct shortly prior to the offence. Section 84 casts the burden on the accused to adduce the evidence and prove that at the time of occurrence his mental condition was such that he did not know what he was doing.

10.5.7 Intoxication

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 to him without his knowledge or against his will.

This section protects a man from criminal liability, if at the time of committing the offence, he was incapable of knowing the nature of this act or that he was doing something wrong or contrary to law by reason of intoxication, provided that the intoxicant was administered to him 'without his knowledge' or 'against his will'. The terms 'without his knowledge' or 'against his will' denote that it should be involuntary intoxication

The expression 'without his knowledge' means that the person concerned is ignorant of the fact that what is consumed by him is an intoxicant or is mixed with an intoxicant. The word 'against his will' means that the person was forced or coerced into consuming an intoxicant.

But, by no means, this section is limited to drunkenness only. The essential elements of the defence are as follows.

- i) the accused must be under the state of intoxication at the time of doing an act.
 - ii) he, by reason of intoxication, must not be knowing the nature of his act, or he must not be knowing that his act was wrong or contrary to law.
 - iii) the intoxicant is given to him without his knowledge or against his will.
- *State of Intoxication:* This 'state of intoxication' can only mean intoxication which renders a person incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. Where a drunken person commits an offence, there will be no presumption of guilty-intention and such intention must be proved like any other fact in issue. The person will be exonerated from liability for an act done while in a state of intoxication if he, at the time of doing it, by reason of intoxication was incapable of forming the intention. Voluntary drunkenness is no excuse for the commission of offence.
 - *Burden of Proof:* The burden of proof of involuntary intoxication and its resultant incapacity on the person is on the accused. Like in all other exceptions, the onus of proving the same is on the accused.

Section 86: Offence requiring a particular intent or knowledge committed by one who is intoxicated: In cases, where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a 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.

Section 86 deals with the cases where an act done is not an offence unless done with a particular knowledge or intent. The section further says that a person voluntarily drunk will be deemed to have the same knowledge and liable for consequences as he would have had if he had not been intoxicated.

- *Intoxication and insanity:* In both the cases, the defence put up is incapacity of understanding or knowing the nature of the act. But, it cannot be treated in the same manner. Incapability is the resultant of unsoundness of mind where as the *incapacity* is due to intoxicant.

Presumption of intention: Every drunken man is presumed to intend the natural consequences of his act, unless he proves the incapacity. Section 86 is an exception to section 85. To avail the exception under section 86, the degree of intoxication of the offender must be of such that he is incapable of knowing the nature of the act or that he is doing what is either wrong or contrary to law. Intoxication at lesser degree will not entitle the offender to the benefit of the exception.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

- 9) Explain 'Legal Insanity' and 'Intoxication' as exceptions to criminal liability along with necessary elements to be proved.

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10.5.8 Consent, Compulsion and Duress

Let us first look at Consent.

- 1) **Consent:** Section 87 deals with consent.

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 to be likely to cause death or grievous hurt, is an offence by reason of any harm which it may cause, or be intended by the doer to cause to any person, above eighteen 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 take the risk of that harm.

This section is based on the principle 'violent non fit injuria' which means he who consents suffers no injury. If there is no intention or knowledge on the part of someone to cause death or grievous hurt, his act does not amount to an offence even though it may cause or be intended by the doer to cause harm to a person who is above eighteen years of age and who has consented to suffer. This section does not justify intentional causing of death or grievous hurt, or where the doer knows that death or grievous hurt is likely to result in one giving one's consent. It is an absolute and unconditional restriction. Generally, consent means something which is done deliberately and by free will. The consent must be given by the person suffering the harm and such person should be above 18 years of age. Consent may, thus, be express or implied.

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.

It protects surgeons and surgical operations. A person acting for the benefit of another is given greater latitude than is allowed to one acting merely with consent. The doer of the act must prove that he did the act in good faith for the benefit of that person with consent, express or implied. This section also protects teachers who inflict corporal punishment on children to correct them and to maintain school discipline.

Section 89: Act done in good faith for benefit of child or insane person, by or by consent of 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 —

Provided:

- i) That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;
- ii) That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;
- iii) That this exception shall not extend to the voluntary causing of grievous hurt, or to the attempting to cause grievous hurt, unless it be for the purpose of preventing death or grievous hurt, or the curing of any grievous disease or infirmity;
- iv) That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

Section 89 is corollary to section 88 of the code. This section empowers the guardian or other person having lawful charge of a child below 12 years or a person of unsound mind, to accord permission and consent on their behalf to inflict harm either himself or consent to other provided that it is done in good faith and for the benefit of the person and that act is not immoral or illegal. The immunity granted under this section is not absolute. To avail the exemption from criminal liability, he has to establish that the act was done not only with no intention but for the benefit of the person concerned. He must also act in good faith.

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 the 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 child:** Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

2) Compulsion: Section 91 deals with compulsion.

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.

This section contemplates a situation where in, despite the consent given, an act constitutes an offence not by reason of the harm caused, but by the reason that the act consented to, is per se illegal.

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 cause 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:

Provided —

- That this exception shall not extend to the intentional causing of death, or to the attempting to cause death;
- That this exception shall not extend to the doing of anything which the person doing it knows to be likely to cause death, for any purpose other than the preventing of death or grievous hurt, or the curing of any grievous disease or infirmity;
- That this exception shall not extend to the voluntary causing of hurt, or to the attempting to cause hurt for any purpose other than preventing the death or hurt;
- That this exception shall not extend to the abetment of any offence, to the committing of which offence it would not extend.

This section is designed to meet those cases which do not come under sections 88 and 89. Under section 92, consent may be absolutely dispensed with when the circumstances are such as to render consent impossible, where the person is incapable of assenting, or there is no one at hand whose consent can be substituted. Here, the law presumes implied consent of the party. This section grants immunity to that class of persons who cause harm during the course of performing an act of surgical operation, etc., though without consent, provided the act was done in good faith and for the benefit.

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.

This section gives protection to persons who make a communication to another person in good faith for the benefit of that person even if the same may cause harm to that person. Acts are done for the benefit of a person. Naturally, the burden of proof is on the accused to show that the communication had been made in good faith, for the benefit of the persons to whom it was made.

3) Duress: Section 94 deals with duress.

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 is done by a person who is compelled to do it by 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 a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Explanation 1: A person who, of his own accord, or by reason of a threat of being beaten, joins a gang of dacoits knowing their character, is not entitled to the benefit of this exception, on the ground of his having been compelled by his associates to do anything that is an offence by law.

Explanation 2: A person seized by a gang of dacoits, and forced by threat or instant death, to do a thing which is an offence by law; for example, a smith compelled to take his tools and to force the door of a house for the dacoits to enter and plunder it, is entitled to the benefit of this exception.

The defence provided under this section is also known as the defence of compulsion, or of duress, or of coercion. This section recognizes the principle that offences committed out of compulsion is a defence to criminal liability. Compulsion is a restraint upon the will of a person, whereby a man is urged to do what, which his judgment disapproves and if the decision rests on the person he will reject it. It is highly just and equitable that a man should be excused for such acts which are done through unavoidable force and compulsion.

The benefit of this section will extend to all offences under IPC except the two which have been specifically excluded in the provision. The two acts that are expressly excluded by the section are: i) murder, and ii) offences against the state punishable with death.

The threat under which the act was done must be a threat of instant death, if the act is not done. If the threat is anything other than 'instant death' was real or not, if the circumstances show that at the time of doing the offence, the accused was under a reasonable apprehension that instant death will be caused to him if he does not do the act, then such reasonable apprehension of instant death is sufficient for the accused to be excused from criminal liability.

Threat of instant death must be present at the time of doing the act or committing the offence. If the threat ceases, the defence action is not allowed.

10.5.9 Trifling Acts

Section 95: Act causing slight harm: 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.

One of the first principles of law is *deminimus non curat lex*, i.e. the law does not concern with trifles. In this social life men are bound to suffer some inconveniences. It is for this reason that the law exempts trivial actions from the category of crime. This section will apply where the harm is so slight that no person of ordinary sense and temper would complain of such harms.

10.5.10 Right of Private Defence

In this sub-section, we deal with right of private defence as an exception.

Section 96: Things done in private defence: Nothing is an offence which is done in the exercise of the right of private defence.

The right of private defence is based on the cardinal principle that it is the primary duty of a man to protect himself. Subject to certain limitation the law gives a right to every person to defend his body or property or the body and property of another person against unlawful aggression. The right of private defence is absolutely necessary. The right of private defence serves a social purpose and that right should be liberally construed. In a well-ordered civilized society, it is generally assumed that state can take care of the persons and properties of individual citizens.

Section 96 merely gives recognition to the fact that whenever something is done in the exercise of one's right of private defence it would not amount to an offence. The use of the expression 'private defence' in preference to 'self defence' is deliberate. No state can provide security to each individual. Consequently, the state has to have a law with respect to private defence. Every person has right to resist when attacked. With the recognition of the right of private defence this section completely absolves person from all guilt once the act is provided to be done in such defence.

- **Right under this section essentially a defensive right:** The right of private defence is an act of defence and not of offence. It is essentially a defensive right available only when the circumstances clearly justify it. It should not be allowed to be pleaded or availed of as a pretext for a vindictive, aggressive or retributive purpose. Where a crime is endeavored to be committed by force, it is lawful to repel that force in self-defence. It is subjected to the restrictions indicated in IPC which are as important as the right itself. Right of private defence can be exercised only to repel unlawful aggression and to retaliate. The right under section 96 is one of the defence and not of retribution or reprisal.
- **Right of private defence is not available to Aggressors:** The right of private defence is available against an offence. No one on the pretext of the right of private defence shall take the offensive side.
- **Right of private defence not available against lawful Acts:** The right of private defence cannot be exercised when a person is carrying out a lawful act. In

fact, preventing a person from doing a lawful act would itself amount to an offence.

- *Right of private defence — burden of proof:* Like in all other exceptions, the burden of providing proof of the right of self-defence is always on the accused. When the right of private defence is pleaded or the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record.

Section 97: Right of private defence of the body and of property: Every person has a right, subject to the restrictions contained in section 99 to defend —

- i) His own body and the body of any other person, against any offence affecting the human body;
- ii) The property, whether movable or immovable of himself or of any other person, against any act which is an offence falling under the definition of threat, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

This section specifically provides that every person has a right to defend the person and property of his own and that of any other person. The first part of the section provides for the defence of body against any offence affecting the human body. The second part provides for the defence of property against an act which amounts to the commission of certain offences. The right of private defence is available only to one who is suddenly confronted with immediate necessity of averting an impending danger not of his creation. The necessity must be present, real or apparent.

As per Section 98, the person does not lose the right of private defence of body or property merely because the opposite party is under mental incapacity, or intoxication or misconception. The right of private defence of person and property is recognized in the free and civilized democratic societies within certain reasonable limits.

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 colour 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.

Extent to which the right may be exercised: The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

- *Explanation 1:* A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant as such, unless he knows or has reason to believe, that the person doing the act is such public servant.
- *Explanation 2:* A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction, or unless such person states the authority under which he acts, or if he has authority in writing, unless he produces, such authority, if demanded.

Section 99, thus, lays down the conditions and limits within which the right of private defence can be exercised and further this provision gives a defensive right to the person and not an offensive right. It encourages and accepts the person to help himself and others, if there is a reasonable apprehension of danger to life and property. The citizens are not expected to run away for safety when faced with grave and imminent danger to their person or property as a result of unlawful aggression. This right is basically preventive and not punitive.

This section deals with the general restrictions or limitations on the right of private defence. In other words, the right of private defence is subject to the restrictions contained in above section. These restrictions have been enumerated in the form of four principles. There is no right of private defence: i) against the acts of a public servant; ii) against the acts of those acting under the authority or direction; iii) where there is sufficient time for recourse to public authorities; and iv) the quantum of harm that may be caused shall, in no case, be in excess of harm that may be necessary for the purpose of defence.

It needs to be noted, that the defender is not expected to weigh in the golden scales the amount of force necessary and an overall view needs to be taken by the court in the matter.

- *Right of private defence against a trespasser:* It is well settled that a true owner has every right to dispossess or throw out a trespasser, while the trespasser is in the act or process of trespassing and has not accomplished his possession; but this right is not available to the true owner if the trespassers has been successful in accomplishing his possession to the knowledge of the true owner.

Section 100: When the right of private defence of the body extends to causing death: The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:

- i) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

- ii) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;
- iii) an assault with the intention of committing rape;
- iv) an assault with the intention of gratifying unnatural lust;
- v) an assault with the intention of kidnapping or abducting;
- vi) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

This section gives a right of private defence of body to the voluntary causing of death or any other harm to the assailant, if the assault reasonably causes the apprehension of death or grievous hurt. There can be certain situations wherein a person may have no other way out except to cause even death while exercising right of private defence of body. The right of private defence of the body stands under the restrictions mentioned in section 99 to the voluntary causing of death or any other harm to the assailant if the offence which occasions the exercise of the right be an assault as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence of such assault. Whether the apprehension was reasonable is always a question of fact to be determined by the surrounding circumstances. The test in such case is not whether there was any actual danger but whether there was reasonable apprehension that such danger existed. At the same time, it must be borne in mind that a man acting under apprehension of death or grievous hurt cannot be expected to judge too nicely the situation and modulate his defence step by step.

The section applies if the assault is one which reasonably causes the apprehension of death or grievous hurt. They also do not require as a condition precedent that grievous hurt must be actually caused by the assailant. The test being not whether there was any actual danger of causing of grievous hurt but whether there was reasonable apprehension that danger existed. Thus, the apprehension of danger to the body and not the actual injury received to the criterion in judging whether the act of the accused is justified.

Section 101: When such right extends 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.

But, mere threat, not carried out and later completely abandoned followed by the retracting of steps by the threatener would not justify any assault from the person threatened.

Section 102: Commencement and continuance of the right of private defence of the body: The right of private defence of the body commences as soon as 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; and it continues as long as such apprehension of danger to the body continues.

The right of private defence 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 be committed. The right continues till such apprehension of danger to the body continues. To exercise such right one must not wait up to the time when the first blow on the body falls. Since it is a right of defence it is available for protecting an apprehended unlawful attack and not for punishing an aggressor. Apprehension has to be real and not imaginary. The threat must give rise to a present and imminent and not remote or distant, danger. The right does not extend to a case where blows are inflicted even after the apprehension has ended. Where the imminence of danger has long ended and the attackers have run away but the accused fires shots resulting in loss of life of person standing at a long distance away from the place of the happening, it cannot be held that he was acting under right of private defence.

Section 103: When the right of private defence of property extends to causing death: The right of private defence of property extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the wrongdoer, if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the descriptions hereinafter enumerated, namely:

- i) Robbery;
- ii) House-breaking by night;
- iii) Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling or as a place for the custody of property;
- iv) 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.

If one is not able to establish that the offence which occasioned in section 103, the accused has no right of private defence extending to causing death.

Section 104: When such right extend to causing any 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 wrongdoer of any harm other than death.

This section is corollary of section 103. It says that where the offence of theft, mischief or criminal trespass has been committed or attempted but the descriptions are different from those enumerated in section 103 of the code; the right of private defence of property extends only up to the extent of voluntary causing of any other harm than death. The relationship of this section with section 103, both dealing with defence of property, is similar in nature to that of section 101 of the code, both dealing with defence of body. The section specifically states that the restrictions mentioned under section 99 of the code shall have an overriding influence on this right.

Section 105: Commencement and continuance of the right of private defence of property: The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till 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 or as long as the fear of instant death or of instant hurt or of 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 housebreaking by night continues as long as the house trespass which has been begun by such house-breaking continues.

This section deals with the commencement and continuance of the right of defence of property, but section 99 IPC lays down that there is no right of private defence at all when there is time to have recourse to the protection of the public authorities. The burden of proof is on the accused to prove that there was no time to have the recourse to the authorities.

Section 106: Right of private defence against deadly assault when there is risk of harm to innocent person: If in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

This section deals with a case of extreme necessity, in which a person is authorized by law to run the risk of harming even innocent persons in order to protect himself from mortal injury. In case of an assault reasonably ensuring an apprehension of death, if the defender is faced with such a situation where there exists risk of harm to an innocent person, there is no restriction on him to exercise his right of defence and he is entitled to run that risk. He is entitled to use force even at the risk of causing harm to those innocent persons. He can do such thing only when there is an apprehension of death. If the apprehension is of any other kind but not of death, this section does not give him such a right.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

10) The Right of Private Defence is not absolute. Elaborate the limitations or restrictions provided in the code.

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Right to private defence, in nutshell, can be concluded as follows.

- 1) There is no right of private defence against an act which is not in itself an offence under the code.
- 2) The right avails only against a danger imminent, present and real.
- 3) It is a defensive and not a punitive or retributive right and, therefore, the injury which is inflicted by the person exercising the right should be commensurate with the injury with which he is threatened. At the same time, it is difficult to expect from a person exercising this right in good faith, to weigh 'with golden scales' what maximum amount of force is necessary to keep within the right. Every reasonable allowance should be made for the bonafide defender if he with the instinct of self-preservation pursues, his defence a little further than may be strictly necessary in the circumstances to avert the attack. It would be wholly unrealistic to expect of a person under assault to modulate his defence step by step according to the attack.
- 4) A person who is in imminent and reasonable danger of losing his life or limb may in the exercise of the right of self-defence inflict any harm, even extending to death on his assailant either when the assault is attempted or directly threatened. This principle is also subject to the preceding rule that the harm or death inflicted to avert the danger is not substantially disproportionate to an incommensurate with the quality and character of the perilous act or threat intended to be repelled.
- 5) There must be no safe or reasonable mode of escape by retreat for the persons confronted with an impending peril to life or of grave bodily harm, except by inflicting death on the assailant.
- 6) The right does not accrue and avail where there is "time to have recourse to the protection of the public authorities."

10.6 LET US SUM UP

In this Unit, we have discussed various types of offences or classification of offences, criminal conspiracy, proportionality of punishment and general exceptions to criminal liability. Though we could not present it comprehensively for want of space, we hope that the understanding of the above aspects of Indian Penal Code as a liability creating law would help you in discharge of your role as a better citizen as well as in your functioning as an adult educator.

10.7 ANSWERS TO 'CHECK YOUR PROGRESS' QUESTIONS

- 1) A 'cognizable offence' means an offence for which a police officer may, in accordance with the first schedule of the Indian Penal Code or under any other law, arrest without warrant. 'Non-cognizable offence' means an offence for which a police officer has no authority to arrest without warrant. The code has not given any guidelines to determine whether a particular offence belongs to one category or other. It all depends upon whether it is shown as cognizable or non-cognizable in the first schedule of the code. The schedule refers to all the offences under the Indian Penal Code and puts them into

cognizable and non-cognizable categories. The basis for categorization in the schedule appears to rest on diverse considerations. However, it might be broadly stated that all serious offences are considered as cognizable. The seriousness of the offences is to be determined in relation to the maximum punishment provided for the offence. The offences, under the laws other than IPC, which are punishable with imprisonment for three years or more have been shown in the First schedule as cognizable and those punishable with less than three years have been shown as non-cognizable.

- 2) In the following circumstances release on bail is mandatory.
 - i) Where the arrestee is not accused of a non-bailable offence;
 - ii) Where the investigation is not completed within the prescribed time;
 - iii) Where no reasonable grounds exist for believing that the accused is guilty of non-bailable offence;
 - iv) Where trial before Magistrate is not concluded within 60 days;
 - v) Where no reasonable grounds exist for believing that the accused is guilty after conclusion of trial but before judgment.
- 3) *Taking Cognizance of Offences*: Taking cognizance has not been defined in the code. It is a word of indefinite import, and is not perhaps always used in exactly in the same sense. Cognizance, literally, means knowledge or notice and taking cognizance of offence means taking notice or becoming aware of the alleged commission. The Judicial officer will have to take cognizance of the offence before he could proceed to conduct a trial. Taking cognizance does not involve any formal action or indeed action of any kind and but occurs as soon as a magistrate as such applies his mind to the suspected commission of offence for the purpose of proceedings to take the subsequent steps.

A warrant for arrest may be issued by Magistrate after taking cognizance of any offence, in a case whether it is cognizable or non-cognizable. Hence, the distinction between summons case and a warrant case is relevant.

- If the case in which the cognizance has been taken is a summons case, a summons shall be issued to the accused person in the first instance for his attendance in court and if the case is a warrant case, a warrant for the arrest of the accused may normally be issued for causing the accused to be brought before the court. The code however gives discretion to the Magistrate to depart from this general rule if the circumstances so demand in a particular case. If the magistrate has a reason to believe that the accused has absconded or would not obey the summons, he may issue a warrant for his arrest.
- In practice, however, the Magistrate has hardly any occasion to issue a warrant of arrest if he has taken cognizance of cognizable offence on a police report, because, the police report is submitted to the magistrate after the police has completed the investigation into the offence, and during the investigation the police has power to arrest without warrant a person involved in the commission of a cognizable offence. Further the police is under a legal duty to apprehend every person when it is legally authorized to apprehend.

- Cognizance of any offence can be taken by a Magistrate not only upon a police report but also: i) upon receiving a complaint, or ii) upon the information received from any person other than police officer, or iii) upon the knowledge of the Magistrate himself.
- 4) *Criminal Conspiracy*: When two or more persons agree to do, or cause to be done, 1) an illegal act, or 2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy (Section 120-A of IPC):

- 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.

Explanation: It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

Ingredients of section 120-A: The main ingredients of section 120-A IPC are as follows:

- There should be two or more persons involved;
 - There should be an agreement between themselves;
 - The agreement must be to do or cause to be done,
 - an illegal act, or
 - an act which may not itself be illegal, by illegal means.
- 5) The sentencing process involves the determination of the appropriate sanction both in qualitative and quantitative terms. Bentham sought to achieve some element of rationality in the penal policy by advocating punishments of different magnitudes for different kinds of offences.

Bentham provided the following guidelines for the gradation of offences in terms of different punishment.

- That the value of the punishment must not be less in any case than what is sufficient to out-weigh that of the profit of the offence.
- When two offences come in competition, the punishment for the greater offence must be sufficient to induce a man to prefer the less.
- The punishment should be adjusted in such manner to each particular offence that for every part of the mischief there may be a motive to restrain the offender from giving birth to it.
- The punishment ought, in no case, be more than what is necessary to bring it into conformity with the rules given.

The other rules propounded by Bentham laid down that the quantum of punishment prescribed should be in inverse proportion to the possibility and time factor involved in the infliction of punishment. Regarding the fixation of punishment, Bentham said that the quantum should vary according to the offender's capacity to suffer. He then enumerated thirty two variables of capacity for suffering, ranging from sex, age, physical and mental health, religion and lineage, among others.

The classical school paved the way for distinguishing the various crimes according to their gravity and the prescription of different punishments for them. The IPC is an example of the influence exercised by Bentham. The grading of the various offences is based on their gravity and the gravity of the offence is generally assessed in terms of social danger, alarm, social disapproval, harm and wickedness involved in it.

6) The theories of punishment include the following.

- *Deterrent theory:* This kind of punishment presupposes infliction of severe penalties on offenders with a view to deterring them from committing crime. This theory also seeks to create some kind of fear in the mind of others, so that they keep away from committing crimes. It is one of the effective policies despite the fact that it invariably fails in practical application. It failed in case of hardened criminals and also in many cases crimes are committed in an emotional moments without prior design or intention. The object underlying the deterrent punishment is thus defeated. The severity of punishment is a very inferior deterrent.
- *Retributive theory:* This is based on the principle that evil should be returned for evil. This theory underlined the idea of vengeance or revenge. It has its origin in the crude animal instinct of individual. The modern view, however, does not favour this theory because it is neither wise nor desirable. According to this theory, offender should be made to suffer in proportion to the injury caused to the victim, viz. a tooth for a tooth, or eye for an eye. It is a barbarous form of punishment and betrays an utter ignorance of the causes that lead to crime. Retributive theory is closely associated with the notion of expiation which means blotting out the guilt by suffering an appropriate punishment. It is this consideration which underlies the mathematical equation of crime, namely, guilt plus punishment is equal to innocence. Most penologists refuse this theory. The reason being that no sooner an offender completes his term of sentence, he thinks that his guilt is washed off and he is free to do crime again.
- *Preventive theory:* The object of punishment, according to this theory, is to prevent a criminal from committing crime in future by rendering the offender incapable of committing the offence either permanently or temporality. The purpose is to make sure that the criminal does not commit the act again. The best way is to detach him from society. It is least harsh measure adopted under the concept of incapacitation of offenders.
- *Reformative theory:* Plato is the father of the reformative theory of punishment. This theory views punishment as an instrument to induce wrong doers to hate unrighteousness and to love righteousness. The reformative theory seeks to strengthen the character of the man, so that he may not become easy victim to his own temptation. Criminals stay in prison should serve to re-educate him and to re-shape his personality in a new mould. This theory condemns all kinds of corporal punishment. The major emphasis of the reformist movement is rehabilitation of inmates in pre correctional institutions so that they are transformed into good citizens. The reformists advocate humane treatment of inmates inside the prisons and suggest to train the prisoners to adjust themselves to free life in society after their release from the institutions.

- 7) *Burden of proof on prosecution in proving a crime:* It is the fundamental rule of criminal jurisprudence that a person is innocent until proved guilty. This means that there is always a presumption of innocence in favour of every accused and the burden of proving every aspect of the crime solely rests on the prosecution. The standard of proof required is very high. The prosecution has to prove every aspect of the case beyond all reasonable doubt. The burden of proving that the accused not only committed the criminal act but also he did so with a guilty-mind rests upon the prosecution throughout the trial, it never shifts to the defence. If there is any reasonable doubt regarding the guilt of the person charged with a crime, the benefit of it is given to the accused.

Burden of proof on the accused seeking general exceptions: Section 105 of Indian Evidence Act changed the position and it places the burden on the accused to prove if the case falls within one of the exception. The 'court shall presume' the absence of such circumstances. It is open to the accused to adopt a defence that his case falls under one or other of the general exceptions. If the accused takes such defence then it is for him to prove the same. Once a prima facie case of the existence of circumstances that bring the case within any of the general exceptions is made out, then the burden once again shifts on the prosecution to prove beyond doubt the guilt of the accused or to establish that the general exception claimed by the accused does not exist. This rule of evidence is based on the principle that even if a hundred guilty persons go unpunished, innocent persons should not be punished.

- 8) *Distinction between section 76 and section 79:* Under section 76 a person acts under compulsion, while under section 79 he acts under a legal justification. Section 76 grants exemption to a person from criminal liability when he believes himself bound by law to do a thing in a particular way, although the true state of facts reveal his act to be an offence. Section 79 deals with cases wherein a person, by reason of a mistake of fact, feels himself to be justified by law in doing an act in a particular way. Under section 76, a person acts because he believes he must act in a particular way, whereas under section 79 a person thinks he has justification for action and acts accordingly.
- 9) Legal insanity and intoxication are recognized as exceptions to criminal liability. *Insanity or mental abnormality* is one of the exceptions to criminal liability recognized by law. This is based on the principle of mensrea. Guilty mind alone is punishable. Insanity is denoted by mental derangement, mental disorder and all forms of mental abnormality known to medical sciences. Medical insanity and legal insanity are different from each other. The former is dependent on medical grounds while other depends on this factor as to be proved in a court of law to enable the accused to be acquitted of the charge. If there are sufficient medical grounds to hold that a person is suffering from insanity, it is a case of medical insanity. The legal insanity must be proved by the accused that at the time of commission of crime, because of unsoundness of mind, he did not know the nature of the act or that he was doing what was either wrong or contrary to law. Medically a person may be certified sane or insane.

Similarly, the person will be exonerated from liability for an act done while in a state of *intoxication* if he, at the time of doing it, by reason of intoxication was incapable of forming the intention. Voluntary drunkenness is no excuse for the commission of offence. The burden of proof of involuntary intoxication and its resultant incapacity on the person is on the accused. Like in all other exceptions, the onus of proving the same is on the accused.

- 10) The Right of Private Defence is not absolute. The right of private defence is assured with the restrictions or limitations provided under section 99 of IPC. These restrictions have been enumerated in the form of four principles. There is no right of private defence: i) against the acts of a public servant; ii) against the acts of those acting under the authority or direction; iii) where there is sufficient time for recourse to public authorities; and iv) the quantum of harm that may be caused shall, in no case, be in excess of harm that may be necessary for the purpose of defence.

Further the right is available only against an act which is danger, imminent, present and real. It is a defensive and punitive right.

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UNIT 11 TORT LAW

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11.0 INTRODUCTION

As a part of liability creating laws, we have discussed some important provisions of the Indian Penal Code in Unit-10. We will now focus on the law of tort in Unit-11 here. Tort has some similarities and differences with crime, and creates a liability on those responsible for tort. We will, therefore, discuss the concept of tort, theories of tort, the similarities and differences between crime and tort, ingredients of tort, its general conditions, rules, damages and defences as well as the special torts.

11.1 OBJECTIVES

After going through this unit, we expect you to be able to:

- Explain the concept of tort and define it;
- Distinguish between crime and tort;
- Identify the essential ingredients of tort and the special torts;
- Describe the theories of tort;
- Discuss the general conditions, rules and defences of tort; and
- Analyse the nature of damages.

11.2 LAW OF TORT: CONCEPT AND THEORIES

In this section, we attempt to present you the concept and rationale of tort along with relevant theories. We will also touch upon the similarities and differences between crime and tort.

11.2.1 Concept and Meaning

The term 'tort' is the French equivalent of the English word 'wrong' and of the Roman law term 'delict'. The word tort is derived from the Latin word '*tortum*' which means twisted or crooked or wrong.

Tortious liability arises from the breach of a duty primarily fixed by law; this duty is towards persons generally and its breach is repressible by an action for unliquidated damages (Winfield and Jolowicz, 2002). In the words of Salmon (2009), a tort is a civil wrong for which the remedy is a common action for unliquidated damages, and which is not exclusively the breach of a contract or the breach of a trust or other mere equitable obligation.

The person who has committed a tort, i.e. violated the legal right of another person thereby does a wrong directly or indirectly to him is called **Tortfeasor**. If the person is found to be guilty, he will have to compensate for the damages. If two tortfeasors commit a tort independently, they are called *independent tortfeasors*. If they commit a 'tort' together, they are called *joint tortfeasors*.

11.2.2 Theories of Tort: Rationale of Tort

There are two theories with regard to the basic principle of liability in the law of torts or tort. These theories, in fact, explain the rationale of tort. They are: i) Wider and narrower theory, and ii) Pigeon-hole theory.

- i) **Wider and narrower theory:** According to this theory, all injuries done by one person to another are torts, unless there is some justification recognized by law. This theory was propounded by Winfield (1963). According to him, if I injure my neighbor, he can sue me in tort, whether the wrong happens to have a particular name like assault, battery, deceit or slander, and I will be liable if I cannot prove lawful justification. This leads to the wider principle that all unjustifiable harms are tortious.
- ii) **Pigeon-hole theory:** This theory was proposed by Salmon (1910). According to this theory, there is a definite number of torts outside which liability in tort does not exist. According to this theory, I can injure my neighbor as much as I like without fear of his suing me in tort provided my conduct does not fall under the rubric of assault, deceit, slander or any other nominate tort. The law of tort consists of a neat set of pigeon holes, each containing a labeled tort. If the defendant's wrong does not fit any of these pigeon holes he has not committed any tort.

There is, however, no recognition of either theory. On the whole, if we are asked to express our preference between the two theories, in the light of recent decisions of competent courts, we will have to choose the first theory of liability than the subsequent one. Thus, it is a matter of interpretation of courts so as to select between the two theories. The law of torts has mainly been developed by courts proceeding from the simple problems of primitive society to those of our present complex civilization.

11.2.3 Tort and Crime: Similarities and Differences

Historically, tort had its roots in criminal procedure. Even today there is a punitive element in some aspects of the rules on damages. However, *tort is a species of civil injury or wrong*. The distinction between civil and criminal wrongs depends on the nature of the remedy provided by law. A civil proceeding concerns with the enforcement of some right claimed by the plaintiff as against the defendant, whereas criminal proceedings have for their object the punishment of the defendant for some act of which he is accused. Sometimes, the same wrong is capable of being made the subject of proceedings of both kinds – civil and criminal. For example, assault, libel, theft, malicious injury to property, etc. In such cases, the wrong doer may be punished criminally and also compelled in a civil action to make compensation or restitution.

Not every civil wrong is a tort. A civil wrong may be labeled as a tort only where the appropriate remedy for it is an action for unliquidated damages. However, it has to be born in mind that a person is liable in tort irrespective of whether or not an action for damages has been taken against him. The party is liable from the moment he commits the tort. Although an action for damages is an essential mark of tort and it is the characteristic remedy, often there may be other remedies also.

- a) ***Similarities between Crime and Tort:*** There is a similarity between tort and crime at a primary level. In criminal law, there is primary duty, like not to commit an offence, for example, murder; but this primary duty in tort is *in rem* and is imposed by law. In fact, the same set of circumstances will, from one point of view, constitute a crime and, from another point of view, a tort. For example, every man has the right that his bodily safety shall be respected. Hence, in an assault, the sufferer is entitled to get damages. Also, the act of assault is a menace to the society and hence will be punished by the State. However, where the same wrong is both a crime and a tort, its two aspects are not identical. *Firstly*, its definition as a crime and a tort may differ, and *secondly*, the defences available for both crime and tort may differ. Therefore, the wrong doer may be ordered, in a civil action, to pay compensation and also be punished criminally by imprisonment or fine. If a person publishes a defamatory article about another in a newspaper, both a criminal prosecution for libel as well as a civil action claiming damages for the defamatory publication may be taken against him.
- b) ***Differences between crime and tort:*** Being a civil injury, tort differs from crime in all respects in which a civil remedy differs from a criminal one. There are, thus, certain essential marks of difference between crime and tort such as the following.
- Tort is an infringement or deprivation of private or civil rights belonging to individuals, whereas crime is a breach of public rights and duties which affect the whole community.
 - In tort, the wrong doer has to compensate the injured party, whereas in crime, he is punished by the State in the interest of the society.
 - In tort, the action is brought about by the injured party, whereas, in crime, the proceedings are conducted in the name of the State.

- Damages, in tort, are paid for compensating the injured, and, in crime, it is paid out of the fine which is paid as a part of punishment. Thus, the primary purpose of awarding fine in a criminal prosecution is punitive rather than compensatory.
- The damages in tort are unliquidated and, in crime, they are liquidated.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

1) What are the two competing theories of tortious liability?

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11.3 LAW OF TORT: ESSENTIAL INGREDIENTS AND GENERAL DEFENCES

In this section, the focus of our discussion will be on essential ingredients, capacity to sue or to be sued, and general conditions, rules and defences of tort.

11.3.1 Essential Ingredients

Every want or desire of a person cannot be protected nor can a person claim that. However, whenever he suffers loss he should be compensated by the person who is the author of the loss. The law, thus, determines what interests need protection and it also holds the balance when there is a conflict of protected interests. Therefore, in brief, the ingredients of tort include the following:

- There must be a wrong act committed by a person;
- The wrongful act must be of such a nature as to give rise to a legal remedy; and
- Such legal remedy must be in the form of an action for unliquidated damages.

11.3.1.1 Wrongful Act

An act which prima facie looks innocent may become tortious, if it invades the legal right of another person. That is, it must prejudicially affect him in some legal right; merely that it will however directly do harm to him or his interest is not enough. Liability for tort, therefore, arises when the wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty.

11.3.1.2 Damages

In general, a tort consists of some act done by a person who causes injury to another, for which damages are claimed by the latter against the former. In this connection, we must have a clear notion with regard to the words, 'damage' and 'damages'. The word *damage* is used in the ordinary sense of injury or loss or deprivation of some kind, whereas *damages mean the compensation* claimed by the injured party and awarded by the court. Thus, damages are claimed by the parties and awarded by the court to the parties. The word *injury* is strictly limited to an actionable wrong, while *damage* means loss or harm occurring in fact, whether actionable as an injury or not.

Damages are the compensation which the tortfeasor, if found guilty of the act committed by him, will be liable to pay for the injuries sustained by the plaintiff. The damages are, most commonly, monetary in nature, though they are not the only remedies in torts. Though damages are the most common remedy in tort they are not the only remedy. The court can also award an 'injunction'. An injunction is an order, by which the court tells the tortfeasor to committing or not committing an act. For example, when your neighbor troubles you in the night by playing loud music, the court can order your neighbor to stop playing loud music every night, apart from awarding you damages for your injuries.

Liquidated and unliquidated damages: In the context of tort liability, it is essential for us to have clarity on liquidated damages and unliquidated damages.

- **Liquidated damages:** These are damages which are *predetermined* by the parties if either one of them causes the other injury or the breach of contract.
- **Unliquidated damages:** The damages whose amount is *not predetermined before tort was committed* are called unliquidated damages. In the cases involving unliquidated damages there are no agreements, so the courts decide the amount or the extent of damages the defendant will have to pay.

The real significance of a legal damage is illustrated by two maxims, namely, *Damnum Sine Injuria* and *Injuria Sine Damno*.

- **Damnum sine injuria (damage without injury):** There are many acts which though harmful are not wrongful and give no right of action to a person who suffers from the effects of such acts. Damage so done and suffered is called *Damnum Sine Injuria* or *damage without injury*. Damage without breach of a legal right will not constitute a tort. In *Gloucester Grammar School Master Case* (1410, p.11), it had been held that the plaintiff school master had no right to complain of the opening of a new school. The damage suffered was mere *damnum absque injuria* or *damage without injury*.
- **Injuria sine damno (injury without damage):** This means an infringement of a legal private right without any actual loss or damage. In such a case, the person whose right has been infringed has a good cause of action. It is not necessary for him to prove any special damage because every injury imports a damage when a man is hindered of his right. It is sufficient to show the violation of a right in which case the law will presume damage. This principle was firmly established by the election case of *Ashby v White* (1703, p.938), in which the plaintiff was wrongfully prevented from exercising his vote by

the defendants, returning officers in parliamentary election. The candidate for whom the plaintiff wanted to give his vote had come out successful in the election. Still the plaintiff brought an action claiming damages against the defendants for maliciously preventing him from exercising his statutory right of voting in that election. The plaintiff was allowed damages by Lord Holt saying that there was the infringement of a legal right vested in the plaintiff.

11.3.1.3 Remedy

The law of torts is said to be a development of the maxim 'ubi jus ibi remedium' or 'there is no wrong without a remedy'. If a man has a right, he must of necessity have a means to vindicate and maintain it and also a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without remedy; want of right and want of remedy are reciprocal. Where there is no legal remedy there is no wrong. But, even so, the absence of a remedy is evidence but is not conclusive that no right exists.

11.3.2 Capacity to Sue or to be Sued

The general rule in the law of torts is that every person is entitled to sue and is also liable to be sued. But, this rule is not absolute. Depending upon certain laws and circumstances there are exceptions to this rule which are briefly discussed below.

11.3.2.1 Who Can Sue and Who Cannot Sue?

The discussion below provides us clear understanding of as to who can sue and who cannot sue.

- i) **Convicts and persons in custody:** A felon or convict is a person against whom judgment of death or penal servitude has been awarded on any charge of treason or felony. It was observed in the case of *Sunil Batra v Delhi Administration* (1978) that conviction of a person, thus, does not draw any iron-curtain between him and his rights and he is not reduced to a non-person. So, he is competent to sue.
- ii) **Alien enemy:** Alien enemy is a person of enemy nationality or a person residing in or carrying on business in enemy territory, whatever his nationality. Since, the residence in enemy territory is the real test, even a citizen of India resident there will fall within the description. An alien enemy who is residing outside Indian court jurisdiction cannot sue. He can sue only if he is residing there with the permission of the Government.
- iii) **Married woman:** A married woman can not sue without her husband being joined as a party. But, under the Law Reform (Married Woman and Tortfeasors) Act, 1935, she can sue if she were a feme sole. Under section 7 of the Married Women's Property Act, 1874, a married woman may sue in tort just as a feme sole and in process if she recovers any damage, it becomes her sole property and any damage recovered against her are payable out of her separate property. But, this Act doesn't apply to Hindus, Sikhs, Jains and Muslims and these communities are governed by their personal laws. According to personal laws of these communities, a woman can sue in respect of her separate property without joining her husband in the suit.

- iv) **Husband and wife:** Prior to Married Women's Property Act, 1882 and the Law Reform (Married Women and Tortfeasors) Act, 1935, a married women could not sue for any tort committed by a third person unless her husband joined her as a plaintiff. It was also not possible to sue against her without making her husband a defendant. But, after these Acts, it has become possible that married women can sue or can be sued without making her husband a joint party. After the Law Reform (Husband and Wife) Act 1962, each of the parties to a marriage has the same right of action in tort against each other as if they were not married but it also depends on court to stay the proceedings if it feels that the matter relates to trivial issues.

In India, the wife cannot sue her husband for personal injuries on the basis of personal laws of different communities, but she can sue her husband's employer if husband has committed a tort against her during the course of employment. Similarly, a husband may also recover against her employer if she has committed a tort against her husband during the course of her employment.

- v) **Bankrupt or insolvent:** If an insolvent commits a tort, his liability is not a debt provable in insolvent and is not discharged by insolvency. An insolvent may be sued for a tort committed by him either before or during insolvency and in case of decree against him, the amount thus awarded is a debt provable in insolvency. But, a bankrupt or insolvent cannot sue for wrongs in respect of his property since all his property vests in a Trustee in bankrupt according to English Law, or the Official Assignee or the Official Receiver in India.

- vi) **Infant / minor:** An infant or minor may sue with the help of his next friend (usually father) if any wrong has been done to him. But, if an infant who has sustained injuries when he was in the womb of his mother, whether he can maintain an action for injuries is yet to be answered. In India, though such Act is lacking, since the rights of an unborn child are recognized in Hindu Law, the child in womb has right to share in the property. Causing death to an unborn child through an abortion and miscarriage are also made penal offences under Sections 312, 313 and 316 of the Indian Penal Code.

In India, a child, a boy or girl, below the 18 years of age is called a minor. A minor or infant is equally liable for his torts as an adult person. Knowledge, intention or malice is a necessary ingredient in constituting a tort and infancy is a good defence in case he has not attained sufficient maturity of understanding.

- vii) **Corporation:** Corporation is vicariously liable for torts committed by its agents or servants, when the tort is committed in the course of doing an act within the scope of the powers of the corporation. It may, thus, be liable for assault, false imprisonment, trespass, conversion, libel or negligence of its servants.

- viii) **Lunatic:** Liability that lies with a lunatic is same as with an infant. It has been said that insanity by itself is not a defence in tort. But, in malice, insanity presents a good defence to the existence of such malice or intent. The degree of insanity has to be decided in each case and it depends on the facts and circumstances of the case, and then accordingly requires decision about the liability.

- ix) **Drunkard:** In the law of tort, drunkenness is not considered as a good defence. It is every man's sense to know the consequences of what he does. If a man drinks and does the things and thinks that he would not be liable for his act in this state then he is wrong. But, if A administers intoxicants in B's drinks against his will, or by fraud, or by mistake, then B may not be held liable in tort provided he is unable to differentiate between right and wrong.
- x) **Trade Union:** A trade union can be a body corporate if it is registered under Section 13 of the Indian Trade Unions Act, 1926 and can sue and be sued. If a trade union is not registered then under Order 1, rule 8 of the Code of Civil Procedure, 1908 any one or more of its members may be sued as representing the trade union. Members of a registered trade union are exempted from liability in respect of certain torts.

11.3.2.2 Who Cannot be Sued?

Who cannot be sued is discussed below.

- i) **Sovereign or King:** 'The King can do no wrong' is the maxim on which the immunity of the crown from civil liability is based. So, an action for personal wrong will not be against the Crown. By, 'the Crown Proceedings Act, 1947', while changing the old law, it also preserved the rule that no proceedings can be brought in tort against the crown in a private capacity.

In our country, there is no King. As per the provisions enshrined in the Constitution of India, the President and the Governors shall not be answerable to any court (i) for the exercise and performance of the powers and duties of their office, or (ii) for any act done or purporting to be done by them in the exercise and performance of those powers and duties. Under Section 87-B of the Civil Procedure Code, no ruler of any former Indian State may be sued in any court except with the permission of the Government of India.

- ii) **Act of State:** If an act is done in exercise of sovereign power in relation to another State or subjects of another State, it cannot be questioned by the courts. Acts done by rulers in exercise of political power to the people of another State are acts of State. Some salient features of an act of State are:

- The act is done by State's representative,
- The act is injurious to other State or its subject, and
- Such acts are done either with the prior sanction or are subsequently ratified by the State.

Such acts are exempted from liability. However, if a foreign national gets injured in course of exercising some sovereign power, he can get remedy through diplomatic means.

- iii) **Foreign Sovereign and Ambassador:** No action lies against any foreign sovereigns. No court can entertain an action against a foreign sovereign for anything done or omitted to be done by him in his public capacity as representative of the nation of which he is the head.

11.3.3 General Defences

Even when a plaintiff provides proof for the existence of all the essential elements of a tort, it is possible in some cases for the defendant to take certain defences which can remove his liability. These defences are nothing but specific situations or circumstances in which a defendant is given a waiver for his tortious action. These are as follows.

11.3.3.1 Volenti non fit Injuria

When person consents for infliction of harm upon himself, he has no remedy for that in Tort. That means, if a person has consented to do something or has given permission to another to do certain thing, and if he is injured because of that, he cannot claim damages. Such consent may be implied or express.

In *Wooldridge v Sumner* (1963, p.43), it was held that the defendants had taken proper care during the horse show and the plaintiff, by being in the show, agreed to take the risk of such an accident that happened to him. The defendants were not held liable.

Exceptions to this defence: In the following conditions, this defence cannot be taken even if the plaintiff has consented.

- i) **Rescue Conditions:** When the plaintiff suffers injury while saving someone. For example, A's horse is out of control and is galloping towards a busy street. B realizes that if the horse reaches the street it will hurt many people and so he bravely goes and control's the horse. He is injured in doing so and Sue's A. Here, A cannot take the defence that B did that act upon his own consent. It is considered as a just action in public interest and the society should reward it instead of preventing him from getting compensation.
- ii) **Unfair Contract Terms:** Where the terms of a contract are unfair, the defendant cannot take this defence. For example, even if a laundry, by contract, absolves itself of all liability for damage to clothes, a person can claim compensation because the contract is unfair to the consumers.

11.3.3.2 Plaintiff the Wrongdoer

A person cannot take advantage of his own wrong. This principle has been in use since long time as it is just and equitable. This defence exists only if the injury happens because of a wrongful act of the plaintiff. It does not exist if the injury happens because of a wrongful act of the defendant even if the plaintiff was doing a wrongful but unrelated act. For example, in *Bird v Holbrook* (1828, p.628), the plaintiff was trespassing on the defendant's property and he was hurt due to a spring gun. The defendant had put spring guns without any notice and was thus held liable.

11.3.3.3 Inevitable Accident

Inevitable accident means an unexpected occurrence of something that could not have been predicted or prevented. In such a case, the defendants will not be liable if they had no intention to cause it and if the plaintiff is injured because of it. For example, in *Stanley v Powell* (1891, p.86), the plaintiff and the defendant were members of a shooting party. The defendant shot a bird, but the bullet ricocheted off a tree and hit the plaintiff. The defendant was not held liable because it was an accident and the defendant did not intent it and could neither have prevented it.

11.3.3.4 Act of God

An act of God, in a legal sense, is an extraordinary occurrence of circumstance which could not have been predicted or prevented and happens because of natural causes. For example, no body can predict, prevent, or protect from a natural disaster such as an earthquake or flood. Thus, it is unreasonable to expect a person to be liable for damages caused by such acts of God. There are two essential conditions for this defence; the event must be due to a natural cause, and it must be extraordinary or some thing that could not have been anticipated or expected.

11.3.3.5 Private Defence

As per Section 96 of IPC, nothing is an offence that is done in exercise of the right of private defence. Thus, law permits the use of reasonable and necessary force in preventing harm to human body or property and injuries caused by the use of such force are not actionable. However, the force must be reasonable and not excessive. In *Bird v Hollbrook* (1828, p.628), the defendant used spring guns in his property without notice. It was held that he used excessive force and so was liable for plaintiff's injury even though the plaintiff was trespassing on his property.

11.3.3.6 Mistake

Generally, mistake is not a valid defence against an action of tort. Thus, hurting a person under the mistaken belief will not be defensible. However, in certain cases, it could be a valid defence. For example, in the case of malicious prosecution, it is necessary to prove that the defendant acted maliciously and without a reasonable cause. If the prosecution was done only by mistake, it is not actionable. Further, honest belief in the truth of a statement is a defence against an action for deceit.

11.3.3.7 Necessity

'*Salus Populi Supreme Lex*' means, welfare of the people is the supreme law. If the act causing damage is done to prevent a greater harm, it is excusable. For example, a ship ran over a small boat hurting 2 people in order to prevent collision with another ship which would have hurt hundreds of people is excusable. Thus, in *Leigh v Gladstone* (1909, p.139), force-feeding of a hunger striking prisoner to save her was held to be a good defence to an action for battery.

11.3.3.8 Statutory Authority

An act that is approved by the legislature or is done upon the direction of the legislature is excused from tortious liability even though in normal circumstances it would have been a tort. When an act is done under the authority of an Act, it is a complete defence and the injured party has no remedy except that is prescribed by the statute.

A few examples are given below.

- i) A punches B, but not causing any physical injuries. B can still sue A, because while A has not caused any physical injury, he has caused a legal injury.
- ii) A publishes false claims about B in a magazine. B can claim damages from A for injuring his reputation i.e. defamation.

In *Vaughan v Taff Valde Rail Co* (1860, p.5), sparks from an engine caused fire in appellant's woods that existed in his land adjoining the railway track. It was held that since the company was authorized to run the railway and, thus, the company had taken proper care in running the railway, it was not liable for the damage.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

2) What are the essentials of a tort?

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3) List out general defences available against tortious liability.

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11.4 GENERAL RULES OF LAW OF TORT

There are some general rules of law of torts. These rules deal with how, when and what type of liability arises and who can sue, who can be sued and who cannot be sued under what circumstances. In this section, we will discuss the rules related to these important aspects of torts. Let us first look at strict liability.

11.4.1 Strict Liability

Strict liability means liability of a person for the wrong he does. It means he is liable for any fault of his own; for any care or precaution that he is expected to take but has not taken. There may be many instances when strict liability will arise and also make him absolutely liable for all the consequences. Some of the important instances are discussed below.

11.4.1.1 Rule of Strict Liability

The strict principle of law is: *sic utere tuo ut alienum non laedas*; it means, everyone must so use his own as not to do damage to another. When this maxim is applied to landed property, it is necessary for the plaintiff to show not only that he has sustained damage but also that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural use of his own land.

The owner or occupier of land may lawfully use it for any purpose for which it might, in the ordinary course of the employment of land, be used. And for such natural uses of land, an owner will not, in the absence of negligence, be liable, though damage results to the neighbor. But, for any non-natural user, such as the introduction on to the land of something which, in the natural condition of the land, is not upon it, he is liable if damage results to his neighbour.

Rylands v Fletcher (1868, p.330) — *the water reservoir case*: Fletcher was working in a coal mine under a lease. On the neighboring land, Rylands desired to erect a reservoir for storing water, and for this purpose, he employed a competent independent contractor whose workmen, while excavating the soil, discovered some disused shafts and passages communicating with old workings and the mine in the adjoining land. The shafts and passages had been filled with loose earth and rubbish. The contractor did not take the trouble to pack these shafts and passages with earth, so as to bear pressure of water in the reservoir, when it is filled. Shortly after the construction of the reservoir, whilst it was partly filled with water, the vertical shafts gave way and burst downwards. The consequence was that the water flooded the old passages and also the plaintiff's mine, so that the mine could not be worked. The plaintiff sued for damages. No negligence on the part of the defendant was proved. The only question was whether the defendant would be liable for the negligence of the independent contractor who was admittedly a competent engineer. The Court held that the question of negligence was quite immaterial. The defendant, in bringing water into the reservoir, was bound to keep it there at his peril, and was, therefore, liable.

In this case, it was ruled as follows: A person who, for his own purpose, brings on his land and collects and keeps there, anything likely to do mischief if it escapes, must keep it in and at his peril; and if he does so, he is prima facie answerable for all the damage which is the natural consequence of its escape. This is known as the rule in *Rylands v Fletcher* (also known as “*the wild beast theory*”).

Indian Law: It has been held in several cases that the principle of *Rylands v Fletcher* applies in India.

11.4.1.2 Essential Ingredients of Strict Liability

The essential ingredients of strict liability include the following.

- There should be dangerous thing.
- There should be escape of dangerous thing.
- There should be some damage out of this escape
- There should be a non-natural use of the land or property.

11.4.1.3 Exceptions to the Rule of Strict Liability

The following are five important exceptions to the principle/rule laid down in *Rylands v Fletcher's case*.

- i) **Vis Major or act of God:** An act of God (vis major) is defined to be such a direct, violent, sudden and irresistible act of nature, as could not, by any amount of ability, have been foreseen, or if foreseen, could not, by any amount of human care and skill, have been resisted.
- ii) **Wrongful or malicious act of a stranger:** The rule is also not applicable where the damage is due to the wrongful or malicious act of a stranger. If, however, the act of the stranger is such that it ought to have been anticipated and guarded against, the defendant will be liable for failure to take reasonable care.
- iii) **Plaintiff's own fault:** The rule also does not apply where the escape is due to the plaintiff's own fault.
- iv) **Common benefit:** The rule does not apply where the escape is due to artificial works maintained with the plaintiff's consent and for the common benefit of the plaintiff and the defendant.
- v) **Statutory authority:** The last exception to the rule in *Rylands v Fletcher* is where the defendant is empowered or authorized or required under the law or a statute to accumulate, keep or collect the dangerous thing, which escapes and causes mischief and injury to the plaintiff, persons empowered by statute to bring or keep upon their land, a dangerous substance are not liable in the absence of negligence or an express provision in the statute to the contrary for the damage caused by its escape.

Statutory authority is, however, of two kinds: i) absolute and ii) discretionary. The former confers absolute immunity for the consequences of acts which would otherwise amount to torts. The latter must be exercised with due care and regard to the rights of others.

11.4.2 Absolute Liability

What is absolute liability? Wrongs of absolute liability imposes a kind of liability on a person which is somewhat peculiar in the sense that a person becomes liable without there being any fault on his/her part. It is absolute, meaning thereby, that it is not necessary for the injured party to prove any intention or negligence on the part of the injuring party, and no amount of care and caution expended by the latter to prevent the damage done to the former will excuse him.

The Supreme Court in *M. C. Mehta v Union of India* (1987) recognized another rule (*Rule of absolute liability*) in which the liability was absolute, more stringent than that under the Strict Liability rule, and also not subject to the exceptions to the rule in *Rylands v Fletcher*.

In *M. C. Mehta case*, there was leakage of oleum gas from one of the units of Shriram Food and Fertiliser Industries in the city of Delhi on 4th and 6th December 1985 resulting in the death of an advocate practising in a Court and all the ill-effects caused damage to various other persons. There was claim of compensation through a writ petition filed in the Supreme Court by way of public interest

litigation. The Court found that victims of the leakage of dangerous substances could not be provided relief by applying the Rule of Strict Liability laid down in *Rylands v Fletcher*. This was so, mainly because of the various exceptions to that rule, whereby the defendant could avoid his liability. In this background, the Supreme Court held that it was not bound by the rule of English law formulated in a different context in the 19th century, and evolved a new rule, the *Rule of Absolute Liability*.

According to this rule, when an enterprise is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of persons, it owes an absolute and non-delegable duty to ensure that no harm results to anyone from such activity. If the harm results to anyone due to such activity, the enterprise must be absolutely liable to compensate for such harm and should not be allowed to avoid liability by pleading that it was not negligent. It was further held that the Rule of Absolute Liability is not subject to any of the exceptions to the rule in *Rylands v Fletcher*.

Environment Pollution: When certain industries by the discharges from the acid producing plants cause environment pollution, that amounts to violation of right to life enshrined in Article 21 of the Constitution. In such cases also, the Rule of Absolute Liability is applicable. Such industries can be required to pay costs of remedial measures for restoring pollution-free environment, and can also be asked to be closed down (*Indian Council for Enviro-Legal Action v Union of India*, 1996, p.1446).

The principle of absolute liability was applied when the hazardous condition of a swimming pool in a 5-star hotel in Delhi resulted in serious injuries to the users, the death of a visitor to the hotel, when he dived in the pool (*Klaus Mittelbachert v East India Hotels Ltd.*, 1997).

The Bhopal Gas Leak Disaster Case: By the leakage of MIC, a highly toxic gas, from the plant of the Union Carbide in Bhopal an unprecedented disaster was caused on the night of December 2/3, 1984, resulting in the death of over 3,000 persons, and injuries, mostly serious and permanent, to more than 6 lakh persons. Since the disaster had affected very large number of persons, mostly belonging to lower economic strata, a classic action was the only way out. The Government of India passed 'The Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985' conferring an exclusive right on the Government to represent the gas victims for claiming compensation. The Union of India filed a suit against the Union Carbide Corporation (UCC) in the United States District Court of New York, but the same was dismissed on the ground that the Indian Courts are the more convenient and proper forum for such an action. The Government then filed a suit for compensation in the District Court of Bhopal, which ordered that the UCC should pay interim relief of Rs.350 crores to the gas victims. On a civil revision petition filed by the UCC, the Madhya Pradesh High Court reduced the amount of 'Interim relief payable to Rs.250 crores.

After a long drawn litigation for over four years, there was a settlement between the Union of India and the Union Carbide Corporation and, in terms thereof, the Supreme Court in *Union Carbide Corp. v Union of India* (1990, p.273) passed Orders on February 14 and 15, 1989 directing the payment of a 'sum of 470 million U.S. Dollars or its equivalent nearly Rs.750 crores'. The Supreme Court

again pronounced in *Union Carbide Corp. v Union of India* (1992, p.2481) that the above stated settlement was not void either on the ground that the interested parties were not given notice under the Civil Procedure Code at the time of the Settlement, or the same amounted to compounding of an offence or the stifling of the prosecution, in view of the quashing in the criminal proceedings in the Settlement case.

Unfortunately, the progress of providing compensation and medical and other relief to the gas victims and their rehabilitation has been so slow that even 14 years after the Settlement, proper arrangements for the necessary medical facilities are not yet there, and it is estimated that it will take some 15 years for the Settlement claims to be heard, at the present speed.

11.4.2.1 The Public Liability Insurance Act, 1991

The Public Liability Insurance Act, 1991 aims at providing for public liability insurance for the purpose of providing relief to the persons affected by accident occurring while handling any hazardous substance for matters connected therewith or incidental thereto.

Every owner, *i.e.* a person who has control over handling any hazardous substance, has to take insurance policy or policies so that he is insured against liability to give relief in case of death or injury to a person, or damage to any property, arising from an accident occurring while handling any hazardous substance.

11.4.3 Vicarious Liability

Since ancient times, it is the rule that a person should be held liable for his own mistake. In the words of Plato: “a person should be held for his own sins”. But, in thirteenth century, in England, it was for the first time, established that the master would be liable for his servant’s or slave’s torts only when there is an express command of the master to the servant’s wrong .

By the end of 17th century, this concept of liability was found inadequate due to rise in commercial transactions. New development took place when Sir John Holt, in the case of *Tuberville v Stamp* (1697, p.267), held that “the master would be liable for his servant’s tort if he had given his implied command”.

When does the vicarious liability arise? It depends on circumstances — whether liability attaches to a person for the wrongs committed by others. It arises in three ways:

- i) Liability by ratification,
- ii) Liability arising out of special relationships, and
- iii) Liability by abetment.

11.4.3.1 Liability by Ratification

When a person commits a tort while acting on behalf of another but without his authority and that the other subsequently ratifies that act, he thereby becomes responsible for it. Such act is based on the maxim ‘*omnis ratihabitio retrorahitur mandato priori acquiratur*’ means every ratification of an act relates back and thereupon becomes equivalent to a previous request.

Three conditions are to be satisfied before one person can be held liable for another's tort on the ground of ratification. These are:

- only such acts bind a principal by subsequent ratification as were done at the time on his behalf. This necessarily implies that what is done by a person on his account cannot be effectually adopted or ratified by another;
- the person ratifying the act must have full knowledge of its tortious character; and
- an act which is illegal and void cannot be ratified.

11.4.3.2 Liability Arising Out of Special Relationship

Following are some special relationships where the vicarious liability arises: i) Principal and agent, ii) Partners, iii) Master and servant, and iv) Independent contractor.

- i) **Principal and agent:** There is a maxim '*qui facit per alium facit per se*' which means 'he who does an act through another is deemed in law to do it himself, on which the vicarious liability of principal for the tort of his agent is based. A principal is vicariously liable for the tort of his agent committed within the course of his authority. An *agent* is a person who, otherwise than as a servant and otherwise than as an independent contractor, whether by way of contract or only by way of request, conducts some business or performs some act or series of acts on behalf of another, i.e. principal.
- ii) **Partners:** Partners are vicariously liable for torts committed by their co-partners acting in the ordinary course of the firm's business. The liability of partners is governed by section 26 of the Partnership Act, 1932: "Where, for any wrongful act or omission of any partner acting in the course of the business of the firm or with the authority of his copartners, loss or injury is caused to any person not being a partner in the firm, the firm is liable therefor to the same extent as the partner so acting or omitting an act."
- iii) **Master and servant:** The liability of the master for the tort which has been committed by his servant is based on the maxim '*respondent superior*' i.e. superior is responsible. In law, it is established that he who employs another to do something does it himself or he who does an act through another is deemed in law to do it himself.

Who is a servant? Depending upon the control of master on the person, he is said to be the 'servant'. Under the 'contract of service' a master has the control over the servant by ordering or requiring him "what is to be done" and "how it shall be done". If a master controls a man by ordering him 'what is to be done' and 'the manner in which the work has to be done', then the man is a servant, otherwise he is not.

There are four essential elements of a 'contract of service':

- i) the master's power of selection of his servant;
- ii) the payment of wages or other remuneration;
- iii) the master's right to control the method of doing the work; and
- iv) the master's right of suspension or dismissal.

The discussion below provides us more clarity on *master-servant relationship* and *master's vicarious liability*.

- a) ***Lending a servant:*** Sometimes an employer lends his servant to some other employer for a particular purpose or for a period of time. In such a case, if the servant injures a third party then the question arises: who will be vicariously liable – the first employer or the second employer? This question can be answered on the basis of an important case of *Mersey Docks and Harbour Board v Coggins and Griffiths (Liver Pool) Ltd.* (1847, p.1). In this case, the court held that the power of control, in such cases, is presumed to be in the general employer and the burden of proving the existence of that power in the hirer rests on the general employer.
- b) ***The Scope of Employment:*** Master can only be held liable vicariously for such torts which are committed by the servant in the course of employment. An act is said to be done *in the course of employment* when the servant executes the order of the master: a) The master has ordered the servant to commit a wrongful act, or b) wrong may be committed due to the servant's negligence while carrying out the orders of the master. Thus, sometimes, wrong may be committed due to negligence of servant, but the master is liable for servant's negligence or carelessness.
 - ***Carelessness of servant:*** In *Century Insurance Co. v Northern Ireland R. T. Board* (1942, p.509) and *Williams v Jones* (1865, p.602), the court held the appellants liable as the driver's negligent act was within the course of his employment.
 - ***Mistake of servant:*** During the course of employment, if a servant commits any wrong then the master shall be held liable, e.g. *Bayley v Manchester Sheffield and Lin Rly* (1882, p.415).
 - ***Fraud of servant:*** During the course of employment under a master, if the servant commits any fraud then the master would be liable, e.g. *Lloyd v Grace Smith & Co.* (1912, p.716) and *State of Uttar Pradesh v Hindustan Levers Ltd.* (1972, p.486).
 - ***Theft by servant:*** Earlier, it was the rule that if a servant steals something belonging to other person, the master will not be held vicariously liable. Now, it is well established that if the theft was committed by the servant during the course of his employment, then the master will be held liable, e.g. *Morris v C. W. Martin & Sons Ltd.* (1966, p.716).
 - ***Lift to an employee:*** In *Pushpabai Purshottam Uderhi v Ranjit Ginning & Pressing Co. Pvt. Ltd.* (1977, p.1735), the Manager of the Company going on a business trip also took another employee of company with him. The car met with an accident and that employee died. The manager was driving the car at the time of accident. It was held that the manager had authority to carry that employee with him and the Manager was acting in the course of employment.
 - ***Delegation of duty by servant:*** A servant may delegate his duty in certain circumstances. If a servant has got the authority from his master to delegate his duty in real emergency at the time when his master is not available to give permission to the person to whom he delegates the

duty, then the master will be liable for his (such delegatee's) negligence also. Even if a servant has delegated his duty to another and that person commits negligence then the master will be held liable not because that the person who was appointed/delegated has committed the negligence but his servant has delegated his duty to another person during the course of employment.

c) **Outside the course of employment:** There are so many factors to be considered first before deciding that a particular act is or not within the course of employment, e.g. *Barwick v English Joint Stock Bank* (1867, p.259). In *K. B. Co. v Saad Bin Ahmad* (1977, p.326), it was observed that even though an act be done in the general course of employment still it may not render the employer vicariously liable if it is uncalled for or is excessive.

- **Express prohibition by master:** Sometimes, a master prohibits his servant to do certain acts and if the servant does the acts in defiance of the order as given by his master then his act can be said to have been done outside the course of employment and the master may not be liable, e.g. *Limpus v London General Omnibus Co.* (1862, p.526).
- **Servant and independent contractor:** As we have seen above, a servant is under the total control of his master. What he has to do and how it has to be done are decided by the master. Exceptions are, where the work is technical or professional and the master is incompetent to supervise, e.g. surgery, pilot's job, etc. Whereas an independent contractor is different from servant and agent, he is under a 'contract for service', i.e. 'what is to be done', 'how it is to be done' is in the hands of independent contractor completely. Since the independent contractor is free to choose his way to accomplish his job, his master is generally not liable for any tort committed by the independent contractor.

11.4.3.3 Liability by Abetment

In law of torts, he who abets the tortuous acts is as much liable as the tortfeasors themselves, if he knowingly induces them to commit the wrong for his own ends.

11.4.3.4 Vicarious Liability of the State

Under the English Common Law the maxim was "The King can do no wrong" and therefore, the King was not liable for the wrongs of his servants. But, this position of old common law maxim has been changed by the Crown Proceedings Act, 1947. Earlier, the King could not be sued in tort either for wrong actually authorized by him or committed by his servants in the course of their employment. With the increasing functions of the State, the Crown Proceedings Act had been passed; now the Crown is liable for a tort committed by its servants just like a private individual. Similarly, in America, the Federal Torts Claims Act, 1946 provides the principles which substantially decide the question of liability of the State.

State liability in India is defined by Article 300(1) of the Constitution that originated from Section 176 of the Government of India Act, 1935. This could be traced back to Section 32 of the Government of India Act, 1915, the genesis of which can be found in Section 65 of the Government of India Act, 1858. It

will, thus, be seen that by the chain of enactment beginning with the Act of 1858, the Government of India and Government of each State are in line of succession of the East India Company. In other words, the liability of the Government is same as that of the East India Company before, 1858.

11.4.3.5 Exceptions to the Rule of Vicarious Liability

Following are the exceptions to this rule.

- i) **Doctrine of common employment:** The doctrine of common employment is a defence for that employer who is able to prove that the wrongdoer and the injured person are fellow-servants under him, and at the time of accident they are engaged in common employment. This doctrine was abolished by the Law Reform (Personal Injuries) Act, 1948 in England. But, this doctrine is still in vogue in India although its scope has been limited by the Employer's Liability Act, 1939; the Workmen's Compensation Act, 1923; the Employees State Insurance Act, 1948; and the Personal Injury (Compensation Insurance) Act, 1963. Although its scope has been limited by the above Acts, it needs to be abrogated.
- ii) **Sovereign functions:** Sovereign functions are those actions of the State for which it is not answerable in any court of law. For instance, acts such as defence of the country, raising and maintaining armed forces, making peace or war, foreign affairs, acquiring and retaining territory are functions which are indicative of sovereignty and are political in nature. The entity sought to be made liable is not the government but the State. Therefore, they are not amenable to jurisdiction of ordinary civil court. The State is immune from being sued, as the jurisdiction of the courts in such matters is impliedly barred.

11.4.4 Constitutional Tort

The development of constitutional tort which began in the early eighties and was cemented into judicial precedent in *Nilabati Behe Nilabati Behera v State of Orissa* (1993, p.373) has profoundly influenced the direction the tort law has taken in the past decade. It has recognised state liability, and in denuding the defence of sovereign immunity the constitutional tort has taken wide arcs around previously established practices in tort law.

Constitutional torts fall under absolute liability. Some of these torts are as follows.

11.4.4.1 Custody Death

The incidence of custodial violence and custody death continues unabated. The experience of courts with cases of custodial violence appears to have moved them to regard complaints with reduced suspicion, and enhanced credulity. There is an increasing regularity in referring cases of custody death to the CBI, since it is not seen as realistic to expect that the police will carry out an unbiased investigation in a matter where the police are themselves in the dock.

The regularity with which cases of custodial violence and death reached the courts has made the courts look for reasons for increasing the credulity and lessening the disbelief, particularly when complaints are made of police violence. The doctrine of *res ipsa loquitur* (the thing speaks for itself) has been imported

into this arena. And, in *Kamla Devi v NCT of Delhi* (1970) the Delhi High Court has said: “When a person dies in police custody and the dead body bears telltale marks of violence or the circumstances are such that to indicate foul play, the court acting under Article 226 of the Constitution will be justified in granting monetary relief to the relatives of the victim ...”

11.4.4.2 Police Atrocity

Excessive or unwarranted use of force by the police constitutes a ground for seeking relief – both compensatory and asking for investigation and prosecution – from the court.

11.4.4.3 Encounter Killing

The labelling of a person as a member of an extremist organization has provided a shield to the police and armed forces in cases of encounter killings or in fake encounters. The obstacles to enabling investigation in cases of alleged encounters were also set out in various surveys.

11.4.4.4 Illegal Detention

The casual treatment meted out in matters of liberty has led the courts to direct that compensation be paid to those detained beyond the prescription of the law.

In *Hussain v State of Kerala* (2000, p.139) a person was accused of an offence under the NDPS Act, 1985. Due to the ineptitude of his counsel, he was wrongfully convicted and sentenced to 10 years in prison and a fine of Rs.1 lakh. By the time the Supreme Court heard his appeal, aided by an amicus curiae, he had served 7 years in jail. Acquitting the appellant, the court, however, said: “In this case, we are not considering the question of awarding compensation to the appellant but he is free to resort to his remedies under law for that purpose”.

11.4.4.5 Disappearances

Cases of disappearances continue to crop up in the courtroom. The disappearance of persons picked up by the armed forces has raised presumptions of the disappeared being dead, unless the armed forces produce the person. It has also led to presumptions of the armed forces having disappeared the person. Yet, in constitutional tort, the remedy has been limited to directing the payment of compensation as an interim measure.

11.4.5 Remedy for Tort: Damages

In tort law, a remedy is in the form of monetary compensation given to the aggrieved party. Damages is the sum of money the law imposes for a breach of duty or violation of some right. More appropriately, damages are money claimed by or ordered to be paid to a person as compensation for loss or injury (Black’s Law Dictionary, 2010).

Damages is the most important remedy which the plaintiff can avail of after the tort has been committed. Damages are of various kinds. Generally damages are compensatory, because the idea of civil law is to compensate the injured party for the loss he has suffered. In very exceptional cases, ‘exemplary’, ‘punitive’, or ‘vindictive’ damages may be awarded. Such damages may be in excess of the material loss suffered by the plaintiff and are awarded to prevent similar behaviour by the defendants in future.

11.4.5.1 Remoteness of Damages

Remoteness of damage relates to the requirement that the damage must be of a foreseeable type. In negligence claims, once the claimant has established that the defendant owes them a duty of care and is in breach of that duty which has caused damage, they must also demonstrate that the damage was not too remote. Remoteness of damage must also be applied to claims under the Occupiers Liability Acts and also to nuisance claims.

Remoteness of damage is often viewed as an additional mechanism of controlling tortious liability. Not every loss will be recoverable in tort law. Originally, a defendant was liable for all losses which were a direct consequence of the defendant's breach of duty.

11.4.5.2 Computation of Compensation: Theories of Compensation

Compensation can also be claimed for personal injury, pain and suffering and loss of enjoyment of life. If there is probable future loss of income by reason of incapacity or diminished capacity of work, damages for the same are also recoverable.

Sometimes, damages are for the future loss, *i.e. prospective damages* may also be awarded. Since there can be only one action, and the law does not permit more than one suit for the same cause of action, damages for the likely loss can be claimed.

- *Shortening of expectation of life* of the injured party entitles him to claim compensation for the same. If such a person dies before he could claim compensation for the same, his legal representatives can claim compensation for the benefit of his estate.
- ~~Damages~~ ^{Damages} ~~under the Fatal Accidents Act:~~ Certain dependants of the deceased are entitled to claim compensation under the (Indian) Fatal Accidents Act, 1855. A claim under the Act can be made only on behalf of certain heirs, *i.e.* the wife, husband, parent or child. No action can be brought by the brothers and sisters of the deceased.

Assessment of the Value of Dependency: It is generally done using the following theories.

- Interest theory:** One possible method of assessing compensation payable to the dependants could be to award such amount of compensation that the interest on fixed deposit of it could bring as income to the dependants which is equivalent to the loss of dependency. This theory (interest theory) cannot work well in practice, *firstly*, because due to erosion in the value of money in course of time specific amount of interest may not suffice to cover future loss, and *secondly*, due to illiteracy and ignorance, the claimant may not be in a position to plan a sound investment of the compensation received.
- Multiplier theory:** According to this theory, the likely future loss is assessed by multiplying the likely future loss due to occur every year with a multiplier, which indicates the number of years for which the loss is likely to continue. On the death of a person, his dependants may sometimes receive certain payments like *gratuity, family pension, provident fund, insurance money,*

etc. Such receipts are not to be deducted from the compensation payable. The reason for not allowing such amounts to be deducted from compensation is, *firstly*, the deceased may have paid premiums to secure such benefits thereof, and he never intended that the tortfeasor should derive the benefits thereof, and *secondly*, some of the payments may have been received by the deceased or the dependants even if the death as at present had not occurred.

11.4.5.3 Forms of Remedy: Judicial and Non-judicial

The remedy can be in the form of judicial and extra-judicial or non-judicial remedies.

i) **Judicial remedies:** These remedies include injunction or specific restitution of property.

- **Injunction:** An injunction is an order of the court directing the doing of some act or restraining the commission or continuance of some act. An injunction may be temporary or perpetual; a *temporary injunction* is one which is continued until specified time or until further orders of the court. A *perpetual injunction* is one by which the defendant is perpetually enjoined from the assertion of right, or from the commission of an act, which would be contrary to the rights of the plaintiff. An injunction may also be prohibitory or mandatory. *Prohibitory injunction* forbids the defendant from doing of some act which will interfere with the plaintiffs lawful rights. *Mandatory injunction* is an order which requires the defendant to do some positive act. For example, an order that the wall should not be constructed is a prohibitory injunction and the order that the wall should be demolished is a mandatory injunction.
- **Compensation (Damages):** It is claimed by the plaintiff and is finally decided by the Court in view of the specific facts and circumstances of a case.
- **Specific restitution of property:** When the plaintiff has been wrongfully dispossessed of his movable or immovable property, the court may order that the specific property should be restored back to the plaintiff.

ii) **Extra-judicial remedies:** Apart from the above stated remedies of *damages*, *injunctions* and *specific restitution of property* which are also known as *judicial remedies*, a person may have a recourse to certain remedies outside the court of law and those remedies are known as *extra-judicial remedies*. A person can have these remedies by his own strength by way of self-help. The remedies are: re-entry of land, recapturing of chattels, distress damage and the abatement of nuisance.

- **The egg shell (or thin skull) rule:** A final aspect of remoteness of damage is the egg shell (or thin skull) rule. This means defendant must take their victims as they find them, i.e. if the victim is particularly vulnerable or has a pre-existing condition resulting in them suffering greater injury than would be expected in an ordinary person, the defendant remains responsible for the full extent of the injury, e.g. *Page v Smith* (1996, p.155).

In India, the law is followed usually on the English lines and most of the times, justice is done with the benefit of doubt given in favour of defendants. Whatever analysis of negligence is invoked or distinctions are made, they must stem from the ultimate desire, and the purpose of the law to achieve a just result in any given case.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

4) What are the defences available to the rule laid down in Rylands v Fletcher case?

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11.5 SPECIAL TORTS

We will, now, discuss special torts such as malicious prosecution, negligence, contributory negligence, trespass and defamation.

11.5.1 Malicious Prosecution

Malicious prosecution is the malicious institution of unsuccessful criminal or bankruptcy or liquidation proceedings against another without reasonable or probable cause. Malicious prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge. It is necessary to prove that damage was suffered as a result of the prosecution. Following are *conditions to prove* that there was malicious prosecution against a person.

- i) That the plaintiff was prosecuted by the defendant.
- ii) That the proceeding complained was terminated in favour of the present plaintiff.
- iii) That the prosecution was instituted against him without any just or reasonable cause.
- iv) That the prosecution was instituted with a malicious intention, that is, not with the mere intention of getting the law into effect, but with an intention which was wrongful in fact.
- v) That he suffered damage to his reputation or to the safety of person or to security of his property.

11.5.1.1 Elements of Malicious Prosecution

Following are the elements of malicious prosecution.

- ***Institution or continuation of legal proceedings:*** One view was that a prosecution began only when process was issued and there could be no action when a magistrate dismissed a complaint under section 203 of the code of criminal procedure. The other view was that a prosecution commenced as soon as a charge was made before the court and before process was issued to the accused.
- ***Termination of the prosecution in the plaintiff's favour:*** The plaintiff must prove that the prosecution ended in his favour. He has no right to sue before it is terminated or while it is pending. The termination may be by an acquittal on the merits and a finding of his innocence or by a dismissal of the complaint for technical defects or for non-prosecution. If, however, he is convicted he has no right to sue and will not be allowed to show that he was innocent and wrongly convicted. His only remedy in that case is to appeal against the conviction. If the appeal results in his favour then he can sue for malicious prosecution. It is unnecessary for the plaintiff to prove his innocence as a separate issue.
- ***Malice:*** Malice for the purposes of malicious prosecution means having any other motive apart from that of bringing an offender to justice. Spite and ill-will are sufficient but not necessary conditions of malice. Malice means the presence of some other and improper motive, that is, to say the legal process in question was for some purpose other than the legal and appropriate one. Anger and revenge may be proper motives if channeled into the criminal justice system. The lack of objective and reasonable cause is not an evidence of malice but lack of honest belief is an evidence of malice.
- ***Damages:*** It has to be proved that the plaintiff has suffered damages as a result of the prosecution complained of. Even though the proceedings terminate in favour of the plaintiff, he may suffer damage as a result of the prosecution. The damages may not necessarily be pecuniary. There could be *three sort of damages* as mentioned below; any one of which could be sufficient to support any action of malicious prosecution.
 - i) The damage to a man's fame such as the matter he is accused is scandalous;
 - ii) The damage done to a person such as the man is put to a danger of losing his life, limb or liberty; or
 - iii) The damage to a man's property such as he is forced to expend money in unnecessary charges, to acquit himself of the crime of which he is accused.

The damage must also be reasonable and probable results of malicious prosecution are not too remote. In assessing damage the court, to some extent, would have to consider:

- The nature of the offence the plaintiff was charged of;
- The inconvenience to which the plaintiff was charged to;
- The monetary loss he suffered; and
- The status and prosecution of the person prosecuted.

11.5.1.2 Malicious Civil Proceeding

An action will not lie for maliciously, without reasonable and propable cause, instituting suit; the reason stated to be is that “such a case does not necessarily and naturally involve damage to the party sued”. The civil action which is false will be dismissed at the hearing. The defendant’s reputation will be cleared against all imputations made against him and he will be awarded costs against the opponent. The law does not award damage for mental anxiety, or extra costs incurred beyond those imposed on unsuccessful parties.

11.5.2 Negligence

The concept of negligence is central to the tort system of liability. The negligence concept is centered on the principle that every individual should exercise a minimum degree of ordinary care so as not to cause harm to others.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation. Negligence, as a tort, is the breach of a legal duty to care, which results in damage undesired by the defendant to the plaintiff (Winfield, 1963).

When there is no intention of causing harm to the person complained of, it is called negligence. Carelessness on the part of defendant constitutes negligence. If, there is an unreasonable conduct followed by harm to another, it gives rise to liability for negligence.

11.5.2.1 Theories of Negligence

Theories of negligence are of two types.

- i) *Subjective Theory*: As per this theory, negligence denotes ‘state of mind’. It treats negligence as a specific tort and sets at rest all the controversy over this point. It has got support from Austin, Salmond and Winfield.
- ii) *Objective Theory*: Negligence is a type of conduct and not a particular state of mind. It has been recognized by the House of Lords in *Donoghue v Stevenson* (1932, p.562), where negligence has been treated as a specific tort.

11.5.2.2 Essential Ingredients of Negligence

The essential ingredients of negligence include the following.

- Defendant has a legal duty to take reasonable care towards the plaintiff to avoid the damages complained of;
- The defendant committed a breach of that duty; and
- Due to breach of duty by the defendant plaintiff suffered damage.

Duty to take care: A person is supposed to behave in a reasonable manner; but if he deviates from acting as a reasonable person then he is said to be careless. But, for every careless act a man cannot be held responsible in law.

Criterion of duty: To determine whether duty to take care was there or not is upto Judge to decide. It becomes easier to decide where there is already earlier decision which has established such duty.

In the case of *Donoghue v Stevenson* (1932, p.562), Lord Atkins laid down a very important principle of determining a duty. In this case, the defendant was a manufacturer of ginger-beer who sold the beer in a sealed and opaque bottle. A person bought it and presented it to his friend Miss Donoghue. She drank the ginger-beer. In the bottle, she found decomposed body of a snail. She fell ill and sued the manufacturer for negligence. It may be noted here that there was no contract between the plaintiff and the defendant. Delivering the majority judgment Lord Catkin held that although there was no contractual duty on the part of the defendant, the defendant owed her a duty to take care that the bottle did not contain noxious matter and that he would be liable if that duty was broken.

Lord Atkins's principle has generally been accepted broadly, but it can't be accepted as a universal rule.

11.5.2.3 Burden of Proof in an Action for Negligence

***Res ipsa loquitur* — presumption of negligence:** In the case of negligence, the onus is on plaintiff to prove the action of defendant due to which he has sustained injuries. He must prove the act or omission of the defendant so that defendant could be held liable for damages. The act or omission must also be the proximate cause of damage to the plaintiff. Where the balance is even as to which part is in fault, the one who relies on the negligence of other is bound to turn the scale.

- Proving the negligence of the defendant by the plaintiff may sometimes cause hardship to the plaintiff if he could not know what precise acts or omissions led to his injury or damage and that the cause of damage was known only to the defendant. In such a situation, the maxim *res ipsa loquitur* may be applied. It is a rule of evidence; it meant that the *thing speaks for itself*, i.e. the facts and circumstances of the plaintiff had proved to establish a prima facie case of negligence against the defendant. The crux of the matter is that *the accident should tell its own story and make a picture of negligence on the part of defendant*.

Winfield (1963) stated that there are two requirements for applying the maxim *res ipsa loquitur*.

- The thing causing the damage must be under the control of the defendant or his servant;*
- The accident must be such as could not in the ordinary course of things have happened without negligence.*

Plaintiff's damage must be caused by the defendant's breach of duty and not due to any other cause. Even if the damage is caused by the defendant's breach of duty, the defendant will not be liable if the damages are too remote a consequence of it, or it may be the case of contributory negligence.

11.5.2.4 Professional Negligence: Legal and Medical

Inherent in the concept of any profession is a code of conduct, containing the basic ethics, which underlines the moral values that govern professional practice and is aimed at upholding its dignity.

- For more than a century, in England, it was held that barristers cannot be sued for breach of professional duty. It was the notion earlier that there is no contractual obligation towards their clients and the fees received by them are considered in the nature of honorarium.

In our country, section 5 of the Legal Practitioners (Fees) Act, 1926 provides that no legal practitioner i.e., advocate, vakil, pleader, mukhtar or revenue agent who has acted or agreed to act shall, by reason only of being a legal practitioner, be exempt from liability to be sued in respect of any loss or injury due to any negligence in the conduct of his professional duties.

- Medical profession is one of the oldest professions of the world and is the most humanitarian one. Medical ethics underpins the values at the heart of the practitioner-client relationship. Medical negligence and malpractices by doctors were the grey areas in health care where legal issues operated.

Essential components of medical negligence: On the basis of various judicial pronouncements, essentials of 'Medical Negligence' are discernible, and, in brief, they are as under:

- The Doctor must owe a duty of care to the patient;
- The Doctor must have done a breach of that duty; and
- The patient must have suffered damages due to the said breach.

11.5.2.5 Defences to Negligence

Defences depend upon the conditions which, in general, are negative tortious liability, viz. *volenti non fit injuria*, private defence, statutory authority, act of State, remoteness of damage, contributory negligence, etc. We have already explained them elsewhere above, except the contributory negligence.

11.5.2.6 Contributory Negligence

If someone has committed a negligent act and the other person is not avoiding the consequence arising out of that negligent act even when means and opportunity were afforded to do so it is called contributory negligence. It is difficult for plaintiff to claim the damages from the defendant's negligence if the plaintiff also fails in exercising ordinary care, diligence and skill to avoid the consequences of defendant's negligence. It is based on the maxim -- *volenti non fit injuria* and *in jure non remota causa sed proxima spectator*.

Contributory negligence is negligence on the part of a plaintiff which, combining with the negligence of a defendant, contributes as a cause in bringing about the injury. "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm".

- **Contributory negligence – forgetfulness of known danger:** If a plaintiff voluntarily proceeds into a dangerous situation of which he or she had previous knowledge, but momentarily forgot the danger, such forgetfulness is not in itself contributory negligence unless under all the circumstances it shows an absence of ordinary care not to have kept the danger in mind.
- **Contributory negligence – minors:** In California, a minor under the age of five years is incapable of contributory negligence as a matter of law. Contributory negligence, if any, on the part of the minor over the age of five years does not bar a recovery against the defendant but the total amount of damages to which the minor would otherwise be entitled is reduced in

proportion to the amount of negligence attributable to the minor. The negligence, if any, of the parents, or either of them, does not bar or reduce recovery of damages for injuries to the minor.

- ***Duty of passenger for own safety:*** One who is simply a passenger in a motor vehicle and has no right to the control or management of such vehicle nevertheless has the duty to exercise the same ordinary care for his or her own safety and protection as a person of ordinary prudence would take under the same or similar circumstances. The passenger has the duty of doing whatever a person of ordinary prudence in the same situation would do to inform or warn the driver in an effort to prevent an accident. Contributory negligence, if any, by the passenger does not bar recovery against the defendant but the total amount of damages to which the passenger would otherwise be entitled shall be reduced in proportion to the amount of negligence attributable to the passenger.
- ***Doctrines of alternative danger:*** Res ipsa loquitur is the name of a doctrine that permits a trier of fact to infer the existence of negligence in the absence of direct evidence of negligence. For the doctrine to apply it must be shown that: *First*, it is the kind of accident or injury which ordinarily does not happen unless someone is negligent; *Second*, it was caused by an agency or instrumentality in the exclusive control of the defendant over which the defendant had the exclusive right of control originally, and which was not mishandled or its condition otherwise changed after defendant relinquished control; and *Third*, the accident or injury was not due to any voluntary action or contribution on the part of the plaintiff, which was the responsible cause of plaintiff's injury.
- ***Recovery for intentional harm not diminished by contributory negligence:*** Contributory negligence, if any, on the part of the plaintiff does not reduce any recovery by the plaintiff against the defendant for an injury caused by misconduct of the defendant, if the defendant intended to inflict harm upon the plaintiff.

11.5.3 Trespass

Trespass is an area of tort law broadly divided into *three groups*: trespass to the *person*, trespass to *chattels* and trespass to *land*.

11.5.3.1 Trespass to the Person

Generally, trespass to the person consists of *three torts*: assault, battery, and false imprisonment.

- Assault:*** Under the statutes of various common law jurisdictions, assault is *both a crime and a tort*. Generally, a person commits *criminal assault*; if he purposefully, knowingly, or recklessly inflicts bodily injury upon another; if he negligently inflicts bodily injury upon another by means of dangerous weapon; or if, through physical menace, he places another in fear of imminent serious bodily injury. A person commits *tortious assault* when he engages in "any act of such a nature as to excite an apprehension of battery or bodily injury." In some jurisdictions, there is no requirement of actual physical violence; simply the "threat of unwanted touching of the victim" suffices to sustain an assault claim.

- ii) **Battery:** Battery is “any intentional and unpermitted contact with the plaintiff’s person or anything attached to it and practically identified with it.” The element of battery in common law varies by jurisdiction, e.g. in the United States, the American Law Institute’s Restatement of Torts provides a general rule to determine liability for battery.
- iii) **False Imprisonment:** False imprisonment is defined as “unlawful obstruction or deprivation of freedom or restraint of movement.” In some jurisdictions, false imprisonment is a tort of strict liability: no intention on the behalf of the defendant is needed, but others require intent to cause the confinement. Physical force, however, is not a necessary element, and confinement need not be lengthy; the restraint must be complete, though the defendant does not resist.

Defences to trespass to the person: These include the following.

- **Child Correction:** Depending on the jurisdiction, corporal punishment of children by parents or instructors may be a defense to trespass to the person, so long as the punishment was “reasonably necessary under the circumstances in order to discipline a child who has misbehaved” and the defendant “exercised prudence and restraint.”
- **Consent:** Perhaps the most common defense for the torts of trespass to the person is that of *volenti non fit injuria*, literally means, “to a willing person, no injury is done,” but shortened to “consensual privilege” or “consent”.
- **Self-defense/Defense of others/Defense of property:** Self-defense or non-consensual privilege is a valid defense to trespasses against the person, assuming that it constituted the use of “reasonable force which they honestly and reasonably believe is necessary to protect themselves or someone else, or property.” The force used must be proportionate to the threat as ruled in *Cockroft v Smith* (1705, p.642).

11.5.3.2 Trespass to Chattels

Trespass to chattels, also known as trespass to goods or trespass to personal property is defined as “an intentional interference with the possession of personal property ... proximately causing injury.” Trespass to chattels possesses the following *three elements*.

- i) **Lack of consent:** The interference with the property must be non-consensual. A claim does not lie if, in acquiring the property, the purchaser consents contractually to certain access by the seller. “Any use exceeding the consent” authorized by the contract, should it cause harm, gives rise to a cause for action.
- ii) **Actual harm:** The interference with the property must result in actual harm. The threshold for actual harm varies by jurisdiction. In California, for instance, an electronic message may constitute a trespass if the message interferes with the functioning of the computer hardware, but the plaintiff must prove that this interference caused actual hardware damage or actually impaired its functioning.
- iii) **Intentionality:** The interference must be intentional. What constitutes intention varies by jurisdiction. Intention is present when an act is done for the purpose of using or otherwise intermeddling with a chattel or with the

knowledge that such an intermeddling will, to a substantial certainty, result from the act and continues, it is not necessary that the actor should know or have reason to know that such intermeddling is a violation of the possessory rights of another.

Remedies for trespass to chattel include: damages, liability for conversion, and injunction, depending on the nature of the interference.

Application of trespass to chattels: It is done in two ways.

- **Traditional applications:** Trespass to chattels typically applies to tangible property and allows owners of such property to seek relief when a third party intentionally interferes or intermeddles in the owner's possession of his personal property. "Interference" is often interpreted as the "taking" or "destroying" of goods, but can be as minor as "touching" or "moving" them in the right circumstances.
- **Modern applications:** In recent years, trespass to chattels has been expanded in the United States to cover intangible property, including combating the proliferation of unsolicited bulk email as well as virtual property interests in online worlds. In the late 1990s, American courts enlarged trespass to chattels, first to include the unauthorized use of long distance telephone lines, and later to include unsolicited bulk email.

11.5.3.3 Trespass to Land

Trespass to land involves the "wrongful interference with one's possessory rights in (real) property." It is not necessary to prove that harm was suffered to bring a claim, and is instead *actionable per se*. While most trespasses to land are intentional, British courts have held liability for trespass committed negligently. Similarly, some American courts also found liability for unintentional intrusions where such intrusions arise under circumstances evincing negligence or involve a highly dangerous activity. Exceptions exist for entering land adjoining a road unintentionally (such as in a car accident), as in *River Wear Commissioners v Adamson* (1877, p.743).

- **Interference:** The main element of the tort is "interference". This must be both direct and physical, with indirect interference instead of being covered by negligence or nuisance. "Interference" covers any physical entry to land, as well as the abuse of a right of entry, when a person who has the right to enter the land does something not covered by the permission.
- **Subsoil and Airspace:** Aside from the surface, land includes the subsoil, airspace and anything permanently attached to the land such as houses.

Defenses to trespass to land: There are several defenses to trespass to land such as license, justification by law, necessity and *jus tertii*.

- **License** is express or implied permission, given by the possessor of land, to be on that land. These licenses are irrevocable unless there is a flaw in the agreement or it is given by a contract. Once revoked, a license-holder becomes a trespasser if they remain on the land.
- **Justification by law** refers to those situations in which there is statutory authority permitting a person to go onto land, such as the England and Wales' Police and Criminal Evidence Act 1984, which allows the police to enter

land for the purposes of carrying out an arrest; or the California state constitution, which permits protests on grocery stores and strip malls, despite their presenting a general nuisance to store owners and patrons.

- *Necessity* is the situation in which it is vital to commit the trespass; in *Esso Petroleum Co. v Southport Corporation* (1956, p.28) the captain of a ship committed trespass by allowing oil to flood a shoreline. This was necessary to protect his ship and crew, and the defense of necessity was accepted. Necessity does not, however, permit a defendant to enter another's property when alternative, though less attractive, courses of action exist.
- *Jus tertii* is where the defendant can prove that the land is not possessed by the plaintiff, but by a third party, as in *Doe d Carter v Barnard* (1849, p.945). This defense is unavailable if the plaintiff is a tenant and the defendant a landlord who had no right to give the plaintiff his lease, e.g. an illegal apartment rental, an unauthorized sublet, etc.

11.5.4 Defamation

A man's reputation is his property and is more valuable than any other tangible asset. Every man has the right to have his reputation preserved. It is acknowledged as an inherent personal right of every person. It is a *jus in rem*, a right good against all the people in the world. The degree of suffering caused by loss of reputation far exceeds that caused by loss of any material wealth.

Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally, or tends to make them shun or avoid him.

Law of Defamation, like many other branches of tort law, aims at balancing the interests of the parties concerned. These are the rights that a person has to his reputation vis-à-vis the right to freedom of speech. The Law of Defamation provides defences to the wrong such as truth and privilege thus also protecting right of freedom of speech but at the same time marking the boundaries within which it may be limited. In India, tort law is obtained from British Common Law and is yet uncodified. Therefore, the existing law relating to defamation places reasonable restrictions on the fundamental right of freedom of speech and expression conferred by Article 19(1) (a) of the Constitution and is saved by clause (2) of Article 19.

11.5.4.1 Types of Defamatory Statements

There are two types of defamatory statements.

- *Libel*: It is the publication of a false and defamatory statement tending to injure the reputation of another person without lawful justification or excuse. The statement must be in a printed form, e.g. writing, printing, pictures, cartoons, statue, waxwork, effigy, etc.
- *Slander*: It is a false and defamatory statement by spoken words and/or gestures tending to injure the reputation of others. It is in a transient form. It also involves the sign language used by the physically disabled.

In Common law, a libel is a criminal offence as well as a civil wrong, but a slander is a civil wrong only. However, in Indian law, both are criminal offences under Section 499 of the IPC. Libel is more favorable to the claimant because it is actionable per se and injury to reputation will be presumed.

11.5.4.2 Constituents or Elements of Defamation

Regardless of whether a defamation action is framed in libel or slander, the plaintiff must always prove that the words, pictures, gestures, etc are defamatory. Equally, the plaintiff must show that they refer to him. Finally, he must also prove that they were maliciously published. Thus, there are three essential elements in a defamation action, viz. the following.

- i) ***The statement must be defamatory:*** Any imputation which exposes one to disgrace and humiliation, ridicule or contempt is defamatory. It could be made in different ways; it could be oral, in writing, printed or by the exhibition of a picture, effigy or statue or by some other means or conduct. According to Lord Atkins (1936, p.1237), whether a statement is defamatory or not depends upon how likely the right-thinking members of the society take it. However, words spoken in anger or annoyance or in the heat of the moment are not defamatory as they no way reflect on the character of the one being abused.
- ii) ***The statement must refer to the plaintiff:*** The plaintiff has to prove that the statement which is claimed to be defamatory actually refers to him/her. It is immaterial that the defendant did not intend to defame the plaintiff, if the person against whom the statement was published could reasonably infer that the statement referred to the plaintiff, the defendant is nevertheless liable. However, when the defamation refers to a class of persons, no member of that group can sue unless he can prove that the words could reasonably be considered to be referring to him.
- iii) ***The statement must be published:*** Publication means making the defamatory matter known to some other third party, and unless that is done no civil action for defamation can lie in court. Communication to the plaintiff won't count because defamation is injury to the reputation which consists in the estimation in which others hold him and not a man's own opinion of himself. However, if a third party wrongfully intercepts and reads a letter sent to the plaintiff it is not defamation. However, when the defendant knows that the letter is likely to be read by someone else and it contains some personal information only meant for the recipient, then he will be liable.

When the repetition of the defamatory matter is involved, the liability of the person who repeats that defamatory matter is the same as that of the originator, because every repetition is a fresh publication giving rise to a fresh cause of action. Not only the author is liable but the editor, printer or publisher would be liable in the same way.

11.5.4.3 Defences to Defamation

Following are the defences available to defamation.

- i) ***Justification by truth:*** In a civil action for defamation, truth is a complete defence. However, under criminal law, it must also be proved that the imputation was made for the public good. Under the civil law, merely proving that the statement was true is a good defence, the reason being that "the law will not permit a man to recover damages in respect of an injury to a character which he either does not or ought not to possess".

If a fair and bona fide comment on a matter of public interest is a defence to be available, the following essentials are required:

- It must be a comment, i.e. an expression of opinion rather than an assertion of fact;
- The comment must be fair, i.e. must be based on the truth and not on untrue or invented facts
- The matter commented upon must be of public interest.

ii) **Privilege:** It is of the following two kinds.

- a) **Absolute Privilege:** Certain statements are allowed to be made when the larger interest of the community overrides the interest of the individual. No action lies for the defamatory statement even though it may be false or malicious. In such cases, the public interest demands that an individual's right to reputation should give way to the freedom of speech. This privilege is provided to:
 - Parliamentary proceedings,
 - Judicial proceedings,
 - Military and Naval proceedings, and
 - State proceedings.
- b) **Qualified Privilege:** It is communications made in the course of legal, social or moral duty for self-protection, protection of common interest, and for public good and proceedings at public meetings, provided the absence of malice is proved. Also, there must be an occasion for making the statement. To avail this defence, the following things must be kept in mind:
 - The statement should be made in discharge of a public duty or protection of an interest; or
 - It is a fair report of parliamentary, judicial or other public proceedings; and
 - The statement should be made without any malice.

Defamation does have great significance as it protects a right which is essential for the members of society to co-exist. Obviously, if people do not respect that right and are allowed to say and publish whatever they want without substantiating it with an honest reason to believe, then there would be no harmony in society; insecurity would be rampant and society would be in shambles.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

5) Explain the maxim, *Res ipsa loquitur*.

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- 6) Discuss defamation. Distinguish between libel and slander.

11.6 LET US SUM UP

We discussed the law of tort in reasonable detail. We covered the concept, meaning, theories, essential ingredients, general conditions, rules and defences of torts. Further, we have highlighted the aspects like who are competent to sue or to be sued and who cannot be sued. We hope you would take due cognizance of all the points discussed in tort law and attempt to educate others as well, so that precautionary actions of yours and others would prevent you or them from becoming liable for any tort.

11.7 ANSWERS TO 'CHECK YOUR PROGRESS' QUESTIONS

- 1) The two competing theories of tortious liability are given below.
 - i) Wider and narrower theory: All injuries done by one person to another are torts, unless there is some justification recognized by law.
 - ii) Pigeon-hole theory: There is a definite number of torts outside which liability in tort does not exist.
- 2) The essentials of tort are that:
 - i) There must be a wrong act committed by a person;
 - ii) The wrongful act must be of such a nature as to give rise to a legal remedy; and
 - iii) Such legal remedy must be in the form of an action for unliquidated damages.
- 3) General defences available against tortious liability include: *Volenti non fit injuria*, Plaintiff the wrongdoer, Inevitable accident, Act of God, Private defence, Mistake, Necessity, Statutory authority.
- 4) The following are five important exceptions to the principle/rule laid down in *Rylands v Fletcher*'s case: i) Vis Major or act of God, ii) Wrongful or malicious act of a stranger, iii) Plaintiff's own fault, iv) Common benefit, and v) Statutory authority.

- 5) *Res ipsa loquitur* is a doctrine that permits a trier of fact to infer the existence of negligence in the absence of direct evidence of negligence. For the doctrine to apply it must be shown that:
 - i) The thing causing the damage must be under the control of the defendant or his servant; and
 - ii) The accident must be such as could not in the ordinary course of things have happened without negligence.
- 6) Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally, or tends to make them shun or avoid him.
 - *Libel*: It is the publication of a false and defamatory statement tending to injure the reputation of another person without lawful justification or excuse. The statement must be in a printed form, e.g. writing, printing, pictures, cartoons, statue, waxwork, effigy, etc.
 - *Slander*: It is a false and defamatory statement by spoken words and/or gestures tending to injure the reputation of others. It is in a transient form. It also involves the sign language used by the physically disabled.

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UNIT 12 CONTRACT LAW

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12.0 INTRODUCTION

In day-to-day life, we can't live without depending upon or dealing with others for various things. Consequently, we need to transact with others in various contexts or circumstances to fulfill our needs and interests. The transaction processes may lead to promise by one person and acceptance by the other. Such promise and acceptance becomes an agreement, and if such agreement is made to create legal relationship that becomes a contract.

Therefore, in this Unit, we will discuss the concept of contract, essentials of a valid contract, kinds of contract, and various ways and means of discharging the contractual obligations.

12.1 OBJECTIVES

After going through this unit, you are expected to:

- Explain the concept of contract, its nature and scope;
- Examine the kinds of contractual obligations;
- Elucidate the essentials of a valid contract in detail;
- Distinguish between contract and agreement; and
- Describe various modes of discharging a contract.

12.2 CONTRACT: CONCEPT AND NATURE OF OBLIGATIONS

In our real life situations, we will be entering into different agreements and contracts with different people without even knowing what an agreement or a contract is, or what are the differences and similarities between an agreement and a contract. It is essential for us to have clarity of these concepts, as they have their specific implications and consequences for us, irrespective of our knowledge of the same.

In this section, we, therefore, attempt to present you the concept, nature and scope of contract, on the basis of The Indian Contract Act, 1872.

12.2.1 Concept of Contract

The word '*Contract*' is derived from the Latin word "*Contractum*" which means 'drawn together'. Simply, *contract* is an agreement enforceable by law. It is an agreement between two or more parties. The parties are bound by such agreement.

To understand the concept of contract better, it is essential for us to understand the meaning of 'agreement' and the differences and similarities between the two terms, 'agreement' and 'contract'.

When two or more persons agree to do the same thing in the same sense, it is called an *agreement*. Every agreement is the result of a proposal or offer by one person (party) and acceptance by the other person (other party). Therefore, an agreement must have reciprocal promises between the two parties that they agreed to do something(s) in specific manner. It may or may not create legal obligation. If it creates a legal obligation then it becomes a contract. In such case, each party to such an agreement has a legal duty to fulfill the promise made by him/her. Thus, there are differences and similarities between agreement and contract. To sum up, all contracts are agreements, but all agreements are not contracts.

Thus, every promise or set of promises, forming the consideration for each other is an agreement. The promises which form consideration or part of the consideration for each other are called reciprocal promises. An agreement not enforceable by law is said to be void, i.e. no agreement. An agreement enforceable

by law is contract. An agreement enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others is a voidable contract. A contract which ceases to be enforceable by law becomes void, when it ceases to be enforceable.

The following are the examples of contracts:

- A agreed to paint a picture for B, and B promised to pay Rs.5000/- to A. This agreement is a contract.
- A promised to sell his house for Rs.10,00,000/-, and B accepted to buy the house for the said amount. This agreement is a contract.

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void by law. For example, any agreement made with an infant, or an insane person or a person of unsound mind cannot be called a contract.

12.2.2 Nature of Contractual Obligations

Every contract must have *two essential elements*. They are: i) agreement, and ii) legal obligation. Legal obligation binds the parties together. But, all agreements are not enforceable. Only legal contractual obligations are enforceable, and social contractual obligations are not enforceable.

Difference between social contractual obligations and legal contractual obligations: These are as follows.

- Social contractual obligations:*** If social contractual obligations are breached by any party, the aggrieved party cannot question it in a court of law for its enforcement, due to the lack of essential element, i.e. legal relationship. If the parties do not have any intention to create legal relationship at the time of making of contract, such agreements cannot be enforced. Marriages are called “Family contracts”, which come under social contracts.
- Legal contractual obligations:*** While making the legal contractual obligations the parties involved agree, with full consciousness and with clear intention, to create legal relationship between or among them. Therefore, if legal contractual obligations are breached by any one of the parties, the other may approach the court for remedy.

12.2.2.1 Some Instances/Cases Relating to Contractual Obligations

The following instances will provide us clarity on the social contractual obligations and legal contractual obligations.

A) Instances of social contractual obligations

- i) A wife cannot file a case when her husband fails to buy a *saree* on her birthday.
- ii) A father promises to pay Rs.500/- every month as pocket money to his son. Later he refuses to pay. The son cannot file a case to recover such money, because it is a domestic agreement and does not intend to create legal relationship.

- iii) In the case of *Balfour v Balfour* (1919, p.571), the defendant was an employee of Ceylon government. He went to England with his wife on leave. On health grounds the wife could not return along with the husband to Ceylon. The husband promised to pay £30 per month to his wife as maintenance for the period she had to live separately in England. The husband failed to pay the promised amount. The wife filed a suit, against her husband for recovery of maintenance amount. The Court held that since the agreement had no intention to create legal relationship the husband was not liable.
- iv) In *Jones v Padavatton* (1969, p.616) case, Mrs. Jones herself lived in Trinidad. Her daughter, who had been divorced and had a young son lived in Washington and was serving in the Indian Embassy there. Mrs Jones persuaded her daughter to leave her job in Washington and study for the bar in England. The daughter reluctantly agreed to the suggestion, left the job and went to England in 1962. In 1964, Mrs Jones bought a house in England. The daughter was allowed to stay in a part of the house whereas the other part was let out. The rent received from the part of the house was given to the daughter to cover her expenses. In 1967, some differences had arisen between Mrs. Jones and her daughter and Mrs. Jones brought an action to evict her daughter. Till that time the daughter had not completed her studies for the bar. The daughter contended that in view of the promise made by her mother, she was legally bound to maintain her until she completed her studies. It was held that there was nothing to indicate that there was an intention to create legal relationship between the parties (Bangia, 2009, pp.11-12).

B) Instances of legal contractual obligations

- i) A agrees to sell his house to B for Rs.1,00,000/-. Here, B's promise to pay the sum of Rs.1,00,000/- is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay Rs.1,00,000/-. These are lawful considerations.
- ii) A, B and C enter into an agreement for the division among them of gains acquired or to be acquired by fraud, the agreement is void (i.e. there is no agreement) as its object is unlawful.
- iii) A promises to maintain B's child, and B promises to pay Rs.1000/- monthly for that purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations. So it creates legal contractual obligation on the parties.

12.3 ESSENTIALS OF A VALID CONTRACT

In the above section, we have dealt with the concept of contract (what is contract and what is not contract) and the nature of obligations that a contract creates on the parties to the contract. Now, let us study the essentials of a valid contract, so that you would be in a better position to say whether any particular act is a contract or not.

The essential conditions of a valid contract are laid down in the Indian Contract Act, 1872. These include the following.

- i) Minimum two parties,
- ii) Legal relationship,
- iii) Agreement,
- iv) Lawful object,
- v) Offer and acceptance,
- vi) Certainty of terms,
- vii) Consensus-ad-idem,
- viii) Possibility of performance,
- ix) Capacity to contract,
- x) Lawful agreement,
- xi) Free consent,
- xii) Legal formalities,
- xiii) Lawful consideration.

- 1) **Minimum Two Parties:** There must be at least two parties to a contract. They are: *promisor* and *promisee*. They are also called the *offeror* and *offeree*.
- 2) **Agreement:** There must be an agreement to do same thing in the same sense. Offer by one party and acceptance by the other party makes an agreement. Therefore, to put it simply, Agreement = Offer + Acceptance.
- 3) **Offer and Acceptance:** There must be a lawful offer and a lawful acceptance. A person making an offer is called *offeror* or *proposer* and the person who accepts the offer is called *offeree* or *acceptor*.
- 4) **Consensus-ad-idem:** It means 'identity of minds'. Both parties must have clear understanding about the subject matter of their contract at the same time and in the same sense. Therefore, *Consensus ad-idem* = Offer + Acceptance.
- 5) **Capacity to Contract** (Sections 11 and 12): Every person has capacity to enter into contract if he is a major and with sound mind. Minors and persons with mental disorder (insane persons or persons of unsound mind) have no capacity to enter into contract.
- 6) **Free consent:** (Section 13): There must be free consent. It means both parties must enter into an agreement without any force, fraud, coercion, misrepresentation, mistake or undue influence.
- 7) **Lawful consideration** {Section 2 (d)}: There must be a consideration in every contract. It must be lawful. *Consideration* means 'something in return'. Price is called *consideration*. A contract without consideration is void (i.e. no contract).
- 8) **Legal relationship:** Parties must have intention to create legal relationship between them, *e.g.* A agrees to sell his car to B for Rs.95,000/-. Such agreement creates legal relationship.
- 9) **Lawful object** (Section 23): The object of the contract must be lawful. It must not be immoral or illegal or opposed to public policy. An agreement with lawful object is valid but an agreement with unlawful object is not valid, *e.g.* An agreement to supply rice to a student hostel is lawful, but an agreement to supply rice to terrorist's organization is unlawful, because the object of terrorists is illegal.
- 10) **Certainty of Terms:** The terms of contract must be clear. They must not be vague or uncertain. *e.g.* A agrees to sell B a 'hundred tons of oil'. The terms are not clear because which kind of oil is not mentioned.
- 11) **Possibility of Performance:** An agreement must be possible to perform. Law never compel anybody to do an impossible act. *e. g.* Agreement to transfer of the Sun or the Moon is impossible act.

- 12) **Lawful Agreement:** The agreement must not have been expressly declared void or illegal by any law in force in India, *e.g.* Agreement in restraint of trade, or agreement in restraint of marriage, or agreement in restraint of legal proceedings or wager agreements (Betting agreements).
- 13) **Legal Formalities:** Agreement may be oral or written. Where the agreement is to be in writing, it must fulfill the necessary legal formalities such as writing, registration and attestation, *e.g.* Sale, lease, gift and mortgage are required to be in writing.

Since offer and acceptance are the *two essential acts* involved in making a contract, we will, now, discuss these below.

12.3.1 Offer

Offer is a starting point in the formation of a contract. It is a willingness to do or not to do something. Offer is made with a view to obtain the acceptance of the other party. The person making the proposal is called the *proposer* or *offeror* or *promisor*. The person to whom the proposal is made is called the *offeree* or *promisee*. *e.g.* A offers to sell his house to B for Rs.10 Lakhs. This is an offer. A is the offeror and B is the offeree. When a statement is made without any intention to obtain the assent of the other party that cannot be called as proposal. The offer may or may not be accepted. An offer can also be withdrawn before it is accepted.

12.3.1.1 Essentials of an Offer

The following are the essentials of an offer.

- *Offer may be express or implied:* An offer could be express or implied, and may be made either orally or in writing. An offer made by words — oral or written — is called an *express offer*. Offer made by conduct is called an *implied offer*.
- *There must be an intention to create legal relations:* Offer should be made with an intention to create legal relationship. The social engagements are generally agreed without an intention to create legal obligations. Thus, any agreements, which are not intended to create legal relationship, are not enforceable.
- *The terms must be clear and certain:* The terms of offer must be very clear and definite. They must not be vague, *e.g.* A says to B, 'I will supply 100 tons of oil'. This is a vague offer because, which oil he is referring to is not mentioned.
- *It must be communicated to the offeree:* The offer can be accepted only when it is communicated to the offeree. According to Section 4, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. Mere ignorance of offer does not amount to acceptance of the same.
- *It may be specific or general:* Specific offer is made to a particular person, *e.g.* A offers to sell his house to B. General offer is made to the public in general, *e.g.* A offers to sell his house to any body.

12.3.1.2 Revocation of a Proposal (Offer)

Revocation of a proposal or an offer means cancellation or taking back or withdrawal of the said proposal or the offer. An offer may be revoked at any time before the offeree accepts it. According to Section 5: *'A proposal may be revoked at any time, before the communication of its acceptance is complete as against the proposer, but not afterwards'*.

12.3.2 Acceptance

Acceptance means agreeing the offer made by the offeree. A contract is created only after an offer is accepted. According to Section 2(b), "when the person to whom the proposal is made assents thereto, it signifies that the proposal is said to be accepted". A proposal becomes a promise, when it is accepted. According to Anson (2002), "acceptance to an offer is what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone". It means when the offeree signifies his assent to the offeror, the offer is said to be accepted. Then the parties become bound by a contract. *e.g.* A offers to sell his house to B for Rs.5 lakhs. B accepts the offer to purchase the house. A's offer is said to be accepted and it becomes an enforceable agreement between A and B.

12.3.2.1 Express or Implied Acceptance

Acceptance may be express or implied. When the acceptance is made by words spoken or written it is called '*express acceptance*'. When the acceptance is made otherwise than express modes it is called '*implied acceptance*'. Implied acceptance may be gathered from the surrounding circumstances or from the conduct of the parties (Section 9, Indian Contract Act), *e.g.* When a person boards a train or bus, he impliedly accepts to pay the usual fare. The offeree is not bound to accept the offer. He may or may not accept. Acceptance cannot be implied from the silence of the offeree or his failure to answer, unless the offeree has by his previous conduct indicated that his *silence* means that he accepts.

Just as when the lighted match comes in contact with gunpowder, there would be an explosion and then it will not be possible to bring the things back to the original position. Similarly, after the offer is accepted, it creates a contract whereby both the parties become bound and none of them can go back.

According to Section 6, the offer lapses if it is not accepted within the prescribed time or if no time is prescribed, by removing unaccepted until the expiry of the reasonable time or else the offer could be revoked by notice of revocation by the offeree.

12.3.2.2 Essentials of a Valid Acceptance

Following are the essentials of a valid acceptance.

- *Acceptance must be communicated:* When an offer is made to a particular person, it can be accepted by him alone (*Boulton v. Jones*, 1857, p.564). But, in case of general offer, any person to whom the offer is made can accept it (*Carlill v Carbolic Smoke Ball Co.*, 1893, p.256). The offeree must signify his assent or communicate the acceptance to the offeror. The offeror cannot impose upon the offeree a duty to give reply. *The offeror cannot say that a failure to give reply will be deemed to be the acceptance of the offer.* Therefore, mere silence cannot be regarded as acceptance.

- *Acceptance must be made in prescribed or usual manner:* If the manner of acceptance is prescribed by the offeror, the acceptance has to be made in such manner. If manner is not prescribed, the same may be made in some usual or reasonable manner. Such as post, telegram, telephone, or through messenger, etc.
- *Acceptance must be made while the offer is still subsisting:* The offeror is free to withdraw or revoke the offer. When, once the offer is withdrawn or revoked it cannot be accepted. Therefore, it is necessary that the acceptance must be made while the offer is still alive and subsisting.
- *The acceptance must always be made only after the offer is made:* It cannot precede an offer. If the acceptance precedes an offer, it is not a valid acceptance and does not result in a contract.

12.3.2.3 Revocation of Acceptance

Like the offer is revocable, generally acceptance is also revocable. Section 5 provides for revocation of acceptance as well. An offeree may cancel his acceptance by a speedier mode of communication. An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

1) Define contract. What are the essentials of a valid contract?

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2) What is an offer? Explain the essential elements of a valid offer.

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Reflection

Have you ever heard of the existence of the Indian Contract Act, 1872? If yes, have you ever got an opportunity to read the Indian Contract Act, 1872? If not, have you heard about the offer, acceptance and consideration? If not, don't you think that the law of contract is useful in your day-to-day life and that you should have a copy of the Indian Contract Act at your home for your reading and reference? Reflect upon these questions and do what you feel is right.

12.3.3 Consideration

Consideration means a price or a payment. It may be described as something accepted or agreed upon as a return or equivalent for the promise made. According to Section 25 of the Indian Contract Act 1872 an agreement without consideration is void, "unless it is in writing and registered, or is a promise to compensate for something done, or is a promise to pay a debt barred by limitation law". So, generally, an agreement without a consideration cannot be enforced. Hence, consideration is one of the essential or most important elements of a contract. Consideration, technically called '*quid pro quo*' means 'something in return'. It means, when a party to an agreement promises to do 'something', he must get 'something in return' for it. This is known as *consideration*. It need not necessarily be in cash or kind. It may be an act or abstinence or promise to do or not to do something.

- *Illustration:* A agrees to sell his house to B for Rs.5,00,000/-. Here, Rs.5,00,000/- is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay Rs.5,00,000/-.

12.3.3.1 Rules of Valid Consideration

Following are the rules of valid consideration.

- 1) *Consideration to be given at the desire of the promisor:* The act done or loss suffered by the promisee must have been done or suffered at the desire or request of the promisor.
- 2) *Consideration to be given by the promisee or any other person or privity of consideration* (Section 2(d)): Consideration may be given by the promisee or any other person. It may move not only from the promisee but also a third person, who is not a party to the contract. This is known as *Doctrine of Constructive Consideration*.
- 3) *The consideration may be past, present or future.*
 - *Past consideration:* When an act is done before the date of promise it is called 'past consideration'. *e.g.* A lost his purse. B, a finder of the purse delivers it to A. A, in recognition of this service, promises to pay a sum of money to B. This is a past consideration.
 - *Present consideration:* It is also known as '*executed consideration*'. When the consideration is paid along with the promise, it is called '*present or executed consideration*'. *e.g.* A agrees to sell his car to B for one Rs.1 lakh. B pays money to A at the time of making the contract. This is a present consideration.

- *Future consideration:* It is also known as 'executory consideration'. When the consideration from one party to the other is to pass after the making of the contract, it is called 'future or executory contract'. e.g. A agrees to supply certain goods to B, and B agrees and promises to pay the price on a future date. This is a future consideration.

4) *There must be some act, abstinence or promise:* If nothing is done in exchange of promise there is no consideration. It means where there is no act, abstinence or promise there is no consideration.

- *Consideration need not be adequate* (Section 25): The parties have freedom to make any contract of their choice with free consent. The consideration need not be adequate. The Court will not go into the question of adequacy or inadequacy of consideration (*Vijaya Minerals Pvt. Ltd. v Bikas Deb*, 1996, p.67).
- *Consideration must be real:* Although the consideration need not be adequate, it should be real but not illusory or illegal. Hence, a promise to bring the moon or to create treasure by magic cannot be considered as valid consideration.
- *Consideration must be lawful:* Consideration in an agreement must be lawful. It must not be illegal, immoral or opposed to the public policy. Hence, a promise to supply bombs for murder, girls for prostitution, and so on like that cannot be enforced.
- *Consideration must not be something, which the promisor is already bound to do:* Where a person is already bound to do something, new consideration to perform the pre-existing contract is not valid. Hence, a promise to pay money to a police officer to investigate into a crime is not valid because police officer is already under a duty to do so.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under "Answers to 'Check Your Progress' Questions".

3) What do you understand by consideration? Explain the rules of valid consideration.

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12.3.4 Capacity of Parties

Persons who enter into a contract must have 'capacity'. It means, the parties must have competence to enter into a valid contract. The parties must be competent to contract as per the Indian Contract Act, 1872.

Section 11: Every person is competent to contract who is of the *age of majority* according to the law to which he is subject, and is of *sound mind*, and is not disqualified from contracting by any law to which he is subject. Hence, minors, persons of unsound mind and persons disqualified by law, are not competent to contract.

12.3.4.1 Capacity of a Minor

Following instances/cases make the capacity of a minor very clear.

- *Minor and rule of estoppel:* According to Section 115 of Indian Evidence Act, if a person makes a statement today, which misleads another person, he is not allowed to deny the statement tomorrow when the question of his liability arises. However, such rule of estoppel does not apply against a minor.
- *Minor and beneficial contract:* Although a contract by a minor is void and no liability can be incurred by a minor under a contract, a minor is not debarred from accepting a benefit, e.g.: i) In *Mohori Bibee v Dharmodas Ghose* (1903, p.114), a minor plaintiff, Dharmodas Ghose mortgaged his property to defendant, Brahmo Dutt, who was a money lender to secure a loan of Rs.20,000/-, and minor received Rs.8000/- immediately as a part of loan. Subsequently, the minor filed a suit for cancellation of mortgage, stating that he was a minor when he executed the mortgage. The Court held that mortgage by a minor was void and inoperative. Therefore, the minor was entitled to cancel the mortgage and he could not be asked to repay the advance loan of Rs.8000/-. ii) Minor can sue on a promissory note executed in his favour.
- *Minor and partnership:* Minor being incompetent to contract, he cannot become a partner too. However, a minor may, with the consent of all the partners for the time being, be admitted to the benefits of partnership. He has a right to share of property and profits. He cannot be made personally liable, but only his share is liable for the acts of the partnership firm. On attaining majority, he can have the choice either to become a partner or to leave the firm.
- *Minor and negotiable instruments:* Minor is authorized to draw, endorse/deliver or negotiate a negotiable instrument as per Section 26 of Negotiable Instruments Act, 1881. It binds the other parties, but the minor is not liable for any loss on the negotiable instrument.
- *Minor and agency:* Minor can become an agent but he cannot become a principal and cannot appoint agent. Minor being an agent, he cannot be made liable towards his principal because of minority.
- *Minor-tort and breach of agreement:* Minor is not liable for breach of contract, but he is liable for his torts, e.g. Minor cannot be asked to repay the loan, as a minor's agreement is void.

- **Minor and specific performance:** Generally, a minor's agreement cannot be enforced but it can be enforced only when it is entered into on his behalf by his parent or guardian or the manager of his estate.
- **Minor and parent or guardian's agent:** Generally, the parents or guardian are not liable for the contract entered into by the minor, but when the minor is acting as an agent for the parents or guardian, they shall be liable for the actions of the minor.
- **Minor and restitution:** Restitution means returning it to a rightful owner. Restitution is applied only in valid contracts. Therefore, no order can be made for compensation against a minor for a benefit under void agreement.
- **Minor and ratification:** A minor's agreement is void *ab initio*. It cannot be validated by subsequent ratification after the minor has attained the age of majority. Therefore, a transaction entered into by minor cannot be ratified after attaining the age of majority (*Bhola Ram v Bhagat Ram*, 1927, pp.24, 26).

12.3.4.2 Capacity of a Person of Unsound Mind

Capacity of persons of unsound mind to contract is clear from the following.

- **Capacity of persons of unsound mind:** Section 10 provides that 'all agreements are contracts if they are made by competent persons'. Unsound mind is the result of mental disorder. According to Section 11, only persons of 'sound mind' have capacity to enter into contract. Therefore, a person of unsound mind has no capacity to contract. *e.g.* transfer of property by a deed of gift, sale and lease by a person of unsound mind is void *ab initio*.
- **Who is a person of unsound mind?** A person who is suffering from temporary or permanent mental disorder is called a person of unsound mind. Section 12 provides that 'a person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests'. Unsoundness of mind may arise from idiocy, lunacy, drunkenness, mental illness, etc.
- **Rules of unsoundness of mind:** Following are the rules for unsoundness of mind.
 - 1) A person who is usually unsound, but, occasionally of sound mind may make a contract when he is of sound mind. It means, a person suffering from lunacy can enter into contract during lucid intervals {Section 12, III(a)}.
 - 2) A person who is usually of sound mind, but occasionally of unsound mind, cannot make a contract when he is of unsound mind (Section 12, Para 3).

Thus, soundness of mind is required only at the time of making a contract. In *Inder Singh v Parmeshwardhari Singh* (1957, p.491) case, a property worth about Rs.25,000/- was agreed to be sold by a person for Rs.700/- only. His mother proved that he was an idiot by birth, incapable of understanding the transaction.

The Court held that the agreement of sale was void.

- **Drunkenness:** Drunkenness is also treated on par with the unsoundness of mind, because a person who is so drunk cannot understand the terms of contract. (Section 12 III (b)). At the time of entering into contract a person should be intelligent enough to form rational judgment about such transaction.

12.3.4.3 Capacity of an Alien

Alien enemy is a citizen of an enemy country. Citizen becomes alien enemy because of declaration of war. An agreement with alien enemy is void. He cannot make or enforce a contract.

Capacity of Foreign Sovereigns and Ambassadors: Foreign sovereigns and ambassadors generally enjoy certain privileges and immunities. Such persons promote international relations such as commerce, business, peace, etc., by making bilateral treaties based on agreements. International problems are also solved by mutual agreement. Contracts arise between the countries through ambassadors, e.g. Foreign sovereign can enter into contracts through their agents residing in India.

Check Your Progress

- Notes:** a) Space given below the question is for writing your answer.
- b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.
- 4) What do you understand by ‘capacity to contract’? Explain the position of ‘Minor’ in this regard?

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12.3.5 Consent

Consent means willingness. According to Section 10 the parties must enter into contract with free consent. Where there is no free consent there is no contract. Section 14 explains it; the ‘consent’ is said to be free when it is not caused by:

- i) Coercion (Section 15).
- ii) Undue influence (Section 16).
- iii) Fraud (Section 17).
- iv) Misrepresentation (Section 18).
- v) Mistake (Section 20-22).

Thus, consent must be free from coercion, undue influence, fraud, misrepresentation or mistake. A contract without free consent is not valid. When the consent is obtained by coercion, undue influence, fraud or misrepresentation such an agreement is voidable at the option of the party whose consent was so caused. When the consent is caused by mistake such agreement is void (Sections 20, 21 and 22) and it cannot be enforced {Section 2(g)}.

12.3.5.1 Free Consent

Free consent is an essential requisite of a valid contract. Free consent is the consent, which has been obtained by the free will of the parties out of their own accord. Section 13 provides that ‘two or more persons are said to consent when they agree upon the same thing in the same sense. This is called *consensus ad idem* in English law. It means, both the parties must have same thing in mind while entering into contract.

12.3.5.2 Coercion

Section 15 defines coercion, “Coercion is the committing or threatening to commit, any act forbidden by the Indian Penal code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.” In English law coercion is called *Duress* or *Menace*. The Law Commission of India, in its 13th report on Indian Contract Act, has recommended to include the other penal laws also in the definition of Section 15.

- *Illustration:* A threatens to kill B’s son if he does not sell his house to him. B agrees to sell; such threat amounts to coercion and such consent is not free consent. The acts of coercion should have been done with the intention of causing the other person to enter into an agreement. The party to the contract need not cause the coercion, even it may be caused by a third party, *e.g.* threat to kill, rape, hurt, attempt to commit suicide.

12.3.5.3 Undue Influence

Undue influence means an influence by which a person is induced to act otherwise than by his or her own free will. It is an improper use of any power by superior authority over the mind of the other inferior party to secure consent for the contract. It is also known as ‘*equitable fraud*’. The dominating party uses his/her power and position to obtain the consent of the weak party.

- *Effect of undue influence:* As per Section 19A, the agreement entered out of undue influence is a contract voidable at the option of the party whose consent was so obtained. Any such contract may be set aside either absolutely or as decided by the Court of law. *e.g.* A, a money lender, gives Rs.1000 to B, an agriculturist, and induces B to execute a promissory note for Rs.2000 with an interest @ 6% per month. The Court may set aside the promissory note and order B to repay Rs.1000 only with normal rate of interest. The law of undue influence is founded on the principle of correcting abuses of trust and confidence. It is also called as ‘*equitable fraud*’.
- *Person in mental or bodily distress:* A person is deemed to be in a position to dominate the will of another also in a situation, where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress. Law gives protection to such persons.

- *Illustration:* A, a man enfeebled by disease or age, is induced by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.

12.3.5.4 Fraud

Fraud is a false representation or statement to gain an unjust advantage. Fraud is an intentional misrepresentation of a fact made with an intention to deceive the other party to the contract or to induce him to enter into a contract. When the consent of a party to the contract has been obtained by fraud the consent is not free. Fraudulent representation may be made by making false statement or by conduct.

Section 17: Fraud means and includes any of the following acts done with 'intent to deceive' or to induce a person to enter into a contract.

- The suggestion that a fact is true when it is not true and the person making the suggestion does not believe it to be true.
- Active concealment of a fact by a person who has knowledge or belief of the fact.
- Promise made without any intention of performing it.
- Any other act done to deceive.
- Any such act or omission as the law specially declares to be fraudulent.
 - *Illustration:* A sells by auction to B, a horse, which A knows to be unsound. A says nothing to about the horse's unsoundness. This is not fraud in A.

In *Shri Krishan v Kurukshetra University* (1976, p.376), Shri Krishan, a candidate for LLB first year examination, who was short of attendance, filled his application for examination. He did not fill the attendance column. Neither the Head of the Department of Law nor the authorities of the University made proper scrutiny to discover the truth. The Supreme Court held that mere silence is not fraud. Therefore, the candidate had not committed fraud.

12.3.5.5 Misrepresentation

Misrepresentation means a 'false statement of a fact'. When the consent of a party to a contract has been obtained by misrepresentation, it is not free consent and the contract is voidable at the option of the party. According to Section 18, misrepresentation means and includes the following.

- When a false statement is explicitly made (positive assertion) innocently without any intention to deceive, although he believes it to be true amounts to misrepresentation.
- When a false statement is made by a breach of duty to gain some advantage or benefit at the cost of the other party, although it was made without any intention to deceive, it amounts to misrepresentation.
- When a party acting innocently causes another party to make a mistake as to the substance of the thing, which is the subject of the agreement, it amounts to misrepresentation.

Essentials of misrepresentation: These include the following.

- There must be false representation of a fact.
- Such representation must be the cause of consent.
- Such representation must be made with an intention to induce other party to enter into contract.
- Such representation must be made before the conclusion of the contract.
- Such representation must be made either directly or indirectly.
- Such representation must be made with an intention to deceive the other party.

In the case of *Richview Construction Co v Raspa* (1975, p.377), it was held that when a contract is made by misrepresentation, the disadvantaged party may not only avoid the contract but also sue for damages. In *Bindu Sharma v Ram Prakash Sharma* (1997, p.429) case, a highly qualified bride was told that the bridegroom was in an attractive job with high salary whereas he was only an apprentice in a factory. The Court held that it was a misrepresentation, and therefore, the annulment of the marriage would have to be decreed.

Effect of Misrepresentation (Section 19): When the consent to an agreement is caused by misrepresentation, the aggrieved party to a contract may:

- Insist that the contract shall be performed, or
- Avoid or rescind the contract (Section 19).

12.3.5.6 Mistake

Mistake means wrong understanding of some thing. Mistake may be defined as a wrong belief about something. The consent obtained by mistake is not free consent. Either one or both parties may be working under some misunderstanding of some fact relating to the agreement. Agreement entered by mistake is not an agreement at all, because there may not be *consensus ad idem*, i.e. *identity of minds*. According to Section 13, two or more persons do not agree to the same thing in the same sense, there is deemed to be no consent on their part. Generally, mistake has no effect on a contract, but certain mistakes of a fundamental nature may render a contract void. They are called '*operative mistakes*'.

a) **Mistake of fact:** According to Section 20, "Where both the parties to an agreement are under a mistake as to a matter of fact which is essential to the agreement, such agreement is void".

- *Illustration:* A agrees to buy from B a certain horse. It turns out the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void. This illustration, thus, explains a mistake of fact or mistake as to the subject matter of contract.
- The case of *Courturier v Hastie* (1856, p.673) was an appeal from (1853 (9) Ex 102). In this case, A agreed to sell B, a cargo of corn supposed to be in transit from Salonica to the United Kingdom. Unknown to the parties, it had become fermented and was disposed off on the way, before the contract is being made. The parties were not aware of this fact. The contract was held to be void because of mutual mistake as to the existence of the subject matter. Therefore, the buyer was not bound to pay its price.

- ***Mistake as to quality or identity of subject matter:*** If the parties to the contract are mistaken regarding its quality or identity of the subject matter, the agreement would be valid. It usually arises where one party intends to deal in one thing and the other intends to deal in another. In *Scriven v Hindley* (1913, p.564) there was an auction of several lots, some containing hemp and some containing tow. The auctioneer was selling tow, but the buyer who had come to purchase hemp only, bid for a lot not knowing that it was tow and purchased the same. The evidence shown that the auctioneer knew from the amount of the bid offered and of the large difference in prices between hemp and tow that the buyer was under mistake. The Court held that there was no contract.
- ***Mistake as to possibility of performance:*** The agreement is void when the performance of the contract is not legally possible. It usually arises where both the parties believe that a contract is capable of performance but due to impossibility it cannot be performed. In such case the contract is void.
- ***Mistake as to promise:*** An agreement based on mistake of promise is void. It arises when promise does not reflect the real intention of the promisor. In *Hartog v Shield* (1939, p.566) case, there was an agreement between the seller and the buyer for the sale of 30,000 pieces of Argentine hare skins. The sellers by mistake stipulated in their offer to supply at a certain rate 'per pound' instead of 'per piece'. They did not deliver the skins. The buyer sued the seller for non-delivery of skins. It was held that agreement was void on the ground of mistake as to promise.
- ***Mistake as to the identity of the parties or person:*** Mistake as to the identity of the contracting party makes the contract void. In other words, an agreement is void when there is a mistake as to identity of person. When A intends to contract with B, but enters into contract with C believing him to be B, the contract is void. In *Boulton v Jones* (1857, pp.564, 695), the Court held that where contract is vitiated by mistake, the contract is void, because there is no real consensus between the parties. It is called 'error in consensu' by Sir John Salmon. In *Phillips v Brooks* (1919, p.243), a jeweller sold a gold ring and delivered it on credit to a customer who had come into his shop and had falsely claimed to be Sir George Bullock, a well-known wealthy man. It was held that the contract was valid, because the jeweller had intended to do business with the person in his shop.
- ***Mistake as to nature of Contract:*** An agreement is void when there is a mistake as to nature of contract.
- ***Mistake as to the quantity of the subject matter:*** If both the parties are working under a mistake as to the quantity of the subject matter, the agreement is void. In *Henkel v Pape* (1870, p.7), the defendant wrote to the plaintiff enquiring about the price of rifles and suggesting that they might purchase as many as fifty rifles. Plaintiff sent the list of prices. On receipt of reply, he gave a telegraphic order 'send three rifles', but due to the mistake of telegraphic office, it was transmitted to the plaintiff as 'send the rifles'. The plaintiff in accordance with telegram sent fifty rifles. The defendant accepted only three rifles and rejected the rest. In a suit for the price of fifty rifles, the Court held that there was no contract between parties because of mistake as to quantity.

b) **Mistake of law or mistake as to ordinary law:** A contract is not voidable because it was caused by a mistake as to any law in force in India (Section 21). Ignorance of law of the country is not excusable ignorance.

- *Illustration:* A and B make a contract on erroneous belief that a particular debt is barred by Indian law of limitation. Such contract is not voidable as it cannot be avoided.

➤ **Mistake of foreign law:** A person is bound to know the law of his country, but a person is not expected to know all foreign laws. Therefore, ignorance of foreign law is excusable. It is equal to ignorance of fact (Section 21 of Indian Contract Act).

➤ **Mistake as to private right:** Ignorance of a private right is treated as ignorance of fact and, therefore, would be excusable (*Cooper v Phibbs*, 1867, p.149).

➤ **Mistake as to title:** Sometimes the buyer may already be the owner of what the seller proposes to sell. In such case transfer is impossible, because the buyer is already the owner of the same property. Such agreement of mistake as to title is void due to mutual mistake. In *Cooper v Phibbs* (1867, p.149), Cooper, not realizing that a fishery already belonged to him, agreed to lease it from Phibbs. It was held that the contract was void.

12.3.6 Lawful Object

According to Section 10, the contract is valid only when the object and consideration is lawful. Every agreement entered with an unlawful object and consideration is void.

Illustrations:

- 1) A agrees to sell his house to B for Rs.1,00,000/-. Here, B's promise to pay the sum of Rs.1,00,000/- is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay Rs.1,00,000/-. These are lawful considerations.
- 2) A, B and C enter into an agreement for the division among them of gains acquired or to be acquired by fraud. The agreement is void as its object is unlawful.
- 3) A promises to maintain B's child, and B promises to pay Rs.1000/- monthly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

Unlawful object or consideration: According to Section 23, the consideration or object has been considered as unlawful in the following cases.

- If it is forbidden by law.
- If it would defeat the provision of law.
- If it is fraudulent.
- If it involves or implies injury to the person or property of another.
- The Court regards it as immoral.
- The Court regards it as opposed to public policy.

12.3.7 Legal Relations

Parties must have intention to create legal relationship between them. *e.g.* A agrees to sell his plot to B for Rs.1,50,000/-. Such an agreement creates legal relationship. But, some social contracts such as the following cannot create legal relationship.

- i) A wife cannot file a case when her husband fails to buy a *necklace* on her birthday.
- ii) A father promises to pay Rs.10,000/- to his son if he cleared his exam with distinction. The son spends sleepless nights and passes the exam with distinction marks. Son cannot file a case against the father to make him fulfill his promise.

Offer should be made with an intention to create legal relationship. The social engagements are generally agreed without an intention to create legal obligations. Thus, an agreement to go for a walk, or to go to a cinema, or to go for a dinner cannot be enforced in a Court of law. Thus, those agreements which are not intended to create legal relationship are not enforceable.

12.4 DISCHARGE OF CONTRACT

Discharge means release from duty. Discharge of contract means termination (stopping/closing) of the contractual relationship between parties. Contract creates rights and liabilities. The contract is said to be discharged or terminated when the rights and liabilities of the parties comes to an end. Parties become free after discharge of contract. There are various modes through which the parties can discharge their contractual obligations.

12.4.1 Modes of Discharge of Contract

Following are the different modes of discharging contracts.

- 1) **Discharge by Performance:** When both the parties to the contract fulfill their respective duties as per the terms of the contract, the contract comes to an end. This is known as “*actual performance*”. Sometimes, parties offer to perform their obligation under contract. This is known as “*attempted performance*”, *e.g.* Tender.
- 2) **Discharge by mutual agreement or consent:** Both the parties to the contract, by mutual agreement or consent, may put an end to the contract. The contractual obligation may be discharged by an agreement, which may be express or implied. The various modes of discharge of a contract by mutual agreement are given below.
 - **Novation** (Section 62): Novation means new contract replacing old contract with the consent of the parties. The consideration for the new contract is the discharge of the old contract. *e.g.* A owes money to B. It is agreed between A, B and C that B shall accept C as his debtor instead of A. The old debt of A to B is discharged and new debt of C to B is contracted.
 - **Rescission** (Section 62): Rescission means cancellation of contract. It takes place when all or some of the terms of the contract are cancelled.

If the parties mutually agree to cancel a contract, such contract need not be performed. *e.g.* *X* promises to supply certain goods to *Y* on a certain date. Before the date of performance *X* and *Y* mutually agree that the contract will not be performed. The contract is said to be rescinded.

- **Alteration** (Section 62): Alteration of a contract may take place when one or more of the terms of the contract are altered by mutual consent of the parties to the contract. In such case, old contract is discharged and parties become bound by a new contract, *e.g.* *A* enters into a contract with *B* for the supply of 100 bags of rice by the 1st week of March. *A* and *B*, by mutual consent, may alter the quantity, quality or the price.
- **Remission** (Section 63): Remission means acceptance lesser than what was contracted for. *e.g.* *A* owes *B* Rs.5000/-, but *B* accepts Rs.3000/- instead of Rs. 5000/- as the repay of the whole debt. The whole debt is discharged.
- **Waiver**: Waiver means abandonment/losing a right. It takes place when the parties to a contract agree that they shall no longer be bound by the contract. Neither an agreement nor consideration is required for waiver.
- **Merger**: Merger takes place when an inferior right accruing to a party under a contract merges into a superior right accruing to the same party under the same or some other contract, *e.g.* *P* holds a property under a lease. He later buys the property. His right, as a lessee, merges into his rights as an owner.
- **Insolvency**: Sometimes a person is declared insolvent by the Court of law. After being adjudicated insolvent, he is released from all his liabilities prior to his adjudication.

- 3) **Discharge by lapse of time**: Every contract must be performed within a fixed or reasonable period, called period of limitation. If the contract is not performed and if no legal action is taken by the promisee within the period of limitation, he loses the remedy under contract. In such case, the contract is discharged.
- 4) **Discharge by impossibility of performance**: According to Section 56 “*an agreement to do an impossible act is void*”. Impossibility may appear on the face of the contract or may exist unknown to the parties at the time of making the contract or may arise subsequently after the contract is made.
- 5) **Discharge by operation of law**: Sometimes, a contract may be discharged by operation of law, i.e. by death, insolvency, merger, unauthorized alteration, etc.
- 6) **Discharge by breach of contract**: Failure to fulfill the promise or obligation is called breach of contract. Breach of contract may be by actual breach or anticipatory breach.
 - **Actual breach of contract**: If a party fails to perform his obligation at the time when the performance is due is called ‘*actual breach of contract*’. *e.g.* *A* agrees to deliver to *B* 100 bags of rice on 1st March. He does not deliver the rice on that day. There is a *breach of contract*.

- *Anticipatory breach of contract:* If a party declares his/her intention of non-performance of the contract before the performance is due is called ‘anticipatory breach of contract’, e.g. A agrees to supply to B 100 bags of rice on 1st March. Before this date, A informs B that he is not going to supply the rice. There is an anticipatory breach of contract.

Check Your Progress

- Notes:** a) Space given below the question is for writing your answer.
- b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.
- 5) What is meant by ‘discharge of contract’? What are the various modes of discharge of contract?

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12.5 LET US SUM UP

We have presented you the essential aspects of the Indian Contract Act, 1872 such as offer, acceptance, consideration and discharge of contract. We hope you clear understanding of the contract in general and specific obligations that arise in respect of the parties involved and ways or modes of discharging them. We believe that you will now be able not only to deal effectively with different matters involving contract with various persons in your day-to-day life but also to play your roles as a citizen and as an adult educator in more effective manner.

12.6 ANSWERS TO ‘CHECK YOUR PROGRESS’ QUESTIONS

- 1) The word ‘Contract’ is derived from the Latin word “*Contractum*” which means ‘drawn together’. Simply, *contract* is an agreement enforceable by law. It is an agreement between two or more parties.

Essential elements of a valid contract: The following are the essentials of a valid contract (Section 10):

- i) Minimum two parties,
- ii) Legal relationship,
- iii) Agreement,
- iv) Lawful object,
- v) Offer and acceptance,
- vi) Certainty of terms,

- vii) Consensus-ad-idem,
- viii) Possibility of performance,
- ix) Capacity to contract,
- x) Lawful agreement,
- xi) Free consent,
- xii) Legal formalities,
- xiii) Lawful consideration.

- 2) Offer is a starting point in the formation of a contract. It is a willingness to do or not to do something. Offer is made with a view to obtain the acceptance of the other party. The person making the proposal is called the *proposer* or *offeror* or *promisor*. The person to whom the proposal is made is called the *offeree* or *promisee*. e.g. A offers to sell his house to B for Rs.10 lakhs. This is an offer. A is the offeror and B is the offeree. When a statement is made without any intention to obtain the assent that cannot be called as proposal. The offer may or may not be accepted. An offer can be withdrawn before it is accepted.

Essentials of an offer:

- It may be express or implied.
 - There must be an intention to create legal relations.
 - The terms must be clear and certain.
 - It must be communicated to the offeree.
 - It may be specific or general.
- 3) Consideration means a price or a payment. It may be described as something accepted or agreed upon as a return or equivalent for the promise made. According to Section 25 an agreement without consideration is void and cannot be enforced. Hence, consideration is one of the essential or most important elements of a contract. Consideration is technically called '*quid pro quo*' which means 'something in return'. It means, when a party to an agreement promises to do 'something', he must get 'something in return' for it. This is known as *consideration*. It need not necessarily be in cash or kind. It may be an act or abstinence or promise to do or not to do something.

Rules of valid consideration: These include the following.

- Consideration to be given at the desire of the promisor.
- Consideration to be given by the promisee or any other person or privity of consideration.
- Consideration may be past, present or future.
- There must be some act, abstinence or promise.
- Consideration need not be adequate.
- Consideration must be real.
- Consideration must be lawful.
- Consideration must not be something which promisor is already bound to do.

- 4) Every person is competent to contract who is of the *age of majority* according to the law to which he is subject, and is of *sound mind*, and is not disqualified from contracting by any law to which he is subject. Thus, minors, persons of unsound mind and persons disqualified by law are not competent to contract.
 - *Position of minor vis-avis contract:* In *Mohori Bibee v Dharmodas Ghose* (1903, p.114), a minor plaintiff, Dharmodas Ghose mortgaged his property to defendant, Brahmo Dutt, who was a money lender to secure a loan of Rs.20,000/-, minor received Rs.8000/- immediately as a part of loan. Subsequently, the minor filed a suit for cancellation of mortgage, stating that he was a minor when he executed the mortgage. The Court held that mortgage by a minor was void and inoperative. Therefore, the minor was entitled to cancel the mortgage and he could not be asked to repay the advance loan of Rs.8000/-
 - *Minor and beneficial contract:* Although a contract by a minor is void and no liability can be incurred by a minor under a contract, a minor is not debarred from accepting a benefit. *e.g.* Minor can sue on a promissory note executed in his favour.
 - *Minor and partnership:* Minor being incompetent to contract, he cannot become a partner too. However, a minor may, with the consent of all the partners for the time being, be admitted to the benefits of partnership. He has a right to share of property and profits. He cannot be made personally liable, but only his share is liable for the acts of the partnership firm. On attaining majority, he can have the choice either to become a partner or to leave the firm.
- 5) Discharge means release from duty. 'Discharge of contract' means termination (stopping/closing) of the contractual relationship between parties. Contract creates rights and liabilities. The contract is said to be discharged or terminated when the rights and liabilities comes to an end. Parties become free after discharge of contract.

Various modes of discharge of contract: These include the following.

- i) Discharge by performance.
- ii) Discharge by mutual agreement or consent, which include the following
 - a) Novation, b) Rescission, c) Alteration, d) Remission, e) Waiver, f) Merger, g) Insolvency.
- iii) Discharge by lapse of time.
- iv) Discharge by impossibility of performance.
- v) Discharge by operation of law such as: a) By death of the promisor, b) By merger, c) By insolvency, d) By unauthorized alteration.
- vi) Discharge by Breach of Contract, which include: a) Actual breach of contract, b) Anticipatory breach of contract.

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UNIT 13 FAMILY LAW

Structure

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13.0 INTRODUCTION

Family has been found in every human society. It is a primary social institution. Marriage, divorce, adoption, partition, inheritance, etc are considered as secondary institutions of the society (Sachdeva and Vidya Bhushan, 1988). India is a land of diversities with several religions, which vary widely. Hence, in the matters of personal relationships like marriage, divorce and succession there are different laws governing people belonging to different religions. So, we do not have uniform law to deal with family matters. Therefore, there is the Hindu Marriage Act, 1955, Hindu Succession Act, 1956, Hindu Adoptions and Maintenance Act, 1956, etc., for Hindus; the Parsi Marriage and Divorce Act, 1936 for Parsis; the Christian Marriage Act, 1872 and the Indian Divorce Act, 1869 (amended in 2001) for Christians; the Shariat Act, 1937, the Dissolution of Muslim Marriage Act, 1939 and the Muslim Women (Protection of Rights on Divorce) Act, 1986 for the Muslims; and the Special Marriage Act, 1954 for interreligious marriages.

In India, family is a pious unit and it enables economic progress of the country. Joint family system which fosters great social virtues like sacrifice, affection, co-operation and spirit of selflessness among its members, has been prevalent in India, though now we find only a few of them. This joint family system slowly disintegrated and nuclear system has emerged in its place. After the advent of nuclear family system there is a common tendency that matrimonial litigation is on the rise and it has very adverse effect on the parties, their children and the entire family. Therefore, it is important for us to have knowledge and awareness about relevant laws, and procedures and forums for family conflict resolution, among other things.

13.1 OBJECTIVES

After going through this Unit, we expect you to be able to:

- Explain the concepts of ‘family’ and ‘family relations’ as used in law relating to family;
- Identify the sources of family law;
- Distinguish between and among different basic laws or legal principles of different religions, particularly related to institution of marriage and consequential matters having bearing on the institution of family; and
- Explain the need, significance, objectives and purpose of law with reference to the family.

13.2 SOURCES OF FAMILY LAW

The source of family law may be literally meant a quarter from which we have to seek our knowledge of the law. It indicates a method by which law is evolved. In ancient times, law was developed by a custom. Hindu law is of this kind. A custom is said to be a valid one if it is ancient. But, even in the modern world *custom* is used as the material source of law. What was considered a custom may be enforced today so long as it is not inconsistent with the current legislation or disapproved by judicial pronouncements. *Ancient legal system recognized sources of law* such as the Vedas, the Smrities, and custom.

13.2.1 Vedas

Veda means knowledge, which is the fountain head of Hindu religion and law. There are four Vedas namely, *Rig veda*, *Yajur veda*, *Sama veda* and *Atharvana veda*. These Vedas contain the sacred lore. They came into existence long before writing was invented but their text has been preserved and transmitted to us. The vedic religion as depicted in Vedas is so simple. The vedic religion consists of the following Gods — the Fire God (*Agni*), the Rain God (*Indra*), the Sun God (*Surya*) and the wind God (*Vayu*). The Vedas do not contain rules of law in a connected form. However, there are vedic passages dealing with marriage, adoption, partition, inheritance, stridhana, etc. The teachers of Vedas gave different interpretations to Vedas and, therefore, various *sakhas* developed. Vedas are also called *srutis*, means what is heard. It is nothing but the direct word of God as heard by the sages (Subba Rao, 2009).

13.2.2 Smritis

Next to Vedas, Smritis are very important source of Hindu law. *Smriti* means, what was (heard and) remembered. They represent what was recorded by the sages in their own words of what they heard from the Deity. The early smritis were termed as *dharma sutras*. The principles of law are mostly covered under this part. Manusmriti is the oldest one. According to Manu, law is the king of kings. He recognizes the divine power of the kings to enforce law through *danda*. He gave importance to custom as a source of *dharma*. In his writings, he was harsh towards women and sudras. In Yajnavalkya smriti, which contains 1010 slokas in 2nd century AD, king was subordinate to law and relatively he was less harsh towards women. The British judges were assisted in the administration of justice by native pundits, who gave their opinions on *dharma Sastra* applicable to Hindus. The *Narada Smriti* and *Brihaspati Smriti* deal largely with legal subjects (Yagnavalkya smriti, mentioned in Subba Rao, 2009).

13.2.3 Customs

“*Acharaha Parmodharmaha*” is the ancient Indian principle, which means the custom is the supreme law. Custom is transcendent law. A valid custom should be ancient. The evidence must establish unambiguously the usage of it. A custom must be reasonable. Unreasonable customs which are contrary to public policy are rejected by courts. For example, a custom of polyandry allowing a woman to remarry during the life-time of her husband is immoral (Yagnavalkya smriti, op cit.). Customs may be classified into *local custom*, *family custom*, *caste custom*, etc. The legal requirements of a valid custom are that a custom should be ancient; it must be certain and reasonable.

In Muslim religion, *Koran* is the scripture of divine origin. Since the Koran represents the voice of God, its authority is paramount. Some of the verses of the Koran deal with legal matters such as marriage, divorce, inheritance, guardianship, etc. In Muslim law also, custom became a source of law. According to Muslim customary law, Mohammedan law as to *iddat* was not recognized in the State of Punjab. But, this customary law was superseded by the Shariat Act, 1937 (Mulla, 1972).

13.2.4 Legislations, Judicial Decisions and Equity

Good conscience, equity and justice have been other sources of law. In family law, these form very important sources, based on which many reformative legislations and judicial pronouncements have also been made. Acts enacted by Parliament and State Legislatures form the modern, essential and very important sources of law. Where law is either silent or not clear on any matter then judicial precedents or pronouncements or decisions formed the basis of law. Thus, legislations, judicial decisions, equity and good conscience are considered as modern sources of family law.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

1) What are the traditional and modern sources of Hindu law?

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2) How far did Smritis serve as sources of law?

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3) What are the essentials of a valid custom?

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13.3 CONDITIONS FOR A MARRIAGE

In this section, we will focus on the conditions when a marriage is said to have been valid, and when it becomes void or voidable or irregular. For us, to say that a marriage took place, we need to understand the conditions to be fulfilled by it, for it to be called a marriage. Let us look at what these conditions are.

13.3.1 Conditions for a Valid Marriage

Marriage is a sacred institution and it is the very foundation of a stable family in a civilized society. However, there are certain prerequisites for a valid marriage as per their personal laws, which vary depending upon their religion, caste, customs, and so on. Everyone has an absolute right to marry. In fact, right to marry is a component of the right to life under Article 21 of the Indian Constitution which says that no person shall be deprived of his life or liberty except under the procedure established by law.

13.3.1.1 Hindu Marriage

A marriage may be said to have been solemnized between any two Hindus, if the following conditions are fulfilled (Section 5 of the Hindu Marriage Act, 1955).

- Neither party has a spouse living at the time of the marriage. A marriage in violation of this condition is void.
- At the time of marriage, neither party:
 - Is incapable of giving a valid consent due to unsoundness of mind; or
 - Though capable of giving 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 has been subject to recurrent attacks of insanity;
- The parties should not be within prohibited degrees of relationship and should not be sapindas (sa-pinda means connected by particle of the same body, e.g. two persons are sapindas when they have a common ancestor). A marriage in violation of this condition is void unless there is a custom recognizing such a marriage as valid.
- The bridegroom should have completed the age of 21 years and the bride 18 years at the time of marriage. A marriage in violation of this condition is voidable and the parties are exposed to penalties. It can be validated at the option of the parties.

Thus, by enacting Hindu marriage Act, at a single stroke the practice of bigamy/polygamy, child marriages, were abolished and at the same time the Act encourages widow re-marriages. It is important to note that, it is open to the State Government to make the registration of marriage compulsory. This has not been done so far. Recently, the Law Commission also recommended for compulsory registration of marriages. It paves the way for controlling not only the child marriages but also bigamous marriages that take place in the name of religious conversion.

13.3.1.2 Christian Marriage

Under the Indian Christian Marriage Act, 1872 the conditions for certification of Indian Christians marriage have been provided under section 60 of the Act. They are as follows:

- The Act applies when one or both of the parties to the marriage is/are Christians;
- The age of a bridegroom shall not be under 21 years and the bride's age shall not be less than 18 years;
- Neither of the parties to the marriage (either bride or bridegroom) shall have a living spouse;
- One of the parties to the marriage should give written notice to the Marriage Registrar of the District; and
- The Registrar of marriages present at the time of marriage shall register the marriage in a marriage register-book and a certificate is attached to that book as counterfoil (Kusum; 2008).

13.3.1.3 Muslim Marriage

According to Muslim law, marriage is a civil contract. No religious ceremony is necessary to bring about this relationship. On completion of 15 years of age a person attains puberty. As per Mohammedan law attainment of puberty confers contractual capacity. If a person is of sound mind and has attained puberty his or her marriage cannot be performed without his/her consent. This emphasizes the contractual character of the Muslim marriage. Unlike Hindu law, a Muslim can marry 4 times simultaneously during his life time. That means a Muslim can have four wives at a time.

For a valid marriage the following conditions should be satisfied (Mulla, 1974):

- The parties should have attained puberty or the marriage contract should be entered by the guardian in marriage on behalf of the party;
- The parties should be of sound mind;
- According to Shias, witnesses are not necessary, but for Sunnis at least two male witnesses or one male and two female witnesses are necessary. The absence of witnesses can only render the marriage irregular and not void;
- The parties should not be within prohibited degrees of relationship. Presence of any such relationship is an impediment to marriage. On the ground of blood relationship, i.e. consanguinity, the following relationships are not suitable for marriage and make the marriage void:
 - Mother and son;
 - Grandmother and grandson;
 - Brother and sister;
 - Uncle and niece; and
 - Nephew and aunt.

13.3.1.4 Special Marriage: Marriage Between any Two Persons belonging to Different Religions

A marriage between any two persons belonging to any religion may be solemnized under the Special Marriage Act, 1954. We will deal with it in sub-section 13.3.3.

13.3.2 When a Marriage is not Valid: Void, Voidable and Irregular Marriages

Ancient Hindu marriages are regarded as sacramental marriages. In a sacramental marriage, the relationship between the husband and the wife is established exclusively by the performance of some religious ceremonies and not by a contract between the parties. *A marriage which is not valid may be void or voidable.*

A *void marriage* is one which has no legal status. The courts regard such marriage as never took place and no rights and obligations ensue to the parties in that case. It is void *ab initio*. That means, right from the inception the marriage has no legal sanctity. Hence, the parties are at liberty to contract another marriage without seeking a decree of nullity of the so-called first marriage.

A *voidable marriage* is a marriage which is binding and valid, and continues to subsist for all purposes until a decree is passed by the court annulling the same.

Thus, so long as such decree is not obtained, the parties enjoy all rights and obligations that go with the status of marriage. A marriage by any of the parties without the decree of nullity of first marriage is illegal, as it would amount to bigamy (Kusum, 2008).

Check Your Progress

Notes: a) Space given below the question is for writing your answer.
b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

4) Explain the requisite conditions of a valid Hindu marriage.

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5) Distinguish between void and voidable marriages.

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6) Examine the legal consequences of irregular marriages under the Muslim personal law.

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13.3.3 Special Marriage Act, 1954

A marriage between any two persons belonging to different religions may be solemnized under the Special Marriage Act, 1954. Under this Act, any two persons, irrespective of their religion, can marry. We will present here the requisite conditions to be fulfilled for such a valid marriage along with the effects of such a marriage, and provision for divorce under this Act.

13.3.3.1 Requisite Conditions for a Valid Marriage

The conditions required for a valid marriage as provided under Section 4 of the Special Marriage Act, 1954 are as follows:

- Neither party should have a husband or wife living at the time of marriage;
- Neither party is a lunatic or incapable of giving a valid consent due to unsoundness of mind;
- Neither of the parties are unfit for marriage and procreation of children;
- The bridegroom must have completed the age of twenty one and the bride the age of eighteen years;
- The parties are not within the degrees of prohibited relationship. Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within prohibited degrees;

13.3.3.2 Effect of the Marriage

If the Hindu marrying under the Special Marriage Act was prior to marriage a member of a Hindu joint family, the effect of his marriage is to sever him from that family, i.e. he becomes a divided member. He will not have the right of survivorship in the family. But, the person whose marriage is solemnized under this Act shall have the same rights and shall be subject to the same disabilities in regard to the right of succession of any property as a person to whom the Caste Disabilities Removal Act, 1850 applies (Section 19 of the Special Marriage Act, 1954).

13.3.3.3 Notice of Intended Marriage

When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing 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 thirty days immediately preceding the date of such notice. The Marriage Officer must publish such notice by affixing a copy thereof to some conspicuous place in his office. The Marriage under this Act is a civil marriage by registration. The certificate of the Marriage Officer that this has been done is conclusive evidence of the marriage under this Act. Even marriages not solemnized under this Act may be registered under this Act. The effect of registration under this Act is that the marriage would be deemed to have been solemnized under this Act.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

7) What are the conditions for a marriage under the Special Marriage Act?

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13.4 MATRIMONIAL RELIEFS

Once the marriage is celebrated it may lead to happy family or the spouses may face difficulties in continuing with their married life. To cope with the difficulties of varying intensity, there are various alternatives available to the spouses – to force by law one spouse to live with the other, to live separately keeping the marriage bond in tact and to put an end to their marriage ties. Important matrimonial reliefs that are available include: restitution of conjugal rights, judicial separation and divorce. We will discuss these below.

13.4.1 Restitution of Conjugal Rights

Restitution of conjugal rights is one of the various reliefs available to spouses under family law. Restitution of conjugal rights is a relief to the spouses belonging to Hindu religion (Section – 9 of the Hindu Marriage Act, 1955). When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

The idea of providing a decree for restitution by the court is to preserve the marriage tie as far as possible, by enabling the court to intervene and enjoin upon the withdrawing party to join the other. The conditions to be satisfied for obtaining such decree are as follows:

- One spouse (wife or husband) has withdrawn from the society of the petitioner.
- There is no reasonable excuse for such withdrawal.
- The burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

Constitutional Validity of the Section: By marriage the husband becomes entitled to the conjugal society of his wife and the wife to the conjugal society of her husband. If either party unreasonably withdraws from the conjugal society of the other or the parties are not living together, the aggrieved party can petition for restitution of conjugal rights. There has been lively controversy with regard to the constitutional validity of the restitution of conjugal rights.

- In the famous case, *Sareetha v Venkata Subbaiah* (1983, p.356), the Andhra Pradesh High Court observed that Section 9 which provides for restitution of conjugal rights is unconstitutional as it offends right to liberty which includes privacy guaranteed under Article 21 of the Constitution. It is also unconstitutional under Article 14 of the Constitution which speaks about right to equality.

On behalf of the wife it was argued that the right to privacy confers on a woman “a right to free choice as to whether, where and how her body is to be used for the procreation of the children and also the choice of when and by whom the various parts of her body are to be sensed”. This freedom of choice is part of her right to privacy. This is guaranteed by Article 21 of the

Constitution as part of her liberty. The Court also observed that by recognizing the remedy of restitution of conjugal rights (Section 9 of the Hindu Marriage Act, 1955) the State is violating fundamental liberties. Therefore, it was argued that Section 9 of the HM Act is unconstitutional and struck down by the Court as it violates the wife's right to privacy by compelling her to have sexual contact with the husband against her will. Hence, husband's petition for restitution of conjugal rights was dismissed.

- However, the view of the Andhra Pradesh High Court was disapproved by the Delhi High Court in *Smt. Harvinder Kaur v Harmander Singh* (1984, p.66) and declared Section 9 of the Hindu Marriage Act was constitutionally valid. The Court maintained that sexual intercourse is only one of the elements in the concept of marriage. The courts do not and cannot enforce it. The remedy of restitution aims at cohabitation (living together) and consortium (conjugal society) and seeks to uphold the institution of marriage. It is enforced by financial sanctions under Civil Procedure Code. Further, it is only a step towards divorce. If the decree for restitution of conjugal rights is not obeyed for one year, the remedy of divorce can be sought under Section 13(1-A) of the Hindu Marriage Act.
- This cleavage of opinion of different High Courts was finally set at rest by the Supreme Court in *Saroj Rani v Sudarshan Kumar* (1984, p.1562). The Supreme Court of India observed that the right of the husband/wife to the society of the other spouse is not merely a creature of the Statute. Such right is inherent in the very institution of marriage itself. There are sufficient safeguards in Section 9 to prevent it from tyranny. It serves a social purpose as an aid to the prevention of break-up of marriage. It cannot be viewed in the manner the learned judge of AP High Court has viewed and, therefore, the Supreme Court is unable to accept the position that Section 9 is violative of Article 21 of the Constitution if the purpose of the decree for restitution of conjugal rights is understood in its proper perspective.

A mere paper decree cannot compel the parties to live together in conjugal relationship. If the respondent has a valid ground to live separately from the petitioner, the petitioner cannot succeed in a suit for restitution of conjugal rights. The normal rule is that the wife should reside with the husband. The husband can successfully sue for restitution of conjugal rights if the wife withdraws herself from his society without reasonable cause. If the wife has reasonable cause to withdraw herself from husband's society she would be entitled to maintenance and separate residence. For example, Mrs. X is working in Delhi and her husband Mr. Y is residing in Chennai. The wife mere residing away from the husband does not constitute a reasonable ground for restitution of conjugal rights. If the wife is willing to receive her husband at all times at her residence in Delhi or she is willing to live with her husband during holidays at his residence in Chennai, it is not reasonable ground to establish that the wife is withdrawing from the conjugal society and keeping the husband separately. Hence, it is not a reasonable ground for the husband to obtain the decree of restitution of conjugal rights.

Restitution of conjugal rights is one of the various matrimonial reliefs available to spouses not only under Hindu Marriage Act but also available under the Parsi Marriage and Divorce Act, 1936, the Special Marriage Act, 1954, and the Indian Divorce Act, 1869. Any agreement between the wife and the husband to live separately is void and is contrary to public policy. Hence, such agreements are

invalid and not enforceable. The same position exists in Muslim law also. Whether such an agreement is before marriage or after the marriage, it is contrary to public policy. It is well settled law that any agreement or contract which is against public policy is not valid and cannot have legal effect.

The Muslim law does not specifically provide statutory provision for the matrimonial relief of restitution of conjugal rights. However, where a wife without lawful cause ceases to cohabit with her husband, the husband may demand the wife for restitution of conjugal rights. Similarly, the wife has the right to demand the fulfillment by the husband of his marital duties. The judiciary has also observed that a suit for restitution of conjugal right would lie in a civil court by a Muslim husband to enforce his marital rights. But, if there is cruelty to a degree rendering it unsafe for her to return to his dominion or if there were gross failures on his part to perform the obligations imposed on him by the marriage contract, the court can dismiss the petition and refuse to give relief of restitution of conjugal rights to the husband.

13.4.2 Judicial Separation

Judicial separation is also one of the matrimonial reliefs provided under personal law statutes. Unlike divorce, it does not put an end to the marriage. The legal relationship of husband and wife subsists and the parties cannot remarry. However, it is not obligatory on the parties to cohabit (live together) with each other. Statutory provisions are there under different personal laws. The object of remedy of judicial separation in case of wife is to allow her to remain separate from her husband, without putting an end to the marriage. It only renders separate residence and non-cohabitation lawful.

Hindu Law: Section 10 of the Hindu Marriage Act deals with judicial separation. Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in section 13(1) of the HM Act. When a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may on the application by the petition of either party and on being satisfied with the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so.

It is understood from the above provision that the grounds for judicial separation and divorce are common; the parties are under no obligation to cohabit after the decree; and the decree may be rescinded. It is pertinent to note that prior to the 1976 amendment, the grounds for judicial separation and divorce were different. The grounds for judicial separation are:

- Desertion for not less than two years;
- Cruelty as to cause reasonable apprehension of harm or injury;
- Virulent form of leprosy for not less than a year preceding petition;
- Venereal disease in communicable form for not less than three years preceding petition;
- Unsoundness of mind for not less than two years preceding petition;
- Adultery.

Since a decree for separation does not snap the legal tie, neither spouse can contract another marriage. A marriage after separation but before divorce amounts to bigamy (Having more than one spouse / having marital relation with more than one spouse). However, intercourse by a man with his wife during judicial separation is an offence. In order to be judicially separated, it is necessary to obtain a decree. A wife living away from her husband without a decree for judicial separation cannot be said to be judicially separated.

Parsi Law: Under the Parsi Marriage and Divorce Act, 1936 any married person may sue for judicial separation on the grounds for which such person could have filed a suit for divorce. That means the grounds for both the matrimonial reliefs, i.e. divorce and judicial separation are common. Prior to the amendment of the Act in 1988 a petition for judicial separation could also be filed on the ground that the defendant (Respondent) had been guilty of such cruelty to him or her or their children; or had used such personal violence or had behaved in such a way as to render it, in the judgment of the court, improper to compel him or her to live with the defendant.

Christian Law: The only statute which has retained some distinction between the grounds for judicial separation and divorce is the Indian Divorce Act, 1869. Prior to the amendment of the Act in 2001, the grounds for divorce were very limited. The same has been considerably enlarged and brought almost at par with the Hindu Marriage Act, 1955. With regard to the judicial separation, the amendment has not made any significant change, except that the grounds that were earlier available only for judicial separation are now available for divorce also. A husband or wife may obtain a decree for judicial separation on the ground of adultery or cruelty or desertion for two years or upwards. A decree of judicial separation may also be reserved.

Muslim law: The relief of judicial separation does not exist under Muslim law and divorce is the only remedy for the dissolution of marriage

Special Marriage Act: Special Marriage Act is applicable to any two persons from different religions who can marry. The position under the Special Marriage Act, 1954 is the same as under the Hindu Marriage Act, 1955, and the grounds for judicial separation and divorce are common. Following are the grounds for judicial separation and divorce under this Act.

- i) Every ground for divorce is a good ground for alternative relief under the SPM Act. Further, failure to comply with a decree for restitution of conjugal rights is a good ground for judicial separation.
- ii) Either the husband or the wife can file a petition for divorce on the ground that the respondent (Section 23 of the Special Marriage Act, 1954):
 - had voluntary sexual intercourse with a third person,
 - is undergoing sentence of imprisonment for seven years or more for an offence under the Indian Penal Code,
 - had deserted the petitioner for two years prior to the petition,
 - has treated the petitioner with cruelty,
 - has been incurably of unsound mind or suffering from mental disorder to such an extent that the petitioner cannot be reasonably expected to live with respondent,

- has been suffering from venereal disease in a communicable form,
- has been suffering from leprosy or other form of communicable disease,
- has not been heard of as being alive for seven years,
- has failed to comply with a decree for restitution of conjugal rights for one year or more.

iii) *Divorce by Mutual Consent*: Divorce is possible under the Special Marriage Act, 1954 by mutual consent. If the husband and the wife are living separately for one year or more and are not able to live together, then they may mutually agree that the marriage should be dissolved. A petition for divorce may be presented by both the parties and then they should wait for six months. Thereafter, before the expiry of eighteen months from the petition they should jointly move the court for a divorce decree. The court may thereupon, pass a decree for divorce declaring the marriage to be dissolved with effect from the date of decree.

iv) *Some special grounds for wife alone*, and they include the following:

- Husband being guilty of rape, sodomy or bestiality;
- The order for separate maintenance was passed against husband, and he has not resumed cohabitation for one year or upwards.

You can also read the said provisions of Special Marriage Act as part of divorce discussed below under sub-section 13.4.3, since the same grounds, as mentioned above, are equally applicable to divorce as well.

13.4.3 Divorce

The term 'divorce' comes from the Latin word *divortium* which means to turn aside or to separate. Divorce is the legal cessation of a matrimonial bond. It means putting an end to the marriage by dissolution of marital relations (Subba Rao, 2009). The parties can no longer be husband and wife. All the personal laws in India provide for divorce under certain grounds. Though there are different laws governing people belonging to different religions, the grounds provided for divorce are more or less the same with slight variations. However, Muslim law is different from other laws.

Divorce under Hindu Law: Section 13 of the Hindu marriage Act, 1955 itself contains provisions for seeking divorce by the wife and husband. This Act was amended in the year 1976 and certain changes were made to the grounds available to a Hindu wife for seeking dissolution of marriage. They are:

- Husband had voluntary sexual intercourse with any other person other than his wife (it amounts to the offence of bigamy);
- Husband has treated the wife with cruelty;
- Husband has converted to another religion;
- Husband has been suffering from incurable insanity, leprosy or venereal disease for not less than three years immediately prior to the petition for divorce;
- Husband becoming sanyasi;

- Husband not having been heard of for seven years or more;
- No compliance with the decree of restitution of conjugal rights for two years or more (Now the period has been reduced to one year or more after amendment);
- There was a decree of judicial separation and husband has not resumed cohabitation though two years or more (now after amendment the time limit has been reduced from two years to one year) have expired since the passing of the decree;
- Husband has been guilty of rape, sodomy or bestiality;
- A woman (petitioner) married before commencement of the Act, 1955 has further one more ground: Husband has another wife whom also married either before or after the petitioner's marriage but before the commencement of the Act and such other wife is alive at the time of the presentation of the petition.

The amendment Act 1976 has brought some radical changes to the existing provisions:

- For the first time divorce by mutual consent of the parties has been made available as a matrimonial relief under the Act. Section 13-B provides for mutual consent. If the parties have been living separately for one year or more and have not been able to live together, by mutual consent they can jointly apply for divorce (Mulla, 1974).
- Cruelty is considered as a valid ground for divorce for both the parties. Recognizing it as a reasonable ground for divorce is only a civil law remedy. That means petitioner will get maintenance or monetary relief and there will not be any criminal action against the respondent. Cruelty is also recognized under the Dowry Prohibition Act, 1961. Demand for dowry in any form prior to marriage, at the time of marriage or even after marriage amounts to cruelty. It is also recognized as an offence under Indian Penal Code in order to save the women who have been subjected to harassment by the respective husbands or the relatives of the husbands (Section 498-A of IPC). If any woman has died under suspicious circumstances and has been subjected to harassment or cruelty for the demand of more dowry soon before her death, it is presumed to be a dowry death (Section 304-B of IPC). Both the offences are punishable and accordingly the culprit respondents will be imprisoned.

Recently, in the year 2005, the Protection of women from Domestic Violence Act was passed in order to protect women who have been subjected to violence and cruel treatment within their family. Under this Act, any woman including girl child can claim relief. A married woman can have a right of residence and obtain the residence order in the same house where husband is residing whether it is own house, rented house or ancestral property. Really, it is women friendly legislation. Earlier, the moment a woman complains against the husband's cruelty, she was being thrown out of the house and she used to become homeless. Consequently, she used to suffer from social security to such women. This prompts the women to keep silent and not to complain about the harassment of the husband or his relatives. Now, the new Act is providing a right of residence along with interim monetary relief. Any woman, irrespective of her religion can seek remedy under this new law. In a way it is not only women friendly legislation but also a secular one (Revathi, 2009).

Under the Islamic law, a husband can divorce his wife without assigning any reason or pleading any ground. So far as the wife is concerned apart from the right of divorce under personal law, she has a statutory right under the Dissolution of Muslim Marriages Act 1939 to obtain a divorce on the grounds of cruelty. The concept of cruelty is explained in the act that the husband:

- Habitually assaults her or makes her life miserable by cruelty (physical and mental),
- Associates with women of evil repute, or
- Attempts to force her to lead an immoral life, or
- Disposes of her property or prevents her exercising legal rights over her property,
- Obstructs her in the observance of her religious profession or practice,
- If he has more wives than one and doesn't treat her equitably in accordance with the injunctions of the Quran.

Cruelty is also recognized as valid ground for taking divorce under the Indian Divorce Act. Section 10 of the Act specifies that women should get divorce only if she proves cruelty coupled with either adultery or desertion. It was challenged on different occasions that it violates Article 14 of the Constitution which speaks about equality. It is against equality because cruelty simpliciter is a valid ground for divorce for Hindu and Muslim women, whereas it is not so in case of Christian women. This plight of Christian women was recognized by the judiciary and the anomaly was removed by way of amendment to the section 10 of the Indian Divorce Act. Now, even the Christian women can claim divorce exclusively on the ground of cruelty.

Irretrievable Breakdown of Marriage: The complexity of modern life which is the outcome of fast changing socio-economic conditions such as the disintegration of the joint family structure, the rapid growth of industrialization and urbanization, education and employment of women, and so on has had tremendous impact on the institution of marriage. Until a few decades back, divorce was abhorred as an evil; the grounds for divorce were very limited and it was sought only under compelling circumstances. However, things have changed gradually and marriage is no longer viewed as an indissoluble union. In fact, there has been considerable legislative and judicial activity in the sphere of matrimonial laws during the past few decades all over the world. In view of the needs of changing times, divorce laws have been and are being substantially modified and liberalized.

The word 'irretrievable' means irreparable (Kusum, 1978). A Bill was introduced in the Lok Sabha to provide a new ground for divorce, namely irretrievable breakdown of the marriage. Without any fault of either of the parties as such the marriage might have collapsed. This may be due to: 1) temperamental compatibility of the parties; 2) the insistence of one of the parties to stay with the parents when the other party objects to it; and 3) the husband and the wife being in employment at different places and impossibility of both of them either getting employment at one place or stubbornness on the part of either to give up employment and live with the other.

Now, the question arises: what are the guidelines to determine whether a marriage has broken down irretrievably? The proposed section 13-C of the Hindu Marriage

Act and Section 28-A of the Special Marriage Act lays down guidelines that the parties must not have lived in the house-hold for a continuous period of not less than three years immediately prior to the filing of the divorce petition. If the court is satisfied with all the evidence that there is irretrievable breakdown of the marriage, it may grant the decree of divorce on this ground. Jurists, academicians and courts as well as the Law Commission of India have recommended that irretrievable breakdown of marriage be made a ground for divorce. However, irretrievable break down *per se*, is not enough and courts invoke a statutory ground and in view of the cumulative facts, grant relief. The Supreme Court recently recommended strongly the inclusion of irretrievable breakdown as a ground for divorce.

Divorce under Muslim Law: Muslim marriage is a contract. A contract marriage may be dissolved under Muslim personal law in the following ways:

- By the husband at his will, i.e. *talaq*;
- By the wife under a power delegated to her, i.e. *talaq-e-tafweez*;
- By mutual consent of the husband and the wife, i.e. *khula and mubarat*; and
- By judicial decree under the Dissolution of Muslim Marriages Act, 1939.

Talaq, in its original sense, means repudiation or rejection, but under Muslim personal law it means a release from the marriage tie. It is a generic name for all kinds of divorce. Any Mohammedan of sound mind, who has attained puberty, may divorce his wife whenever he desires, without assigning any cause. A *Talaq* may be effected either orally, by spoken words or by a written document called *talaqnama*. For oral *talaq* no proof of intention is required. Thus, the husband pronounces the word '*Talaq*' before a family council by naming the wife, it is held to be valid. Presence of wife is not mandatory (Mulla, 1972).

Talaq becomes complete only on the expiration of the period of '*iddat*'. The period of *iddat* is three menstrual courses from the time of first pronouncement of divorce. During the *iddat* period the husband should abstain from sexual relations. If he resumes such relations it means that he has changed his mind and the divorce is regarded as revoked. That means the husband has ample scope/opportunity to reconsider his decision to effect a divorce. *Talaq* becomes irrevocable at once, as soon as it is pronounced. The irrevocability is signified when he makes at once three pronouncements saying "*Talaq, Talaq, Talaq*", i.e. "I divorce you, I divorce you, I divorce you". If triple *talaq* is pronounced without any deliberation and without the intention to make it annul, may be revoked before the expiry of *iddat* (Fyzee, 1974).

Husband and wife may be divorcing by mutual consent. In *Khula* (to put-off) form of divorce the wife being dissatisfied with her husband may offer to compensate the husband for releasing her from the marriage contract. If the husband accepts this offer, there is an immediate irrevocable divorce. In *Mubara'at* divorce also there is mutual agreement for divorce. But, here the dissatisfaction is mutual while *khula* it is felt only by the wife. Further, the offer to dissolve the marriage may emanate either from the wife or from the husband whereas in *khula* it emanates only from the wife. In *mubara'at* as well as *khula* divorce, the divorced wife has to observe *iddat* and during *iddat* the husband is bound to maintain her.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.
b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

8) What is meant by restitution of conjugal rights? Examine the constitutional validity of the same.

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9) Explain the difference between judicial separation and divorce. What are the various grounds for judicial separation and divorce under the Special Marriage Act?

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10) Explain the scope of cruelty as a valid ground for taking divorce to wife and husband under Hindu, Muslim and Christian personal laws.

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11) Define *Taalq*. Critically evaluate how far triple *talaq* is justified.

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13.5 SUCCESSION – TESTAMENTARY AND INTESTATE

When a person dies without indicating how his property is to be disposed of *on his death*, that is, without making a will, the law prescribes how his property is to be distributed among his relations. The law does this in order to prevent a scramble among the relations to get at the properties of the deceased owner. The relations on whom the property of the deceased devolved are called his heirs. The process of such devolution of the property of the late owner upon his relations is called *inheritance* or *intestate succession*. Otherwise, that is, if the deceased person had made any 'will' the property will devolve accordingly, and it is called *testamentary succession*.

It is a general principle of the law of inheritance that 'inheritance is never in abeyance'. It means that on the death of the owner intestate, the relation who is the nearest heir at the time would take the property. The ascertainment of the heir cannot be postponed beyond the emergence of a nearer heir. For example, at A's death his nearest heir is B. Subsequently, another relation C is born who, if he had been in existence at A's death, would have been a nearer heir to A than B. Still B takes the inheritance on A's death and his rights are unaffected by C coming into existence later on.

The institution of joint family is peculiar to Hindu society. It is a legal entity represented by its manager. The *Manager or Karta* is the senior most male member. Some of the members of the family are the coparceners. They have a right to insist upon the partition of the property of the joint family. The other members are the dependents of the coparceners. They have only a right of maintenance. They are the members of the joint family but not the coparceners. Coparceners are those who have a right by birth in the joint family property. Property inherited by a person from his father, father's father, father's father's father (3 generations) or property allotted at a partition is his ancestral property. In this property his son, son's son and son's son's son acquire by birth coparcenary rights. Therefore, that property is coparcenary property. Accretions to this property, such as purchases made with the income of the coparcenary property are also coparcenary.

- a) **Intestate Succession:** The property of a male Hindu dying intestate shall devolve according to the provision of the Hindu Succession Act, 1956. *Firstly*, the property first devolves upon Class-I heirs mentioned in the schedule. *Secondly*, if there is no heir of Class-I, then the property will devolve upon the heirs, being the relatives specified in Class-II of the schedule. *Thirdly*, if there is no heir of any of these two classes, then upon the agnates of the deceased. Agnates mean relations whose chain of relationship to the property owner can be traced uninterruptedly through males. For example, Brother's son's son; Father's brother's son's son. *Lastly*, if there is no agnate, then upon the cognates of the deceased. The relations in whose chain of relationship to the propositus (the deceased owner of the property) are through at least one female link are called cognates. For example, daughter's son, sisters' son, sister's daughter, etc.

The property of an intestate shall be divided among the heirs in class-I of the schedule in accordance with the following rules:

Rule-1: The intestate's widow, or if there are more than one widows all the widows together shall take one share.

Rule-2: The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule-3: The heirs in the branch of predeceased son or each predeceased daughter of the intestate shall take between them one share.

Class-I Heirs: Son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased son, son of a predeceased daughter, daughter of predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son.

Class-II Heirs: i) Father; ii) Son's daughter's son, son's daughter's daughter, brother, sister; iii) Daughter's son's son, daughter's son's daughter, daughter's daughter's son, daughter's daughter's daughter; iv) Brother's son, sister's son, brother's daughter, sister's daughter; v) Father's father, father's mother; vi) Father's widow, brother's widow; vii) Father's brother, father's sister; viii) Mother's father, mother's mother; ix) Mother's brother, mother's sister.

- b) **Property Rights of Women under Hindu Succession Act:** Prior to the enactment of Hindu Succession Act, 1956 women had limited interest in the inherited property unlike male members. Limited interest means a woman can have a right in the inherited property but that right was not absolute and it was limited. Thus, she had a right of enjoyment over her property and she cannot alienate, sell or gift away the property. After her death, the property will revert back to the heirs of last deceased male estate holder from whom she got the right over property. This anomaly was removed by passing of the Hindu Succession Act, 1955 and limited estate of women has enlarged into absolute estate and became the absolute owner of the property with full-fledged rights. Thus, the Act has done away with the distinction between male and female heirs.

Further, the Act was amended in the year 2005 and called as Hindu Succession (Amendment) Act, 2005. The main purpose of the amendment is to bring about economic emancipation of women in order to ensure gender equality. The amendment took place in tune with the constitutional goal of equality before law. With the amendment Act, the daughter becomes coparcener by birth and has all rights in the same manner as the son. She has the same rights and liabilities in the said coparcener's property as that of a son. It is a welcome trend, especially, as it provides economic security to women and after marriage she need not depend on her husband. In a way this provision will reduce the most heinous social evil like dowry and other related problems. However, in practice, this law is not in proper implementation. Women themselves are not aware of their rights or claiming their property rights. Hence, this law is also proved as an eye-wash to the plight of the women.

Check Your Progress

Notes: a) Space given below the question is for writing your answer.

b) Check your answer with the one given at the end of this unit under “Answers to ‘Check Your Progress’ Questions”.

12) Who are coparceners and what is meant by coparcenary property?

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13) “Inheritance is never in abeyance”. Explain the statement.

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14) Explain the general rules to devolution of property.

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15) Examine the significance of women’s property rights. What radical changes did the amendment to Hindu Succession Act, 2005 bring in?

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13.6 LET US SUM UP

Family has been inseparable part of the society. Depending upon the religion, the family norms and law have been different and changing over time. These changes have had their impact on the secondary institution of marriage, its consummation, separation of wife and husband, and termination of the bond of marriage. We have dealt with all these of the family with reference to the Hindu, Muslim, Parsi and Christian religions and of inter-religious marriage. Further, we have also dealt with succession of property as per Hindu law.

13.7 ANSWERS TO 'CHECK YOUR PROGRESS' QUESTIONS

- 1) A source of law may be literary source. That means, it is from that part we seek our knowledge of law. Ancient Hindu legal system recognized different sources of law such as Vedas, Smrities, and Customs. Justice, equity, good conscience, precedents and legislation are considered as modern sources of law.
- 2) Smriti means what was heard and remembered by the sages, i.e. what they heard directly from the Deity. The early smritis were termed as *Dharma Sutras*. Achara, vyavahara and prayaschitta are the subject matters of smritis. The principles of law were mostly covered under the part vyavahara. Manusmriti, Yajnavalkya smriti and Brihaspati smriti and Narada smriti were recognized in the ancient system.
- 3) Custom is recognized as transcendent law. The essentials of a valid custom are that it must be ancient, certain and reasonable. Any custom which is contrary to public policy is rejected by the court. Disuse of custom puts an end to them. A local custom is not put to an end by non-user.
- 4) The requisite conditions of a valid marriage are: neither party has spouse at the time of marriage, neither party is incapable of giving consent, the bridegroom should have completed the age of 21 and the bride 18, and the parties are not within the prohibited degrees unless there is a custom or usage governing each other.
- 5) A void marriage is one which is in contravention of a mandatory requirement relating to the conditions laid down by the law for a valid marriage. Those marriages are void right from the inception. Whereas voidable marriages are valid until they are set aside by the court at the option of the parties. Those marriages are not void from the inception.
- 6) An irregular marriage is one which is not valid because of the presence of certain temporary disqualifications peculiar to Mohammedan law. For example: A Muslim male can have four wives at a time. If he takes fifth wife while already having four wives, the marriage with fifth wife would be an irregular marriage. The children born out of irregular marriage are legitimate children. If the husband dies, all the four wives will get share in his property but not fifth wife.

- 7) The conditions required for a valid marriage under the Special Marriage Act are as follows:
- Neither party should have a husband or wife living at the time of marriage;
 - Neither party is a lunatic or incapable of giving a valid consent due to unsoundness of mind;
 - Neither of the parties are unfit for marriage and procreation of children;
 - The bridegroom must have completed the age of twenty one and the bride the age of eighteen years;
 - The parties are not within the degrees of prohibited relationship. Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within prohibited degrees.
- 8) If one of the spouses, without reasonable cause, terminates the existing relationship with an intention to withdraw from the conjugal society, the aggrieved party may file a petition for the restitution of conjugal rights. It is a matrimonial relief which is recognized under section 9 of the Hindu Marriage Act and declared by the competent judiciary as constitutionally valid.
- 9) Judicial separation keeps the marriage alive. It legalizes the living of wife and husband separate from each other. It is intended to see that the parties may reconcile with each other. But, divorce is to put an end to the marriage. The decree of divorce leaves the parties free to contract a fresh marriage with any eligible party.

Following are the grounds for judicial separation or divorce under the Special Marriage Act.

- i) Every ground for divorce is a good ground for alternative relief under the SPM Act. Further, failure to comply with a decree for restitution of conjugal rights is a good ground for judicial separation.
- ii) Either husband or wife can file a petition for divorce on the ground that the respondent:
 - had voluntary sexual intercourse with a third person,
 - is undergoing sentence of imprisonment for seven years or more for an offence under the Indian Penal Code,
 - had deserted the petitioner for two years prior to the petition,
 - has treated the petitioner with cruelty,
 - has been incurably of unsound mind or suffering from mental disorder to such an extent that the petitioner cannot be reasonably expected to live with respondent,
 - has been suffering from venereal disease in a communicable form,
 - has been suffering from leprosy or other form of communicable disease,
 - has not been heard of as being alive for seven years,
 - has failed to comply with a decree for restitution of conjugal rights for one year or more.

iii) *Divorce by Mutual Consent*: Divorce is possible under the Special Marriage Act, 1954 by mutual consent. If the husband and wife are living separately for one year or more and are not able to live together, then they may mutually agree that the marriage should be dissolved. A petition for divorce may be presented by both the parties and then they should wait for six months. Thereafter, before the expiry of eighteen months from the petition they should jointly move the court for a divorce decree. The court may thereupon, pass a decree for divorce declaring the marriage to be dissolved with effect from the date of decree.

iv) *Some special grounds for wife alone, and they include:*

- Husband being guilty of rape, sodomy or bestiality;
- The order for separate maintenance was passed against husband, and he has not resumed cohabitation for one year or upwards.

- 10) Cruelty by one spouse against the other is an offence and hence the offender may be imprisoned with suitable punishment. Recently, to protect women from domestic violence a law was enacted and if any wife is abused or harassed she may get relief of interim maintenance and a right of residence in the husband's house, etc. It is also a valid ground for seeking divorce for both the parties, irrespective of the religion.
- 11) *Talaq* means divorce. The irrevocability of divorce is signified when a Muslim husband pronounces Triple *talaq*. The wife will be maintained upto the period of iddat. It is not justified because after the iddat who will take care of such women. How can she survive? That is why the higher judiciary from time to time on various occasions started deviating from observing personal law and awarded maintenance to Muslim divorced women as per Sec. 125 Criminal Procedure Code, where the women will get maintenance till the end of her life unless otherwise such women have means to maintain themselves or remarry.
- 12) The joint family under Hindu law is an institution *sue generis* (emerged on its own kind). It consists of a male, his wife, unmarried daughters, his male descendants and their wives. It is, thus, patriarchal in nature. Inside this joint family there is coparcenary. The coparceners are the owners of the joint family property. They have a right of partition in that property. This property is called their heritage. However, the law enacted recently brings all women also as part of coparceners.
- 13) When a person dies without executing a will then the law prescribes the rules as to how the property is to be disposed of on his death among his relations. It is a general principle of law of inheritance that inheritance is never in abeyance. This means that on the death of the owner intestate the relation who is the nearest heir at the time would take the property. No one can have a heir while alive. Only at death of the owner can his heir be ascertained. The ascertainment of the heir cannot be postponed beyond such point and does not await the emergence of a nearer heir.
- 14) The properties of a male Hindu dying intestate shall devolve firstly upon the Class-I heirs, secondly upon the class-II heirs if there is no class-I heir. If there is no heir of any of the two classes then the property devolves upon the

agnates and finally if there is not agnate, the property goes to cognate of the deceased.

The property of a female Hindu dying intestate shall devolve *firstly*, upon the sons and daughters including the children of pre-deceased son or daughter and the husband. *Secondly*, the property will devolve upon the heirs of the husband if there is no heir available mentioned in the first category, *thirdly*, upon the mother and the father, *fourthly*, upon the heirs of the father and finally upon the heirs of the mother. It is the general rule that the second category heirs will get only if there is no heir from first category and third category will get only if there is no second category heir and so on....till the last category heirs.

- 15) Prior to 1956, women had limited interest in the inherited property and they had only right to enjoyment of the property. After the death, the property used to revert back to the legal heirs of the last male estate holder. After passing of the Hindu Succession Act, 1956 the limited interest has been transformed into absolute interest.

The Hindu Succession (Amendment) Act, 2005 brought radical changes. The Act was long felt-need to bring about economic emancipation of women in order to ensure gender equality. Section 6 of the Principal Act which deals with devolution of property, the interest of the female coparcener and rule of survivorship is recasted and modified. By this Act the daughter becomes coparcener by birth and has all rights in the same manner as the son. However, this Act placed a restriction that a female heir cannot seek partition of a dwelling house until the male heirs choose to divide.

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